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THE
SOUTHWESTERN REPORTER,
VOLUME 23,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TEN-
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Rule 25. Original writs or other process issued by either division of the court, or by any judge in vacation, shall be returnable to and disposed of by such division.

All motions and matters in civil cases which have not been assigned by the court in banc to a division for final determination, upon the record, shall be presented to, heard and determined by Division Number One.

All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

(Adopted October 13, 1893.)

SUPREME COURT OF TEXAS.

12. When any clerk of civil appeals shall certify to this court any question for determination, or shall send to this court any cause upon a certificate of dissent, either upon its own motion or that of any party, the certificate in either case shall be accompanied by the briefs filed in the court

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of civil appeals; and the clerk of this court shall, upon the receipt of the briefs, issue notices to the attorneys whose names appear thereon of the day on which the question, or cause, as the case may be, shall be set down for submission.

Promulgated June 24, 1893.

(v)*

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THE
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FLEENER v. STATE.

(Supreme Court of Arkansas. July 4, 1893.)

EMBEZZLEMENT—SUFFICIENCY OF INDICTMENT—
EVIDENCE.

1. In an indictment for embezzlement, an allegation that defendant was "the agent of the P. Express Company" is a sufficient allegation of his agency.

2. In an indictment for embezzlement, where the money embezzled is described merely as "current money of the United States," a more particular description is excused by a recital that the particular denomination and kind is to the grand jury unknown.

3. In Mansf. Dig. § 1638, providing that if any officer, agent, clerk, or servant of a corporation shall embezzle, or convert to his own use without the consent of his master or employer, any money or goods belonging to any other person, which shall come into his possession by virtue of such employment or office, he shall be deemed guilty of larceny, "other person" means one other than the person guilty of the embezzlement, and not one other than the master.

4. On a prosecution under such act, evidence of the general reputation of corporate existence of the injured party is sufficient.

5. To show the felonious intent in such a case, some kind or degree of concealment, or acts calculated to mislead the employer, should be proven.

6. It is no defense to such prosecution that defendant's bondsmen have made good to his employer all losses suffered by reason of the alleged embezzlement.

Appeal from circuit court, St. Francis county; Grant Green, Jr., Judge.

A. W. Fleener was convicted of embezzlement from a corporation, under Mansf. Dig. § 1638, and appeals. Reversed.

Geo. Sibly, for appellant. James P. Clarke, Atty. Gen., for the State.

BUNN, C. J. The defendant, A. W. Fleener, was indicted at the October term, 1892, of the St. Francis circuit court, for the crime of embezzlement; at the March term, 1893, found guilty, and sentenced to imprisonment in the penitentiary for the period of one year. Motion in arrest of judgment, and also for new trial, were overruled, and appeal taken to this court.

The indictment, omitting formal parts, is as follows, to wit: "The said A. W. Fleener, on the 15th day of June, 1892, in the v.23s.w.no.1—1

county of St. Francis aforesaid, then and there being over the age of sixteen years, and being the agent of the Pacific Express Company at Wheelley, Arkansas,—said express company being a corporation organized and incorporated under the constitution and laws of the state of Nebraska, and doing business in the state of Arkansas and county of St. Francis,—and having in his possession, as such agent as aforesaid, and then and having come into his possession as such agent as aforesaid, two hundred and fifty-one dollars and sixty-four cents, current money of the United States, the particular denominations and kind of which is to the grand jury unknown, the property of the Pacific Express Company, unlawfully, feloniously, and fraudulently did make way with, embezzle, and convert to his own use, without the consent of the Pacific Express Company as aforesaid, against the peace and dignity of the state of Arkansas." To this indictment a general demurrer, in short, on the record, was interposed. Section 1638, Mansf. Dig. under which the indictment, presumably, was found, is as follows, to wit: "If any * * * officer, agent, clerk or servant of any incorporated company, or any person employed in such capacity, shall embezzle or convert to his own use, without the consent of his master or employer, any money, goods * * * belonging to any other person, which shall have come into his possession * * * by virtue of such employment or office, he shall be deemed guilty of larceny, and on conviction, shall be punished as in cases of larceny."

The demurrer raises two or three questions as to the allegations of the indictment—First, that it is not explicit enough in alleging the agency of the defendant; secondly, that the money alleged to have been embezzled is not sufficiently described; thirdly, that it failed to allege that the money embezzled by him belonged to another person,—meaning another person than the master; and, lastly, that the indictment does not allege that the money came into the possession of defendant by virtue of his employment.

The allegation that the defendant was "the

agent of the Pacific Express Company at Wheatley, Arkansas," is sufficient.

The want of more particular and definite description of the money received, and alleged to have been embezzled, by the defendant, is sufficiently excused by the recital that a more particular description was unknown to the grand jury; and this meets the requirement suggested in *State v. Ward*, 48 Ark. 36, 2 S. W. Rep. 191.

While the language of our statute (section 1638, Mansf. Dig.) is rather obscure, in so far as the words, "belonging to another person," are concerned, and may seem to justify a different construction,—the construction given by the English courts,—yet, in view of the very nice and technical distinction between larceny and embezzlement, we are constrained to adopt the construction given to similar words in New York, Missouri, and Minnesota, and hold that "another person" means another person than the person guilty of the embezzlement, in contradistinction to the English rule, which holds that the same words mean "another person other than the master." *People v. Hennessey*, 15 Wend. 147; *State v. Porter*, 29 Mo. 201; *State v. Kent*, 22 Minn. 41. This is not in conflict with *Powell v. State*, 34 Ark. 693, which was an indictment against a general household servant, who, having the custody of some tools under the superior possession of the master, appropriated the tools to his own use. This was held to be larceny, and not embezzlement, and the decision is in accord with the weight of authorities. The same authorities hold that when the servant comes into possession of the property before the master, and his possession is by reason of his relation as such servant, and he appropriates it to his own use before it comes into the possession of the master, and while yet in his possession, the fraudulent appropriation thus made is embezzlement, and not larceny. See note to *Calkins v. State*, 98 Amer. Dec. 126-129. The rule of construction in New York, Missouri, and Minnesota, and perhaps other states, is considered necessary, in order that there be not a hiatus in the law, as there would otherwise seem to be.

The objection that the proof of the corporate existence of the injured party is not sufficient, we think, was properly overruled. A mere de facto corporation, it seems, may be the victim of embezzlement. Evidence of general reputation or corporate existence is regarded as sufficient in such cases. *Burke v. State*, 34 Ohio St. 82; *Calkins v. State*, 98 Amer. Dec. 121. And, if the same rule is to be applied in criminal as in civil cases, it would seem that one dealing with even an ostensible corporation, as such, is not permitted to deny its corporate capacity. *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. Rep. 319; note to *Heaston v. Railroad Co.*, 79 Amer. Dec. 437, and cases cited. The state put in evidence the authenticated cop-

ies of articles of association, and other papers alleged to have been necessary to the proper organization of such corporations in the state of Nebraska, and these are copied in the bill of exceptions. In a note to the bill of exceptions, as copied in the transcript, the clerk of the circuit court informs us that the statutes of Nebraska, used in evidence, had been taken out, and that he could not copy them in the transcript. So much thereof as pertained to the organization of corporations in that state, and used as evidence, should have been made part of the bill of exceptions, as they were part of the evidence in the case. Had we before us the copy used on the trial, in any other form than as part of the bill of exceptions, we could not legitimately make use of it. In the absence of this evidence, it is to be presumed that the action of the court in determining that the organization of the corporation thereunder was in conformity thereto is conclusive on us.

The defendant's own testimony sufficiently established the fact that he was the agent of the Pacific Express Company at Wheatley, Ark., and also that the company assumed to do business, and was notoriously doing business, whether strictly according to law or not. It, at least, could be the victim of embezzlement; and a felonious deprivation of its property, it seems, ought to be the subject of our criminal law.

The third ground of the motion for new trial assigns as error the ruling of the circuit court in refusing to give to the jury the second instruction asked by the defendant. It is in words and figures as follows, to wit: "The mere failure to pay over to the Pacific Express Company the money in his hands, by defendant, at the proper time, would not, of itself, constitute the offense of embezzlement; but, to constitute embezzlement, it must appear that the defendant did retain money of the Pacific Express Company, that came to his hands by reason of his agency, by attempting to, in some manner, conceal from the company the fact that he was in possession of same, or by falsely and fraudulently keeping his accounts so as to prevent the company from knowing the defendant had it in his possession; and, the taking and receiving the same being lawful, the appropriation thereof must appear to have been felonious." In order to show the felonious intent, in cases like this, the weight of authority is to the effect that some kind or degree of concealment, or acts misleading the master, should be proven. Notes to *Calkins v. State*, 98 Am. Dec. 132-134; *Com. v. Tuckerman*, 10 Gray, 173; 1 Whart. Crim. Law, § 1030; *Louisiana v. Tompkins*, 32 La. Ann. 620; article in 13 Cent. Law J. 464. Having failed to give any other, covering the same ground,—the most important in the case,—the circuit court should have given this instruction, under the peculiar facts of this case, with proper explanations of the nature of the

offense, and the character of evidence admissible to prove the intent, or want of intent, with which the unlawful appropriation was made. As the case will be reversed and remanded for this error,—which, indeed, may have been a very grave one,—we deem it proper not to speak further of the instruction, especially as applicable to the facts of the case.

The fourth ground of the motion for new trial is a novel one. The defendant contends that having hired the guaranty company to make his bond for faithful performance of duty to the Pacific Express Company, and that company having paid the express company for all losses claimed by it to have been suffered by reason of defendant's alleged embezzlement, therefore there was no crime committed; that the express company had no longer any interest at stake, and even that the state has no interest in the matter. In this the defendant is mistaken. This is no longer a controversy between himself and the two companies, or either of them, and has not been, since he fraudulently appropriated the money of the express company, if, indeed, he did so appropriate it. It is now a controversy between the state of Arkansas and himself, which the state will not permit either one of the said companies to determine, at present or in the future, nor will the state acknowledge the validity of any settlement of it, by anything they both, or either of them, have done in the past.

We see nothing materially wrong in the rulings of the circuit on other points not noted herein. For its error in refusing the second instruction asked by the defendant, and not giving the same, with proper explanation, as suggested, the judgment of the St. Francis circuit court in overruling defendant's motion for new trial is reversed, and the cause is remanded, with direction to grant a new trial, and proceed in accordance with this opinion.

POWELL, J., being absent, did not sit in this cause.

BATTLE, J. The second instruction that the defendant asked for should have been given. To constitute the offense with which he is charged, there must be an appropriation by one of the property of another, with a fraudulent or felonious intent to make it his own, and deprive the owners of dominion over the same. The fraudulent intent is essential to the offense. Without it, there may be misconduct, but there will be no criminality. *State v. Lyon*, 45 N. J. Law, 272; *State v. Baldwin*, 70 Iowa, 180, 30 N. W. Rep. 476; *State v. Butler*, 21 S. C. 353; *Com. v. Hays*, 14 Gray, 62; *Warmoth v. Com.*, 81 Ky. 133; 2 Bish. Crim. Law, (New,) § 372; 1 Whart. Crim. Law, (9th Ed.) § 1007.

"The question * * * whether any par-

ticular act of conversion was inflicted or accompanied by a fraudulent purpose is a question of fact, to be passed upon by the jury. But the submission of that question to their determination ought to be accompanied with suitable instructions in the matters of law which pertain to it." *Com. v. Tuckerman*, 10 Gray, 173, 202; *People v. Galland*, 55 Mich. 628, 22 N. W. Rep. 81.

The evidence in this case tends to prove, substantially, among others, the following facts: The defendant was the agent of the Pacific Express Company at Wheatley, in this state. As such agent, it was his duty to make monthly reports of the receipts of money by him, in his capacity of agent, and remit the same to the company at Omaha, in Nebraska. In one month he received about \$255. He reported that he had received \$4.75, and said nothing about the remainder. He altered the books of the company so as to make it appear that he had forwarded the entire amount, changing the receipt of the express messenger to make it so appear. When he was detected he admitted that he was "short," but failed to pay his indebtedness incurred on account of the missing money. The receipt of the money which he failed to report, it seems, only appears in the alteration of the receipt book of the company, in which it is made to appear to have been sent to his principal.

The second instruction asked for by the defendant was suitable to this state of facts. The failure of the defendant to pay over to the Pacific Express Company the sum unaccounted for did not, in itself, constitute the offense of embezzlement. *Rex v. Smith*, Russ. & R. 267; *People v. Hurst*, 62 Mich. 276, 28 N. W. Rep. 838; *Chaplin v. Lee*, 18 Neb. 440, 25 N. W. Rep. 609; *State v. O'Kean*, 35 La. Ann. 901; 2 Bish. Crim. Law, (New,) § 376. But if, having received it, by virtue of his employment, for transmission to the express company, he failed to pay it over, the fact he concealed his possession of it from his principal, if true, was strong evidence of the commission of the offense. Such concealment might have been effected by false entries upon the books of the company, or by the failure to make any entry upon them at all, or by representations known to be untrue, or by failure to report the receipt of the money when it was his duty to do so, or by any device resorted to for the purpose of disguising the truth from the knowledge of his principal, and thus inducing it to rest in a false security. *Com. v. Tuckerman*, 10 Gray, 204; *Regina v. Jackson*, 1 Car. & K. 384; 2 Bish. Crim. Law, (New,) §§ 376-378.

But there is no prescribed set of circumstances by which a fraudulent conversion must be shown. If shown in any way, it is sufficient. The sufficiency must be left alone to the jury to determine, under the instructions of the court. The defendant's

second instruction, technically, is not correct. It does not cover the whole law upon the subject; neither was it intended to do so. But it does cover, substantially, all the evidence adduced, tending to show a felonious intent; and for that reason it should have been given, with explanation as to what was necessary to constitute a concealment. In the nature of the case, the intent must have been proved by the evidence adduced at the trial, or not at all.

BLAND et al. v. FLEEMAN.

(Supreme Court of Arkansas. July 1, 1893.)

SALE OF DECEDENT'S PROPERTY — PURCHASE BY ADMINISTRATOR — ACTION TO SET ASIDE — LIMITATIONS.

1. An administrator who sells land of the estate to another person, and before the confirmation of such sale buys it himself from such person, is guilty of purchasing at his own sale, and the transaction will be treated as fraudulent.

2. The fact that the administration has not been closed does not prevent the running of the statute of limitations as against an action to set aside a sale by the administrator to himself.

3. In an action to set aside a purchase by an administrator of lands previously sold by him, before the confirmation of the sale, it appeared that plaintiff knew 12 years before suit all the facts constituting his cause of action, except that the purchase by the administrator was prior to the confirmation of his sale, and that he could have discovered that fact as easily then as later. There was no evidence of actual fraud on the part of the administrator, or that he attempted to conceal the facts in the case. *Held*, that plaintiff's cause of action was barred by the five-years statute of limitations applicable to judicial sales.

4. *Mansf. Dig. § 4474*, providing that actions for the recovery of lands sold at judicial sales shall be brought within five years, is binding on courts both of equity and law.

5. Where an administrator purchases property sold under execution in favor of the estate, he becomes clothed with a constructive trust in favor of the estate, which will be barred by the statute of limitations.

Appeal from circuit court, Franklin county; Hugh F. Thomason, Judge.

Bill by Robert A. Bland and others against M. F. Fleeman. From a decree in favor of complainants, defendant appeals. Reversed.

U. M. & G. B. Rose and J. V. Bourland, for appellant. J. E. Cravens and J. M. Moore, for appellees.

FLETCHER, Special Judge. R. H. Adams died in 1863. On November 19, 1865, M. F. Fleeman married his widow, and on November 27, 1865, he took out letters of administration upon the estate of Adams. Fleeman made regular annual settlements in the probate court up to 1875, but his final settlement was not made until August 4, 1880, at which time he was discharged. On the 26th day of December, 1883, a part of the heirs interested in the estate, and who were nonresidents, brought suit in the United States

court at Ft. Smith, Ark., against Fleeman and the other heirs, who were residents of this state, for the purpose of falsifying the settlements of Fleeman, and to recover lands of the estate which it was alleged Fleeman had fraudulently sold and caused to be purchased for his benefit. That suit was on April 24, 1887, dismissed for the want of jurisdiction, and on the 24th day of May, 1887, this suit was brought by all the heirs in the Franklin circuit court in chancery, for the same purpose. From the decree of the court below all the parties have appealed.

As to certain claims probated against the estate, and which it is alleged were fraudulently allowed by the administrator, the circuit court decided there was no fraud; and as to the accounts of Fleeman the court found, to use the language of the decree, that there were "no such errors arising from fraud, accident, or mistake as to justify opening the same; that such irregularities as appear therein may have been susceptible of explanation at the time, whilst not so after so long a lapse of time, for which reason the court declines to disturb the settlements." We have carefully examined the record, and as to this we think the conclusions of the circuit judge are correct.

The lands are designated in the record as lots 1 to 7, inclusive. The leading questions in the case arise as to lots 2 and 3. These two tracts were sold by Fleeman, as administrator, at public sale, on January 6, 1868, for the purpose of paying debts probated against the estate. Prior to the sale Perry F. Webb, a neighbor of Fleeman, in conversation with Fleeman's wife, expressed a desire to purchase lot 2, but said he did not feel able to pay for it on so short credit as was to be given. Mrs. Fleeman informed him that she would like to have a half interest in this tract, and would take half at whatever price he might pay. She also requested Webb to bid off lot 3 for her at the sale. This tract (lot 3) had been previously set apart to her as her dower in the lands of R. H. Adams, and only the remainder interest was advertised for sale. Webb bid off lot 2 at the sale for \$6,000 in his own name; but lot 3 brought so much more than was anticipated by Webb, he ceased bidding, and it was purchased by Parkes & Qualle for \$3,845. Whether Fleeman knew of the arrangement between Webb and Mrs. Fleeman we need not inquire. We find that before the sale was confirmed he entered into an agreement with Webb to take the half of lot 2 adjoining lot 3 at the same price which Webb bid for it, and when Webb's note for \$6,000 became due he allowed him credit for one-half thereof, and charged himself as administrator with it. This tract sold for within \$255 of its appraised value, and within about \$1,800 of the price which Adams gave for it just before the war. We are unable to say from the evidence that there was any positive or actual fraud in the sale of this

tract, but the fact that Fleeman acquired an interest in the land before the sale was confirmed was equivalent to a purchase at his own sale, and the law condemns it as fraudulent. *Woodard v. Jaggars*, 48 Ark. 250, 2 S. W. Rep. 851; *Gibson v. Herriott*, 55 Ark. 92, 17 S. W. Rep. 589; *McGaughey v. Brown*, 46 Ark. 32.

Fleeman pleads the statutes of five and seven years' limitations; but it is argued by counsel for plaintiffs that the statute was not set in motion in his favor until after his final settlement and discharge, August 4, 1890, and that five years did not thereafter elapse before the bringing of the first suit. The rule, we believe, is universally established that the statute will not bar an express trust. "But this doctrine," says Chief Justice Cockrill in *McGaughey v. Brown*, 46 Ark. 34, "is subject to two qualifications, namely, that no circumstances exist to raise a presumption of the extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title;" citing *Ang. Lim.* 174, 472; *Wood, Lim.* 212, 213; *Harriet v. Swan*, 18 Ark. 495. The sale to Webb was reported to the probate court, and was confirmed on February 4, 1868. The purchase money was regularly accounted for and paid out to the parties entitled thereto, and the accounts of the administrator regularly approved by the court. In so far as the probate court was concerned, the property passed from the trust, and the administrator was discharged therefrom. *Fort v. Blagg*, 38 Ark. 475. The sale was not void, but voidable, and the parties interested had their right of action to set it aside at any time after being apprised of the facts of the purchase by Fleeman. *McGaughey v. Brown*, 46 Ark. 32; *Woodard v. Jaggars*, 48 Ark. 250, 2 S. W. Rep. 851; *Gibson v. Herriott*, 55 Ark. 92, 17 S. W. Rep. 589; *Muselman v. Eshleman*, 10 Pa. St. 394; *Worthy v. Johnson*, 8 Ga. 236. The fact that the administration had not been closed was no impediment to plaintiffs' right of action. We can see no reason why they could not and should not have sued before as well as after the final settlement and discharge of the administrator, unless it be that they were not apprised of the facts which rendered the sale and purchase by Fleeman invalid. In *Keeton v. Keeton*, 20 Mo. 541, the administrator purchased property at a sale made by himself, as was done in this case. The court said: "With regard to the statute of limitations, it will run from the time the facts are brought home to the knowledge of the party. He then has a cause of action, and there is no reason for placing him in a better situation than any other suitor. Having a cause, and being fully aware of it, there is nothing to prevent the statute from running against him." 1 *Bigelow*, *Frauds*,

33. Actual notice of the evidence or facts upon which an action may be sustained is not necessary to put the statute in motion. As said by the United States circuit court of appeals, eighth circuit, in *Percy v. Cockrill*, 53 Fed. Rep. 872: "Notice of facts and circumstances which would put a man of ordinary intelligence and prudence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead him to a fact he shall be deemed conversant with it." Citing *Kennedy v. Green*, 3 Mylne & K. 699, 722; *Wood v. Carpenter*, 101 U. S. 135, 141; *Rugan v. Sabin*, 53 Fed. Rep. 415; *Parker v. Kuhn*, 21 Neb. 413, 421, 426, 32 N. W. Rep. 74; *Wright v. Davis*, 28 Neb. 479, 483, 44 N. W. Rep. 490. See, also, *Busw. Lim. & Adv. Poss.* § 385; *Pearsall v. Smith*, 13 Sup. Ct. Rep. 833. Both W. W. Adams and Mrs. Bland, the ancestor of all the plaintiffs, except Adams, were advised of the sale of the lands. Adams lived with Fleeman on lot 3, which adjoins lot 2, from the date of the sale until after he became of age, in 1877. He testified that he knew "ever since soon after the sale in 1868 that Fleeman claimed to be the owner of a half interest in lot 2, of the reversionary interest in lot 3, and since his wife's death in May, 1872, the absolute owner of lot 3," and that he had always heard, while living with Fleeman, that Parkes and Webb purchased the land at the sale. He was engaged in business on his own account since 1875. So far as the testimony shows, no effort was made by Fleeman or any one to conceal the facts of his purchase. Webb and Parkes & Qualle, the purchasers at the probate sale, lived at or near Ozark, where Adams did business. The probate court records showed the sales by Fleeman, and when confirmed. Fleeman's deeds from Webb and from Parkes & Qualle were of record in the recorder's office, and the deed from Parkes & Qualle bore date before the sale was confirmed by the court. R. A. Bland, a son of Mrs. Bland, and one of the plaintiffs, visited Franklin county 10 or 12 years before the first suit was brought, to get information in regard to the estate, and the papers in the estate were shown him, and the business explained to him, by one of Fleeman's attorneys. In May, 1874, Mrs. Bland wrote Fleeman a letter, inquiring about the estate and the lands which had been set apart to Mrs. Fleeman as dower. This letter was answered by Walker & Mansfield, Fleeman's attorneys, who informed her that the administration was kept open because it was thought something might possibly be had upon one or two claims due the estate and still unsettled, and inviting an investigation of all the acts of

the administrator. She was also informed that "the reversionary interest or estate in remainder in the lands held as dower was sold by order of the court to the highest bidder, and purchased by Qualle and Parkes, and that Fleeman had purchased from them at an advance of \$1,000 on the price they gave for it." In conclusion they said to her: "But those interested in the question as to this, or the manner in which Mr. Fleeman has administered upon Mr. Adams' estate, are not expected to take our opinion, or even any statement of facts by us, as being correct. They are expected to look into those matters for themselves, or through their own attorneys." It is apparent that at least as early as 1874 or 1875 all the material facts going to establish plaintiffs' cause of action were known to W. W. Adams and Mr. Bland, as appeared of record, except the fact that Fleeman's purchase was made before the confirmation of his sale, and this fact could have been as easily discovered in 1875 as in 1883. *Leach v. Moore*, (Ark.) 22 S. W. Rep. 173. It is true that W. W. Adams did not become of age until 1877, and that Mrs. Bland, the other heir, died during the same year; but after that he waited more than five years before commencing suit, and the heirs of Mrs. Bland were affected with all the notice chargeable to her. If it be that the statute of seven years (*Mansf. Dig. § 4471*) is not applicable to Adams, yet, according to the view we have taken, he is barred by the statute of five years, (*Id. § 4474*), applicable to judicial sales. *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. Rep. 1052.

If we were able to find from the evidence that Fleeman was guilty of positive or actual fraud in the sale and purchase, or that he in any way concealed the facts from plaintiffs, our conclusion would be different; but, while there may be circumstances pointing to actual fraud, they are not, in our opinion, sufficient to establish the charge. There is nothing to show any effort at concealment. The case, as we hold, is one of constructive fraud only, as to which the rule is less rigid than where actual fraud or concealment has been perpetrated. *Busw. Lim. & Adv. Poss. § 385*; *Wilmerding v. Russ*, 33 Conn. 67. The case at bar is different from that class of cases wherein the administrator has not accounted for property which has come to his possession, or has not in any way paid over the proceeds thereof, or where there has been no order of court for him to do so, or where there is no right of action until final settlement or order to pay over, as in *Harriet v. Swan*, 18 Ark. 495; *Brinkley v. Willis*, 22 Ark. 1; and other cases cited by counsel for plaintiffs. In *Harriet v. Swan*, at page 505, the court said: "In May, A. D. 1844, Mrs. Barden made her last settlement with the probate court, showing in her hands a balance belonging to the estate, which balance was struck from

an aggregate, which included the appraised value of the appellants. She never afterwards surrendered these effects to distributees, or divided them between herself as dowress and as such distributees, or made any effort to do so, so far as anything appears on this record. On the contrary, she never closed the administration in any way, or sought any discharge from it, as is expressly admitted; and from everything that appears in the record, from the time of that settlement (her will having been made some four years previously) until the day of her death, the affairs of the estate and the possession of the slaves seem to have been, in all respects material to the question we are considering, in the same condition that it had been from the death of her husband up to the time of that settlement." At pages 506, 507 the court further said: "The rule is that, if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the cestui que trust; and if the only circumstance is that he does not perform his trust, his possession is according to his estate." In the case of *Brinkley v. Willis*, 22 Ark. 1, the administrator had wholly failed to account for the property or its proceeds. Besides, it seems the plaintiff Mrs. Brinkley was a married woman at the time the cause of action arose. The court said, (at pages 5 and 6:) "We are not certain that any cause of action existed against Willis concerning the slave George till Willis had swapped him to Rumsey, which was about or near the time when the infant Nancy Floyd became Nancy Brinkley, and who thenceforward has been under the disability of coverture; and more especially because the defendant Willis, as an executor, and therefore a trustee charged with the execution of an express trust till discharged therefrom by due course of law, would hold the property or its proceeds in trust for the legatees, without he had, by notorious acts hostile to their claim and right, renounced the trust, and converted the property to his own use." Moreover, the court in that case refused to be bound by the statute of limitations. But our general statute of seven years, (*Mansf. Dig. § 4471*), in reference to lands, in express terms applies to any action or suit, either in law or equity; and the statute of five years, (*Id. § 4474*), while not referring in express terms to courts of equity, seems equally as comprehensive. It says: "All actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter, saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." These statutes are equally applicable to and binding upon courts of law and courts of equity, unless the delay after the cause of action accrues is superinduced by fraud or concealment. They operate upon

the cause rather than the form of action. *McGaughey v. Brown*, 46 Ark. 34; *Mitchell v. Etter*, 22 Ark. 178; *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. Rep. 1052; *Alvis v. Oglesby*, 87 Tenn. 172, 10 S. W. Rep. 313.

Lot 3 embraced the homestead of Adams. By clerical error or mistake this tract was neither described in the petition nor order of sale. It was advertised, appraised, and sold, however, as if it had been described in the petition and order of sale; and it seems to have been the understanding of the probate judge, administrator, and his attorneys that it was so described and ordered to be sold, but the error was not discovered until a short while before the suit was brought in the United States court. It is argued by counsel for plaintiffs that the sale was, on this account, absolutely void. It is unnecessary for us to decide this question, for, if the proposition be admitted, it cannot strengthen plaintiffs' case, because, this tract having been set apart to Mrs. Fleeman as her dower in the real estate before the sale, she held possession of it as such until her death in 1872, at which time all the debts had been paid, and the time had expired for probating other claims. The administrator had no right to possession of the land after Mrs. Fleeman's death, and there was no duty imposed upon him as administrator in reference to it. *Reed v. Ash*, 30 Ark. 775; *Stewart v. Smiley*, 46 Ark. 376. His deed, if void, formed color of title, under which he has openly and continuously held possession of the land as his own, of which fact plaintiffs had actual knowledge. Lot 9 in block 20, and lot 5 in block 28, in the town of Ozark, were purchased by Fleeman at execution sale to satisfy a judgment in favor of the estate, in 1867. The tract designated as lot 1 in the record is situated in Sebastian county. The estate held a mortgage upon this tract to secure \$646.86, which was foreclosed by decree of court. The land was sold August 2, 1869, and the attorney in charge of the proceedings bid it off in Fleeman's name at \$505. Fleeman was not present at the sale of this tract, and did not know it was bid off for him until informed by the attorney. He charged himself with his bid in each case, and afterwards sold part of the Ozark property and all of the tract in Sebastian county for more than he bid for them. There was no concealment of the facts or intentional fraud in either purchase; both were made in the absence of higher bidders. As to these tracts, Fleeman was not a trustee of an express trust; but by his purchase of them he became clothed by operation of law with a constructive or implied trust only, as held by this court in *Jones v. Graham*, 36 Ark. 400. See, also, *Harris v. King*, 16 Ark. 124. The general rule is that the statutes will bar a constructive trust. *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. Rep. 1052. Counsel in argument have urged no ground for relief as

to the other tracts, and we find none disclosed by the record. The decree of the court below, in so far as it is inconsistent with this opinion, is reversed, and the case will be here dismissed, at the cost of plaintiffs.

MANSFIELD, J., being disqualified, did not sit in this cause.

JOHNSON v. STATE.

(Supreme Court of Arkansas. July 1, 1893.)

JUSTIFIABLE HOMICIDE—INSTRUCTIONS.

1. An instruction excusing homicide on the ground that deceased was making an attack on defendant under circumstances indicating an intention to take life or do great bodily harm, or if it so appeared to defendant as a reasonable man, and the circumstances were such as to excite the fears of a reasonable man, is too broad and unqualified, as it must appear that the danger is not only impending, but so pressing and urgent as to render the killing necessary.

2. An instruction denying defendant the right of self-defense if he was the assailant, though he afterwards abandoned the conflict in good faith, and did not kill till forced to do so, is erroneous.

3. Where defendant's wrongful acts bring on a difficulty, the fact that he is an officer, and in the course of the difficulty attempts to arrest deceased, will not avail him as a defense.

Appeal from circuit court, Faulkner county; Robert J. Lea, Judge.

J. S. Johnson was convicted of murder, and appeals. Reversed.

J. H. Harrod, for appellant. James P. Clark, Atty. Gen., for the State.

HUGHES, J. The appellant, J. S. Johnson, was convicted of murder in the second degree for the killing of one Williams, and has appealed to this court. The killing was not denied, but the defendant contends that it was done in self-defense. The defendant was at the time of the killing the constable of the township in which the killing occurred, and contends that at the time he killed the deceased the deceased was advancing upon him with a drawn stick, and striking at him, because the defendant, as constable, had told him he would arrest him, and had told him to consider himself under arrest for an assault, which he contends the deceased had made upon Manning, a brother-in-law of the defendant, to prevent the said Manning from taking from the possession of the deceased a plow that belonged to the defendant, the possession of which he contends the deceased had taken without right and without his consent.

So much of the evidence as will throw light upon the declarations of law given and refused by the court at the trial, only, will be stated in substance as it appears in the abstract of appellant, which is admitted by the state to be correct. Williams, the deceased, was a share cropper on the place of J. F. Johnson, the father of the appellant,

whose contract with Williams was that he would furnish him with team and tools to cultivate his land. J. S. Johnson, the appellant, was also cultivating land on the farm, and owned his tools. The deceased had taken the defendant's plow without the defendant's consent. The defendant had gone to the deceased, and got his plow, and informed the deceased that he would need the plow for several days. On returning to his field early the next morning, the defendant found that his plow had been taken away, and thought from tracks he saw that the deceased had taken it again. He returned to his father's house, and told him that the deceased had his plow, and requested his father to get the plow, reminding him that it was his duty to furnish the deceased with tools. The father of the defendant thereupon requested his son-in-law, Manning, to go and get the plow, saying that the deceased was friendly to Manning. Manning, who was on a visit with his wife and child to his father-in-law, and was about ready to start home, said he would not go if there was to be any trouble, but, being assured by the defendant that there would be no trouble upon his part, consented to and did go to the field, where the deceased was plowing, which was perhaps about 100 yards from the residence of J. F. Johnson. The defendant followed behind Manning, and there is evidence tending to show that Wash Johnson, the brother of the defendant, also went along with them. They approached the deceased as he came to the end of a cotton row in which he was plowing, as it appears, with the defendant's plow. They spoke to the deceased, saying "Good morning," and Manning said, "You are plowing her out," to which the deceased replied, "Yes." Manning then said to Williams that Mr. Johnson sent him over to get the plow, and to say to him that he would get him another plow if he wanted another. Williams replied that he would not let the plow go till he got another. Manning thereupon stepped forward, according to the testimony of Williams' wife, who states that she was present, and said: "My name is Manning. Don't you know me?" and as he said this stooped to unhitch the horse of the deceased from the plow, and Williams then drew a stick; and Mrs. Williams says: "And then Jim and Wash Johnson drew their pistols, [the defendant was called familiarly Jim Johnson.] Manning picked up the plow, and Jim said to him, 'Put down the single-tree,' and Manning did it. Manning then started off with the plow, and the defendant told him to put down the plow, and take the stick away from Williams. Jim said to Mr. Williams, 'Consider yourself under arrest,' and Mr. Williams said, 'I will not be arrested by you,' and then Jim, the defendant, fired." Mrs. Williams, who was the only person present save the deceased, Manning, Jim and Wash Johnson, says, when the second shot was fired, that her husband, the de-

ceased, was falling, and was upon the ground when the last shot was fired, and that he expired immediately; that at the first shot they were 10 feet apart. It appeared that there had previously been some bad feeling between the defendant and Williams, the deceased, and that the defendant, some time previous to the killing, had been told that Williams had threatened his life, and that Johnson had said that he did not want any trouble, and would mind his business, but that he was on his own premises, and did not propose to be run off. The defendant, in his testimony, states that when Manning stepped up to the plow, next to the horse, "Williams picked up a stick, and stepped toward Manning;" that he told Williams to lay the stick down; that he was not going to have any trouble, and for him to behave himself. He said, "I told him if he did not put his stick down, I would arrest him. He said, 'You will have to call in some of your neighbors to help you.' I told him again, if he did not lay down his stick I would arrest him. He started toward me with his stick drawn, and advanced toward me, and I told him to stop, but still he came on. He came very close, striking at me with his stick, when I shot the first time. He struck again, and I shot the second time. I was preparing to shoot again, when I saw he was hit. * * * I was constable of the township, and carried my pistol all the time, because I thought I had a right to do so. My brother, Wash, did not go over with Manning and myself."

There was some testimony tending to contradict Mrs. Williams, and to show that she was not present when the shooting occurred, but that she came up immediately afterwards. There was evidence tending to show that the stick which Williams had at the time he was shot was about as long as a man's arm, about 3 inches wide at one end, about 1½ at the other, and about 1 inch thick, "of heart pine, and good weight;" and a witness said: "I think it would have weighed four or five pounds. I had hold of the stick. I think a fatal blow could be given with it in the hands of a man with ordinary strength."

The court gave the jury the following instruction at the instance of the attorney for the state, over the objection of the defendant, to which he excepted, to wit: "The jury is instructed that a man cannot bring about a quarrel or encounter, and then justify himself under the law of self-defense, unless he in good faith endeavored to abandon the difficulty, and did all within his power consistent with his safety to avert the necessity of killing before the mortal injury was inflicted; and if the jury believes from the evidence that the defendant, being armed with a deadly weapon, went either alone or with Thad Manning and Wash Johnson, or either of them, to the field where the deceased, Williams, was plowing,

for the purpose of getting a plow, intending, if Williams would not give it up to him, to take it by force, and, if Williams resisted, to kill him, and that Williams did resist, and the defendant shot and killed him, then the defendant cannot justify himself under the law of self-defense, and such killing would be murder in the first degree, unless he had in good faith abandoned the affray, and done all in his power, consistent with his safety, to avoid the danger, and avert the necessity of the killing, before the mortal injury was given." This instruction is not substantially defective, and there is not reversible error in it.

The court refused the third, the sixth, and seventh instructions asked for by the defendant, and refused the eighth as asked, but modified it, and gave it as modified, to all which the defendant excepted. We do not discuss these instructions, because we think the law was sufficiently declared by the court, as to matters they were designed to cover, in other instructions that were given.

Exceptions were reserved to the court's refusal to give the ninth instruction asked for by the defendant without modification, and to the court's modification of it, and giving it as modified. The instruction, as requested, was as follows: "The defendant seeks to justify the killing on the ground that the deceased was making an attack on him under such circumstances as indicated an intention to take away his life, or do him great bodily injury; and that, whether such harm was intended or not, if it so appeared to the defendant, as a reasonable man, at the time, and if the circumstances were such at the time as to excite the fears of a reasonable man, and the jury believe that the defendant really and in good faith acted under the influence of such fear, and not in a spirit of revenge, then the killing would be justifiable." The court modified the instruction by adding the following: "Provided he was not the assailant, or did not bring on the difficulty, and had done all within his power consistent with his safety to avoid the danger, and to avert the necessity of the killing when the mortal injury was given;" and gave the instruction as so modified. This instruction, as was said of a similar instruction in *Palmore v. State*, 29 Ark. 266, was "too broad and unqualified." To excuse homicide it must appear that the danger is not only impending, but so pressing and urgent as to render the killing necessary. This idea was left out of the instruction as asked, but this was favorable to the defendant, and as to this he could not complain. But the modification is vicious, and prejudicial to the defendant. It is true as a legal proposition that where a defendant brings upon himself a difficulty, in which he continues until he brings upon himself a necessity to kill, the law will not hold him guiltless; "yet it is not to be doubted that

a person accused of crime may show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow." There should always be left room for repentance and the abandonment of an evil or unlawful purpose. *People v. Simons*, 60 Cal. 72. "This space for repentance is always open," says Bishop, (1 New Crim. Law, § 871.) "When, therefore, a combatant, to abandon the conflict, and not to gain fresh strength or a new advantage, withdraws as far as he can, but the other will pursue him, if the taking of life becomes inevitable to save life, he may lawfully kill his pursuer; but a mere colorable withdrawal avails nothing." *Id.*, note 1; 1 Hale, P. C. 479, 480. The modification to this instruction excludes the right of self-defense where the defendant is the assailant, though he abandons the conflict in good faith, and strikes the fatal blow thereafter only to save his own life, or to prevent great bodily harm being inflicted upon him. The instruction told the jury in effect that, if the defendant was the assailant, that fact cut him off from the right of self-defense, though he afterwards abandoned the conflict in good faith, and did not kill till forced to do so by an actual, impending, and pressing necessity, or by the appearance of such a necessity, which was sufficient to excite the fears of a reasonable man that his life was in danger, or that he was in danger of great bodily harm, and that there was no escape from the danger but by slaying his antagonist. For the error in giving this instruction the judgment must be reversed.

The tenth instruction is obnoxious to the objection to the ninth before it was modified. There was no error in refusing it.

The modification of the twelfth instruction was not prejudicial.

The fourteenth instruction, as modified, involves some close questions of law, upon which the decisions are not harmonious; but, as a majority of the court are of the opinion that the theory sought to be embodied in said instruction before it was modified, that the defendant was acting in his official character in seeking to preserve the peace when he fired the fatal shot, or that he killed the defendant in attempting to arrest him for a breach of the peace, has support in the evidence, we refrain from discussing it. That instruction, as asked, is as follows: "You are instructed that if you find from the evidence that the defendant was a constable, and the deceased was making an assault upon Manning in defendant's presence, the defendant had the right to arrest the deceased." The court refused this instruction as asked, and modified the same by adding at the end thereof the following: "Provided deceased was not justifiable in the assault; and he would be justifiable in the assault if neces-

sary to prevent Manning from taking from him the plow without his consent." The defendant excepted to the refusal of his instruction as asked, and excepted to the above modification, and giving the same as modified. When the court came to instruct the jury, after reading the above instruction as above modified, it verbally added the following statement to the jury: "Provided the deceased used no more force than was necessary to repel the unlawful force used against him." To this verbal statement of the court the defendant at the time excepted. A majority of the judges think the instruction was wrong as asked, and that the modification neutralized it, and that, as modified, it was harmless. It is the opinion of the majority of the court that, if the wrongful acts or conduct of the defendant brought on the difficulty, he could not take shelter behind his character as an officer, but that he stood as any other person, without the right to claim anything in that difficulty by reason of the fact that he was an officer.

The sixteenth instruction, as modified, is not prejudicial, and there was no error in giving it.

For the error in giving the ninth instruction, as modified, the judgment is reversed, and the cause is remanded for a new trial.

SMITH et al. v. CROSBY et al.

(Supreme Court of Texas, June 15, 1893.)

LEVY ON REALTY—SHERIFF'S DEED—SUFFICIENCY OF DESCRIPTION.

A levy, sale, and sheriff's deed of "all the right, title, and interest of defendant * * * in and to league No. 6, Galveston county, originally granted to B., and known as the 'Virginia Point League,'" is sufficient to convey whatever interest defendant has in such league. 22 S. W. Rep. 1042, affirmed.

Certificate of dissent from court of civil appeals, first supreme judicial district.

Trespass to try title by Mollie Terry Smith and others against Mildred M. Crosby and others. Judgment for defendants. Plaintiffs appeal. Affirmed by court of appeals, and certified to supreme court. Affirmed.

Robt. G. Street and Scott, Levi & Smith, for appellants. S. S. Hanscom and Willie, Campbell & Ballinger, for appellees.

STAYTON, C. J. The adverse parties claim through J. Mayrant Smith, and, if the sheriff's sale passed his interest in the Bundick league, then appellant has no right, for she claims through a conveyance made by him since the sale by the sheriff was consummated. The ancestor of J. Mayrant Smith, defendant in execution, owned an undivided interest in the Samuel C. Bundick league, which was partitioned through a decree of the district court for Galveston county prior to the levy and sale under execution through which appellees claim,

but the decree partitioning the land was not recorded until long after the sheriff's sale. By the partition decree, a particular part of the league was set apart by J. Mayrant Smith and coheir, and, under this state of facts, it is contended that the levy, sale, and sheriff's deed did not pass to the purchaser his interest in the league. The levy indorsed on the execution, in so far as it described the land, was as follows: "All the right, title, and interest of the defendant J. Mayrant Smith in and to league No. 6, Galveston county, originally granted to Samuel C. Bundick, and known as 'Virginia Point League.'" The advertisement under which the sale was made was not produced, but the description of the land contained in the sheriff's deed, under which appellees claim, was the same the levy indorsed. It is not claimed that the description of the league was in any respect uncertain or inaccurate, but it is contended that the levy, sale, and deed, for want of more particular description of part sold, did not pass title to the purchaser to any part of the league owned by defendant in execution. In the absence of evidence to the contrary, it must be taken as true that the sheriff took the necessary steps required by law to make a valid sale, and did sell all he was authorized by the levy to sell.

It seems to be contended that the words "all the right, title, and interest of the defendant" in and to the league of land described in the levy and sheriff's deed should not be given the same effect as would words declaring expressly that the land itself was levied upon, sold, and conveyed; but we cannot concur in this. The words, as descriptive of the estate and quantity of land levied upon, sold, and conveyed, must be given the same effect as would be given to them in a conveyance voluntarily executed by an owner or claimant of land. Nearly three centuries ago it was said: "If a man be seised of land in fee simple, or for life, or have an estate in it for years, by statute merchant, staple, elegit, or the like, and he grant all his estate, or all his right, or all his title, or all his interest of and in the land, by this grant all his estate, and as much as he is able to grant, doth pass." Shep. Touch. 98; Elph. Interp. Deeds, 205. This is one of the fixed rules regulating conveyances. When an owner of land, whatever his estate may be, conveys "all his right" therein, he passes to the person to whom the conveyance is made the same right he held as fully as he could by words which in terms purported to convey the land. Conveyance of right in and to property necessarily transfers the property in so far as owned by the person making the conveyance. When the owner of land conveys "all his title" in and to it, he necessarily brings about the same result. When he conveys his "interest" in and to land, he transfers whatever owner-

ship he has measured by estate and area of interest. For a long time past, from solicitude to use words that would embrace every conceivable interest in lands, it has been usual to convey "all the right, title, and interest in and to" land described in a deed; and when such words are used, without other words limiting their effect, they must be held to convey the land as fully as if it was owned by the maker of the deed. If he owned the entire tract described in the deed in fee simple, that passes to the vendee. If he owned a less estate in the entire tract, that passes. If he owned in fee simple or lesser estate only a part of the tract described, whatever he owned passes. If he owned an undivided interest in the whole tract described, or only in part of it, that which he owned will pass. The same rule applies to liens, sales, and conveyances made by sheriffs in obedience to executions, unless there be some rule of law making them exceptions. In *Brown v. Smith*, 7 B. Mon. 362, the rule was thus announced: "The objection made to the terms of the levy, as being upon the right, title, and interest of Johnson in the land, and not upon the land itself, is untenable. The distinction is but nominal, and has been too frequently disregarded in making levies and sales for it to be now questioned whether a levy and sale in either mode is not sufficient, with the sheriff's deed, to pass to the purchaser such title as the defendant had subject to execution." The same ruling was made in *Humphrey's Ex'r v. Wade*, 84 Ky. 400, 1 S. W. Rep. 648. In *Woodward v. Sartwell*, 129 Mass. 214, attachment was levied on "all the right, title, and interest" of the defendant in a tract of land, and it was held to be valid. The court said: "The land itself may be conveyed, or the right, title, and interest of the debtor in the same may be conveyed, and, if the latter form of deed is used by the officer, such estate as the debtor had in the premises at the time of the attachment would pass. * * * The deed to the purchaser recites the attachment, the seizure, the notices, and the sale, and conveys the right, title, and interest which the said Wales L. Egerton had at the time when the same was attached as aforesaid in and to the following described real estate. We are of opinion that this was a sufficient deed to the premises. It was sufficient to describe what was to be sold—the right, title, and interest of W. L. Egerton—on the day of the attachment, and the deed of the same conveyed that which was attached." In *Vilas v. Reynolds*, 6 Wis. 229, the levy of an execution on land was upon the "right and interest" of the defendant, which was held to be sufficient. The same ruling was made in *Millett v. Blake*, 81 Me. 531, 18 Atl. Rep. 293; *Parks v. Watson*, 29 Mo. 108; *Lewis v. Chapman*, 59 Mo. 381; *McLaughlin v. Shields*, 12 Pa. St. 287; *Swan v. Parker*, 7 Yerg. 490. The

statute provides: "When a sale has been made, and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim which the defendant in execution had in and to the property sold." Rev. St. art. 2316. The word "claim" does not add anything to the certainty or extent of a levy, or to a conveyance made in pursuance of a sale made under it. The rule that, in sales under execution and in like sales, the land sold must be designated with reasonable certainty, is as fully recognized in this state as elsewhere, but there may be a seeming conflict in the decisions made in the different states as to what amounts to a sufficient designation. It has been held that a sale by a sheriff of an undesignated part of a larger tract of land, there being no means of distinguishing the part sold from the remainder, is void. Among the cases so holding are the following: *Wofford v. McKinna*, 23 Tex. 36; *Norris v. Hunt*, 51 Tex. 609; *Wooters v. Ariedge*, 54 Tex. 395; *Pfeiffer v. Lindsay*, 66 Tex. 123, 1 S. W. Rep. 264. In these and like cases no description of the land was given to which, with safety, might extrinsic evidence be applied for the purpose of locating it upon the ground. In that class of cases extrinsic evidence could not be received, simply because there is no general, yet accurate, designation of the land given in the levy and deed by which extrinsic evidence must be controlled. In such cases, to admit extrinsic evidence to show the unexpressed intention of the officer would be to make that operative as a conveyance, instead of the deed. In *Wilson v. Smith*, 50 Tex. 363, the levy and conveyance was on and of "one hundred and sixty acres of land, being a part of the homestead tract of said James Bankston, exclusive of two hundred acres exempt by law." The homestead tract embraced about 360 acres of land, but the exempt 200 acres had not been designated. The levy and conveyance were held not to be void. "It was not a sale of so many acres out of a larger tract, with no means of fixing or locating the land sold, then or afterwards, but was a sale of that part of the tract remaining after the homestead was laid off."

That extrinsic evidence may be introduced to clearly locate and identify land passing by a sheriff's deed, containing an accurate, but general, description, ought not to be controverted, and is not an open question in this court. *Wilson v. Smith*, 50 Tex. 370; *Giddings v. Day*, 84 Tex. 608, 19 S. W. Rep. 682. The rule in this respect is the same whether the deed be one executed by a sheriff after a sale under execution, or one voluntarily executed by the owner of the land. The sheriff's levy and deed are not ambiguous, in the sense that there is uncertainty as to the meaning of the language used in describing the land levied upon and sold; for that can

have but one meaning, which is that the sheriff levied upon, sold, and conveyed to the purchaser every interest in the league of land described which the defendant in execution had at the time the levy was made. There are a few decisions that seem to sustain the proposition that a levy, sale, and conveyance made by a sheriff under execution of the "interest" of the debtor in a tract of land described will not pass title to so much of the land as he owned. Those decisions seem to stand not so much upon the uncertainty of the land levied upon and conveyed as upon a rule of public policy, deemed necessary for the protection of the right of the debtor. In *Whately v. Newsom*, 10 Ga. 74, the levy was on "all John Whately's interest in lot of land, number not known, the place whereon said Whately now lives." The deed conveyed "the interest of John Whately in lot of land No. 271, first district of said county" (Macon.) There was no controversy as to the lot on which Whately lived being lot No. 271, as described in the conveyance; but it was contended that a levy, sale, and conveyance of Whately's interest, without stating what that was, would not pass title. In disposing of the case, the court said: "Does the sheriff's deed sufficiently describe the land, so as to enable the purchaser to maintain ejectment for its recovery? We think not. The interest only of Whately in the lot was levied on and sold, and conveyed by the deed, without specifying what that interest was; whether a mere possession, a term, a fee, a succession, remainder, or any other estate, or whether in the whole or a part only of the land. Upon principle and policy, as well as authority, we are clear that this defect is fatal." After stating that a debtor's interest might be sold under execution, the court said: "When the attempt is made to levy and sell that interest, should it not be described in such a way as that the creditor, debtor, and public may all be notified what it is that is selling?" That decision was followed in another case, in which the levy was upon "a certain and all of the interest" of the defendant in execution in a lot described. *Williams v. Baynes*, 84 Ga. 116, 10 S. E. Rep. 541. The case of *Jackson v. Rosevelt*, 13 Johns. 97, is cited as authority in the first of the decisions above noticed. In that case it appeared that a large tract of land, extending over several counties, was granted to some proprietors by what was known as the "Hardenburgh Patent." The land was subdivided time and again between the proprietors and their descendants, when, after half a century from the time the grant was made, a certain lot vested in one of the heirs of one of the original proprietors, who died, leaving five children, against two of whom a judgment was rendered. Execution, issued under that judgment, was levied, but the form of the levy does not appear. In the sheriff's deed the land was described as "all the lands and tenements of Elizabeth Ellis

and Sarah Van Kleeck, heirs and devisees of Laurence Van Kleeck, situated, lying, and being in the patent commonly called and known by the name of the 'Hardenburgh Patent.'" Partition, before referred to, was confirmed by an act of the legislature, had been filed in the office of the secretary of state, and was shown to have been of great notoriety. The sheriff's sale and conveyance was held inoperative, for want of sufficient description of the land. That was an extreme case; and, in view of its facts, it may be that each of the subdivisions, or, as they were termed, "lots," should have been deemed separate tracts of land, as fully as though each had passed from the government as a separate grant. The case of *Jackson v. De Lancy*, 13 Johns. 538, is referred to in support of the rule announced in *Whately v. Newsom*, but it has no bearing on the question. In that case the sheriff seized and sold two separate tracts of land, for each of which a certain sum was bid and paid, and these were conveyed to the purchaser; but the sheriff's deed went further, and undertook to convey "all other, the lands, tenements, and hereditaments whereof the said William Earl of Sterling was seised within the county of Ulster." Lands embraced within this general description were in controversy, and the court simply held that the sheriff could not pass title to land he had neither seized nor sold. In the course of the opinion, however, it was said "that the sheriff cannot sell any land on execution, but such as the creditor can enable him to describe with reasonable certainty," and with this statement no fault can be found, for it does not undertake to determine what would be such reasonable certainty. The law does not require that in such sales the description must be such that the land may be identified by inspection of the levy and deed, and if the description be general, but sufficiently accurate to enable parties to identify the land levied upon and conveyed, by the use of such means as would be admissible in a court of justice for that purpose, then the description should be deemed sufficient. In one of the cases referred to, it is said that the description must be such "as that the creditor, debtor, and public may all be notified what it is that is selling." In another, that the officer must "so locate the lands as to afford means to the bystanders and bidders of informing themselves as to the value;" while in another it is said that "the policy of the law requires, not that there should exist the means of showing at some future time what is otherwise indefinite and uncertain, but that, at the time of sale, it should be within the power of all who are by the notice invited to become bidders to know what was offered, and that it should not be left to be surmised or guessed at some future time as to what the officer intended to sell." *Herrick v. Morrill*, 37 Minn. 254, 33 N. W. Rep. 849.

If the general description given be accu-

rate, and such that, following and applying it, purchasers, by the use of that diligence and care usually exercised in examining title and ascertaining the value of land they contemplate purchasing, may ascertain what particular land or interest in it is offered for sale, can it be said that such persons have not present means of knowing what is offered for sale? Can it be said, when land or interest in it is so described that bidders have not means of informing themselves of its value,—when so described, can it be said that creditor, debtor, and the public are not notified of what is to be sold? If we decide this case upon the weight of authority, we must hold that under the description of "right, title, and interest" in the league of land passed every interest held by the defendant in execution. If we decide in accordance with reason, keeping in view the right of debtors to have their property fairly sold, of purchasers to know what they are buying, and also the right of creditors to subject the debtor's property to sale in payment of his debts, we are forced to the same conclusion. The impropriety of requiring a creditor to so describe a tract of land, or interest in it owned by the debtor, that its locality, or the interest therein, may be determined from that description, is well illustrated by the facts of this case. The law contemplates that the owners of land will place evidence of right on record, so that all persons dealing with it may know how the title stands; and a failure to record may result in loss to the owner, if the land passes into the hands of an innocent purchaser. A person desiring to know what, if any, interest J. Mayrant Smith had in the league of land described in the levy and deed would go to that record to ascertain his right, and that would inform him that the father of J. Mayrant Smith owned an undivided interest in the league, the extent of which might or might not be disclosed by the record. He would then ascertain whether the father was living, and, finding that he was dead, would then inquire who inherited the estate or took it by devise. If the property was disposed of by will, from that he might ascertain, most frequently, in what proportion two or more devisees took the testator's interest in the land, or whether it went only to one person. If he ascertained that the father died intestate, an inquiry would have to be made as to the persons and number of persons who inherited his estate, and the interest each one was entitled to. From this he would ascertain that J. Mayrant Smith had an undivided interest in the league; but, if he be a creditor seeking to subject that interest to the payment of his debt, must he determine from his own inquiry what the interest of his debtor is, and, at his peril, direct the sheriff to levy on only a specified undivided interest in the league? We think not, for the creditor ought not to be compelled to

determine at his peril, in such a case, just what the undivided interest of his debtor is. If he conclude it to be an undivided fourth interest, and it should be so levied upon and sold, and it should afterwards appear that the debtor owned an undivided half interest, what would be the effect of the sale? If such a sale would pass the interest sold, it might operate to the injury of both debtor and creditor, while a sale of the actual interest would have been beneficial to both.

The record would have shown in connection with the inquiry as to the death of the father that J. Mayrant Smith owned an undivided interest in the entire league, when, in fact, by reason of the partition, he owned only an undivided interest in that part of the league given to the estate of his father in partition. The decree by which the partition was made was not recorded until after the levy and conveyance were made, although required by law to be recorded. Under such state of facts, was the creditor under obligation to cause the levy and sale to be made only of the undivided interest in the part given to the estate of the father in partition? A rule that would require such a procedure would not further the ends of justice, but would encourage debtors to withhold from record their evidence of right, in order that neither a creditor nor a sheriff could make, or cause to be made, a valid levy and sale of real estate. The debtor does not need to be informed what interest he has in a tract of land accurately described. He is presumed to know the extent of his right and its character, and when all his right, title, and interest in a tract of land, sufficiently described, is levied upon, he must take notice that a sale under that levy will pass all the interest he has. No prudent man, contemplating the purchase of land at sheriff's sale under execution, relies upon the levy or proposition of the sheriff to sell in determining what part or interest in a tract of land, sufficiently described in a levy and offer to sell, he will acquire right to under a purchase; nor can he claim that it is the duty of the creditor to exercise a higher degree of care for his benefit, in directing the levy, than self-interest will induce the purchaser to exercise for his own protection. The purpose of advertisement is not solely to give notice of the time and place the sale will be made, but is also to afford persons desiring to purchase an opportunity to examine title, and to determine for themselves what land, or interest in land, they can acquire by a purchase. As to this they do and must rely upon their own judgments, based on such inquiry as they deem proper to make, or to cause to be made. "The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intention will be made in their favor, so as to

secure, if it can be done consistently with legal rules, the object they were intended to accomplish." *White v. Luning*, 93 U. S. 514, 523. The certainty necessary in the levy, sale, and conveyance of land under execution is thus well stated: "There may not be certainty to every interest, nor is it necessary there should be in such a case. Certainty to a general interest, such as would put the owners and purchasers upon inquiry, affording the means of complete information, is all that can be expected." *Swan v. Parker*, 7 Yerg. 493. Decisions may be found in which it was held that, under a levy, sale, and conveyance such as that before us, title to lots in a town, within the grant generally described, would not pass; and this is in accordance with the statute in force in this state, which provides that "if real property situated in any town or city, taken in execution, consist of several lots, tracts, or parcels, each shall be offered separately, unless the same be not susceptible of a separate sale, by reason of the character of the improvements thereon." Rev. St. art. 2305. The statute further gives a defendant the right, when lands not situated in a town or city are taken in execution, if he be the sole owner, to have them sold in lots, upon conditions named in the statute. *Id.* arts. 2306-2308. Neither those decisions nor statutes can have any bearing favorable to the proposition made by appellants, to the effect that no valid sale could be made of the interest of the debtor in the league unless it was in terms a sale of the undivided interest in the part of the league set apart to his father's estate by the decree of partition, made in pursuance of a levy on that interest in the particular tract. The disposition made of this case by the court of civil appeals was correct, and the judgment of that court, as well as of the district court, will be affirmed.

CREW v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1893.)

RAPE—DRUNKENNESS AS DEFENSE—INTENT.

Drunkenness being by Pen. Code, art. 40a, declared no excuse for crime, a charge on a prosecution for rape that, if the jury believed defendant's mind was so far overcome from the recent use of intoxicants as to be incapable of forming an intent, they should not infer the intent from his acts, is properly refused.

Appeal from district court, Orange county; Stephen P. West, Judge.

Joe Crew was convicted of assault with intent to rape, and appeals. Reversed.

C. A. Teagle, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of an assault with intent to rape, and his

punishment assessed at two years in the penitentiary, from which he appeals.

Appellant complains that the court erred in refusing to charge the jury that, if they believed defendant's mind was so far overcome from the recent use of intoxicating liquor as to be incapable of forming an intent, they should not infer the intent from his acts. The court did not err in refusing to give this instruction. The statute declares that drunkenness is no excuse for crime.

In the general charge to the jury, the court charged that when there is a particular intent on the part of the defendant necessary in law to constitute the offense, if the defendant's mind was incapable of forming such necessary intent from intoxication, he would not be guilty. This charge was error, and directly against the statute of this state, (Pen. Code, art. 40a,) as held by this court in the *Evers Case*, 20 S. W. Rep. 741. But we do not think the evidence in this case is sufficient to sustain a conviction for an assault with intent to rape, and the judgment is reversed, and the cause remanded. Judges all present and concurring.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. June 22, 1893.)

HOMICIDE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—TESTIMONY OF CONVICT.

A new trial in a homicide case, for newly-discovered evidence, as to which only a convict makes affidavit, will not be granted on the chance that he may be pardoned, and thus made a competent witness.

Appeal from district court, Houston county; W. O. Reeves, Judge.

Henry Williams was convicted of murder, and appeals. Affirmed.

W. H. Moore, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years in the penitentiary, from which judgment he appeals. The only ground relied upon for a reversal of the judgment is the discovery of important evidence after the trial. The record shows that John Young was a convict. The facts discovered are without significance without the evidence of John Young, the convict. No competent witness, by affidavit or otherwise, swears to a fact of the slightest importance disconnected from the affidavit of Young. In other words, relieve the motion for a new trial of the affidavit of Young, and there remains no fact discovered which has any bearing upon the case. Young, being a convict, cannot be a witness on another trial. Counsel for appellant, being aware of this fact, contends the court should have granted a new trial,

and thereby given the appellant an opportunity of procuring a pardon for Young, and consequent restoration to competency as a witness. Did the court err in not granting the motion for such a purpose? Evidently it did not. It would be a remarkable doctrine, indeed, to announce such a rule of practice. What degree of certainty was there that Young would ever be pardoned? That he would is mere speculation. The judgment is affirmed. Judges all present and concurring.

PEARCE v. STATE.

(Court of Criminal Appeals of Texas. June 23, 1893.)

EXTRADITION—HABEAS CORPUS—INDICTMENT—VALIDITY OF IMMATERIAL.

Where one is arrested on an executive warrant in extradition proceedings, the validity of the indictment under which he is charged by the demanding state will not be tried on habeas corpus.

Appeal from district court, Taylor county; T. H. Connor, Judge.

Petition in habeas corpus by George A. Pearce for release from custody. The petition was denied, and petitioner appeals. Affirmed.

Lockett & Joiner, Kirby, McKinzie & Kirby, and Leggett & Hardwicke, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Relator was arrested on an executive warrant issued the 22d day of April, 1893, by the governor of this state, upon the requisition of the governor of Alabama, charging relator with embezzlement and theft. Upon the 28th day of April, he presented his application to the Honorable T. H. Connor, judge of the forty-second judicial district, for a writ of habeas corpus, praying for reason therein stated to be discharged from custody. Upon hearing the court refused the prayer of the relator, remanding him to the custody of the agent of Alabama who had him in custody at the institution of these proceedings. Pending this appeal, relator was placed in the custody of the sheriff of Taylor county.

Relator attached as Exhibit A to his petition a copy of the executive warrant, which recites that George A. Pearce stands charged by indictment with the crime of embezzlement and grand larceny committed in Alabama, and the defendant had taken refuge in the state of Texas, and that the governor of Alabama, in pursuance of the constitution and laws of the United States, had demanded that he, the governor of Texas, cause said fugitive to be arrested and delivered to P. D. Dorlan, who was duly authorized to receive him, etc. Petitioner further attached as Exhibits B and C copies of the indictments presented to the governor of Texas by the said executive of Alabama, duly certified to

by the clerk. In the return of the writ of habeas corpus by the said agent and by the sheriff of Taylor county the same exhibits are made; also the requisition of the governor of Alabama, stating that it appeared by the annexed copy of the indictment, duly authenticated in accordance with the laws of the state, that George A. Pearce stands charged with the crime of embezzlement and grand larceny committed in the county of Mobile, and it had been represented to him that he had fled from the justice of that state, and taken refuge in the state of Texas. Also as exhibits to the return the authorization of said Dorlan as agent. There were two indictments so certified, each beginning as follows: "State of Alabama, Mobile county. City court of Mobile, February term, 1889. The grand jury of said county charge that before the finding of this indictment, George A. Pearce, an officer or agent of the Planter's and Merchant's Insurance Company," etc., and concluding, "against the peace and dignity of the state of Alabama." The first indictment contains 3 counts, charging embezzlement and grand larceny of \$30,000, the property of said company. The second indictment contains 15 counts, charging embezzlement and grand larceny of 13 state bonds of the denomination of \$1,000 each, the property of said company. But outside of the marginal statement of venue, and the allegation of the crime being committed before the finding of the indictment, there was no time nor venue laid in the indictment.

The relator insists on being discharged, because there was no indictment pending against him in Alabama or elsewhere which would authorize his extradition; (1) that the so-called "indictments" were insufficient to authorize such a proceeding, because it was not alleged therein that said offenses were committed in the state of Alabama, and in violation of her laws; (2) that said indictments were wholly void, in that no time or place were laid therein, and it did not appear where said offenses were committed, nor that the said offenses were not long since barred. Relator further showed he had been a citizen of Texas for more than three years, and his whereabouts were known to interested parties in Alabama, and he asked leave to make proof under the statute of limitation, presumably of Texas.

It may be considered as the settled doctrine of the courts that a prima facie case is made out against the relator where the returns of the writ of the habeas corpus or the exhibits filed with the petition show (1) a demand or requisition for the prisoner made by the executive of another state, from which he is alleged to have fled; (2) a copy of the indictment found, certified as authentic by the executive of the demanding state; (3) the warrant of the governor of the asylum state authorizing the arrest. When these facts are made to appear by papers regular on their

face, the prisoner is *prima facie* under legal restraint. *Spear*, Extr. 208-303; *In re Clark*, 9 Wend. 212; *Schlemm's Case*, 4 Har. (Del.) 577; *In re Hooper*, 52 Wis. 690, appendix; *People v. Brady*, 50 N. Y. 182; *Johnston v. Riley*, 13 Ga. 97; *Ex parte Stanley*, 25 Tex. App. 378, 8 S. W. Rep. 645. This is practically conceded by relator, who does not deny he is a fugitive from justice, or raise any issue thereon, as he had a right to do. *Ex parte Mohe*, 2 Ala. Law J. 457; *Wilcox v. Nolze*, 84 Ohio St. 520; *Whart. Crim. Pl. & Pr.* 31, 34, 35. Relator relies entirely upon the invalidity of the indictments for his discharge, for it is not shown how long the offenses were committed prior to the February term, 1889, when said indictments were found, nor what is the statute of limitation in Alabama, if any, for embezzlement and theft. Now, admitting that the indictments in this case, if tested by the laws and constitution of Texas, are wholly insufficient to be made the basis of a conviction, does it follow that they cannot sustain the requisition of the governor of Alabama for relator?

In considering the first objection of relator to the indictment, that it does not allege that the crimes therein mentioned were committed in Alabama, and against her laws, we may say that the right and duty of the executive of this state to order the arrest and delivery of relator to the governor of Alabama is derived wholly from the federal constitution and acts of congress. As said in *Hibler's Case*, 43 Tex. 203, this provision of the constitution is equally binding on each state as though it was a part of its own constitution, or whether congress had passed laws relating thereto or not. Now, although the extradition law, as understood by the authorities, can only be invoked by the state within whose limits the crime is committed, yet no specific form of indictment is required by the federal constitution or laws. On the contrary, the matter seems to have been left to the due course of legal proceedings in each state.

Article 4, § 2, subd. 2, of the constitution of the United States declares that a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand by the executive of the state from which he fled, be delivered up. *Rev. St. U. S.* § 5278, reads: "Whenever the executive authority of any state demands any person as a fugitive from justice of the executive of another state * * * to which such person has fled, and produces a copy of an indictment found, * * * charging the person demanded with having committed treason, felony, or other crimes, certified as authentic by the governor of the state from whence the person so charged has fled, it shall be the duty," etc.

An examination of the constitution shows that where a person is charged—that is, in due course of legal procedure of the par-

ticular state, or, to use the language of the statute, where there is an indictment found charging a person—with having committed a crime, and he is a fugitive from justice, he should be surrendered on demand of the executive of the state from which he fled. Had the constitution declared that where a person was charged with crime committed in the demanding state, or had the act of congress declared that the demanding governor must produce a copy of an indictment found charging the person demanded with having committed crime within said state, it would perhaps be held necessary that such allegations should appear in the body of the indictment. But the fact that there are no such requirements, and no special form of indictment prescribed, (we are not speaking of affidavits or complaints,) would seem to sanction the conclusion, to which the great weight of authority tends, that any indictment which under the laws of the demanding state sufficiently charges the crime will sustain the requisition, even though wholly insufficient under the laws of the asylum state. It is, then, to the laws of the demanding state we should look to test the question of crime, and, if deemed necessary, the sufficiency of the indictment. *Kentucky v. Dennison*, 24 How. 104; *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. Rep. 1148; *Davis' Case*, 122 Mass. 324; *Brown's Case*, 112 Mass. 409; *In re Greenough*, 31 Vt. 279; *Briscoe's Case*, 51 How. Pr. 422; *Hamilton v. Kingsbury*, 4 Fed. Rep. 432; *Spear*, Extr. 372, 373. Can we, then, take notice of the laws of the demanding state? We can see no good reason why the governor of the asylum state, in the first instance, (*Spear*, Extr. 372,) or the courts upon hearing on *habeas corpus*, may not, and should not, look to those laws for guidance. In *Ex parte Reggel*, *supra*, a copy of certain of the penal laws of Pennsylvania were forwarded with the requisition, and were considered, and no reason exists why, when we have all the laws of several states at hand, they should not be examined. In trying the case below, the court says he examined a copy of the laws of Alabama, and found the indictments sufficient thereunder. We can see no error.

It is true that in criminal as well as civil cases the laws of other states must be proven before they can be taken notice of. Thus, in cases where stolen property is brought into this state, a conviction therefor cannot be sustained unless it is shown that the act committed in the state from whence it was brought would be theft or robbery by the laws of that state. *Pen. Code*, art. 799. This is because the presumption of innocence must be indulged in favor of defendant by the tribunal which must pass upon his guilt or innocence; but in interstate extradition cases the court of the asylum state cannot pass upon such a question. The guilt or innocence of the relator cannot be

considered. The only question before the court is the correctness and legality of the proceeding. Do they conform to the requirements of federal and such state laws as the asylum state may have adopted, not in conflict with the federal laws?

In the case at bar there is no question as to the nature of the crimes charged, and that they are offenses against the laws of Alabama. Embezzlement and theft are crimes in every state of the Union. Neither time nor place are essential elements in said crimes. We do not think an indictment failing to charge time and venue must necessarily be fatally defective in every state in the Union, whatever be its statutes or forms of proceeding. In the case of *Noles v. State*, 24 Ala. 603, this question was passed on by the supreme court, which held that the then Code, dispensing with the necessity of allegation of time and venue, but requiring proof thereof, was not against the bill of rights; that the accusation of the commission of crime is the gravamen of the indictment that could not be dispensed with, but the particulars as to time, place, and circumstance, not constituting essential elements in the crime, may be dispensed with by statute, and be left as a matter of proof in establishing jurisdiction. See, also, *Thompson's Case*, 25 Ala. 41; *Quartermus' Case*, 3 Heisk. 65; *Alexander's Case*, id. 475; *Chamberlain's Case*, 6 Nev. 257; *Foster's Case*, 19 Ohio St. 415.

In speaking of the allegation of time, Mr. Bishop says it is a mere form, unless some special reason renders it important. 1 Bish. Crim. Proc. § 386. And in this state, where some allegation of time is necessary, any time between the finding of the indictment and the period fixed by limitation can be shown. In Alabama, under section 4373, Code 1886, it is not necessary to state the precise time at which the offense was committed. It may be alleged to have been committed on any day before the finding of the indictment, unless time is a material ingredient of the offense. As to venue, Mr. Bishop says: "It was provided by 14 & 15 Vkt. c. 100, § 23, that the venue need not be stated in the body of any indictment, but the county or city named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the indictment." 1 Bish. Crim. Proc. § 368. He also says some of our states have adopted statutes more or less like this one. It is believed that none of them dispense with the proof of the place, but in some the provision is distinct that it need not be alleged. Thus, in Alabama, "it is not necessary for the indictment to allege where the offense was committed, but the proof must show it to have been within the jurisdiction of the county in which the indictment is preferred." 1 Bish. Crim. Proc. § 385. The section of the Code referred to by Mr. Bishop is 4374 of the Code of 1886. It is true, Mr. Bishop questions the wisdom of such legislation, (1

Bish. Crim. Proc. § 385;) but we may answer in the language of Chief Justice Taney: "Alabama has an undoubted right to regulate forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other state." *Kentucky v. Dennison*, 24 How. 107; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148.

The judgment appealed from is in all things affirmed, and it is ordered that appellant pay the costs of this appeal, and that he be delivered to the said P. B. Dorlan, or any duly-authorized agent of the state of Alabama, in accordance with the requirements of the executive warrant of the governor of this state.

HURT, P. J., and DAVIDSON, J. We desire to modify certain propositions stated in the opinion of Judge SIMKINS. It is intimated, if not stated directly, that the relator would have the right to show by proper evidence that the indictment in substance was not sufficient under the laws of the demanding state. Our position upon this question is that, if it reasonably appears upon the trial of the habeas corpus that the relator is charged by indictment, in the demanding state, whether the indictment be sufficient or not under the law of that state, the court trying the habeas corpus case will not discharge the relator because of substantial defects in the indictment under the laws of the demanding state. To require this would entail upon the court an investigation of the sufficiency of the indictment in the demanding state, when the true rule is that, if it appears to the court that he is charged by indictment with an offense, all other prerequisites being complied with, the applicant should be extradited. We are not discussing the character of such proof. This must be made by a certified copy of the indictment, etc.

CROW et al. v. FIDDLER et al.

(Court of Civil Appeals of Texas, June 28, 1893.)

TRESPASS TO TRY TITLE — COMMUNITY PROPERTY — EVIDENCE — PLEADINGS — LIMITATION OF ACTIONS — SUBROGATION.

1. In an action to recover, as heir of plaintiff's mother, an interest in land which had been sold on execution against her father alone, claiming that when sold the land was community property, the court found that the land was purchased with money brought by plaintiff's parents from Missouri, under whose laws property acquired during marriage becomes the separate property of the husband. The evidence showed that the parents were married in Missouri in October, 1858; that in December, 1859, they were residing in Texas; that in July, 1860, the land was purchased of an estate, under an order allowing a credit of one year; that a note was given for a portion, only, of the price. But there was no evidence as to when or how the balance of the price was paid. *Held*, that the land was community property.

2. Where the replication alleged infancy, only, in avoidance of the plea of limitation, the disability of coverture cannot be asserted on the trial.

3. Land belonging to a decedent's estate was conveyed by the administrator to B., who gave a note for a part of the price, signed by a surety. The administrator subsequently procured a judgment on the note against the surety alone, and in execution thereof levied on the land conveyed to B., and sold the same to defendant's grantor. While B. held the land, it was community property. Held that, though the decedent's estate received the benefit of the void sale to defendant's grantor, as between defendant and the heirs of B.'s wife, the latter's interest is superior.

4. In trespass to try title, where defendant claims under a void execution sale, he cannot invoke the right of subrogation, because of having extinguished an existing lien, without pleading such fact specially.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action in trespass to try title by Clara B. Crow and others against Jacob Fiddler and others. Defendants had judgment, and plaintiffs appeal. Reversed in part, and remanded.

Stuart & Lewis and L. H. Mathis, for appellants. Potter, Potter & Giddings, for appellees.

Conclusions of Fact.

STEPHENS, J. This action of trespass to try title was brought July 31, 1890, by Elizabeth M. Crow and Clara B. Crow, (joined by her husband, John B. Crow, Jr.,) to recover, each, an undivided one-fourth interest in 1,476 acres of land, situated in Cooke county, known as the "Albert Martin Survey." The defenses interposed were pleas of not guilty, statutes of limitation of five and ten years, and improvements made in good faith. The several defendants also prayed to have their warrantors vouched in, and for a recovery over against them in case the plaintiffs should prevail in the suit, but the record fails to show that the warrantors were cited. In avoidance of the pleas of limitation the disability of minority was alleged. There was a trial without a jury, resulting in a judgment in favor of the defendants, rendered upon the following conclusions of law and fact:

"First. That by deed dated July 21, 1860, R. D. Stone, as administrator of the estate of Green Stallcup, deceased, in pursuance of an order of the probate court of Cooke county, sold the land in controversy to Thomas A. Braley for the sum of \$771.20; that said order of court directed said sale to be made upon a credit of twelve months; that said Braley, in part payment for said land, executed his note for \$307.47, dated July 8, 1860, with W. W. Foreman as surety, due twelve months after date, with interest at 12 per cent. per annum after maturity. Said deed retains a vendor's lien upon said land to secure the payment of said purchase money. There is no direct evidence as to when or how the remainder of the \$771.20

was paid. From the circumstances, I find that it was paid before the institution of the suit to collect said \$307.47 note. Second. That on November 8, 1861, said Stone, as administrator of Stallcup's estate, in the district court of Cooke county, recovered a formal judgment against W. W. Foreman, as surety on said note, for the amount due therein. No judgment was rendered against Braley, the suit as to him having been dismissed, and no foreclosure of the vendor's lien on said land was had. Third. That by virtue of an execution issued upon said judgment, dated June 30, 1870, said land was levied upon as the property of said Braley, and by the sheriff of Cooke county, by deed dated August 17, 1870, sold to R. F. Scott, and each of the defendants has a regular chain of title to the portion of said land claimed by them from said Scott. Fourth. That plaintiffs, Clara B. Crow and Elizabeth Crow, are the daughters and only surviving children of said Thomas A. Braley and Mary Ann Braley; that said Thomas A. Braley and Mary Ann Braley were married in the state of Missouri on the 12th day of October, 1858; that the maiden name of Mary Ann Braley was Mary Ann Stallcup, and she was the sister of Green Stallcup; that Mary Ann Braley died May 30, 1869, and that Thomas A. Braley died November 13, 1890; that plaintiff Elizabeth Crow was born July 8, 1859, and was married to Benjamin Crow on May 31, 1882, and that said Benjamin Crow died April 21, 1886; that Clara B. Crow was born August 23, 1864, and married John B. Crow, who still lives, on June 22, 1887. Fifth. That the money paid by Thomas A. Braley on the purchase of said land was acquired before he came to Texas, and that by the laws of the state of Missouri, where Thomas A. and Mary Ann Braley were married, property acquired during marriage became the separate property of the husband. Sixth. That each of the defendants has established his plea of the statute of five years' limitation against the plaintiff Elizabeth M. Crow, but not against Clara B. Crow, and that each of the defendants is a 'possessor in good faith' of the land claimed by him, and has made permanent and valuable improvements thereon, to the value stated in the statement of facts filed in this case.

"As a matter of law, I find that, the land in controversy having been paid for, to the extent of \$463.73 of the purchase price, by Thomas A. Braley, by money he acquired in the state of Missouri, it became his separate property, and not the community property of himself and his wife, Mary Ann Braley, and, his right thereto having been barred before his death, plaintiffs cannot recover through him. And I find that though the execution of date the 30th day of June, 1870, by virtue of which the lands in controversy were sold by the sheriff of Cooke county to R. F. Scott, was void, the estate of

said Stallcup having received the benefit of said sale, it was sufficient to pass the title of said estate to said lands to the purchaser at said sale; and the said Thomas A. Braley having never paid for said lands, and a vendor's lien having been reserved in the deed to him, the title of the Stallcup estate therein, which passed to the purchaser at said sale, was superior to the title of said Braley, and is sufficient to defeat a recovery by plaintiffs, and hence I render judgment for defendants."

Conclusions of Law.

The controlling question in the case is raised by the first and second assignments of error, which require us to pass upon the sufficiency of the evidence to support the fifth finding quoted above; the contention of appellants being that the cogent presumption that property acquired during marriage is community property was not overcome by the testimony. The record does not present a case of conflicting evidence, but only a few meager facts, from which the conclusion in question was drawn. It appears that after the marriage of Thomas A. and Mary Ann Braley, which occurred in the state of Missouri in October, 1858, they came to Texas,—whether immediately or not, does not appear,—but that they were residing at Gainesville, Cooke county, as early as December, 1859, and continued to so reside for a year or more thereafter. It does not appear whether, during that time, their intention was to remain in Texas, or to return to Missouri. The only two witnesses produced by the appellees to prove that the purchase money paid for the land in controversy was not acquired in Texas testified that they did not think Thomas A. Braley followed any business while in Gainesville, Tex., except looking after the estate of Green Stallcup. It appears, however, that he qualified in December, 1859, as administrator of the estate of James Stallcup, deceased,—a brother of Green Stallcup. There was no evidence that he ever acquired any money or property in the state of Missouri, or that he ever brought any with him to the state of Texas. The evidence does not show when, or precisely how much of, the purchase money was paid for this land, but we think it should be inferred that none was paid earlier than 18 months after they came to Texas. It appears that the land was bought on a credit of 12 months, under an order of the probate court made more than six months after they came, and during that time they resided at Gainesville, Tex. To hold that the land was in part paid for with the separate property of Thomas A. Braley, we would have to presume that he owned property in Missouri; that he brought it to Texas, and used it in paying for the land,—which would be to deduce one presumption from another in order to overcome a presumption, which the law will not permit.

Railway Co. v. Porter, 73 Tex. 304, 11 S. W. Rep. 324. Under this state of the proof, we are constrained to hold that the presumption that property purchased during marriage is community property was not sufficiently rebutted to justify a finding to the contrary. Our conclusion from the statement of facts is that the land in controversy, when purchased by Thomas A. Braley on a credit of 12 months, became the community property of himself and wife. Epperson v. Jones, 65 Tex. 425. The other findings of fact, in so far as they do not conflict with this conclusion, are approved. We conclude, therefore, that appellant Clara B. Crow is entitled to recover, as heir of her deceased mother, an undivided one-fourth interest in the land in controversy, but that the other appellant is not entitled to recover anything, her right being barred by the statutes of limitation.

By the ninth assignment of error, appellants contend that, as to J. D. and J. W. Robinson, Elizabeth Crow is not barred, because she was a married woman when the deeds under which they claim were placed upon record. The answer to this is that her replication in avoidance of the pleas of limitation did not assert the disability of coverture, but only that of infancy. The same answer disposes of the eighth assignment of error, as to the defendant Stansbury.

The answer to the tenth assignment of error—that, as to the defendant J. B. Martin, there was no plea of the 5-years statute—is that the 10-years statute was set up, and the plea seems to have been sustained by the proof. We conclude, then, that the judgment rendered against appellant Elizabeth Crow should be affirmed.

It is urged in support of the judgment against Clara B. Crow that, if there was error in the conclusion that the land in dispute became the separate property of Thomas A. Braley, it must be sustained by the further conclusion of law upon which it was rested,—that, though the execution sale to R. F. Scott, made in June, 1870, under whom appellees claim, was void, it was nevertheless sufficient to pass the superior title remaining in the Stallcup estate, on the ground that said estate had received the benefit of the sale. This seems to us to be an unwarranted application of the anomalous doctrine—which, strange to say, has become a rule of property in this state—that by expressly retaining the lien which the law implies the nature of the transaction itself is said to be changed from an executed to an executory contract, so as to retain in the vendor of land the superior title till all the purchase money is paid. Weems v. Masterson, (Tex. Sup.) 15 S. W. Rep. 590. The title never was in the administrator, but, immediately on the death of Green Stallcup, was cast upon his heirs, or vested in his devisees, subject to be di-

vested by the court for the purposes of administration in accordance with the provisions of the probate statute. The administrator's deed, made in pursuance of the order of the probate court confirming the sale, in terms, vested the title in Thomas A. Braley, and on its face made the land community property of Braley and wife. This was solely by virtue of a compliance with the statute empowering the court to divest the title of the heirs or devisees in order to raise money to pay the debts against the estate. Pasch. Dig. arts. 1322, 1327, 1333. According to the court's findings, more than half of the purchase price was received from Thomas A. Braley as a result of the sale so regularly ordered and made. From the subsequent and void execution sale made without authority of any court, the subsequent administrator seems to have received from appellees' vendor less than one-fifth (\$142) of the amount originally approved by the probate court as the reasonable purchase price of the land. It is not perceived upon what principle such a void proceeding on the part of an administrator, who derives all his power from the law and the orders of the court, can operate to transfer to appellees the superior title, which is held to remain in the heirs or devisees till all the purchase money of a sale regularly ordered, made, and approved is paid. *Burgess v. Millican*, 50 Tex. 397. While a vendor in whom the superior title remains may elect, in default of the payment of the purchase money, to avoid the sale, by reselling to another, no such power belongs to an administrator. He could only resell, as in the first instance, by obtaining an order of court. In a contest of titles between appellants, claiming as heirs of Mary Ann Braley, deceased, under the conveyance regularly made to Thomas A. Braley pending his marriage with Mary Ann Braley, and appellees, claiming under a purchase at a subsequent sale made by virtue of a void execution levied on the land in controversy as the property of Thomas A. Braley, we think appellants hold the superior title, under the common source, except in so far as it is defeated by limitation. If reliance should be placed on the defense of an outstanding legal title in the owner of the estate of Green Stallcup, deceased, and the claim under Thomas A. Braley as a common source would not preclude its assertion, it would seem that the judgment would have to be reversed, and the cause remanded, on the ground of error in excluding the will of Green Stallcup, deceased, whereby this legal title was devised to the mother of appellants. *Burgess v. Millican*, 50 Tex. 397.

The further contention of appellees, that the judgment must be sustained on the ground that the money paid at the void execution sale by their common vendor, Scott, had removed an incumbrance from appellants' title, and thereby enabled them to

retain possession of the land in the absence of an offer on the part of appellants to reimburse them, must also be denied, because no such facts were alleged. Such a defense invokes the equity of subrogation, and is held to be so far in the nature of affirmative relief as to require that it be specially pleaded in an action of trespass to try title. *Fuller v. O'Neil*, 69 Tex. 349, 6 S. W. Rep. 181.

The judgment, as to Clara B. Crow and husband, will be reversed, and here rendered, vesting in her an undivided one-fourth interest in the land in controversy, but the cause will be remanded for further proceedings in partition to adjust the equities growing out of valuable improvements made by the several defendants. We could not, in the state of the record brought here, in the absence of partition proceedings, adjust these matters, as the parties seem to contemplate in the briefs, further than to approve the finding in favor of appellees on that issue, which we do. We would not be justified in entering judgment against the warrantors, in the absence of an appearance by them, without it being made to appear by the record that they had been cited. In remanding the cause, therefore, it will be without prejudice to the rights of the parties entitled to such relief.

BAILEY et al. v. LAWS et al.

(Court of Civil Appeals of Texas. June 21, 1893.)

TRESPASS TO TRY TITLE—PARTITION—STATUTE OF LIMITATIONS—TITLE—RES JUDICATA—EVIDENCE—DEPOSITION—PARTIES—CONVEYANCE PENDING ACTION—TAXES—CONTRIBUTION BY COTENANTS.

1. In an action by L. for partition, a decree was rendered in favor of M., intervener, for 440 acres, and in favor of defendant W. for 200 acres, as his homestead, and provided that, if they failed to agree on the boundaries of the homestead within a certain time, "then — are hereby appointed commissioners" to allot the land. Plaintiff and other defendants were decreed to take nothing. Before any agreement was made, or any commissioners were appointed, W. died. In the mean time L. and M. agreed on an equal division between them of the land decreed to the latter, and that, if they failed to agree, the division should be made by arbitrators, and deeds passed. Thereafter M. conveyed one-half of his remaining interest to S. & J., and afterwards conveyed to B. all the interest in such land decreed to him in such action. *Held*, in trespass to try title and for partition, commenced by L. more than three years after such decree, against all the other parties claiming an interest in such land, that the judgment in the former suit was res judicata of the title at that time, and that the defeated parties therein in possession could not set up the three-years statute of limitations, since their possession was without title or color of title.

2. Any right such defeated parties had acquired by possession prior to such judgment was thereby canceled, and such possession cannot be tacked to their subsequent possession, so as to make any statute of limitations available.

3. Where plaintiff changes the form of his action from one of partition to one of trespass to try title and partition, there is no such change in the cause of action as will prevent the original petition from having the effect to stop the running of the statute of limitations.

4. It was not error to exclude as evidence certain tax deeds executed prior to such judgment, under which one of the defeated parties thereto claimed title.

5. Nor was it error to exclude evidence of plaintiff to show that, previous to such decree, he had conveyed his interest to a stranger to the record, since his agreement with M. reinvested him with sufficient title to enable him to maintain the action, though he had previously parted with it.

6. A conveyance by plaintiff of his interest in the land, during the pendency of the action, will not defeat recovery by him, and his grantees need not be made parties.

7. A deposition will not be excluded because a letter by which the witness refreshed his memory as to the date of a transaction about which he was testifying was not attached thereto, where the witness was not asked to attach it, and no effort was made to quash the deposition before trial.

8. It was proper to admit evidence showing that, at the time of the conveyance by M. to B., the latter had knowledge of M.'s previous agreement with L., and conveyance to S. & J.

9. The parties need not go back of the former judgment to establish title, since it is the common source.

10. Where, in partition, the cotenants, in possession of the entire premises, seek to compel contribution for taxes paid by them during a series of years, the court should, in adjusting the equities, take into account the value of such possession, though a cotenant cannot recover rent until demand and refusal of joint occupancy.

Appeal from district court, Tarrant county; R. P. Willing, Special Judge.

Action of trespass to try title and for partition by J. M. Laws and others against Bailey and Walker and others. From the decree entered on the verdict of a jury, Bailey and Walker appeal. Affirmed.

The other facts fully appear in the following statement by HEAD, J.:

The land in controversy is 222 acres out of the E. S. Carver survey, 250 acres out of the L. O. Walker survey, and 160 acres out of the D. C. Manning survey, all lying adjacent to each other. On January 14, 1882, a suit was pending in the district court of Tarrant county in which J. M. Laws was plaintiff, A. G. Walker, Sr., A. G. Walker, Jr., Eliza Hedges, wife of Aaron Hedges, William W. Walker, a minor, Mary Calloway, wife of Leander Calloway, and E. A. Walker, wife of John G. Walker, deceased, were defendants, and Spartan G. Marshall, executor of James Marshall, deceased, was intervenor. In this suit the land in controversy was the subject-matter of the litigation, and, on the date above named, judgment was rendered in favor of the intervenor, Marshall, for 440 acres of the land, and in favor of the defendant A. G. Walker, Sr., for the remaining 200 acres as his homestead. In this judgment it is decreed that "should the said A. G. Walker, Sr., and the said intervenor fail to designate the boundaries or have surveyed by agreement the homestead

of 200 acres as aforesaid, within one month after the adjournment of this court, then — are hereby appointed commissioners of partition to allot 200 acres of said land, including the improvements thereon, to the said A. G. Walker, Sr., as his homestead, and report their action under oath to the next term of this court." The plaintiff, J. M. Laws, and other parties to said suit, were decreed to take nothing. Before the time for prosecuting a writ of error from this judgment had expired, the following agreement was entered into by some of the parties: "J. M. Laws, by Agt. To compromise. S. G. Marshall, by Attys. The state of Texas, county of Tarrant. Whereas, in the case of J. M. Laws vs. A. G. Walker, Sr., et al., S. G. Marshall, Intervener, No. 1,048, in the district court of Tarrant county, the said intervenor recovered judgment for 420 acres of land, more or less, described in plaintiff's petition, less 200 acres, the homestead of A. G. Walker, Sr., dated January 14, 1882, and the said plaintiff has two years by law from date of judgment to prosecute a writ of error to the supreme court; and whereas the plaintiff and intervenor desire to end the litigation between them by compromise and final settlement: Therefore this agreement witnesseth that so soon as the homestead of A. G. Walker, Sr., consisting of 200 acres, shall have been designated and set apart to him under the said judgment, an equal division of the remainder of the land described in said judgment, consisting of 420 acres, more or less, shall be made between the plaintiff, Laws, and intervenor, Marshall, equal in value as near as may be; and, should they fail to agree on the division, then the same shall be made by three disinterested arbitrators, each party selecting one, and the two arbitrators the third; and, after partition, the proper deeds of relinquishment shall be made to each party, which shall be a final settlement of the matters in dispute. Witness our hands, this June 8th, 1882. J. M. Laws. By J. W. Ferris, Agt. S. G. Marshall. Smith & Jarvis, Attys. for S. G. Marshall." After the execution of this agreement, Marshall conveyed to his attorneys, Smith & Jarvis, (defendants in this suit,) one-half of his interest in the land, which would be one-fourth of the 440 acres. On the — day of May, 1883, after the compromise and the conveyance from Marshall to Smith & Jarvis above referred to, Marshall conveyed to Robert Bailey "all the undivided right, title, interest, and claim that was decreed to the heirs of James Marshall in cause No. 1,048, J. M. Laws v. A. G. Walker et al., and Spartan G. Marshall, Intervener, in the district court of Tarrant county, Tex., embracing the following tracts or parcels of land," and described the three tracts by metes and bounds, and nowhere alluded in the deed to his having compromised the judgment, or made a conveyance of any part of the land

to either Laws or Smith & Jarvis. The evidence, however, amply sustains the finding of the jury that, at the time of this conveyance, Bailey had notice both of the compromise with Laws and of Smith & Jarvis' interest from Marshall, and that it was only the intention by the deed to convey the interest that Marshall then had in the 440 acres decreed to him as aforesaid. A. G. Walker, Sr., to whom the 200-acre homestead was decreed, having died before it was partitioned to him, this suit was instituted on the 9th of March, 1885, by J. M. Laws, as plaintiff, against the other parties herein, as defendants. The petition recognized the right of the Walker heirs to the 200-acre homestead; also the right of Smith & Jarvis to one-fourth, and of Robert Bailey to one-fourth, and alleged ownership in plaintiff to the other one-half of the remainder, after deducting the 200 acres; and asked that commissioners be appointed to make partition in this way. Smith & Jarvis concurred with the plaintiff in his statement of the rights of the parties, but the defendants Bailey and Walker claimed to be the owners of all the land by reason of Bailey's purchase from Marshall and the decree in favor of the Walker heirs for the 200 acres. It seems that, after Bailey purchased from Marshall, he and Walker had a division of all the land, each receiving one-half by metes and bounds. Bailey claimed to have been an innocent purchaser for value from Marshall, and Walker claimed to be an innocent purchaser from Bailey, and also claimed the right to share Bailey's innocence, even though he may have had notice himself. They also claimed under the three, five, and ten years' statutes of limitation. On December 13, 1886, plaintiff changed the form of his petition to that of an action of trespass to try title, including a prayer for partition. On February 18, 1889, plaintiff again amended, continuing the form of his action as one to try title, with prayer for partition, but recognizing the rights of the parties to be the same as alleged in the original. On July 1, 1885, the plaintiff, Laws, conveyed all his interest in the land to John H. Cole and J. W. Ferris, Cole to have two-thirds, and Ferris one-third. On October 18, 1890, a trial before a jury resulted in the following verdict: "We, the jury, find for plaintiff, as hereinafter described. We award to J. M. Laws, plaintiff, 210 acres of the land in controversy, and to Smith & Jarvis 105 acres of said land; A. G. Walker to hold the 200-acre homestead allotted him in judgment 1,048, and Robert Bailey the remaining 105 acres; and we agree that said Bailey's 105 acres be given him, so that it cover all of the improvements he has put on said lands, if possible to so apportion his said interest without serious detriment to the value of the remainder of said tract apportioned to and to Smith & Jarvis; and that, lands are partitioned or divided,

if any improvements are placed on land allotted to plaintiff or to Smith & Jarvis, that said plaintiff or Smith & Jarvis pay for said improvements, and refund their pro rata of all taxes that may have been paid by any party other than themselves to whoever paid said taxes from May 14, 1883, to this date; and, further, that the court appoint a commission of three householders in Tarrant county, Tex., to apportion said lands, and assess the value of improvements as mentioned above. This October 18, 1890. W. C. French, Foreman." Upon this verdict a decree was entered adjudging the rights of the parties as therein set forth, and appointing commissioners to make the partition, from which this appeal is prosecuted. A. G. Walker, Sr., and those claiming under him, held possession of the land continuously since about 1853, no writ of possession having been issued upon the judgment rendered in January, 1882.

Hintler, Stewart & Dunklin, for appellants.
H. M. Chapman and J. W. Ferris, for appellee Laws; R. M. Wynne and A. M. Carter, for appellees Smith & Jarvis.

HEAD, J., (after stating the facts.) The judgment rendered on the 14th of January, 1882, was an adjudication of the title of the parties to the land in controversy at that date. No writ of possession could have issued upon this judgment until the partition ordered therein was made. Walker having died before this was done, and no commissioners having been named to make the partition, this suit was instituted to accomplish this. The judgment was, however, final, as an adjudication of the title to the land from which an appeal could have been prosecuted. *White v. Mitchell*, 60 Tex. 164. This being the nature of the judgment, we think the three-years statute of limitation no longer had application. In *Wright v. Dally*, 26 Tex. 730; *Harris v. Hardeman*, 27 Tex. 248; *Spring v. Eisenach*, 51 Tex. 435; *Long v. Brenne-man*, 59 Tex. 211; *Paxton v. Meyer*, 67 Tex. 96, 2 S. W. Rep. 817; *Snowden v. Rush*, 69 Tex. 593, 6 S. W. Rep. 767; *Blum v. Rogers*, 71 Tex. 677, 9 S. W. Rep. 595; and *Grigsby v. May*, 84 Tex. 254, 19 S. W. Rep. 343,—it is held that, after a sale of the land by the owner, neither he nor those claiming under him can prescribe under the three-years statute. After such sale, he no longer has title, or color of title, within the meaning of the law. We think the same effect should be attributed to this decree. After its rendition, neither A. G. Walker nor his heirs could be said to have either title or color of title from the sovereignty of the soil to the 440 acres of which they were thereby divested. We are also of opinion that any right the parties to that judgment may have acquired by reason of their possession prior to its rendition was thereby canceled, in so far as it could be used against the successful

party therein, or those claiming under him, and that such possession cannot be tacked to their possession since the judgment to complete the time required by either of the statutes. If we are correct in this conclusion, we need not have considered the question as to whether or not the change in the form of plaintiff's suit from one of "partition" to "trespass to try title and partition" was the institution of a new suit, within the meaning of the law; but we have considered it, and are clearly of the opinion that there was no such change in the cause of action asserted in the two petitions as would prevent the first from having the effect to stop the running of the statute. What we have said shows that we are of opinion the court committed no error in excluding the tax deeds under which A. G. Walker, Jr., claimed. These bore date long previous to the decree of January 14, 1882, and he was a party to that judgment.

The court did not err in excluding from the jury the deposition of J. M. Laws, to show that previous to the rendition of the decree of January 14, 1882, he had conveyed all his interest in the land to John H. Cole. Laws' title prior to this decree is not important in this case, as the compromise agreement with Marshall reinvested him with sufficient title to maintain this suit, even though he had previously parted with it.

There was also no error in the action of the court in holding that the deed from Laws to Cole and Ferris, in July, 1885, would not prevent his recovering. We have already held that the filing of the amended petition in December, 1886, was not the institution of a new suit, and, if we are correct in this, it was entirely proper that the proceeding be continued in the name of the original parties until its final termination. A purchaser pendente lite need not be made a party to the record. *Lee v. Salinas*, 15 Tex. 495.

The court did not err in refusing to exclude from the jury the deposition of J. J. Jarvis, because the letter by which he refreshed his memory was not attached. The only use made of this letter by the witness was to refresh his memory as to the date of the transaction about which he was testifying, and he distinctly says the letter "called to his mind the date," and not that he remembers writing the letter, and knew at the time it was dated correctly. Mr. Greenleaf says: "The cases in which such writings are proper to be used may be divided into three classes: (1) Where the writing is used only for the purpose of assisting the memory of the witness. In this case it does not seem necessary that the writing should be produced in court, though its absence may afford a matter of observation to the jury, for the witness at last testifies from his own recollection." 1 Greenl. Ev. § 437; The witness was not asked to attach the letter in the interrogatories, nor was any effort made to

quash the deposition before entering into the trial. The objection was not made until the deposition was read, and the court was then asked to exclude it.

The court did not err in permitting the witness Spartan G. Marshall to testify to the conversation between him and Robert Bailey at the time of the sale of the land to him. This evidence was correctly admitted to show notice to Bailey at the time he made the purchase of the previous compromise between Marshall and Laws, and the conveyance from Marshall to Smith & Jarvis.

We think the charge of the court was full and clear upon the different phases of the rights of Bailey and Walker as innocent purchasers under Marshall, and there was no error in refusing the special charges requested by them upon this branch of the case.

The court did not err in refusing to instruct the jury to find against Smith & Jarvis, because they had not introduced their entire title as set up in their pleading. The judgment of January 14, 1882, was the common source of title of all the parties, and they were not required to go further than this. A party to a suit of trespass to try title cannot introduce another and different title to that specially pleaded by him, but he is not required to introduce all of the links set forth in his plea, if he can show a better title than his adversary by introducing only a part of them.

We have had considerable difficulty in arriving at a satisfactory conclusion as to the rights of the parties in respect to the taxes paid by the defendants Bailey and Walker. It seems that they have paid the taxes upon all the land during a series of years, and in their answer they seek contribution in case they lose the land. Where one cotenant removes an incumbrance, such as a tax lien, upon the whole land, it would seem clear, upon principles of equity, that he should be subrogated to such lien to secure contribution from his cotenant for his share. *Freem. Coten.* 263. It seems, however, in this case that, during the years the defendants paid these taxes, they had possession and the use of the entire land; and, while it is true one tenant cannot be made to pay his cotenant rent where he has actually occupied the land himself until demand and refusal of joint occupancy, (*Thompson v. Jones*, 77 Tex. 626, 14 S. W. Rep. 222,) yet we believe that when he has had possession of the entire premises, and asks that his cotenant be made to pay a part of the taxes, this should only be allowed upon an adjustment of the equities between them, and that this can be done when the report of the commissioners is returned, and it is known what part, if any, of the improvements these defendants lose. We will therefore order that the judgment of the court below be affirmed, but that this in no way prejudice the rights of the parties to have the equities between them growing out of the improvements made and taxes

paid by the defendants adjusted when the report of the commissioners is filed for confirmation, in pursuance of the decree rendered in the court below.

DAVIDSON et al. v. SENIOR et al.
(Court of Civil Appeals of Texas. June 28, 1903.)

LAND CERTIFICATE—CONVEYANCE—WHAT CONSTITUTES — POWER OF ATTORNEY — QUESTION FOR JURY—PROOF OF DEATH AND HEIRSHIP—RECITALS IN POWER OF ATTORNEY BY HEIRS.

1. A writing executed in 1838, in the republic of Texas, recited that, for a valuable consideration, S. appointed C. "a substitute as attorney under me, to apply for and obtain a patent or title" to one league and labor of land, which C. obtained through his assignees from the board of land commissioners, and which certificate was transferred by the assignees to said S., "wherefore C. is hereby authorized to obtain patent in his own name, or in the name or names of any other person or persons," and generally to do everything necessary in the premises; "and I, the said S., do hereby declare the same to be legal and binding on me, as though done by myself, in my own proper person." *Held* that, in the absence of evidence showing the contrary, such writing was a conveyance of the land certificate, and not a mere power of attorney.

2. In an action to recover land by the heirs of S., to whom the land was patented, against parties claiming under such instrument, it appeared that part of such certificate had been located before such writing was executed, but it was not shown who located it or procured the patent. Four days before its execution, S. conveyed the land thus located to C. The latter died 12 years, and the former 17 years, thereafter, and it was not shown that either exercised any acts of ownership over the unlocated part of the certificate after the instrument was executed. Soon after C.'s death, his administrator sold the land, and it was not shown that either S., in his lifetime, or plaintiff, asserted any claim to it during a period of over 50 years. *Held*, that it was error to submit to the jury the question as to whether S. intended by such writing to convey such certificate to C., or to give him a power of attorney only.

3. Part of the land in dispute passed by successive conveyances from C. to one H. T., and some of defendants claimed under a deed executed by attorneys in fact. The power of attorney recited that the makers were the only heirs of H. and L. T., deceased. *Held*, that the recitals of the power of attorney were not admissible to prove either the death of H. T. or the heirship under him, where it did not appear that better evidence was not obtainable.

4. Such defendants cannot urge as a defense against plaintiffs' claim the conveyance of the certificate by S. to C., since the legal title was thereafter vested in S. by the issuance of a patent to him, and an outstanding equity cannot be interposed in such case in defense to the legal title.

Error from district court, Archer county; P. M. Stine, Judge.

Action by Sarah Senior and others against John P. Davidson and others to recover certain land. There was a judgment for plaintiffs, and defendants bring error. Reversed.

Ingraham, Ratcliff & Ingraham, for plaintiffs in error. F. E. Dycus, for defendants in error.

HEAD, J. The land in controversy was patented May 15, 1856, to Simon Schloss, assignee of Miquel Galan, and defendants in error claim as his heirs, while plaintiffs in error claim under the following instrument, executed by him: "Republic of Texas, county of Nacogdoches. Be it known that on the 12th day of September, one thousand eight hundred and thirty-eight, and of the independence of Texas the third, I, Simon Schloss, of the county aforesaid, in and for a valuable consideration to me in hand paid, have nominated, constituted, and appointed Auguste Adolphe Cardett, also of said county, a substitute as attorney under me, to apply for and obtain a patent or title from the commissioner general of the land office to one league and labor of land, which Miquel Galan obtained through his assignees, William Dankworth and George Bondies, on the 6th day of February, 1838, from the board of land commissioners in and for said county, and which said certificate was transferred by said assignees to said Simon Schloss on the thirty-first day of August, 1838; wherefore the said Auguste Adolphe Cardett is hereby authorized to obtain patent in his own name, or in the name or names of any other person or persons whatsoever, if the law will so allow, and generally to do all and everything necessary to be done in the premises; and I, the said Simon Schloss, do hereby declare the same to be legal and binding on me, as though done by myself, in my own proper person. In testimony whereof, I have hereunto set my hand and seal, the day and date as aforesaid. S. Schloss. [Seal.]" The court below submitted to the jury to decide, under all the evidence, whether it was the intention of Schloss by this instrument to convey the certificate to Cardett as his own property, or whether it was only to have the effect of an ordinary power of attorney. The evidence showed that a part of this certificate (3,342 acres) had been located in Nacogdoches county previous to the execution of this instrument, and, only four days before its execution, Schloss had conveyed said land by a separate deed to Cardett. Cardett died in 1850, and Schloss in 1855. Neither is shown to have exercised any acts of ownership over the unlocated part of the certificate by virtue of which the land in controversy was patented from the date of the above instrument until his death. It is not shown by the record who made the location and procured the patent to this land. The administrator of Cardett made the sale under which defendants in error claim only a short time after his death. Neither Schloss, in his lifetime, nor defendants in error, as his heirs, are shown to have asserted any claim to this land until about the time of the institution of this suit, a period of over 50 years from the date of the instrument in question. In this state of the evidence we believe the court should have instructed the jury that

the instrument executed by Schloss to Cardett September 12, 1838, was a conveyance, and to find for those of the plaintiffs in error who had connected themselves therewith. We do not hold that a state of facts could not have been shown that would have made it proper for the court to have submitted to the jury to decide whether said instrument should have the effect of a conveyance or power of attorney, as was done; but we do hold that, upon its face, without the aid of extrinsic evidence, it should be construed as a conveyance, and there was not sufficient evidence introduced upon this trial to authorize the jury to change this construction. This instrument recites that it was executed for a valuable consideration, and authorizes the grantee to procure the patent, either in his own name or in the name or names of any other person or persons whatsoever; and when we take into consideration, as stated in *Cox v. Bray*, 28 Tex. 260, the "well-known fact that this course was frequently pursued in transactions of this kind at that day," and was regarded as the only effectual conveyance that could be made of some titles but a few years previous, we think there can be little question that it was the intention of Schloss to pass the title to this certificate to Cardett. Similar instruments have been so construed more than once. *Cook v. Lindsay*, 57 Tex. 67; *Brown v. Simpson's Heirs*, 67 Tex. 225, 2 S. W. Rep. 644.

A part of the land passed by successive transfers from Cardett to one Henry Teutsch, and A. Teutsch and others executed a power of attorney to Asa Moore, James Steen, and D. M. Pate, reciting that the makers of the power were the sole and only heirs at law of Henry and Lavinia Teutsch, deceased, and directing the appointees to partition all the lands belonging to said estate between the heirs and plaintiffs in error. Z. T. and Martha E. Mast claim under a deed made by these attorneys. They also joined in executing the power. There was no evidence of the death of Henry Teutsch, nor as to the heirship under him, other than the recitals in this power, which the court held not admissible. We think this was correct. While it is well established that hearsay evidence, under certain restrictions, is admissible to prove pedigree, including death and heirship, (*Louder v. Schluter*, 78 Tex. 103, 14 S. W. Rep. 205, 207; *Chamblee v. Tarbox*, 27 Tex. 140,) and that recitals in deeds and other instruments, where the proper predicate is laid, are admitted for this purpose, (1 Greenl. Ev. 103, 104; *Chamblee v. Tarbox*, *supra*,) yet this is usually restricted to cases where the maker of the deed is dead, or his evidence, for some other reason, cannot be obtained, and he is shown by the evidence to have sustained such relation to the person about whom he makes the declaration as would entitle his statements to be received in evidence under the well-settled rules of law. *Johns v. Northcutt*, 49 Tex. 455. In

this case no predicate whatever was attempted to be laid for the introduction of these recitals, and the power was of entirely too recent date to make them admissible on account of its age alone, if this would ever be sufficient. That it was necessary for these plaintiffs in error to show the death of Henry Teutsch and their heirship under him in some way, in order to connect their title with the transfer to Cardett, there can be no question. *Pratt v. Jones*, 64 Tex. 694.

Plaintiffs in error Mast also contend that, even though they failed to show that they claim under Cardett, yet they could urge the conveyance from Schloss to him in defense as an outstanding title; but we think this cannot be sustained. The conveyance from Schloss to Cardett was only of the certificate. The legal title was afterwards vested in Schloss, by the issuance of the patent in his name. That an outstanding equity cannot be successfully interposed in defense to the legal title is well settled. *Gullett v. O'Connor*, 54 Tex. 408; *Shields v. Hunt*, 45 Tex. 424.

The other assignments need not be considered. We might be authorized to reverse the judgment as to those of the plaintiffs in error who connect themselves with the Cardett transfer, and affirm as to the others, but it may be that upon another trial Mrs. Mast will be able to show her title under Henry Teutsch, and we think it will conduce more to the ends of justice to give her an opportunity to do this by remanding the entire case; and it is so ordered.

D. A. TOMPKINS CO. v. GALVESTON CITY ST. R. CO. et al.

(Court of Civil Appeals of Texas. May 25, 1893.)

SALE — ACTION ON PURCHASE-MONEY NOTES — DEFECTIVE MACHINERY — MEASURE OF DAMAGES — SUFFICIENCY OF ANSWER — AMOUNT OF ATTORNEYS' FEES.

1. In an action for the price of engines, a sum spent in repairing defects in one of them is recoverable as damages.

2. Where the engine was intended for use in generating electricity with which to propel cars over the purchaser's street railroad, defendants are not entitled to damages because certain cars had to lie idle while the engine was being repaired, such damages being too remote.

3. Where such action is on notes given for the price, it is error to compute the commission for attorneys' fees on the full amount due on the notes without first deducting the amount found to be due defendants as damages.

Error from district court, Galveston county; William H. Stewart, Judge.

Action by the D. A. Tompkins Company against the Galveston City Street Railroad Company and William H. Sinclair on promissory notes given for the price of certain engines, in which defendants claimed damages on account of defective construction of one of the engines. There was a judgment for plaintiff for part of the amount claimed, and it appeals by writ of error. Reversed and rendered.

Hutcheson, Carrington & Sears, for plaintiff in error. James B. & Chas. J. Stubbs, for defendants in error.

PLEASANTS, J. 1. The plaintiff in error instituted this suit against the defendants in error to recover balance of the price of two steam engines sold by plaintiff to the defendant the Galveston City Street Railroad Company. A chattel mortgage on both of the engines was executed at the time of their delivery to secure the three notes executed in payment of part of the purchase money. The defendants demurred, and answered by general and special answers, averring that one of the engines was improperly constructed, and in consequence thereof it broke down after a week's operation, and, in repairing this engine, defendants were compelled to expend the sum of \$600, and further that, in consequence of said breakdown of the engine, defendants were obliged to discontinue the use of six of their cars, and thereby suffered damage in the sum of \$1,500. The case was tried by the judge without a jury, and judgment was rendered for plaintiff for its debt and interest, as evidenced by the notes sued on, and for attorneys' fees, as stipulated for in the notes, and for traveling expenses incurred by plaintiff, and which were also stipulated for in the contract of sale; and judgment was rendered for defendants for the amount expended in repairing the engine, and also for the sum of \$564.55, as compensation for damages sustained by defendants for the loss of the use of the engine for four weeks. The engines were purchased and were used by defendants for generating electricity, with which cars were propelled over the defendants' railway tracks, in the streets of the city of Galveston. There was no warranty by the vendor of either one of the engines. They were shipped from another state to the city of Galveston, to defendant company, upon its order; the order reciting the terms and conditions of the proposed purchase, and, with the order, the three notes referred to in it were also sent to plaintiff. To the judgment the plaintiff appealed by writ of error.

2. The assignments of plaintiff in error present the following propositions: (1) That in a suit to recover the contract price of machinery sold and delivered, and the defense is that the machinery was defective, the measure of damages in such case being the difference between the value of the machinery without the alleged defect and its value with that defect, this difference cannot be recovered upon proof of an allegation "that, by reason of the defect, defendant was compelled, necessarily, to expend a certain sum of money in repairing the machinery;" the plaintiff making no objection to the evidence by which such allegation is proved, and not having excepted to the defendant's pleading; (2) that damages for

loss of the use of the engine for four weeks, in consequence of the alleged defect, is not recoverable by defendant because such damages are not warranted by any rule of law, are too remote, and speculative.

3. We are of the opinion that the first of the above propositions cannot be maintained. The court holds that as there was no exception to the pleading by plaintiff, and as it was proved, without objection from the plaintiff, that the defendant company did pay the sum of \$435.45 in repairing the engine, and that the repairs were rendered necessary by reason of the alleged defect in the construction of the engine, and that the costs of the repairs were reasonable, it was competent and proper for the court to render judgment for defendant, for the sum so paid by it, as the measure of damages to which defendant was entitled for the defect in the engine. If it be conceded that the measure of damages for defect in the engine is simply the difference, and nothing more, between the value of the engine with the defect complained of, and its value without such defect, it cannot be said, we think, that the judgment of the court, in this particular, "is without either plea or proof" to support it. The facts averred in the answer, when proved, were, of themselves, competent and sufficient to establish the difference between the value of the engine without the defect, and its value with the defect. The most that can be said against the answer is that it imperfectly stated a good defense. Such pleading, with proof of its averments, is certainly sufficient predicate for a judgment, in the absence of both exceptions to the pleading, and objection to the evidence offered in support of the pleas. But this court is inclined to the opinion that the measure of damages to which defendant is entitled, in this case, for the defective construction of the engine, is not restricted solely to the difference between the value of the engine, had it been properly constructed, and what its value was, constructed improperly. We are disposed to think that, in addition to this difference in value, should be added any injury resulting to the engine itself from the defect in its construction. If we are correct in this opinion, then the answer was not obnoxious to demurrer. It stated correctly a good defense.

4. The second proposition submitted by plaintiff in error under his assignments, we are of opinion, is correct, and that the court erred in rendering judgment for damages resulting to defendants from the necessary withdrawal of six cars from their railway tracks while the engine was being repaired. Such damages cannot be held to have been in contemplation of the plaintiff and defendants when the contract for sale of the engine was made, and are too remote. For this error the judgment must be reversed and rendered. The court rendered judg-

ment for plaintiff for 10 per centum upon the amount due upon the notes sued on, in payment of attorneys' fees. This, we think, was error. A commission of 10 per centum should have been rendered for fees due plaintiff's attorney upon the sum adjudged to be due upon the purchase-money notes, less the sum adjudged defendant as damages.

5. It is therefore ordered that the judgment of the lower court be reversed, and that judgment be now rendered by this court in favor of plaintiff, against defendants, for \$4,092.78, less \$435.45, damages adjudged the defendant the Galveston City Railroad Company, and for the further sum of \$365.73 in payment of attorneys' fees, and for the sum of \$80 in payment of traveling expenses incurred by plaintiff in its effort to effect a settlement of its claim with defendant company, with interest on said several sums rendered for plaintiff from the 7th day of March, A. D. 1892, at the rate of 6 per centum per annum, and for foreclosure of the mortgage executed by said defendant upon the said engines, and which is set out in plaintiff's petition, and for all costs of suit, both in this and the district court.

6. To our conclusions upon the facts expressed in our statement of the cause, made in the first paragraph of this opinion, we add the following: Six of the defendant's cars were idle during the four weeks the defective engine was being repaired. Without this engine, the defendant was unable to operate these cars, and the net earnings of these cars within this time, according to their previous and subsequent earnings, would not have been less than \$1,000, but the plaintiff was not informed at the time of the purchase of the engines as to the uses for which they were intended by defendant company. The plaintiff made two trips to Galveston for the purpose of making settlement with defendants, and that he thereby incurred expenses, not less than \$60. The repairs made upon the engine were rendered necessary by the defective construction of the engine, and the sum expended by defendant in making the repairs was proper and reasonable.

BLANKENSHIP & BLAKE CO. v. KELLY.

(Court of Civil Appeals of Texas. May 25, 1893.)

APPEAL—OBJECTIONS WAIVED—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

1. Under rule 29 of the court of civil appeals, (20 S. W. Rep. viii.) assignments of error not copied into the brief of appellant will be disregarded.

2. A trust deed authorizing the trustee to sell the property conveyed at wholesale or retail, to pay certain creditors, is not void on its face where it does not show that the assignors

were insolvent, nor that they owed other debts than those secured by it, nor that the property conveyed was all that they possessed.

Appeal from Upshur county court; D. A. Bule, Judge.

Action by the Blankenship & Blake Company against Trinkle & Doss on a debt. Garnishment issued against T. J. Kelly. Judgment was entered in favor of the garnishee, and plaintiffs appeal. Affirmed.

Briggs & Kendrick and Williams & Evans, for appellants. Bowen & Warren and J. S. Barnwell, for appellee.

WILLIAMS, J. Appellants sued the firm of Trinkle & Doss in the county court upon a debt, and caused a writ of garnishment to be issued and served upon appellee. The latter answered, denying any indebtedness to Trinkle & Doss, and denying also the possession of any property or effects belonging to them. The answer alleged that certain goods held by the garnishee had been conveyed to him by Trinkle & Doss before the service of the garnishment, as trustee for certain creditors named in the conveyance, and that he held the property so conveyed under the deed, which was attached to the answer. Appellants contested the answer, asserting that the conveyance was void, as being in fraud of creditors of the assignors. The instrument is not a general assignment for the benefit of creditors, but is a trust deed for the benefit of certain named creditors. The cause was tried, and judgment rendered discharging the garnishee, from which this appeal is prosecuted.

In attempting to present their case, appellants have not copied into their brief any of the assignments of error except the second. The old rules of the supreme court in force when the appeal was perfected, as well as those now in force regulating practice in this court, provide in plain terms that assignments not copied in the brief are to be treated as waived. See rule 29, 20 S. W. Rep. viii. We will not, therefore, notice any point raised under assignments thus abandoned. *Chappell v. Railway Co.*, 75 Tex. 82, 12 S. W. Rep. 977; *Hughes v. Railroad Co.*, 67 Tex. 595, 4 S. W. Rep. 219.

The second assignment is based upon the ruling of the court in admitting in evidence the deed of trust under which the garnishee held the goods. The objection made to the instrument was that it showed on its face that it was fraudulent against creditors of Trinkle & Doss, in that it "authorized the trustee to take possession of said stock of goods, wares, and merchandise conveyed therein to the said trustee, and to sell the same, either at retail or in bulk, and at private or public sale, but requiring that, if said property should be sold at private sale, it should be sold in the town of Big Sandy, Tex.; thus authorizing said trustee to sell said property in due course of trade at retail, and limiting him in the sale thereof

to a certain place, and failing to limit him as to any time within which to carry out the trust." The deed did contain the provisions stated in the objection, but nevertheless it did not show upon its face that it was void. It contained no recitals that the makers of it were insolvent or in failing circumstances, nor that they owed any other debts than those which were secured by its provisions; nor did it show that the property conveyed was all that the mortgagors possessed. If it was not valid, its nullity arose from facts which did not appear upon its face. The court did not err in admitting it in evidence, as its effect was to be determined from all of the facts affecting it. What its effect was, whether it was valid or invalid, are questions which are not properly presented in the briefs, and which we will not, therefore, determine. No error being pointed out, the judgment will be affirmed.

On Rehearing.

(June 22, 1893.)

In the decision of this case we declined to consider the most of the points made in appellants' brief, treating the assignments as waived by a failure to copy them into the brief. The motion for rehearing asserts that an assignment which we did not consider was contained in the brief. The statement in the brief is that only a portion of that assignment is set out, and a reference to the transcript shows that a large part of the assignment is omitted. It would be easy to point out how an indulgence of this practice would lead to the mischiefs intended to be prevented by the rule. It is not desired to enforce the rules too rigidly or technically, so as to cut off substantial rights; but they are intended to facilitate the dispatch of the business, and there seems to be rather a general disregard of many of their requirements. The assignment in question shows no error in the action of the court below. It asserts a liability on the part of the garnishee, which is not set up in the contesting affidavit, nor in any pleading filed in the court below by appellants. The motion for rehearing is therefore overruled.

ADKINS et al. v. HARN et al.

(Court of Civil Appeals of Texas. May 25, 1893.)

VENDOR AND VENDEE—ACTION FOR PRICE—QUIETING TITLE.

Where, in an action on a note given for the price of land, defendants defeat the claim by the plea of the statute of limitations, plaintiffs are entitled to amend their plea, and to judgment quieting title in them.

Appeal from district court, Grimes county; Norman G. Kittrell, Judge.

Action by Josephine Harn and husband to recover certain land sold to defendants Clara Adkins and husband. Judgment for plaintiffs. Defendants appeal. Affirmed.

Preston & Spencer, for appellants. H. H. Boon, for appellees.

GARRETT, O. J. As originally brought, this suit was to recover on certain promissory notes executed by the appellant Clara Adkins, payable to I. M. Camp or order, for lot 10, in block 42, Camp's addition to the town of Navasota, in Grimes county, and to foreclose a vendor's lien on said lot. It appeared from the petition that four notes were executed, dated November 15, 1884, (1) payable one day after date, for the sum of \$10; (2) payable one year after date, for the sum of \$60.67; (3) payable two years after date, for the sum of \$56; (4) payable three years after date, for the sum of \$51.33. All of the notes recited that a vendor's lien was retained on the lot. A credit of \$10, dated January 11, 1887, was admitted on the first note, and a credit of \$20, dated January 24, 1889, was admitted on the second note. Suit was filed November 17, 1891, by the appellee Josephine Harn, joined by her husband, A. D. Harn. They alleged that the said Josephine was a daughter of said I. M. Camp and his wife, Eliza Camp, then deceased, and that the notes sued on became the property of the plaintiff Josephine Harn in a settlement and partition of the community estate of the said I. M. Camp and Eliza Camp, deceased, and the surviving children of said Camp and his deceased wife. Plaintiffs prayed judgment for the amount due on said notes, principal and interest, less the credits admitted, and for order of sale, writ of possession, and general relief. Defendants answered November 30, 1891, and, by special demurrer, pleaded the statute of four years' limitation in bar of plaintiffs' recovery. They also pleaded the general denial, and specially the coverture of the defendant Clara Adkins when the notes were executed, and prayed that she be dismissed, with her costs. On August 11, 1892, the case was called for trial, when the court sustained the demurrer pleading limitations, as to the first three notes, and at the request of plaintiffs granted them leave to file a trial amendment, which was filed, as follows: "And now come the plaintiffs, by leave of the court,—the court having sustained the defendants' plea of limitations as to the three first notes declared upon,—and file this, their trial amendment, and for amendment say that defendants are in possession of said lot, and, having refused to pay therefor, have no title thereto, and that the superior legal and equitable title and ownership of said lot is in plaintiff Josephine Harn, in her own separate right. Wherefore, plaintiffs pray that they have judgment for said lot, and that the deed under which defendants claim be declared a cloud on their title thereto, and as such removed; that they have their writ of possession, costs of suit, and general relief," etc. To which amendment the defendants,

on the same day, filed their first supplemental answer, and demurred: (1) That the relief sought could not be set up by trial amendment; (2) that it is not an amendment to the original petition, but sets up new matter, and is, in effect, a new suit; (3) the amendment is bad because it seeks to rescind a contract valid in law, which plaintiffs have affirmed by the suit for the foreclosure of a lien on notes, one of which is not barred by limitation; (4) plaintiffs do not tender or offer to return that part of the purchase money which had been paid; (5) the pleading does not allege that plaintiffs are the owners of the property. Also, pleas of general denial, and the statute of 10 years' limitation, and that I. M. Camp had never executed, nor offered to execute, a deed to the defendants. Defendants' demurrers were overruled by the court, to which the defendants excepted, and the case proceeded to trial without a jury, and judgment was rendered in favor of the plaintiffs for the land, and a writ of possession was awarded. Costs were adjudged against the defendants. The defendants excepted to the judgment of the court, and gave notice of appeal.

There was no statement of facts made, but the trial judge filed his conclusions of fact and of law. The conclusions of fact are: "(1) That for a number of years before the date of the notes the defendants had lived on lot 9, block 42, in the town of Navasota, and for many years had paid taxes thereon, but paid no taxes on lot 10, in same block. (2) That at the date of the notes, or thereabout, on a survey or measurement being made, it was ascertained that their improvements were on lot 10, whereupon I. M. Camp, father of Josephine Harn, and her assignor of the notes, then owner of the property, agreed to sell the property to the defendants. (3) The trade was made, and notes of Clara Adkins were taken, with the concurrence and assent of her husband. Camp indulged the parties for a number of years, during which time they only paid \$20, and after purchase they paid taxes. (4) Finally failing to pay more, after repeated promises, suit was brought, and the defendants pleaded the statute of limitation, whereupon plaintiffs had leave to amend, and pray the recovery of the land."

We conclude that, in the absence of a statement of facts, it will be presumed that all the facts were proved that would be necessary to sustain a judgment authorized by the pleadings. There are sufficient allegations in the petition to authorize the assumption that it was shown that, in the settlement of the community estate of her father and her deceased mother, the plaintiff Josephine Harn took, with the notes that were delivered to her, the superior title to the lot, as it existed in I. M. Camp. By indulgence of the defendants for so long a time after the maturity of the notes, the ac-

ceptance of payments thereon, and the institution of suit for the purchase money, I. M. Camp and the plaintiffs lost their right to rescind, and affirmed the contract for the sale of the property, so that a suit for the recovery could be defeated by payment of the purchase money. But although the right to rescind may be lost, and the contract be regarded as affirmed, still the purchaser will not be allowed to retain the land without payment of the purchase money. As said in *McPherson v. Johnson*, 69 Tex. 487, 8 S. W. Rep. 798: "The vendee in an executory contract, who has not paid the purchase money, must at least offer to pay, in order to enforce the agreement. The vendor's right of action on his debt may be barred, and the privilege of election thereby lost, but the vendee is not relieved of his obligations to pay his debt, if he would hold the land. The debt remains, though the right of action be barred, (*Fievel v. Zuber*, 67 Tex. 275, 3 S. W. Rep. 278;) and, without an offer to pay it, the vendee, if in possession, cannot defeat the suit of the vendor for the recovery of the land, nor, if out of possession, can he recover against the vendor, or any one holding under him." Defendants are in no position to complain of a judgment against them for the land, when they defeated the claim of plaintiffs for the purchase money by their plea of limitation. If the plaintiffs had originally brought their suit for the rescission of the sale, there might have been equitable considerations that would compel them to restore the purchase money that they had received; but, on the contrary, they did not ask for a rescission of the sale, and only sought to recover the unpaid purchase money, in which they were defeated by the defendants' plea of limitation; and thus, being driven by the defendants to amend their pleadings so as to recover the land, the defendants had no equity, that was made to appear, by which they could demand that the money which had been paid on the notes should be refunded, especially since they had had the possession of the lot during the whole time. In the absence of a statement of facts, we cannot revise the action of the court in permitting evidence to be introduced as to the rental value of the lots, even if we could consider the same, for the want of a statement to the proposition. There was no error committed by the court below, for which the judgment should be reversed. Appellees did not complain or in any manner call the attention of the court below to the fact that judgment for costs had been entered against both of the defendants, and the judgment should not be reversed on attention being first called to the matter here. If the trial amendment set up a new cause of action, it would have involved only the taxing of costs against the plaintiffs up to the time of the filing thereof. The judgment of the court below will be affirmed.

GULF, C. & S. F. RY. CO. v. WERCHAN.
(Court of Civil Appeals of Texas. June 15,
1893.)

APPEAL—JURISDICTIONAL AMOUNT—COSTS.

Under Act April 5, 1889, (Gen. Laws, 1889, p. 131.) providing for the recovery of claims of less than \$50 against railroad companies, and fixing the measure of damages recoverable as the claim sued for and an attorney's fee, to be assessed by the court or jury, which must be reasonable, and not over \$10, and which can be recovered only in case certain formalities are complied with in the presentation of the claim, such attorney's fee is part of the matter in controversy, and not costs, within Const. art. 5, § 16; Rev. St. art. 1165,—giving the county court appellate jurisdiction of cases from justice courts when the judgment appealed from or the amount in controversy exceeds \$20, exclusive of costs.

Appeal from Washington county court;
E. P. Curry, Judge.

Action by Henry Werchan against the Gulf, Colorado & Santa Fe Railway Company. From a judgment of the county court dismissing an appeal by defendant from a judgment of a justice of the peace for plaintiff, defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant.

GARRETT, C. J. Appellee brought suit in the justice's court against appellant to recover the value of four acres of grass burned by sparks of fire emitted from the company's engine. His statement of the cause of action, as filed December 28, 1891, with the justice of the peace is for "the value of four (4) acres of grass burned by sparks of fire emitted from said company's engine, and the injury to the turf or sod of said four acres, on the 28th day of August, 1891, \$16.00. Citation issued on the same day, stating the nature of the demand for the value of the grass burned and injury to the turf, which was alleged to be \$16.00, with the prayer that citation be issued to defendant, and for judgment for damages and all costs of suit, and, in addition thereto, ten dollars (\$10.00) attorney fees," etc. Trial was had January 18, 1892, when the court overruled defendant's exception to the attorney's fee sought to be recovered,—that the law allowing it was unconstitutional and void,—and rendered judgment for the plaintiff for the sum of \$21, with 6 per cent. interest from date, and all costs. It appears from the transcript from the justice's court that \$5 attorney fee was allowed plaintiff's attorney. From this judgment the defendant appealed to the county court, where the appeal was dismissed on the motion of the plaintiff that the county court had no jurisdiction, because the amount in controversy was less than \$20. Defendant excepted to the judgment of the county court dismissing the appeal from the justice's court, and gave notice of appeal to the court of appeals, and the transcript of the record has been filed

in this court in accordance with the act of the legislature providing for the organization of the courts of civil appeals. It was held by the court of civil appeals for the second district that the court of appeals did not have jurisdiction of an appeal where the judgment rendered in the county court or the amount in controversy did not exceed \$100. *Railway Co. v. Rowley*, (Tex. Civ. App.) 22 S. W. Rep. 182; followed by the third district in *Railway Co. v. Farmer*, (Tex. Civ. App.) 22 S. W. Rep. 515. The court of appeals has held that it had jurisdiction when the judgment rendered or the amount in controversy in the justice's court exceeded \$20, and there had not been a trial de novo in the county court; citing as authority *Pevito v. Rogers*, 52 Tex. 581; *Williams v. Sims*, 4 Willson, Civil Cas. Ct. App. § 151. As the question cannot arise as to the jurisdiction of this court, since the limitation as to trials de novo does not occur in the law organizing the court of civil appeals, and we have had very few cases transferred to us from the court of appeals in which the question could arise, we prefer to follow the law as it was construed to be at the time the appeal in this case was perfected, and to hold that we have jurisdiction of the appeal in this case if the county court had jurisdiction. The appellate jurisdiction of the county court, as fixed by the constitution and statute, is "in civil cases over which the justice's courts have original jurisdiction when the judgment of the court appealed from or the amount in controversy shall exceed twenty dollars, exclusive of costs." Const. art. 5, § 16; Rev. St. art. 1165; *Himan v. Eldman*, White & W. Civil Cas. Ct. App. §§ 627, 630. The judgment of the justice's court was for \$21 and all costs, but it is evident that \$5 of the amount for which judgment was rendered was for the attorney fee in the case; and, unless it can be said that the attorney fee was not a part of the costs of the suit, the county court had no jurisdiction, and the motion of the plaintiff to dismiss the appeal was properly sustained. The authority of the justice of the peace to render judgment for the attorney fee is conferred by an act of the legislature approved April 5, 1889, (Gen. Laws, 1889, p. 131.) It will be seen from an examination of the law that its purpose is to regulate the collection of claims against railroads where the amount does not exceed \$50, and "to fix the measure of damages recoverable" in such cases; and that the measure of damages is the claim sued for, and an attorney fee, which must be reasonable, and not exceed \$10. The fee is not, by the language of the act, to be taxed as a part of the costs, nor does its recovery follow a judgment for the claim sued on as costs, but it is only under certain conditions that the fee can be recovered. The claim must not exceed \$50. It must have been verified, and presented to an agent of the company. Thirty days must have

elapsed from the time it was presented before suit. The plaintiff must establish his claim for the full amount thereof; and, finally, only a reasonable fee, not to exceed \$10 can be allowed, which is to be assessed by the court or jury trying the issue. Hence the right to recover the attorney fee is a matter of controversy also, both as to the right to recover at all as well as the amount thereof. It must be sued for as a part of plaintiff's demand, and the facts authorizing its recovery must be shown on the trial. The intention of the legislature was no doubt to allow it as a penalty for the failure of railroad companies to settle promptly small claims against them that are just, without forcing the holders of such claims to the necessity of bringing suit thereon, and as such it becomes in every suit in which it is claimed a part of the matter in controversy, and does not follow the judgments as costs of the suit. The court below erred in dismissing the appeal, and the judgment will be reversed, and the cause remanded for a trial *de novo* in the county court.

SAN ANTONIO & A. P. RY. CO. v. WELLS.

(Court of Civil Appeal of Texas. May 18, 1893.)

SERVICE ON CORPORATION—PROOF—JUDGMENT BY DEFAULT.

Where the sheriff makes return that a citation, which directed him to serve a corporation, was served on the secretary thereof, in accordance with Rev. St. art. 1223, providing that, in suits against a corporation, service may be had on the president, secretary, or treasurer of the company, or on its local agent, further proof that the person served was the secretary is not necessary, before judgment by default.

Error from district court, Harris county; James Masterson, Judge.

Action by J. T. Wells against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

O. T. Holt, for plaintiff in error.

WILLIAMS, J. Article 1223, Rev. St., provides that, in suits against incorporated companies, service of the citation may be had on the president, secretary, or treasurer of the company, or upon the local agent representing such company, in the county in which the suit is brought, etc. In this case service was had upon Reagan Houston, the sheriff stating in his return that Houston was the secretary of the defendant. The citation commanded the sheriff to serve the defendant by name, and was directed to the county of its domicile. It is claimed by plaintiff in error that, before judgment by default was taken upon such service, the court should have required evidence that Houston was in fact the secretary of the company. The court is of the opinion that

the case differs from those in which service is made upon some person claimed to be the local agent representing the defendant in the county in which the suit is brought. In the latter case it has been intimated that, where the petition does not allege that the person served is such local agent, evidence of the fact that he is should be required. *Railroad Co. v. Gage*, 63 Tex. 572. This provision of the statute points out no particular agent or officer of the corporation who is authorized to represent it in receiving service. The sheriff, when he delivers the process, may deliver it to an agent who has not, as well as to one who has, under the provisions of this law, such authority. Without directions in the writ, he must judge for himself whether or not the person served occupies such relation to the defendant as to warrant such service. There is, therefore, a reason for requiring evidence of the fact of agency which does not apply in cases where service is had on one of the general officers named in the statute. Those officers, by the law which controls and directs the sheriff in making the service, are clothed with the capacity to represent the defendant for the purpose of the service. The statute itself directs to whom the process may be delivered. All that the officer has to do is to determine the identity of the incumbent of the offices specified, just as, in serving an individual, he must ascertain his identity. When he states in his return, therefore, that he has served one of those officers, that should, in our opinion, afford prima facie evidence that the person served is such officer. But it does not appear from this record that the court did not receive evidence that Houston was the secretary of the defendant, and, if necessary, it should be presumed that such evidence was furnished. All of the facts which the statute requires to appear of record do thus appear. There is no requirement that evidence in regard to agency should be put of record, and, in aid of the judgment, every presumption should be indulged which is consistent with the facts made to appear. The judgment is therefore affirmed.

BLACKWELL et al. v. BLACKWELL.

(Court of Civil Appeal of Texas. May 18, 1893.)

DEVISE FOR LIFE—ADMINISTRATION.

Land devised by testator to his wife for life, remainder to his heirs, on being turned over to the life tenant ceases to be part of the estate, and does not on the death of the life tenant become part of the estate, to be administered as property belonging thereto.

Appeal from district court, Rusk county; J. H. Wood, Judge.

Application of Wiley Blackwell to require Jasper L. Blackwell, as executor of Jediah Blackwell, deceased, to make report for final

settlement. From a judgment directing that certain land be partitioned the executor appealed to the district court, where the judgment was reversed. J. H. Turner, as special guardian of certain heirs, appeals. Affirmed.

J. H. Turner, for appellant. G. H. Gould, J. H. Jones, and N. B. Morris, for appellee.

GARRETT, C. J. This case originated in the county court of Rusk county in the administration of the estate of Jediah Blackwell, deceased. The controversy arose upon the application of Wiley Blackwell to require Jasper L. Blackwell, the executor of the will, to make a report for final settlement, and to show cause why the estate should not be partitioned among those entitled to receive it. The executor made a report, showing certain land and some money on hand for partition. This report was objected to by several of the devisees under the will of the said Jediah Blackwell, and by the attorney appointed by the court to represent certain minor and absent heirs, who had been cited in partition and settlement, for the reason that the executor had failed to inventory and return 310 acres of land which the said Jediah Blackwell had devised to his wife, Nancy Blackwell, for life, with remainder to his heirs, as the said Nancy Blackwell had died. The executor answered that the land mentioned had been delivered to the said Nancy Blackwell, and by her had been conveyed to him, and that he claimed title thereto by virtue of said conveyance. Judgment was rendered in the county court directing that said land be partitioned among the heirs, and that the executor account for the rents thereof. The executor appealed from said judgment to the district court, when the matter was tried, and a judgment entered approving the account for final settlement, and refusing to partition the land, for the reason that the court had no jurisdiction to settle the question as to whether or not the land was the property of the estate. J. H. Turner, as special guardian for the minor and nonresident heirs, alone has appealed.

The following are the facts necessary to be considered in disposing of the case: (1) Jediah Blackwell died prior to May 24, 1874, leaving a will, and possessed of an estate of real and personal property, including a tract of 930 acres of land in Rusk county. He devised to his wife, Nancy Blackwell, 310 acres of the land, all the stock on his homestead place, and \$500 in money, for the term of her natural life, and after her death to be divided equally among his heirs. After disposing of the residue of his estate, Jasper L. Blackwell, his son, was appointed executor of the will. (2) The will was duly probated, and Jasper L. Blackwell qualified as executor May 24, 1874. The executor inventoried the 310 acres of land sought to be partitioned, and on May 28, 1874, turned the same over to the said Nancy Blackwell, and took her

receipt, which acknowledged that she had received all the property of every kind and description that said Jediah Blackwell had devised and bequeathed to her by his said will. (3) On December 28, 1877, the said Nancy Blackwell conveyed the land to the said Jasper L. Blackwell, when he took actual possession thereof, and afterwards lived on it, occupying and using it as his own, paying taxes thereon up to the time of the trial. He rented out a part of the land to one of the heirs, and asserted title thereto, and improved the same as his own, erecting thereon a dwelling house, ginhouse, barn, and stables, to the value of \$3,800. (4) Nancy Blackwell died on the — day of —, 1879, and left some other property, which was divided among her heirs. (5) On June 1, 1882, the executor, Jasper L. Blackwell, filed his account for final settlement of the estate, which on May 24, 1883, was approved by the court, and the executor was ordered to distribute the money on hand among the heirs. The decree does not in terms discharge the executor, nor does it show that the money was paid over to the distributees, but in fact the money was paid over to them. (6) On February 8, 1887, the executor filed an application, showing that he had an offer of compromise of a claim which had been reported by him as insolvent, and asked that the administration be reopened, and for an order authorizing him to make the compromise, which was stated in the application. An order was entered allowing the estate to be opened for the purpose named, and approving the compromise. As a result of the compromise the estate became possessed of some land, a part of which was improved and brought in rents. (7) An annual report was filed, showing collection of rents and expenses for 1888 and 1889. On August 30, 1890, the executor filed his additional account for final settlement in answer to an application by the heirs to require him to do so, and prayed for a final discharge; and this is the account approved by the district court in the judgment from which this appeal was taken. (8) No debts were shown to have existed against the estate of Jediah Blackwell, and it appeared that the administration was reopened in 1887 for the sole purpose of compromising a claim which had been reported in the settlement of 1883 as insolvent.

We conclude that the land which the appellant seeks to have inventoried and partitioned as a part of the estate of Jediah Blackwell, deceased, was not a part of said estate. It had been taken out of the estate by the devise to Nancy Blackwell for life, with remainder to the heirs of the testator, as it appears not to have been needed for the payment of debts, and to have been delivered to the devisee. When it was delivered to the devisee it ceased to be a part of the estate, and on the death of Nancy Blackwell it became subject to partition among the

heirs of the testator according to the terms of the will, provided the appellee did not acquire the title as alleged by him; but it did not again become a part of the estate, and could not be partitioned in the county court as property belonging thereto. Nor was there any necessity shown for an administration of this land. There were no debts, and it was only sought to be brought in for the purpose of partition. The heirs had their remedy in the district court, which is not affected by the refusal of the court to bring it in the probate court.

Appellee contends that the objections to the final account by which it is sought to have the land inventoried and partitioned make an issue as to the title thereof, and that the probate court has no jurisdiction to try such an issue; also, that the reopening of the administration is a nullity. But we do not deem it necessary to determine these questions. For the reasons already stated the judgment of the court below will be affirmed.

CAMPBELL v. ALSTON.

(Court of Civil Appeals of Texas. May 18, 1893.)

CARRIERS—INJURIES TO PASSENGERS—PLEADING—DAMAGES—QUESTION FOR JURY.

1. In an action against a carrier for personal injuries by a fall in alighting from a train, admitting evidence that plaintiff, while trying to keep from falling, "was laughed at by other passengers," is reversible error.

2. In an action for personal injuries, where there is no evidence as to the value of the time lost or expenses incurred by plaintiff because of the injuries, it is error to submit to the jury such elements of damages.

3. Whether the circumstances rendered the carrier negligent by the omission to assist a passenger to alight from the train is a question for the jury.

Appeal from Smith county court; B. B. Beard, Judge.

Action for personal injuries by G. W. Alston against T. M. Campbell, receiver of the International & Great Northern Railroad. Plaintiff had judgment, and defendant appeals. Reversed.

G. H. Gould, for appellant. Ben B. Cain, for appellee.

WILLIAMS, J. Several errors occurred in the trial below, on account of which the judgment must be reversed.

1. The second special exception to the petition should have been sustained. It was leveled at the allegation that while plaintiff, in alighting from the train, was trying to keep himself from falling, he was laughed at by other passengers. No circumstances are alleged which would make defendant responsible for such conduct of others. If

plaintiff was mortified by it, this injury to his feelings was not shown to have been a proximate consequence of any act or omission of defendant. The court not only overruled the exception, but evidence was introduced in support of the allegation, and the error is therefore material.

2. There was no evidence of the value of any time which plaintiff may have lost, nor of the amount of any expenses he may have incurred, as the result of his alleged injuries. It was therefore error for the court to submit to the jury for their finding any such elements of damages. It has been repeatedly held that, before there can be a recovery for such items, the evidence must show the amount to which plaintiff is entitled, and that, where the evidence fails to do this, the charge must not authorize the jury to find damages upon such basis.

We will proceed to notice the other points raised by the briefs, and pass upon such as may occur at another trial. The court should have sustained appellant's motion to suppress some of the interrogatories addressed to appellee, as leading, viz.: "Was the place you alighted from a station? Did it seem to be a safe place for you to get off, or did you have reason to believe it was dangerous? Was the train moving?" The entire fourth and fifth interrogatories; the following part of the sixth, "Did the trainmen, or any of them, assist you to get off the train?" and the last subdivision of the seventh. The eighth is not objectionable in form, but the evidence sought to be elicited would be irrelevant under our decision of the first point. The effect of portions of the charge was to inform the jury that the law imposed upon defendant's servants the duty of assisting plaintiff to alight from the train. The circumstances testified to by plaintiff may have been such as made it the duty of the carrier to aid him in alighting, but whether it was or not, and whether the omission to render such aid was negligence, were questions that should have been more properly left to the jury. The charge of the court upon the measure of damages seems to be open to the criticism made in appellant's ninth assignment,—that it assumes that plaintiff received permanent injuries. This should be avoided at another trial. The seventh assignment of error, which is relied on by appellant as a proposition also, complains of the refusal of seven special charges, which are copied, each of which presents a distinct proposition. This is not a compliance with the rules either in the framing of assignments or propositions, and we therefore decline to consider it. The other rulings complained of do not require especial notice. On account of the errors pointed out, the judgment is reversed, and the cause remanded.

CAMPBELL v. MCCOY.

(Court of Civil Appeals of Texas. May 18, 1893.)

CONTINUANCE—INJURY TO EMPLOYE — PROXIMATE CAUSE—DAMAGES.

1. It is not an abuse of discretion to refuse a continuance for the absence of a witness, the materiality of whose testimony was known to counsel six weeks before trial, but who had left the state two weeks before trial, when counsel intended to issue a subpoena, though the witness had promised to be present and testify.

2. In an action for personal injuries, where defendant was guilty of negligence, plaintiff can recover, unless his own negligence proximately contributed to the injuries.

3. A charge in such case that if plaintiff, by his negligence, contributed to his injury, so that but for it he would not have been hurt, the jury should find for defendant, is not on the weight of evidence.

4. A verdict for \$2,500 is not excessive where the little finger of a brakeman was so mashed as to require amputation, and the next finger was drawn halfway to the palm of the hand, and cannot be straightened.

Appeal from district court, Anderson county; F. A. Williams, Judge.

Action by R. W. McCoy against T. M. Campbell, receiver, for personal injuries. Judgment for plaintiff for \$2,500, and defendant appeals. Affirmed.

G. H. Gould, for appellant. A. W. Gregg, for appellee.

PLEASANTS, J. The appellee, R. W. McCoy, who was in the employment of appellant as brakeman on the 16th of September, 1890, while attempting to uncouple two cars in the regular discharge of his duties, had his right hand injured, and the injury, as alleged by the plaintiff, was the direct result of the negligence of defendant, in this: in furnishing plaintiff with a worn and defective coupling. The plaintiff laid his damages at \$10,000. The defense was contributory negligence on part of plaintiff, and negligence of his fellow servants. A verdict and judgment were rendered for plaintiff for \$2,500, and defendant appealed.

The appellant's first assignment of error impugns the correctness of the judgment of the court, refusing his application for a continuance. The application shows that no subpoena was issued for the witness, though the materiality of his testimony was known to defendant's counsel some six weeks before the cause was tried, and counsel was informed by the witness that he would attend the trial and testify. Counsel intended to have a subpoena issued for the witness some two weeks before the commencement of the term, but, before that time arrived, the witness left the county. When the statutory remedy for obtaining testimony has not been used, the application for a continuance is addressed to the discretion of the court, and we cannot say, from the facts before us, that the court abused its discretion in refusing the application for a continuance in this in-

stance. The facts expected to be proved were not stated, nor was there an averment that applicant had reasonable expectation of procuring the testimony by the succeeding term of the court, if the continuance should be granted. *Vide* Railway Co. v. Hardin, 62 Tex. 369.

The next assignment of error complains that the court refused to give the following instruction asked by defendant: "That, notwithstanding defendant was guilty of negligence in having a defective drawhead, yet, if plaintiff, by his negligence or carelessness in handling the pin, contributed to his injury, he cannot recover." To defeat the plaintiff's right to recover when negligence is shown on part of defendant, the plaintiff must be guilty of negligence which proximately contributed to his injury; and what is meant by "proximately contributing to his injury" is that the plaintiff's negligence was such that without it he would not have been injured. The requested charge did not, we think, correctly state the law, and consequently there was no error committed by the court in refusing to give it. *Vide* Wood, Mast. & Serv. 638.

The third assignment is that the court committed error in charging the jury "that if plaintiff, by his negligence, contributed to his injury, to such an extent that but for it he would not have been hurt, you will find for defendant." It is insisted that this charge is upon the weight of evidence; that, if plaintiff contributed in any degree to his injury through his negligence, he cannot recover; and that, therefore, the qualifying words in the charge, "to such an extent that but for it he would not have been hurt," make the charge one upon the weight of evidence, and are misleading. A charge almost in the identical words of the one under discussion was given by the trial judge in the case of Railway Co. v. Ormond, 64 Tex. 489; and, upon appeal, it was approved and commended by the supreme court of this state. We therefore hold that the charge is neither misleading, nor upon the weight of evidence.

The fourth assignment of error is that the court should have granted a new trial, because the court erred in the particulars set out in the previous assignments, and because the verdict is contrary to the law and the evidence, and is against the great weight of the evidence, which shows that plaintiff's injury was the direct result of his own contributory negligence; and the verdict is grossly excessive. Before considering and disposing of this assignment, we will state our conclusions upon the facts given upon trial, as the same are detailed in the agreed statement. The injury was inflicted about 9 o'clock at night, on 6th of September, 1890, at Tyler. While the cars were standing still, and plaintiff was in the act of uncoupling two of the cars, plaintiff gave the engineer the signal to slack the

train, and, while that was being done, he stepped between the cars, and with his right hand took hold of the head of the pin, next to the hind car, and, when the slack came, the drawhead on the hind car gave back under the car, and caught plaintiff's hand between the head of the pin and the deadwood of the car, mashing his little finger in such manner as to necessitate its amputation, and tearing the leaders of the lower part of the hand, so that the finger next to the little finger is drawn about halfway towards the palm of the hand, and cannot be straightened. The plaintiff remained in the defendant's hospital about three weeks, and was under treatment by defendant's surgeon for about three months, and he was unable to use his hand for four months, and was suffering with it at the time of trial, December, 1891. His ability to perform any kind of manual labor is much impaired by the injury. The car which the plaintiff was attempting to uncouple was one which had, just before the accident, been received in the yard from the Cotton Belt Railway. The defect in the drawhead could not be discovered without getting down under the car. The rules of the defendant company required that cars received in its yards from other railroads should be inspected before removed from the yard, and if found out of fix, and not in a condition safe to be handled, such defect should be indicated by placing the proper notice upon the car found to be unsafe. There was nothing on this car to indicate to plaintiff that it was defective or unsafe, and the evidence showed that it was not the duty of the plaintiff to make the inspection of the cars in the yard; under the rule requiring their inspection, that duty belonged to another servant of the company. Plaintiff did not know of the defect in the drawhead. He had never seen the car before. He had been brakeman about eight months before his injury, and was in the employment of the defendant at the time of his injury. The plaintiff, in removing pins when uncoupling cars, places his hand upon the head of the pin, his fingers being between the pin and the deadwood, and waits for the slack of the train, and then, while the slack comes, he draws out the pin. Several experienced brakemen testified that the proper and prudent way to uncouple cars is not to take hold of the pin with the whole of the hand, but only with the thumb and forefinger, holding the hand above the head of the pin, and not touch the pin until after the slack comes; that it is more dangerous to place the fingers on the head of the pin, and await the slack, as plaintiff did, than to wait until the slack comes, and then seize the head of the pin. From the testimony of these witnesses it further appeared that only experts in the business could wait for the slack before seizing the pin; that it requires great quickness to seize the pin after the slack comes, and remove it before the

slack leaves; and it appeared also from this testimony that there was no established rule or method for uncoupling cars. These witnesses also testified that a prudent brakeman would look out for defective drawheads when the cars were received from another railroad, and not known to the brakeman; that it was well known to brakemen that the drawheads of cars just off of a trip are frequently out of fix. Our conclusions upon these facts are that, while the evidence may show that plaintiff was not as expert in coupling and uncoupling cars as others, it does not prove that the acts of plaintiff done in attempting to uncouple the cars were such as a man of ordinary prudence would not have committed; nor does the evidence show that but for the acts of plaintiff he would not have been hurt. Such being our conclusions upon the facts, we cannot say that the jury were wrong in giving a verdict for plaintiff, nor can we say that the verdict is excessive. It cannot be said, we think, that \$2,500 is more than a reasonable compensation to a young man for an injury to his right hand, such as the plaintiff has sustained. To defeat the right of plaintiff's recovery, as we have before intimated, upon the ground of contributory negligence, it is necessary that the negligence must be such as a man of ordinary prudence would not be guilty of, and that, but for his negligence, plaintiff would have escaped injury. Our opinion is that the court committed no error in refusing the motion for a new trial. The judgment of the lower court is affirmed.

CAMPBELL v. HARRIS.

(Court of Civil Appeals of Texas. May 18, 1893.)

RAILROAD COMPANIES—INJURIES TO WIFE OF EMPLOYEE—ACTION BY HUSBAND—WHEN MAINTAINED—NEGLIGENCE OF HUSBAND'S COEMPLOYEE—LIABILITY OF COMPANY—LICENSE—ASSUMPTION OF RISK.

1. In an action by a railroad employee against his employer for personal injuries to his wife, caused by the negligence of another employee, the rule that an employee cannot recover of the master for injury caused by the act of a fellow servant has no application.

2. In such action, mental suffering of the wife is a proper element of damages.

3. Plaintiff was foreman of a gang of defendant's men, and also kept a boarding car. Plaintiff's wife was staying on the car by the permission and at the suggestion of defendant's agent, under whose orders plaintiff was working at the time she was injured; and the accident was caused by the negligence of a conductor. *Held*, that defendant was liable.

4. The rule that a person who is on a train of cars through courtesy of the railroad company cannot recover for injuries resulting from the negligence of its employees does not obtain in Texas.

5. A married man may maintain an action against his employer for injuries to his wife caused by the negligence of his fellow servant.

Appeal from district court, Anderson county; F. A. Williams, Judge.

Action by R. J. Harris against T. M. Campbell, receiver of the International & Great Northern Railroad Company, for personal injuries to plaintiff's wife, caused by defendant's negligence. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

G. H. Gould, for appellant. Sink & McMeans, for appellee.

PLEASANTS, J. The appellee was in the employment of appellant as foreman of the fence gang,—men employed in fencing the right of way of appellant,—and he was at the same time boarding the hands under his charge and supervision. For this he was paid 50 cents per day for each boarder, the defendant retaining the board out of the wages of the men. The company furnished appellee with three cars, one of which was occupied by the men, another by the foreman and his cook, and the third was used as a kitchen and mess hall. While so employed in service of defendant, appellee's wife, while on a visit to him, was, as he alleges in his petition, injured by the derailment of the car in which they were lodging, with their two children and the cook, the derailment being caused through the alleged negligence of one of the servants of defendant company. The appellee brought suit and recovered judgment for the sum of \$4,750, from which judgment defendant appealed. The defense made to the action was contributory negligence, negligence of fellow servants, and that the wife of plaintiff was voluntarily in the car, without defendant's knowledge or permission, and defendant owed her no duty, and she assumed the risk of her situation.

The facts of the case, in addition to those recited in the statement, given above, of the plaintiff's suit, and its result, are, as we deduce them from the record, as follows: On the 8th of February, 1891, about midnight, while appellee and his wife and children were asleep in appellant's car, it became necessary to remove the car from the track on which it was standing, and for this purpose the conductor of a freight train operated by defendant between Phelps and Tyler attached an engine to the car, and attempted to switch it on another track, and the car was derailed, and pulled for some distance over the cross-ties, and finally thrown from the track upon the ground. It was not turned over, but tilted at an angle of about 45 degrees. Appellee and his wife and one child were sleeping together. Their bed was not turned over, nor was any one of them thrown from the bed, but they were jolted and piled upon each other, against the side of the car. They lay upon two mattresses, but, notwithstanding this, the jolting over the cross-ties shook them up considerably. The wife was assisted from the car, and with assistance she walked first to the de-

pot, and from there to the hotel in the town, where she remained until some time during the day of the 9th, when she returned to the car, and continued to stay on the same, with her husband and children, for some weeks. There is testimony that at the time of the occurrence both the wife and the husband declared that she was badly scared, but not hurt. The accident resulted from the conductor's mistake in turning the wrong switch. There were two switches very near each other, and the conductor made the mistake, as he admitted, of turning one of the switches when he should have turned the other. He told appellee he was the cause of the damage to his property on the car, and directed him to make out his account. The appellee estimated his loss by injury to his cooking stove, his crockery, and one of his bedsteads, at \$15, which sum was paid him by the conductor. Some days before the accident the appellee applied for leave to visit his family at Palestine. He was told by the officer to whom he applied for a leave of absence that he could not be spared from his work, but that he would go to Palestine in a few days, and would procure a pass for his family, and send them down on a visit to him; and it was also shown that it was the habit with men who boarded railroad hands to take their families with them, and to keep them in the cars furnished by the company for boarding purposes. The testimony of the witnesses for the plaintiff as to the condition of the wife's health before the accident was that it was good; that she was able to and did cook and sew for herself and children. On the other hand, there was testimony for the defendant to the effect that the wife had been an invalid for years, and that her husband had brought her from her home to stay upon the cars in the hope that the change would be beneficial. Dr. West testified that he was the family physician of appellee at one time for several years; that he had not been his physician for three or four years before the accident by which his wife was said to have been injured; that when he treated appellee's wife she suffered from constipation and falling of the womb, and was subject to flooding. His opinion was that her present suffering could not have been produced by the jolting or concussion she received at the time of the derailment of the car in which she was lodging. Since the accident the wife has been an invalid. She is over 45 years of age; suffers from pain in back and abdomen and head, and from flooding; and has a lump in her side, which her physicians say is one of her kidneys, which has been from some cause displaced; and if she was in good health at the time of the accident and previous thereto, about which they have no knowledge, except that derived from her statements, they think the displacement of the kidney was proximately caused by the shock her

system received from the derailment of the car. Other surgeons who testified were of the opinion that the sufferings of appellee's wife could not have been caused by the jolting incident to the derailment of the car.

The appellant's objection to the judgment for appellee may be considered under three heads: First, the evidence makes it manifest that if plaintiff has suffered injury the injury was caused by the negligence of his fellow servant; second, that the jury were instructed that in assessing the damages they might allow for the mental suffering of the wife; and, third, that, the wife being upon the car for the convenience and comfort of her husband, and at most only by permission of the defendant, defendant owed to her no higher duty than it owed the plaintiff, and, if negligence of a fellow servant precludes recovery by plaintiff, it must defeat also a recovery by his wife. As to the first of these objections it suffices to say that, if plaintiff was suing to recover damages for injuries inflicted upon himself through the negligence of a fellow servant, the objection would be well taken; but when the suit is by the husband for damages for injuries inflicted upon the wife the rule that one cannot recover for injury caused by the act of a fellow servant has no application. If plaintiff's wife is entitled to damages, the suit must be brought by the husband. She cannot institute the suit herself. It must, except in rare cases, be brought by the husband, and in his name. Suppose a wife to be a passenger on a train of cars, and her husband should be one of the trainmen, and through the negligence of one of his fellow servants the train should be derailed, and the wife, by the derailment, severely injured, could it be pretended that the wife could not recover because the suit was brought by her husband? We think not. The reasons in which the rule invoked by appellant is founded have no connection with or bearing upon the question of the right of the wife to recover in this case. When the reason for the rule ceases, the rule itself ceases to operate. The second objection is clearly not tenable. That mental suffering is a basis or element of damages is not denied, but it is insisted that such suffering is not an element for damages when the plaintiff sues for injuries inflicted upon another. While this is true, as a general rule, it is not true when the suit is by the husband for injuries to the wife. In such case the same rule applies as would if the suit were by the wife herself. Vide *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. Rep. 288; *Railway Co. v. White*, 80 Tex. 202, 15 S. W. Rep. 808. The evidence shows very plainly that appellee's wife was staying with her husband upon the cars of defendant, not only by the permission of defendant, but at the suggestion of the agent or servant of defendant, under whose orders appellee was working. The contention of

appellant that one who is upon a train of cars through favor or courtesy cannot recover for injuries resulting from negligence of the servants of the railway company is doubtless the rule of some of the states of the Union, but such is not the rule here, as we understand the decisions of our supreme court. Vide *Railway Co. v. White*, 80 Tex. 202, 15 S. W. Rep. 808; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. Rep. 288; and *Prince v. Railway Co.*, 64 Tex. 144. In the case of *Brown v. Sullivan*, the plaintiff was boarding hands in the employment of defendant, the receiver of the Texas & Pacific Railway. He was furnished cars for this purpose by defendant, and his wife stayed with him upon these cars, and cooked for him, and while so engaged she was injured. Her injuries were caused by the negligence of defendant's servants in handling an engine. The engine and its tender, while being switched in the yard, were allowed to come with such force against the car in which the plaintiff's wife was standing as to throw her from the car upon the ground, by which she was severely injured. The plaintiff was permitted to recover damages for the injury sustained by his wife. From this, and the other cases cited above, it is evident that, under the law as construed and administered in the courts of this state, one who is on the cars of a railway company, not as a passenger, but simply through the favor or courtesy of the company, may recover damages for injuries to his or her person, caused by the negligence of the servants of the company. In the face of these decisions, we do not feel authorized to reverse the judgment rendered for the appellee. We do not think the court erred in the charge given to the jury, nor did it err in refusing the charges asked by the defendant, and in overruling the defendant's demurrers to the petition. There is much that may be said in support of the contention made by appellant's counsel that the plaintiff's wife, in going and remaining upon the cars of defendant with her husband, assumed the risks of such accidents, at least, as the one by which she claims to have been injured. But for the decisions to which we have referred, the writer would be inclined to hold that, under the facts of this case, the defendant should not be liable to the plaintiff without proof that defendant was guilty of negligence in the selection of its servants. The judgment of the court below is affirmed.

On Rehearing.

(June 29, 1893.)

We have duly considered appellant's motion for a new hearing, and, after weighing the argument of its learned counsel in support of the motion, we are constrained to say, with all deference to counsel, that we find nothing in their motion or their briefs which shakes our confidence in the correctness of the decision rendered herein on a

former day. Counsel misapprehend the purpose for which the cases of *Brown v. Sullivan*, *Railway Co. v. White*, and *Prince v. Railway Co.* are cited in the opinion announcing the decision in this case. These authorities were cited to show the liability of a railway company to a mere licensee for injuries sustained by the negligence of the company's servants. The opinion does not hold that these cases negative the proposition that a wife of a railway employee cannot, in this state, maintain suit in the name of her husband against the husband's employer for injuries inflicted by a fellow servant of her husband. The opinion rejected this proposition, and attempted to show its fallacy, but not by reference to the decisions above cited. If we apprehend correctly the ground upon which appellant's counsel rest their motion for a new hearing, it is this: Because the law does not permit the husband to recover from his employer damages for injuries received by his wife, through the negligence of the husband, that, therefore, the husband cannot recover from his employer for injuries to his wife, inflicted through the negligence of the husband's fellow servant. To the proposition that the husband cannot recover and should not recover of his employer damages for injuries received by his wife through his negligence, we give our full assent; but to the other proposition, that the husband cannot recover of his employer damages for injuries sustained by the wife through the negligence of the husband's fellow servant, we cannot assent. The second proposition is not, as counsel, in their argument, seem to assume, a logical sequence of the first. Every employee of a railroad, in contemplation of the law, by the contract of employment, agrees and undertakes to exercise skill and care in the discharge of his duties. Such being the nature of the contract between the employer and the employee, it would manifestly be unjust to the employer to permit an employee to recover damages from his employer for injuries received by the wife of the employee through his own negligence. To permit such recovery would allow the employee to reap a benefit for his breach of contract. And the wife should not be permitted to recover, for the reason that to permit her to do so would, in effect, concede the right of the wife to recover damages from her husband for injuries inflicted upon her person by or through his negligence; because, if the employer be liable to the wife for injuries inflicted upon her through the negligence of her husband, then the employer should recover from the husband, under his contract of employment, the damages recovered of him by the wife. These are the reasons, as we conceive, why the wife is held by the law chargeable with the negligence of her husband, and is in such case denied a remedy against his employer. But to deny the

wife the right to recover damages for injuries resulting from the negligence of her husband's fellow servant is to bind her by a contract to which she is not a party. The wife is not bound by the husband's contract to assume all risks of injury to his person resulting from the negligence of his fellow servants. The existence of the wife is not, with us, as at common law, merged in that of her husband. She has rights and can maintain suit for their protection, and she can recover damages for wrongs done her, and the money recovered for such wrongs is not, as at common law, the exclusive property of the husband; and while it is true that the wife must generally sue in the name of her husband, he who has wronged her cannot justify under a contract made with her husband, to which she is in no wise a party. The husband, it is true, can by his contract convey the interest of the wife in the community estate, but we know of no law which would authorize the husband to make a contract binding upon the wife, which would exclude her from the right to recover for injuries to her person, inflicted by the wrong or negligence of another. The motion must be denied.

PALMER et al. v. TEXAS TRAM & LUMBER CO.

(Court of Civil Appeals of Texas. June 1, 1893.)

TRESPASS TO TRY TITLE—DEED—ACKNOWLEDGMENT.

In trespass to try title by the heirs of P. against one in possession under a deed from the heirs of W., it appeared that in 1839 P., being the owner in common with his wife, gave H. power of attorney to sell and convey the land; that in 1844 H. conveyed the land to W. by deed, the certificate of acknowledgment to which reciting facts showing that the consideration therefor inured to H. personally, and not to P.; that such deed was recorded by H. in 1850, and that W. paid the taxes from 1846 to 1850, at least; that in 1886 W.'s heirs conveyed the land to defendant. The evidence showed that P. died in 1850, and his wife in 1890; that in 1850 plaintiffs removed with their mother from the county in which the land was situated, and have never paid taxes on, nor asserted any claim to, the land, until 1891, when suit was brought. *Held*, that the circumstances, in view of the great lapse of time, justified the court in holding that the deed to W. passed the title, notwithstanding the defective acknowledgment.

Appeal from district court, Jasper county; Stephen P. West, Judge.

Action in trespass to try title by J. M. Palmer and others against the Texas Tram & Lumber Company. Defendant had judgment, and plaintiffs appeal. Affirmed.

W. S. Blake, K. B. Seale, and W. B. Powell, for appellants. Ford & McComb, for appellee.

WILLIAMS, J. Trespass to try title by appellants, as heirs of Martin Palmer, to recover of appellee 1,614 acres of the WI-

ham Williams league, in Jasper county. From a judgment of the district court in favor of the defendant, this appeal was taken.

It was shown that, prior to 1844, Martin Palmer and his wife owned the land in controversy as their common property, and that in 1839 he executed a power of attorney to Charles S. Hunt, authorizing him "to sell and dispose of and convey, by deed or otherwise," the land; "and, further, to sign, seal, and deliver to the purchaser or purchasers a deed, or any other instrument of writing, that my said attorney, Chas. S. Hunt, may think proper, for me and in my name, as though I was personally present, * * * and, further, to do, perform, and execute, for me and in my name, all and singular, the things that shall or may be necessary, &c., in the premises." On the 4th day of July, 1844, Hunt—and as attorney in fact, and in the name, of Palmer—executed a deed of the land to John D. Wilkens, reciting a paid consideration of \$1,000, and containing a general warranty of title. Attached to this deed is a certificate of acknowledgment by Hunt, as attorney in fact, made on the 6th day of July, 1844, which is in proper form, and states that he executed the deed "for the use and purpose therein contained: provided, It is expressly understood and acknowledged by the said Charles S. Hunt that the foregoing deed is given in consideration of eight land certificates, for one league and labor of land each, issued by the board of land commissioners of Jasper county, to wit, [here follows a list of the certificates,] which certificates, as aforesaid, Chas. S. Hunt sold to John D. Wilkens, of the parish of St. Mary, Louisiana, which being passed by the board of land commissioners for the county of Jasper, and, on examination by the board of examining commissioners, rejected, which circumstances render the validity of such claims doubtful, therefore this deed is given as an indemnity to said John D. Wilkens." Palmer continued to reside in Jasper county until March, 1850, when he died. His widow and children then moved to Walker county, where she continued to reside until her death, which occurred in the year 1890. This suit was brought in 1891. The records of Jasper county were burned in 1849. The deed from Hunt to Wilkens was recorded in December, 1850. Whether or not it had been recorded before the burning of the records, there is no evidence. It is shown that from 1846 to 1849, inclusive, Wilkens paid taxes on the land, and that during these years Palmer paid none. It was also proved that for the past 11 years the heirs of Palmer have paid no taxes. There is no evidence that they have ever paid any, or asserted a claim to the land. In 1886 the defendant bought the land from the heirs of John D. Wilkens, paying full value for it, and placing its deed upon record, and has ever since paid all of the taxes. In 1889 it took actual possession, and has since been cutting

timber from the premises, that so used being of the value of \$3,000. The circumstances and facts thus stated are all the record contains, and beyond that the evidence is silent as to any further claim or assertion of ownership of the land, either by Palmer and his heirs, or Wilkens and his heirs.

The decision of the case turns upon the effect to be given to the recital in the acknowledgment that the conveyance of the land was made for a consideration which inured to Hunt, the agent, and not to his principal. That the power of attorney did not authorize such a conveyance as that recited in the acknowledgment is plain. *Reese v. Medlock*, 27 Tex. 120; *Frost v. Cattle Co.*, (Tex. Sup.) 17 S. W. Rep. 52. The authority given to Hunt was to sell, and, having sold, to convey. He had no rightful power to convey without selling. The general terms were to be intended to be used in aid of the specific power defined, and not as containing in themselves an enlargement of the scope of the authority. It is suggested in argument that the land certificates which had been previously sold by Hunt to Wilkens probably belonged to Palmer, and that the obligation to indemnify Wilkens for their loss rested upon him, and that the conveyance was made in discharge of it. The language of the certificate does not suggest such a fact, and if it were admitted it would not bring the conveyance within the terms of the power, though it might render the inference of a ratification by Palmer more readily admissible. A power to sell does not include a power to convey in discharge of a pre-existing obligation or liability of the constituent. The question therefore recurs, what effect is to be given to the statement in the acknowledgment that the conveyance was made in consideration of an obligation existing on the part of the attorney in fact to the grantee, Wilkens? The statute at that time did not require that the certificate of authentication should contain any statement concerning the consideration of the instrument, and even now such a statement is not necessary. *Monroe v. Arledge*, 23 Tex. 479. The acknowledgment itself was not an essential part of the deed. That instrument operated from the time of its delivery, whether acknowledged or not. It bears a date two days prior to the acknowledgment, and, in the absence of evidence as to the time at which it was delivered, the weight of authority, and of reason, holds the presumption obtains that delivery was made at the date of the instrument, rather than that of the acknowledgment. *Devil. Deeds*, 178-181, 265. The deed therefore passed the title, or was void, irrespective of the recitals of the acknowledgment. The acknowledgment, by its own force, cannot have the effect of defeating or impairing the operation of the deed. If the deed was void or voidable, it was because of the facts, and not through any efficacy

given by law to the certificate of authentication. But the recital in the certificate is, we think, evidence against the defendant, that the recited fact existed. It comes from the custody of those claiming under the deed on which it is indorsed, and together with which it is one of their evidences of title. The acknowledgment containing it was made use of as a means of recording the deed, and of thus asserting title. These circumstances show that the deed was accepted with the acknowledgment upon it, and the latter is not, therefore, to be treated as the ex parte statement of Hunt and of the officer. It is analogous to an assertion made by one person, prejudicial to the interest of another, in his presence, and assented to, or not denied. It is therefore evidence, but not conclusive evidence, that the fact existed as stated. It could certainly have been rebutted by positive testimony that it was not true, and that Wilkens had in fact paid the consideration recited in the deed for the use of Palmer, and it is equally true it could be rebutted by circumstances. For this reason it was proper to admit the deed in evidence, and to determine its effect, in the light of all the facts of the case. Thus considered, we cannot say that the court below was bound to accept the recital in the certificate as furnishing a controlling reason for holding the deed to have been inoperative. The evidence shows that, after the deed to Wilkens, Palmer paid no taxes upon the land; that since his death none have been paid by his wife, the alleged owner of one half, and his children, who claim to have inherited the other half, and there is no evidence of an assertion of any claim, or the exercise of any act of ownership by them; that, upon the receipt of the deed from Hunt, Wilkens commenced the payment of taxes, and put his deed on record at least as early as 1850; that in 1886 his heirs conveyed to defendant, thus asserting ownership; and that defendant at once recorded its deed, and has since paid taxes, and taken possession, and used the property. Thus, for more than 40 years, both parties interested in this conveyance have acted in a manner inconsistent with the fact that Hunt had conveyed without authority, and consistent with the hypothesis that his act was recognized as done in pursuance of the power conferred on him. Those claiming under the deed have asserted the title, and those whose interests would be prejudiced thereby have acquiesced. It is true that there is no direct evidence that either Palmer or his heirs knew of the conveyance by Hunt to Wilkens, but the evidence to charge them with notice of it is as strong as that which affects defendant with notice of the acknowledgment. It is not probable that persons who supposed they had title to land would fail to discover, during all the years that have passed, the facts of the conveyance. So we

conclude that the circumstances of the case, in view of the great lapse of time, were sufficient to justify the court in holding that the deed passed the title notwithstanding the acknowledgment.

It has been urged by appellee that, admitting the fact as to the consideration to be as stated in the acknowledgment, still the deed passed the legal title to Wilkens, and left in Palmer and his heirs only the equitable right to avoid the conveyance by action taken within reasonable time, and that their claim is rendered stale by lapse of time. The result of the authorities seems to be that, under a naked power to sell, a conveyance by the attorney in fact, without consideration, or upon a consideration inuring to himself alone, is void, as between the parties, and passes no title, either legal or equitable. Yet such a conveyance may be ratified, and may support a title in a subsequent bona fide purchaser from the grantee in the deed of the attorney; and this illustrates that it is not true, in an absolute and unrestricted sense, that the deed is void. In the hands of the grantee of the attorney in fact, and of all purchasers from him, with notice of the fraud, it is void, as against the constituent of the power, and may be so treated by him in an action of trespass or ejectment to recover the property, even in states where a recovery must be had in these actions upon the legal title. *Meade v. Brothers*, 28 Wis. 689; *Campbell v. Campbell*, (Wis.) 15 N. W. Rep. 138; *Dupont v. Wertheiman*, 10 Cal. 368; *Randall v. Duff*, (Cal.) 19 Pac. Rep. 583; *Jeffrey v. Hirsch*, (Mich.) 12 N. W. Rep. 898; *Deputron v. Young*, 184 U. S. 241, 10 Sup. Ct. Rep. 539; *Mott v. Smith*, 16 Cal. 534. In the case of *Connolly v. Hammond*, 51 Tex. 635, there are some expressions which seem to militate against this view. But that case was not one of a naked power to sell, but was treated as belonging to the class of cases in which a trustee, with power of sale, indirectly purchases the trust property. Such trustees were usually invested with the legal title, and can therefore convey it. In sales by executors, administrators, and guardians, the legal title passes by the action of the court. In all of these cases, if the trustee has perpetrated a fraud, and through another person attempted to acquire the property, the holder of the legal title is charged as trustee, but must be reached by timely action. But an attorney in fact, with a bare power of sale, is not clothed with any title to the property, nor with any power over it, except such as the instrument confers. The extent of such powers must be taken notice of by all persons dealing with him. When he exceeds that power he confers no right. The circumstances under which, after a long lapse of time, a ratification might be presumed or inferred, we need not, in view of the conclusion already stated, discuss. The judgment is affirmed.

TEXAS & P. RY. CO. v. MOODY et ux.
(Court of Civil Appeals of Texas. June 1,
1898.)

DEATH BY WRONGFUL ACT—DAMAGES—ACTION BY
PARENTS—EVIDENCE OF PLAINTIFFS' RACE—
MATERIALITY—WILLFUL ACT OF BRAKEMAN—
LIABILITY OF RAILROAD COMPANY—EVIDENCE.

1. In an action by husband and wife for the wrongful death of his stepson and her son, evidence is not admissible to show that plaintiffs and deceased were negroes, for the purpose of reducing damages, on the hypothesis that family ties are not strong with the negro race.

2. A railroad company is not liable for the willful act of a brakeman, in kicking a trespasser from its moving train, whereby the latter was killed, in the absence of evidence to show that it was within the general scope of the brakeman's authority to eject trespassers from its trains. *Railway Co. v. Anderson*, 17 S. W. Rep. 1039, 82 Tex. 519, followed.

3. In an action against a railroad company for the death of a trespasser, who was kicked from defendant's train by its brakeman while the train was running fast, a witness who had been a brakeman testified that he knew it was the duty of defendant's brakemen to put trespassers off the trains; that orders were given out to put them off when the train was running, and he had done so; that he did not know of any printed or general orders issued by the company to put trespassers off; and that his orders, in each case, came from the conductor, when a person was on the train who had no right to be there. *Held*, that there was no evidence that the brakeman, in ejecting deceased, acted within the general scope of his authority.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Action by John Moody and Mollie Moody, his wife, against the Texas & Pacific Railway Company, to recover for the death of the son of Mollie, caused by being kicked from defendant's moving train by a brakeman. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendant appeals. *Reversed*.

F. H. Prendergast, for appellant. J. H. Wood, L. P. Wilson, and Pope & Lane, for appellees.

GARRETT, C. J. This action was brought by Mollie Moody, joined by her husband, John Moody, to recover damages for the death of Willie Moody, the son of Mollie and the stepson of John Moody. Deceased, in company with another boy, named Ed. Calhoun, boarded a freight train on defendant's railroad at Marshall, without permission of anybody, to go to Longview. When the train had gone five miles, a brakeman ordered them to jump off. Calhoun jumped off, but the brakeman kicked Moody off, and the train ran over him and killed him. The testimony in the case was by deposition, and the defendant offered evidence to show that plaintiff and deceased were negroes, for the purpose of reducing the amount of damages, on the hypothesis that family ties are not strong with the negro race. We think that the court very properly excluded the evidence.

Appellant's second assignment of error relates to the refusal of the court to give the following special instruction to the jury, requested by the defendant: "If the jury believe that the brakeman kicked the boy off willfully, and with intent to injure him, then the defendant would not be liable for the act of the brakeman, and in such case the plaintiff cannot recover." And the seventh assignment of error: "The court erred in not granting a new trial, because the evidence showed that the brakeman acted maliciously, and beyond the scope of his duty and authority, when he kicked the boy off the train." In order to make the defendant liable for the wrong done the deceased by the brakeman, in kicking him off the train, it was necessary for the plaintiffs to show that it was within the general scope of his authority to eject trespassers from defendant's trains; and, unless there is evidence in the record sufficient to support the finding of the jury that the act was done while the brakeman was in the exercise of a duty that came within the general scope of his employment, the requested instruction should have been given. *Railway Co. v. Anderson*, 82 Tex. 519, 17 S. W. Rep. 1039. The evidence to show the authority of the brakeman was that of the witness Batson, who testified that he knew the duty of a brakeman on defendant's railroad; that he had been a brakeman on it, and it was the brakeman's duty to put trespassers off the train. He had put them off when the train was running. Orders were given to put them off while trains were running fast. On cross-examination he said: "I did not know of any printed orders or general orders issued by the company, to put trespassers off. My orders came from the conductor. These orders were given, in each case, when a person was on the train who had no right to be there. The conductor would order him off, and the brakeman would put him off." It does not appear from the evidence that it was within the scope of the general employment of the brakeman to eject trespassers from defendant's trains, but that he acted, in each case, under the orders of the conductor. The facts here are very similar to those in the case of *Railway Co. v. Anderson*, supra, in which it was held that no implied authority was shown to be in the brakeman, to eject trespassers from the train. It appeared from this evidence that the brakeman kicked the deceased off the train while it was moving fast, after he had told him to "fall off," and it was certainly a willful act, done with intent to injure the deceased. Upon the authority of *Railway Co. v. Anderson*, the requested instruction should have been given.

There was no error in the paragraphs of the charge complained of under the 3d, 4th, and 5th assignments of error. The evidence did not show that deceased had been

manumitted by his mother, and the jury were correctly charged upon the measure of damages, both as to the value of the services of the deceased during his minority, and the reasonable expectation of the plaintiff of benefits from him after he should have arrived at the age of 21 years. For the error indicated the judgment of the court below will be reversed, and the cause remanded.

SCOTT v. SLOAN et al.

(Court of Civil Appeals of Texas. May 25, 1893.)

LIMITATIONS—ACCRUAL OF CAUSE OF ACTION—INTEREST DUE MARRIED WOMAN—FORECLOSURE OF MORTGAGE.

1. Where notes are made payable to a married woman, with interest from maturity at a certain rate per annum, but the interest is not payable annually, or at stated times, and is not evidenced by interest coupons, the contract to pay interest is not separable from the contract to pay principal, and the cause of action for the interest is not barred by the statute of limitations, if, owing to the coverture of the payee, that for the principal is not barred.

2. A junior mortgagee may avail himself of the defense of limitations in an action to foreclose the senior mortgage.

Error from district court, Harrison county; W. J. Graham, Judge.

Action by Elizabeth S. Sloan and W. L. Sloan against Nancy Sherrod, executrix, the First National Bank of Marshall, and William T. Scott. From a judgment overruling the special demurrer of defendant Scott, he brings error. Affirmed.

T. P. Young, for plaintiff in error. James Turner, for defendants in error.

GARRETT, O. J. The defendant in error Elizabeth S. Sloan, joined by her husband, W. L. Sloan, brought this suit in the district court of Harrison county on December 22, 1891, against Nancy Sherrod, independent executrix of the will of L. L. Sherrod, deceased, to recover on three promissory notes, and to foreclose a lien on land in Irion county. The First National Bank of Marshall, Tex., and the plaintiff in error, William T. Scott, were joined as defendants, the bank, as a subsequent purchaser of the land from the executrix, and Scott, as a junior mortgagee of L. L. Sherrod, both with notice of the lien of plaintiff Elizabeth S. Sloan. There is no statement of facts in the record, and the case comes up on the action of the court in overruling the special demurrer of the defendant Scott setting up the statute of four years' limitation against the interest on the notes sued on, which were the separate property of Mrs. Sloan, and, though due more than four years, were protected by her coverture. It was claimed that the interest was community property. The petition showed a cause of action on three notes, all dated December 13, 1883, and due on Janu-

ary 1, 1885, 1886, and 1887, respectively, payable to the order of Elizabeth S. Sloan, with interest thereon from maturity at the rate of 10 per cent. per annum; and that the notes were given for land which was the separate property of Mrs. Sloan. Interest had been paid and credited on the notes to within four years of the date of the filing of the suit. Interest on money which is the separate property of the wife becomes the community property of the husband and wife. *Braden v. Gose*, 57 Tex. 37. It is the opinion of the writer, as expressed by Judge West in *Carllale v. Sommer*, 61 Tex. 127, that interest contracted for in vendor's lien notes executed for the separate real estate of the wife remains the separate property of the wife. But let it be conceded that the interest on the notes sued on in this case became community property as it accrued, it was an incident to the notes, and no separate cause of action could have been maintained therefor. The cause of action on the notes was not barred by reason of the coverture of Mrs. Sloan, and it is clear that the right to recover all interest accruing within four years of the time of filing the suit was not barred, if not interest that accrued more than four years before that time. The contract to pay interest is not separable from the contract to pay the principal, together with interest, as it might be where it is stipulated that interest must be paid annually, or at stated times, or is evidenced by coupons upon which when detached a separate action may be maintained. A junior mortgagee may avail himself of the defense of limitation against the debt secured by the prior mortgage which is sought to be foreclosed. *Wood, Lim. § 41; Johnson v. Association*, (Tex. Civ. App.) 21 S. W. Rep. 962. There was no error in the judgment of the court below, and it will be affirmed.

TEXAS & N. O. R. CO. v. HARE.

(Court of Civil Appeals of Texas. May 17, 1893.)

ACCIDENT AT RAILROAD CROSSING—APPEAL AND ERROR—ASSIGNMENT OF ERROR—CONTRIBUTORY NEGLIGENCE.

1. Right to a writ of error on supersedeas bond within the time limited by Rev. St. art. 1389, is not defeated by an appeal on supersedeas bond to a prior term, which was dismissed for failure to file brief.

2. An assignment of error to the rendering of judgment against defendant because plaintiff was guilty of contributory negligence, which was the cause of the accident, is specific enough to require consideration where the evidence going to show contributory negligence was pertinently directed to one act.

3. For one to step behind and follow a freight train without listening or looking to discover if an engine was following, though he knew that engines did sometimes follow freight trains, was contributory negligence, preventing recovery for an injury from an engine following the train at a distance of 50 to 150 yards, and running at 5 to 15 miles per hour, and that,

too, though the accident was at a crossing, and the engine failed to give any signal.

4. The fact that the boy became confused at the shouts and signals of the brakeman on the train trying to direct his attention to the engine, and that he stopped and stood on the track, trying to understand him, till too late, does not render the railroad company liable for the injury.

Error from district court, Liberty county; L. B. Hightower, Judge.

Action by Leon J. Hare, by next friend, against the Texas & New Orleans Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. Motion to dismiss appeal denied. Reversed on merits.

Perryman & Gillaspie, for plaintiff in error. Douglass & Lanier and W. B. Denson, for defendant in error.

On Motion to Dismiss.

GARRETT, O. J. Defendant in error has filed a motion to dismiss the writ of error in this case because an appeal therein by the plaintiff in error, with supersedeas bond, has been heretofore dismissed for the want of prosecution. Judgment was rendered in favor of the defendant in error against the plaintiff in error in the district court of Liberty county August 19, 1891, from which the plaintiff in error perfected an appeal, with supersedeas bond, to the term of the supreme court at Galveston, 1892. Plaintiff in error duly filed the transcript in the supreme court at said term, but, having failed to file its brief, in accordance with law and the rules of the supreme court, the appeal was dismissed on the motion of the defendant in error. Afterwards, on February 4, 1892, the plaintiff in error sued out this writ of error to the Galveston term, 1893, of the supreme court, and, in accordance with the act of the legislature organizing the courts of civil appeals, filed the transcript in this court.

It is contended by the defendant in error, in support of his motion to dismiss, that when a party appeals from a judgment, gives notice of appeal, and files a supersedeas bond, according to law, he cannot prosecute a writ of error on supersedeas bond to the succeeding term of the appellate court. The statute permits a writ of error to be sued out at any time within two years after final judgment, and does not, in terms, place any limitation thereon. Rev. St. art. 1389. The question of the right to prosecute a writ of error after an appeal has been perfected has come before the supreme court in several cases, but not as here presented. It was held in *Perez v. Garza*, 52 Tex. 571, that a person who had perfected an appeal under a supersedeas bond could not abandon it, and sue out a writ of error with a like bond, returnable to a term subsequent to that to which the appeal was returnable, and thus defeat the right of appellee to affirmance of the judgment or cer-

tificate. In *Thompson v. Anderson*, 82 Tex. 237, 18 S. W. Rep. 153, it was held that an appeal perfected with cost bond, afterwards abandoned, would not defeat the right to a writ of error; but the court said: "If the appeal had suspended the right of defendant in error to enforce his judgment, there would be much reason for holding that a writ of error ought not to be allowed returnable to a term subsequent to that to which the appeal was returnable." The decisions go no further. The cases of *Thomas v. Thomas*, 57 Tex. 516, and *Eppstein v. Holmes*, 64 Tex. 562, follow *Perez v. Garza* in announcing that a party cannot resort to both methods of appeal for mere delay; from which we infer that a certificate of affirmance cannot be defeated by a subsequent writ of error sued out after an appeal with supersedeas bond has been perfected. As said in *Schonfield v. Turner*, (Tex. Sup.) 6 S. W. Rep. 628: "It has been the uniform practice of this court, when an appeal has been dismissed for the want of prosecution, to allow the cause to be taken up by writ of error." It is true that the appeal in that case was by a guardian ad litem without bond, but the construction given to *Perez v. Garza* therein was only that a perfected appeal secured the right to have the judgment affirmed on certificate, notwithstanding the subsequent writ of error. Defendant in error says in argument that he could not have the judgment affirmed on certificate in this case, because the transcript was on file; to which it may be replied that when the appellant failed to file a brief, the appellee had the option to have the appeal dismissed, or to proceed ex parte. Rev. St. art. 1038; Old Rules Supreme Court, No. 43. Having voluntarily chosen to dismiss the appeal, he ought not to complain if the appellant then sues out a writ of error. We have only the expression in *Thompson v. Anderson*, without any indication as to how the court would decide the question, in support of the contention of defendant in error, and opposed to this are the plain terms of the statute and the uniform practice of the court as limited in *Perez v. Garza*, and the other decisions above referred to.

We are of the opinion that the motion to dismiss the writ of error should be overruled.

On the Merits.

(June 1, 1893.)

This suit was brought in the district court of Liberty county January 25, 1890, by Leon J. Hare, a minor, who sues by next friend, against the Texas & New Orleans Railroad Company to recover damages for personal injuries received from being struck by an engine on the defendant's railroad in the town of Liberty. Defendant pleaded contributory negligence on the part of the plaintiff. There was a trial by jury, which re-

sulted in a judgment in favor of the plaintiff. Reversal of the judgment of the court below is sought, among other grounds, upon the following assignment of error: "The verdict of the jury should have been for the defendant, and the court erred in rendering judgment against the defendant, and refusing a new trial, because the evidence shows that the said L. J. Hare was guilty of contributory negligence, and said contributory negligence was the immediate, direct, and proximate cause of the injuries received by him." This assignment is objected to by appellee because it is not in compliance with the statute and the rules of the supreme court relating to the subject, in not showing in what the contributory negligence consisted; but, from the facts in the case, we think it is specific enough to require us to consider it, since the evidence going to show contributory negligence was pertinently directed to one act. It was shown that the accident occurred on the defendant's railroad at a place where a public road or street crossed it, about a half of a mile west of defendant's depot in the town of Liberty on July 25, 1889. Plaintiff, who was then 16 years of age, accompanied by another boy named Graves, was walking upon and along the track, going in the direction of the river, west of town. About the time they reached the place where the road crossed the track, a freight train composed of 35 or 40 cars passed, going in the same direction, followed closely by an engine called "the pusher," which was following it for the purpose of pushing the train over the grade beyond the river. It was customary for a "pusher" to follow heavy freight trains out of Liberty, to push them over the hill beyond the river, and the plaintiff knew that a "pusher" sometimes followed trains out. When the train overtook the boys, they got off the track to let it pass, and after it had passed Graves continued to walk on alongside of the track, but the plaintiff, at a place where the road crossed, stepped again upon the track, walking just inside of the south rail. Graves had got in advance of Hare while the train was passing, and, as the caboose passed him, he looked back, and saw the pusher coming, as he stated, about 75 yards behind Hare. A brakeman on the rear platform of the caboose saw Hare get upon the track, and began to halloo at him, and to motion to him, trying to attract his attention to the "pusher" that was following; but the boy did not understand the brakeman at first, became confused, and stopped, looking directly towards the brakeman. At last he realized his situation, and attempted to get out of the way, but it was too late, and his foot was caught, and so mashed that it had to be amputated. There was evidence that the train and "pusher" were running at the rate of 10 or 15 miles an hour, but the brakeman testified that they were slowing up for the bridge, and were running 5 or 6 miles an hour. He also testified that the "pusher"

was about 50 yards behind the train when the boy was struck. The evidence was somewhat conflicting as to what the distance was at which the "pusher" was following the train. Graves fixes the distance at about 150 yards, others at much less. Plaintiff got upon the track without looking or watching for the engine, which could have been seen easily if he had looked, because the track was straight, and the view was unobstructed. He was on the left side, within a foot of the south rail of the track. The place of the fireman on the engine is on the left side, and that of the engineer is on the right. There is no evidence to show that the bell on the engine was being rung or the whistle blown as the engine approached the crossing, but, on the contrary, witnesses testified that they did not hear either. From the evidence it clearly appears that the accident would not have occurred but for the negligence of the plaintiff himself in stepping upon the track in front of the approaching engine. He exercised no precaution whatever. Without looking around, or stopping to listen, or reflecting a moment, as soon as the train passed, he stepped again upon the side of the track, and continued his way along the track, regardless of the fact that he knew that the "pusher" sometimes went out with freight trains to push them over the hill. When the brakeman commenced hallooing and motioning at him, he stopped still, and continued to look in the opposite direction from the approaching engine. Going upon the track without looking or listening was of itself negligence, but when it is considered that he knew that the "pusher" sometimes followed outgoing trains, an utter absence of care on his part is manifest. The failure to ring the bell or blow the whistle did not relieve plaintiff from the exercise of care in going upon the track, and, but for his going upon the track in front of the approaching engine, which at the time was within a short distance of him, the accident would not have occurred, and the plaintiff would not have been injured.

It will not do to speculate upon what might have happened if the bell had been rung or the whistle blown, because the duties of both plaintiff and defendant at the crossing were reciprocal; and, while plaintiff did not forfeit all right to protection by going on the track as he did, still it was incumbent on him to show that the accident could have been avoided by the defendant. That plaintiff became confused by the hallooing and signals of the brakeman, and stopped, and stood upon the track, does not render the defendant liable to him for an injury which could not have occurred but for his own neglect. The brakeman saw the danger that threatened the plaintiff, and it was his duty to warn him of it, and, although the warning was misunderstood, and the plaintiff became confused and stopped, and the act that was well meant possibly

contributed to the injury, still it was an unfortunate circumstance, for which no one could be held responsible, and could not affect the question of plaintiff's negligence. The most that could be contended for this circumstance would be that the engineer in charge of the "pusher" might have become aware of the situation of the plaintiff, and could have avoided the collision; but it is not shown that the engineer and fireman knew, or by the exercise of proper care could have known, of the confused condition of the plaintiff's mind, or, if they had become aware of it, that they could have stopped the engine in time after they did become aware of it to have prevented the injury. The engine was within a short distance of plaintiff when he first stepped upon the track, and the engineer had the right to assume that he would get off in time to avoid the injury, whether he was crossing the track or walking along the same, and, traveling even at the rate of five or six miles an hour, it is hardly probable that the engineer could have seen the plaintiff, become aware of the fact of his condition of mind, and stopped the engine in time to have avoided the accident. Being negligently upon the track, it would devolve upon the plaintiff, in order to entitle him to recover, to show that, although his act contributed to the injury, still the more direct cause of it was the failure of the defendant to avoid it when it ought to have done so. This we think he has failed to do. Instead of fixing liability upon the defendant, the evidence shows that but for the negligence of plaintiff the accident would not have occurred, and fails to show that it could have been avoided by the performance of any duty that devolved upon the defendant or its servants.

We have considered this case in the light of the reciprocal duties devolving upon the plaintiff and defendant at a public crossing on a railroad track, and find that the defendant is not liable for the injuries sustained by the plaintiff; but it is doubtful if, under the facts, the plaintiff was not a trespasser upon the track of defendant, since he was not upon it for the purpose of crossing, but was using it as a highway. If he had gone upon the track for the purpose of crossing, it is almost certain that he would have crossed safely, because it would not have been necessary for the brakeman to have warned him, or, if the brakeman had attempted to warn him, it is not likely that he would have been attracted by the attempt, and stopped on the track. If upon the track for the purpose of crossing, it would have been plaintiff's duty to have gone directly across, and not to have stopped or changed his course and walked along it.

We do not deem it necessary to notice the remaining assignments of error presented in the brief of appellant's counsel. The judgment of the court below will be reversed, and the cause remanded.

TEXAS MEXICAN RY. CO. v. CAHILL.
(Court of Civil Appeals of Texas. June 8, 1893.)

AMENDING APPEAL BOND.

Act April 13, 1892, (organizing the court of civil appeals,) § 33, provides that where there is a defect "in any appeal or writ of error bond, on motion to dismiss the same for such defect," the court may allow a new bond to be filed. Rules Ct. Civ. App. 8 (20 S. W. Rep. vii.) provides that all motions relating to informalities in bringing a case to the court shall be filed and entered in the motion docket on or before the Tuesday next before the day on which the case is subject to be called for submission, otherwise the ground of objection shall be waived; and such filing and docketing will be sufficient notice of the motion. Held that, where the motion to dismiss the appeal because of a defective bond is entered at the proper time, to entitle the appellant to file a new bond, the same should be presented before the hearing of the motion.

Appeal from district court, Nueces county. Action by Johanna Cahill against the Texas Mexican Railway Company. Plaintiff had judgment, and defendant appealed. The appeal was dismissed because of defects in the appeal bond, and defendant now moves that the case be reinstated. Motion granted.

Thos. W. Dodd and G. R. Scott, for appellant. Henderson & Henderson, for appellee.

PER CURIAM. At a former day of this term the court sustained the motion of the appellee to dismiss the appeal in this cause, for the reason that no sufficient appeal bond was filed in the court below. On motion for rehearing the appellant has presented a new appeal bond, conditioned as required by the statute, and asks that it be received and filed, and the case reinstated.

Section 39 of "An act to organize the courts of civil appeals, to define their jurisdiction and powers, and to prescribe the mode of procedure therein," approved April 13, 1892, provides: "Where there is a defect of substance or form in any appeal or writ of error bond, on motion to dismiss the same for such defect, the court may allow the same to be amended by filing in said court of civil appeals a new bond on such terms as the court may prescribe." Cases filed in the court of civil appeals must be heard and decided in the order in which they are filed, except as provided by the law organizing the court, and for that purpose must be set down for hearing, and the parties notified of the time for which they are set. Sections 23, 28. All motions relating to informalities in the manner of bringing a case into the court shall be filed and entered by the clerk in the motion docket on or before the Tuesday next before the day on which such case is subject to be called for submission, otherwise the ground of objection shall be considered as waived, if it can be waived by the party. Such filing and docketing will be sufficient notice of the motion. Rules Ct. Civil App. 8, 84 Tex. 698, 20 S. W. Rep. vii. This cause was set down

for hearing on Tuesday, the 11th day of May, 1893, and the attorneys for both parties were notified of the fact, as required by law. The notice to dismiss the appeal on account of the defective appeal bond was pending on Tuesday next preceeding that day. Appellant should have taken notice of the pending motion, and, before it had been submitted, should have presented a new bond, so that the submission of the case should not be delayed.

We have indicated what our construction of the law is so that parties may adapt themselves to the practice, and the business of the court may not be delayed by the offer of such bonds on motion for rehearing after taking the chances of the motion. In view of the circumstances of this case, the rehearing will be granted, and the case will be reinstated on filing of the bond, but the costs of the motion to dismiss and for rehearing and the filing of the new bond will be taxed against the appellant.

HOUSTON WATERWORKS CO. v. HARRIS.

(Court of Civil Appeals of Texas. June 1, 1893.)

CONDUCT OF TRIAL—REMARKS OF COUNSEL.

In an action against a water company for damages from a failure to supply sufficient water to operate plaintiff's machinery, pursuant to contract, in his closing argument plaintiff's counsel remarked that "I have not told you of the great privileges the city has given it, [defendant.] I have not said anything about its not having an effective hydrant in this whole city. I have not told you that this corporation has a place up here on the street where it retails water by the barrel." This being excepted to, counsel remarked that he knew it was a tender spot he had touched, and that there were many other sore spots; that he "expected the galled jade to wince when its wethers were sore." *Held*, that the failure of the court to reprimand counsel for the remarks, and instruct the jury to disregard the same, was reversible error.

Appeal from district court, Harris county; S. H. Brashead, Judge.

Action by Jonathan Harris against the Houston Waterworks Company for breach of contract. Plaintiff had judgment, from which, and an order denying a new trial, defendant appeals. Reversed.

E. P. Hamblen, for appellant. W. P. Hamblen, for appellee.

PLEASANTS, J. On the 20th of November, 1890, appellee brought suit against appellant for the recovery of damages upon an alleged breach of contract. The petition averred that plaintiff contracted with J. O. League on the 8th of April, 1890, to sink for him in the city of Houston an artesian well, and that on the 10th of said month appellant undertook and agreed to furnish plaintiff with a continuous flow of water, to enable him to sink said well for said

League, and that appellant failed to supply a continuous flow of water, as it had agreed and promised to do, and that by reason thereof plaintiff's pipes became fastened in the well, and he had to abandon the work, and that he again attempted to sink said well in another place, and that he again failed in the effort to sink the well, and that his failure resulted from appellant's breach of contract to supply him with a continuous flow of water, such flow being necessary to prevent the pipes becoming fastened in the bore; that, by the failure of appellant to comply with his agreement aforesaid, plaintiff was compelled to employ his machinery and the labor necessary to operate it from April 9 to September 6, 1890, and that he lost a great quantity of piping and \$1,000 in profits, and that his entire damages and losses aggregated \$7,479. Defendant, the appellant, denied the allegations of plaintiff's petition, and averred that plaintiff well knew the capacity of defendant's water main, and made the connection himself, and selected the size of the pipe he used, and, if the pipe selected was not sufficient, plaintiff should have put in a larger one; that defendant had nothing to do with the selection of the pipe used by plaintiff, and charged that plaintiff had furnished him a full supply of water, and that his failure to sink the well resulted from his incapacity or the insufficiency of his machinery. The answer further alleged that more than two months after plaintiff had been engaged in sinking said well, and using defendant's water, plaintiff and defendant had a settlement of all matters growing out of defendant's contract to supply water to plaintiff, and plaintiff gave defendant his due bill for \$75 in payment of water furnished to date of settlement. After the institution of this suit the appellant sued appellee in the county court of Harris county on his due bill executed as aforesaid in payment of water furnished to its date, and upon an account for water subsequently furnished him. Appellee defended that suit, and set up in his answer, as appellant charges, the same allegations as those upon which he bases his cause of action in this suit, and the judgment rendered in said county court upon final trial therein appellant pleaded in bar of this suit. Appellee recovered judgment for \$200.

Appellant makes three assignments of error. The first of these is, in substance, that the court compelled him to accept, after his peremptory challenges had been exhausted, a juror not acceptable to him, and whom he had challenged for cause. The juror was one of the jury selected by the jury commissioners to serve for one or more of the weeks of the January term of the court, and was, with others, who had also been selected by said commissioners for the first or subsequent weeks of the term, regularly impaneled and sworn to

serve for the week in which this cause was tried. This, and the other five jurors, peremptorily challenged by appellant, had each served 18 days during the term. The question presented in this assignment is one which seems never to have been directly decided by our supreme court; at least, counsel have not cited any such decision, and we do not recall any. But the court of appeals have in several cases held that the service of a juror for one week during a term of the court is not a cause for challenge, when the person who had so served is presented as a juror at a subsequent time during the same term of the court. Vide *Myers v. State*, 7 Tex. App. 640; *Tuttle v. State*, 6 Tex. App. 556; *Garcia v. State*, 5 Tex. App. 337; and *Welsh v. State*, 3 Tex. App. 414. The first three of the above cases cited were capital cases. The last (*Welsh v. State*) was a case of theft of cattle, and in that case the question presented in the defendant's bill of exceptions was, did previous service upon the jury in the county court for a less time than one week constitute a cause of challenge to such person, when presented as a juror in the district court within three months after his service in the county court? The court from which the appeal came held that such service as a juror must be to constitute it a cause for challenge for a full week, and the court of appeals held the ruling of the lower court to be correct, and the judge delivering the opinion said that the court were of opinion that the word "preceding" in the act under consideration refers to the term of the court at which the question arises. The question presented by the bill of exceptions did not require any expression from the court as to the meaning of the term "preceding," but in each of the succeeding cases cited above the court of appeals refers to the decision in *Welsh v. State* as having determined that the preceding service referred to in the act applies only to service rendered previous to the commencement of the term of the court at which the question arises, and that a previous service for one week during the then term of the court in which the question arises is not cause of challenge. In the case of *Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. Rep. 665, the appellant was compelled, over his protest, after his challenges had been exhausted, to accept a juror who had served a week during that term of the court, and in that court at and in which the case was tried. But the question presented upon the appeal was not the precise one presented here. With the decisions of the cases cited, sustaining the ruling of the lower court, we cannot say that there was error in its refusal to allow appellant's challenge; but, in the absence of the authorities cited, the writer should be disposed to hold that a week of previous service as a juror, during the same term of the court as that in which

the question arises, is a disqualification, and necessarily a good cause for challenge.

The appellant's second and third assignments will be considered together. The second contains the following quotations from the defendant's bill of exceptions, taken upon the trial of the cause: "Counsel for defendant tells you that I may try to prejudice you. I have not told you of the great privileges the city has given to it. I have not said anything about its not having an effective hydrant in this whole city. I have not told you that this corporation has a place up here on the street where it retails water by the barrel." Here counsel for defendant excepted to the argument used by plaintiff's attorney, when the latter counsel, continuing his speech, remarked that if his remarks were excepted to, he would not pursue the subject further. He said he knew that it was a tender spot he had touched, and that there were many other sore spots; some he had not referred to were very tender spots; that he had "expected the galled jade to wince when its wethers were sore." This language was used in the closing speech of plaintiff's counsel, and it was the plain duty of the judge presiding, when appealed to by defendant's counsel, to have reprimanded counsel for its use, and to have instructed the jury to disregard his inflammatory appeal to their prejudices. The third assignment is that the court should have granted defendant a new trial, because the verdict and judgment are against the weight of the evidence. We refrain from expressing an opinion as to the preponderance of the evidence, but we are of the opinion that the evidence for the defendant, considered with reference to the appeal made by the counsel for the appellee to the jury in his closing argument, most clearly entitled appellant to a new trial, and for the error of the court in refusing to award a new trial the cause is reversed and remanded.

TEXAS & P. RY. CO. v. CUMPSTON et al.

(Court of Civil Appeals of Texas. June 1, 1893.)

RAILROAD COMPANIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DEATH OF EMPLOYEE — PROXIMATE CAUSE — FELLOW SERVANT.

1. Where cars, standing on tracks used exclusively for storage of cars needing repair, are moved by car repairers so close to the switch that one of them is struck by a switch engine properly running on the adjacent track, thereby driving such cars against, and killing, one of such car repairers while at work, the negligence of the repairers is the proximate cause of such death, and the railroad company is not liable therefor.

2. Deceased and the engineer of the switch engine were fellow servants, and the company is not liable even if the accident was caused by the negligence of such engineer.

3. Where, in an action against the railroad company for the death of such employee, it is not shown that any rule for the protection of

defendant's employes while at work on cars standing on such tracks could have protected deceased, the absence of rules for such protection is immaterial.

4. The negligence of the car repairers cannot be excused on account of the absence of clearing posts at the switch.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Action by Mary A. Cumpston and others against the Texas & Pacific Railway Company for the death of Charles D. Cumpston, caused by defendant's negligence. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendant appeals. Reversed.

F. H. Prendergast, for appellant. M. R. Geer, L. P. Wilson, and Pope & Lone, for appellees.

GARRETT, C. J. Charles D. Cumpston, an employe of the Texas & Pacific Railway Company, was killed July 1, 1890, in the yard of the company at Marshall, while repairing a car on the "table" track in said yard, by being caught between the car upon which he was at work, and another car, upon the same track, propelled against it by a blow from a switch engine, which was being run along another track, called the "Lead" track; the cause of the collision being that the car which was struck by the engine stood too near the junction of the lead track and the table track, which was a side track going out from the lead track. His surviving wife, Mary Cumpston, and her children, and the father of deceased, brought this suit against the railway company for damages. The defense is that the deceased and his fellow workmen had moved the cars they were sent to repair, and placed them so near the lead track that one of them was struck by the passing engine, and moved and knocked against the car upon which deceased was at work, and thereby caused the death of Cumpston. Defendant's yard at Marshall contained a number of tracks, four of which, including the table track, were used as storage tracks, to place cars upon that were needing repairs, some of which were sent for repairs to the shops, while others were repaired as they stood on the tracks. These tracks were in charge of the foreman of the shops, who controlled the right of the switchmen to go upon them, and, before putting cars upon them, it was the business of the switchmen to see that there was no one upon them. The lead track belonged to the transportation department, and was used to convey cars from one part of the yard to another, while the table track was used to convey cars from the lead track to the shop, to be repaired. The switch engine would come in on the lead track, but did not go on the table track, unless directed to do so by some one in the car department. The four tracks mentioned were constantly used for repairing

On the morning of the accident the foreman of the shops sent Cumpston and two other men, named Burnett and Boyett, to repair some cars that were standing on the table track. When the workmen got to the place they found the cars standing close together, and it was necessary to separate them in order to work on them. There were eight or nine cars on the track, which extended east and west. They moved two of the cars next to the lead track three or four feet to the east, and left them so that the car nearest to the lead track stood too close to it. Boyett went upon top of the cars to fix the brake, and Cumpston and Burnett pushed the cars. Boyett came down, and put a piece of timber under the southeast corner of the car nearest the track, to keep it from moving, and looked to see if they were clear of the lead track, and thought they were. Cumpston went to work on the east end of the third car, fixing the drawhead. The switch engine came up the lead track, and the tender struck the end of the car next to it, on the table track, with such force that it propelled the second car against the third, and caught Cumpston between them, and killed him. The engine was upon the lead track, and was not going upon the table track, but struck the car because it had been left too close to the lead track. Defendant had no rules for the protection of the men at work on the storage tracks, and there were no clearing posts at the junction of the tracks, to indicate how close a car on one track might be placed to another. There was evidence admitted, on the trial of the case, tending to show that the tender to the engine was wider than the engine, and that it was owing to the negligence of the defendant in having a tender wider than the engine that the car was struck. But there was no such allegation of negligence in the petition, and the court correctly instructed the jury to disregard the evidence, and our consideration of the case here will be had without regard to the evidence that the tender was wider than the engine.

Defendant requested a special instruction, which was refused by the court, that the undisputed evidence showed that the deceased and his fellow workmen were guilty of negligence in moving the car where the engine struck it, and killed Cumpston, and to return a verdict for the defendant. It also requested instructions to present the proposition that if the accident was the result of the act of Cumpston and his fellow servants, in placing the car so close to the lead track that it was struck by the engine going along that track, the plaintiffs could not recover, although they may not have been negligent in leaving the car in such position, or whether or not Cumpston knew of the danger in leaving the cars where he and his fellow workmen placed them. The evidence shows that the accident was the result of the neg-

ligence of Cumpston, and his fellow servants, in leaving the car too close to the lead track. This cannot be excused on account of the absence of clearing posts, because, when they moved the cars, they knew the clearing posts were not there, and should have been careful not to place the car too close to the track. The engineer of the switch engine was also a fellow servant, and if he was negligent in failing to avoid the collision the defendant would not be liable for the damage resulting therefrom, any more than it would be for the acts of the servants who helped Cumpston to move the cars. The evidence showed, however, that the deceased and his fellow servants were negligent in placing the car too near the lead track, and that the accident which resulted in the death of Cumpston was the direct and proximate result of such negligence. The first requested instruction should have been given, and, failing in that, the court should have set aside the verdict of the jury, and granted a new trial.

There is nothing in the evidence that no rule was adopted by the defendant for the protection of its employes at work upon the storage tracks, because it is not shown that any rule could have protected the deceased. The engine was not upon the table track, but was continuing along the lead track, when it struck the car. A flag put upon the end of the car would have only been notice not to go in upon the track, and, as there was no intention to go upon it, it would not have changed the result. But it seems that the defendant did have at least two rules in force, which were that no switchman was allowed to go upon the storage tracks without the permission of some one in the car department, and that it was the business of the switchman to see that no one was on these tracks, before putting cars upon them.

We deem it unnecessary to discuss the second and third errors assigned. The judgment will be reversed, and the cause remanded.

SMITH v. ADAMS et al.

(Court of Civil Appeals of Texas. May 18, 1893.)

TRESPASS TO TRY TITLE — UNRECORDED DEED — INNOCENT PURCHASERS — NOTICE TO AGENT AND PARTNER — DEED OF PARTITION — DELIVERY — WHAT CONSTITUTES — EVIDENCE — INSTRUCTIONS — HARMLESS ERROR.

1. Where a person purchases land of heirs for himself and another jointly, he is not only the partner, but the agent also, of such other purchaser, and the latter is charged with the knowledge of and notice to the former of an unrecorded deed by the ancestor of such heirs.

2. The facts that such unrecorded deed was not found until after the commencement of an action of trespass to try title by the true owners against such purchasers, and that an inquiry pursued by the latter would not have resulted in its discovery, do not relieve them of the obligation to take notice of the status and exact chain of title as claimed by plaintiffs, which

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such inquiry would have enabled them to ascertain.

3. The facts that such unrecorded deed was a deed of partition between such ancestor and plaintiffs' grantors, and that it was found among the papers of deceased's estate, do not raise a presumption against the delivery of the deed, since deceased was as much entitled to its possession as such grantors.

4. Though such deed was neither witnessed nor acknowledged, it was an acknowledgment that deceased held the land in trust for himself and the other parties thereto, and was a good partition thereof.

5. In trespass to try title by the true owners against such purchasers, the admission in evidence of a judgment in an action between plaintiffs and third parties, which recited plaintiffs' title to such land, was immaterial error, since the uncontradicted evidence, independently of such judgment, established notice to defendants.

6. Where, under the uncontradicted evidence, no other judgment could have been rendered than that which was rendered, it is immaterial whether or not errors were committed by the giving and refusal of instructions.

Appeal from district court, Brazoria county; William H. Burkhart, Judge.

Action of trespass to try title by H. B. Adams and E. D. L. Wicks against Travis L. Smith and W. S. Brooks. Plaintiffs and Brooks settled before judgment. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendant Smith appeals. Affirmed.

A. R. Masterson, for appellant. Eugene J. Wilson, for appellees.

GARRETT, C. J. Appellees brought this suit in the district court of Brazoria county in trespass to try title to recover about 2,000 acres of land, a part of the Francis Moore head right, west of Chocolate bayou, in said county. Defendant pleaded not guilty, and that he was purchaser of the land in good faith, without notice of plaintiffs' claim. Trial was had by jury, and verdict and judgment were rendered in favor of the plaintiffs.

Conclusions of Fact.

(1) R. J. Towns is admitted to be common source. (2) Plaintiffs' title is derived as follows: First. Deed of partition dated June 12, 1844, between John W. Harris, E. M. Pease, and R. J. Towns, of lands owned by them jointly, in which Towns took 600 acres out of another grant, and Harris and Pease took the land described in plaintiffs' petition, that portion of the Francis Moore league lying west of Chocolate bayou, containing 2,000 acres, more or less; Pease getting the upper half of the tract, and Harris getting the lower half. This deed was not witnessed by any one, and was not acknowledged by the grantors. It was found after the institution of this suit among the papers of R. J. Towns, deceased. It was recorded May 26, 1891. Second. Deed from John W. Harris to E. M. Pease, dated December 7, 1852, witnessed by Robert H. Chline and Chesley Stringfellow. It is not acknowledged by Harris, nor proven

up by either of the witnesses, but, since the institution of this suit, has been proven for record and recorded. It is on the same sheet of paper with the partition deed. Third. Deed from E. M. Pease to Asa Mitchell, for the 2,000 acres above mentioned. It is dated November 30, 1847, and is a quitclaim deed, in consideration of \$500. It was recorded November 30, 1847. Fourth. Will of Asa Mitchell, probated in Bexar county, December 28, 1865, by which R. H. Beldin, W. J. Joyce, and Hiram Mitchell were appointed independent executors. Fifth. Partition deed from executors of Asa Mitchell to Wallace Mitchell, dated July 31, 1867, recorded in records Brazoria county, October 9, 1872, conveying to him all of the 2,000-acre tract. Sixth. Deed from Wallace Mitchell to H. B. Adams and E. D. L. Wicks, dated June 14, 1875, recorded in record of deeds Brazoria county, Book N, p. 702; date of record not shown. (3) Plaintiffs also introduced in evidence a judgment of the district court of Brazoria county in the suit of Heirs of Francis Moore vs. Adams & Wicks, rendered January 14, 1887, for the land in controversy, which contained a recital of the title of Adams & Wicks from Francis Moore down to them. (4) The defendant T. L. Smith purchased the land from the heirs of R. J. Towns, who conveyed to him by deed without warranty, date July 20, 1889, for a consideration of \$300. His deed was recorded August 30, 1889. (5) Plaintiffs were the real owners of the land by consecutive chain of title from R. J. Towns down to them. (6) Defendant bought without actual notice of plaintiffs' title, or that the land had ever been conveyed by Towns; but his purchase was for himself and one W. S. Brooks jointly, and was made through said Brooks. (7) Brooks, who had learned that there was no deed of record to Towns for the land, mentioned the matter to Eugene J. Wilson. The latter told him of plaintiffs' claim; that they owned the Towns title; and that Brooks could find out the exact status of the title by applying to Adams & Wicks. He advised Brooks not to buy. After this Brooks entered into an agreement with the defendant by which the latter should furnish the purchase money, \$300, and that Brooks should buy the land for their joint account. (8) Brooks conducted the negotiations through Fred Carleton, the husband of one of the heirs, and, during the time of the negotiations which were conducted in behalf of himself and Smith, he knew of the claim of plaintiffs, and told Carleton, as an inducement why he should sell for \$300, that he had been told and was satisfied that there was in existence an unrecorded deed from Towns to some one, and that it would be useless to try to recover the land. In making these statements he was acting under the agreement previously made between him and the defendant. (9) As before stated, the deed was made to T. L. Smith for the land, but it was

understood between Smith and Brooks that the latter owned a half interest. Brooks did not tell Smith what he had learned from Wilson. (10) Since this suit was brought, the defendant Smith, at the direction of Brooks, who compromised with plaintiffs, conveyed to them Brooks' one-half interest in the land

Conclusions of Law.

Brooks was not only the partner of the defendant in the purchase of the title of the Towns heirs to the land, but was also his agent in negotiating for the purchase thereof. The evidence is uncontradicted, and comes from Brooks himself, that at the time he was conducting the negotiations he was mindful of the facts which he had learned from Wilson respecting the claim of plaintiffs, and made use of the same in order to cheapen the price for the title. It is very clear that Smith is affected with the notice that Brooks had.

But it is contended that, if Brooks had pursued an inquiry in accordance with the notice of facts in his possession, it would not have resulted in the discovery of a deed from Towns, because that deed was not found until after the institution of this suit. By such inquiry he could have ascertained the exact chain of title as claimed by the plaintiffs; and because they may have been unable to produce the deed from Towns, or show its record, defendant will not be allowed to speculate upon their present inability to do so. There was a sufficient knowledge of facts to require him to take notice of the state of the title.

Appellant objected to the admission of the judgment in the case of Heirs of Moore vs. Adams & Wicks, and has assigned the same as error. Such error was immaterial, however, because, from the uncontradicted evidence, notice to the defendant was shown independently of the judgment. We may infer also from the record that there was an agreement by which the judgment was admitted without objection upon the question of notice.

Portions of the charge of the court are complained of, as well as the refusal of certain instructions asked by the defendant. Since it appears from the uncontradicted evidence that no other judgment could have been rendered in the case, it becomes immaterial whether or not there was error in this respect; yet we are of the opinion that the charge was quite as favorable to the defendant as he could have asked. While the deed of partition between Towns, Harris, and Pease was neither witnessed nor acknowledged by the parties thereto, still it was an acknowledgment that Towns held the lands in trust for himself and Harris and Pease, and was a good partition thereof. It vested an equitable title in the several parties for their respective interests, sufficient to support the plaintiffs' cause of action; and, although it was found among the papers of

Towns' estate, there could be no presumption against the delivery of the instrument, because Towns was entitled to the possession thereof as much as either Harris or Pease. We find no error in the judgment of the court below, and it will be affirmed.

PUBLIC LEDGER CO. v. CITY OF MEMPHIS.

(Supreme Court of Tennessee. June 30, 1893.)

MUNICIPAL CORPORATIONS—CONTRACT FOR PUBLIC PRINTING—NECESSITY OF PREVIOUS ADVERTISEMENT—VOID CONTRACT—WHEN ENJOINED.

1. A city will not be enjoined, at the instance of a taxpayer, from entering into a contract awarded by it which will be void when executed because it was awarded without previous advertisement for bids, as required by law and a resolution of such city.

2. The act creating the taxing district of Memphis provides that the fire and police commissioners shall in every case, before entering into any contract for any purpose, advertise for proposals for the work to be done, material to be furnished, or services to be performed, and award the contract, if at all, to the lowest bidder, etc. *Held*, that such commissioners could designate some newspaper in which the city would insert its advertisements, notices, etc., for a year, and agree with such proprietor that the printing thus done should be at a stated price per line, square, or column, but in no event exceed by a specified sum the cost of the preceding year, without previous advertisement, and the reception of bids.

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Action by the Public Ledger Company against the city of Memphis to enjoin defendant from entering into a contract with the Scimitar Publishing Company for the public printing of the city for one year. From a judgment dismissing its bill, plaintiff appeals. *Affirmed*.

Thos. M. Scruggs, for appellant. S. P. Walker, for appellee.

SNODGRASS, J. The bill in this cause shows that the board of fire and police commissioners of Memphis "awarded a contract to do the public printing of the city (advertising, publishing ordinances, etc.) to the Scimitar Publishing Company for one year at a price not to exceed by more than \$450 the price paid for public printing the year preceding, and were about to enter into the contract so awarded, and would do so unless enjoined;" that complainant was a property owner and taxpayer of the city, and had the right to enjoin the execution of such contract as illegal. The illegality of the contract was predicated upon alleged violation of the following provision in the act creating the taxing district of Memphis: "The said fire and police commissioners shall in every case before entering into any contract for any purpose, advertise daily for one week or more, for such proposals for the work to be done, the material to be furnished or the service to be performed, and shall open all

the bids on the day named in the advertisement in the presence of a quorum of not less than three of the members of said board of public works, and shall enter such bids with the names of the bidders, in a book to be kept for that purpose, which book shall at all times be open to the inspection of the taxpayers and every bid shall remain open for at least one week for canvass and discussion after the opening before any contract shall be awarded upon it; and after that time, the award shall be made, if at all to the lowest responsible bidder who shall in all cases be required to give ample bond and security for its performance—the bond and security to be approved by the supervisors of public works and fire and police commissioners, who sign the contract." It is averred that the defendant advertised for bids as follows: "Sealed proposals will be received by us until Thursday, March 10, 1892, at 12 o'clock M., for the following work to be done, service to be rendered, or materials to be furnished the city of Memphis, Shelby county, Tenn., for the current year 1892, viz.: For publishing in a daily paper all orders, ordinances, notices, and public advertisements of the city of Memphis, as they may be passed or ordered. All bids must be labeled 'Bids for Public Printing,' and must be accompanied by a certified check on some solvent bank for the sum of (\$250) two hundred and fifty dollars, which check will be returned to the bidder after the award of contract and execution of same. All bids for public printing to be in accordance with the conditions of the resolution passed by the legislative council on February 18, 1892, which is as follows: 'That in advertising for proposals from daily newspapers for making publications of notice during the year 1892 the secretary be instructed to require from publishers a sworn statement of paid circulation by carriers in the city, week to week, for three months ending February 1, 1892; said statements to be subject to verification by other publishers bidding if desired by this council; the contract to be awarded to the newspaper showing the largest daily average on this basis for the period mentioned; the rate to be paid to be the same as that fixed by law for the publication of regular legal notices, such as are published by the various courts of the state.' The board reserves the right to reject any and all bids. W. L. Olapp, President. Attest: John J. Shea, Secretary." Complainant states that no advertisement was made for bids under this provision of the law, other than that set out; that such advertisement is not in accordance with the statute, and no contract could be properly made under it, and none was awarded under it, but the legislative council of defendant city, recognizing this, repealed the resolution embodied in the same, and thereupon awarded the contract for public printing without any advertise-

ment whatsoever, and in violation of law. Complainant states that in response to said publication the Scimitar Publishing Company filed its affidavit as to circulation; that no other newspaper filed any affidavit or made any statement as to its circulation; that thereupon the defendant by vote repealed the resolution of February 18, 1892, hereinbefore set out, and awarded the contract for public printing to the Scimitar Publishing Company, as before stated. The injunction was granted, but on motion it was dissolved, and the bill dismissed. Complainant appealed, and assigns errors.

The decree is correct. Not denying the right of complainant, as a taxpayer, to enjoin defendant from the execution of an illegal contract if it would or might result in irreparable injury, (*Lynn v. Polk*, 8 Lea, 121,) no such case is presented here as calls for the intervention of a court of equity by the extraordinary process of injunction. The contract, as alleged, could at most be void, and not enforceable against the city; and in no event could complainant, as a taxpayer, be therefore injured or affected. The remedy by injunction to prevent municipal corporate action is one not lightly to be applied, or in matters not immediately affecting or to affect the complaining taxpayer. If the matter complained of is one merely of simple contract of no serious moment, and which may be defeated by resistance to its enforcement, even by the body making it, there is no sufficient ground for use of the writ at the instance of the taxpayer. In this case, too, there is no manifestly illegal contract shown. The terms in which that contract was made are not set forth. It does not appear that the city authorities have agreed to pay any large or small sum in gross for a whole year's work. For aught that appears here, the board may have merely designated the Scimitar Publishing Company as the newspaper owner in whose publication it proposed to insert its advertisements, notices, etc., for one year, and agreed or contracted with them that printing thus done should be at so much per line, square, or column, but in no event to exceed by \$450 the cost of the preceding year. The effect of all this or other equivalent form of contract would amount to no more than designating a paper in which these things would be published, and limiting the price for the work when done. Against such an arrangement as this the statute is not directed. Each advertisement for bids must necessarily be made without a previous advertisement for terms, for the contracts which do require preliminary advertisement cannot be contracts for such advertisement. Therefore, as to all advertisements which the city is to make under this provision, it is manifest that the board had the legal authority to contract for them. As the legal duty of making other publications, as notices and

ordinances, devolves upon it also, it is equally clear that it might publish each one without preliminary advertisement for bids upon its printing. The terms used in reference to contracts included in a proper construction of the act forbid the idea that reference was had to each item of printing which the city might need. The delay of such a proceeding is not contemplated, nor the expense, for often the advertisement for bids would be as expensive as the advertisement of a notice or ordinance for the printing of which bids were solicited. These things were not in contemplation of the lawmakers in the elaborate and important provisions made to restrain the power of the board to make contracts. The contracts referred to were such as would bear some reasonable proportion to the care taken to prevent their execution except upon terms enacted. If the city could contract for each advertisement and each notice and each ordinance or separate piece of printing without advertising for bids, it could, for the same reason, designate one newspaper to publish all, and that without advertisement. With the policy of doing this upon any particular basis, as upon certificate of circulation or other ground, the courts have nothing to do. Circulation might be a factor in the value of the publication which should be taken into consideration in estimating the good to be derived from it, but we do not undertake to say that upon this or any other theory the board could absolutely bind the city by a contract for a stipulated sum to be paid in gross for a year's work, or that it could bind the city at all by such contract, or any other of that duration and importance, except in the manner provided in the law quoted, after such advertisement as therein contemplated. All we do undertake to decide is that, as each item of the work might have been contracted for separately without advertising, and the paper in which they were to be published might have been designated in advance, or at time of each publication, by the board, equity would not enjoin any contract it had made which did not affirmatively appear to have effected other or more than this, even where there was a necessity for its intervention at the instance of a taxpayer, not here existing.

The decree is affirmed, with cost.

MCNEILL v. STATE.

(Supreme Court of Tennessee. June 30, 1893.)

INTOXICATING LIQUORS — KEEPING BAR OPEN ON SUNDAY.

Acts 1889, c. 31, makes it unlawful to "keep open on Sunday any place where such [intoxicating] liquors were sold, * * * provided that the provisions of this act shall not apply to druggists selling on the prescription of a practicing physician." *Held* that, where a druggist also holds a tippler's license, and keeps his bar in the same room where his drugs

are kept, so that it cannot be closed without closing the drug room, the latter must be closed on Sunday.

Appeal from circuit court, Henry county, Swiggot, Judge.

T. C. McNeill was convicted of keeping his barroom open on Sunday, and appeals. Affirmed.

Sweeny & Wend and Lamb & Farabaugh, for appellant. The Attorney General, for the State.

BRIGHT, Special Judge. T. C. McNeill was presented for keeping open on Sunday his business house, a place wherein he followed the business of dealing in and selling liquors. He was convicted and sentenced by the court to pay a fine of one dollar and the costs of the case, and has appealed to this court. The facts are briefly as follows: The plaintiff in error, McNeill, was a druggist in Paris, Tenn., and, in addition to his drugs, he keeps all sorts of liquors for sale, and sells same by the drink or quantity, and upon the prescription of physicians, and without such prescriptions. He has a retail liquor dealer's license, and does retail and tipple all sorts of liquors. His drugs and liquors are all in the same house and room, and there is nothing that separates the one from the other. The entrance to one is the entrance to both. He kept this house open on Sunday, but sold no liquors; only sold drugs, etc. The presentment is found under Act 1889, c. 31, which is as follows: "Be it enacted by the general assembly of the state of Tennessee, the law of this state prohibiting the sale of liquors on Sunday, as compiled in sections 5671 of Milliken & Vertrees' Compilation, be so amended as to prohibit the sale on Sunday of any malt, vinous, fermented or other intoxicating liquors, or to keep open on Sunday any place where such liquors were sold or dispensed. And any person offending shall be punished as provided in said acts: provided, that the provisions of this act shall not apply to druggists selling on the prescription of a practicing physician: provided, further, that restaurants and eating houses where spirituous, vinous, and malt liquors are sold under the license law of the state on week days, shall be allowed to conduct their eating department on Sunday, but the barroom shall be closed, and no drinks of any kind sold."

The facts of this case show that McNeill has a saloon in the same room where his drugs are kept; and that he sells his liquors, wines, etc., by the drink and in quantities; and that he has the tippler's or retail liquor dealer's license for this purpose; and that he does not sell his liquors, etc., alone on the prescription of a practicing physician, but sells with or without said prescription. It is true that, under the law (Act 1889, c. 31) under which the presentment in this case is found, an exception is made in favor of druggists who sell liquors on

the prescription of physicians; and if the defendant, McNeill, kept liquors only to sell on prescription, or as a medicine, or to compound medicines with, he would not be required to close his house on Sunday. But this exception does not extend to a druggist who tipples whisky and liquors, etc., generally to any one who applies to buy it, without any prescription, and, if he does so, he must close his house on Sunday. It is manifest that the legislature intended to keep liquor houses closed on Sunday, and did not intend that any person should have the privilege of keeping one open merely by taking out a druggist's or other license; otherwise all saloons could be kept open by merely securing such license, and thus the very object which the statute was intended to promote be not only defeated, but the statute made to subserve an exactly opposite purpose than that for which it was enacted. This is made all the more obvious when we look to the provision made for restaurant and eating-house keepers at a place in which liquors are sold upon condition that—and only upon condition that—the barroom in which the liquors were sold shall be closed.

It was not intended to interfere with the druggist's right to keep his drug store open and sell drugs any more than with theirs. If he kept in connection with it, as they are required to do, a barroom which could be closed, and his other business done, as theirs must be done, without keeping a barroom open; but if he undertook, as in this case, to make a drugroom and barroom one, so that the drugroom could not be kept open without keeping the barroom open, he could keep neither open on Sunday, under the plain terms of the statute, because, in keeping or professing to keep one open, he in fact kept both open.

The druggist who does not tipple or sell without prescription is not affected by the act, and he who attempts to do so could only do it by so separating his barroom from his drugroom that the first may be closed on Sunday, if the latter remains open.

Affirm the judgment.

PETERSON v. REICHMAN.

(Supreme Court of Tennessee. June 29, 1893.)
MARRIED WOMAN—TITLE BOND TO HER PROPERTY—PRIVY ACKNOWLEDGMENT—WHEN NECESSARY.

Where land is conveyed to a married woman "with full power and authority as a feme sole to sell and mortgage, devise by will, or convey in any manner she may see proper," a privy acknowledgment by her is not essential to the validity of a title bond to such land, executed by her and her husband.

Appeal from chancery court, Shelby county; W. D. Bland, Chancellor.

Action by Isabella Peterson, by her next friend, against Henry Reichman to recover

possession of a certain lot. From a judgment for defendant, plaintiff appeals. Affirmed.

L. W. Humes, for appellant. W. W. Goodwin, for appellee.

McALISTER, J. This bill is filed by the next friend of Isabella Peterson, a minor, to recover the possession of a lot in the city of Memphis which formerly belonged to Annie E. Peterson, the mother of the infant complainant. The specific ground of the relief asked is that the said Annie E. Peterson, while a married woman, executed a title bond to this lot, which was also signed by her husband, Nelson Peterson, but without any privy acknowledgment by the wife. The said Annie E. Peterson acquired this lot by purchase from one Minter Parker, who executed to her a warranty deed. The habendum clause of the deed is, viz.: "To have and to hold to the said Annie E. Peterson, her heirs and assigns, forever, and for her sole and separate use, benefit, and behoof, free from the debts, contracts, control, or liability of her present or any future husband, and with full power and authority as a feme sole to sell and mortgage, devise by will, or convey in any manner she may see proper." On the 19th June, 1886, Nelson and his wife, the said Annie E. Peterson, executed an instrument to Nelson Johnson, which, although inartificially drawn, was in reality a bond for title to this land. It commences with the recital that "this document is to show that we, Annie E. Peterson and Nelson Peterson [her husband,] have agreed to sell to Nelson Johnson," describing the lot. The consideration is expressed, and, further on, the instrument recites, viz.: "Now it is understood that should Johnson pay these notes at maturity, we agree to make to him, or as he may direct, a deed to said premises." This instrument is signed by Nelson Peterson and his wife, the said Annie E., but there was no privy examination of the wife, and for this reason it is insisted by complainant's counsel that the instrument is void. In the case of *Jarnigan v. Levisy*, 6 Lea, 400, this court, speaking through Judge Freeman, said, viz.: "We have repeatedly held that the wife could not bind herself by title bond, nor could such an obligation be enforced against her." An examination of this case will show that the land conveyed was a part of the general estate of the married woman, and her conveyance was made without any privy examination. The next case cited is *Wright v. Dufield*, 2 Baxt. 218, in which it is said: "A title bond, though duly executed and certified in every respect, is insufficient to pass the title of a married woman in land. Her title can be divested only by the joint deed of herself and husband, executed in compliance with the forms prescribed by law." This was also a case

in which the land conveyed by title bond was the general estate of the married woman. In the case of *Moseby v. Partee*, 5 Heisk. 30, this court said, viz.: "The next error assigned is that, as M. C. Partee was a married woman when she executed her title bond, her act was a nullity," and that the decree divesting the title out of her was erroneous. This presents the question whether, under the laws of Tennessee, a married woman can enter into a binding contract to convey her lands at a future time, and upon the performance of specific conditions by the other contracting party. The court said: "There is a wide difference between a deed for land and a title bond. The one is the evidence of an executed contract, the other is the evidence of an unexecuted contract; the former is evidence that a sale has been made, the latter that a sale is to be made; the one is a sale, and the other a contract for a sale." It was accordingly held in that case that a married woman cannot bind herself to convey her estate of inheritance by title bond, although her husband joined in the execution of the instrument, and the privy examination of the wife was regularly taken.

None of these cases are to be assimilated to the case at bar, but they are all to be differentiated in this important particular: that here the deed of settlement expressly confers upon the married woman, Mrs. Annie E. Peterson, a technical separate estate, with full power and authority as a feme sole to sell and mortgage, devise by will, or convey, in any manner she may see proper. This distinction was recognized by this court in the case of *Sherman v. Turpin*, 7 Cold. 382. It appeared in that case that a lot in the city of Memphis was by deed conveyed to Christiana B. Turpin, wife of M. D. L. Turpin, to her sole and separate use, and with power to her, at her pleasure, "to sell and convey, devise, or otherwise dispose of the same, in any manner she may see proper, as fully as if she were a feme sole." It was claimed in that case the deed was void, for the reason that it was executed by the married woman alone, without the joinder of her husband and certificate of privy acknowledgment, as required by law in case of the deeds of married women. This court, speaking through Judge Andrews, said, viz.: "A married woman may have, in regard to the disposition of her separate estate in lands, the full powers of a feme sole, if so expressed in the instrument creating the estate. Conveying as a feme sole, under the power conferred by the settlement, her privy examination as a feme covert becomes unnecessary. This necessarily follows, and is so held in England under the statute for the abolition of fines and recoveries." In the case at bar, it will be remembered, the husband signed the deed, but there was no privy examination of the wife. It has been supposed that the case of

Robinson v. Queen, reported in 87 Tenn. 445, 11 S. W. Rep. 38, is in conflict with the views herein expressed. In that case it was held that under the act of 1869-70 a married woman owning a separate estate, where there is no restriction upon her power, is authorized to convey such estate without her husband joining in the deed, but such conveyance would not be valid unless her privy examination is taken before a chancellor or circuit judge, as provided in the second section of said act, carried into the Code, (Mill. & V.) § 3347. It will be observed in that case the court was dealing with the powers of a married woman with a separate estate, where her power of disposition was not withheld in the deed of settlement, which is an entirely different question from that presented in case at bar, in which the married woman is expressly authorized to convey as if she were a feme sole. In *Robinson v. Queen*, Judge Folkes referred to the fact that the marriage contract in that case did not in terms give the married woman the right to convey as a feme sole, and in this respect he distinguished that case from the case of *Sherman v. Turpin*, 7 Cold. 382.

We think the case at bar is controlled by the decision of the court in *Sherman v. Turpin*, and there is nothing in *Robinson v. Queen* that militates against this view. It having been determined, then, that Mrs. Peterson, under her deed from Parker, was clothed with full power of disposition as a feme sole, it is wholly immaterial whether that power has been exercised in the form of an executed contract, as by deed, or whether her contract is simply executory, as in this case, in the form of a bond for title. Affirmed.

HOPSON et ux. v. FOWLKES et al.

(Supreme Court of Tennessee. June 19, 1893.)

HUSBAND AND WIFE—ESTATE BY ENTIRETIES—DIVORCE—EFFECT—SALE ON EXECUTION AGAINST HUSBAND—EJECTMENT BY WIFE—STATUTE OF LIMITATIONS.

1. Where land is owned by husband and wife by entireties, and they are afterwards divorced, they thereby become tenants in common, and the entire estate does not vest in the survivor of them by right of survivorship.

2. Where, after they are divorced, the land is sold on execution against the husband, and the purchasers take immediate possession, and hold and occupy the same adversely for a period of more than seven years, an action of ejectment by the wife and her second husband against such purchasers is barred by the statute of limitations, though it was commenced within two years after the death of such divorced husband, since the statute runs from the date of such sale and possession, and not from the death of the husband.

Appeal from chancery court, Dyer county; H. J. Livingston, Chancellor.

Action of ejectment by W. H. Hopson and Mary E. Hopson, his wife, against H. L. Fowlkes and Gilbert Ledsinger, to recover possession of certain land. From a de-

cree for defendants, plaintiffs appeal. Affirmed.

J. T. Woodson and Draper & Parks, for appellants. Richardson & Coover, for appellees.

McALISTER, J. This is an ejectment bill. Complainants seek to recover a tract of land consisting of 800 acres, situated in Dyer county. Complainant Mary E. Hopson was formerly the wife of one James Wilson, to whom she was married in 1854, and during said marriage, to wit, on September 8, 1856, one William M. Shipp, the father of Mary E., conveyed to her and her then husband, James Wilson, jointly, the tract of land in controversy. The said James Wilson died in November, 1886, and complainants claim that the legal title to said land is vested in the said Mary E. by right of survivorship, the land having been owned by her and her then husband, James Wilson, by entireties. It should be stated in this connection that said Mary E. was divorced from the said James Wilson on the 30th October, 1860, and on the 18th of March, 1861, she intermarried with W. H. Hopson, her present husband. It further appears that on January 4, 1860, the land in controversy was attached by creditors of the said James Wilson, and, under proper decrees of the chancery court of Dyer county, it was sold to the defendants, Fowlkes and Ledsinger. The defendants therefore claim title to said land as purchasers at that judicial sale, under the decrees of the chancery court vesting title in them, and by continuous adverse possession. Respondents say they are, and all the time have been, since the date of the confirmation of sale, the owners in fee of said tract of land, holding and claiming the same openly against all persons. Respondents plead the statute of limitations of seven years, and they rely on said adverse claim of title and possession of more than seven years as a complete defense to said action. The chancellor pronounced a decree in favor of defendants, and complainants have appealed.

It appears from the record that the defendant H. L. Fowlkes and P. C. Ledsinger, the ancestor of defendant Gilbert Ledsinger, purchased this land at the sale in the case of Ingram and Allen Walker against James Wilson, and that on the 24th of January, 1861, a decree was rendered confirming the sale, divesting title, and vesting the same in the purchasers.

It further appears that said purchasers went into immediate possession of the land, inclosed it with fences, erected improvements thereon, and have remained in continuous and adverse possession of the same up to the institution of the present suit, which was commenced on the 12th November, 1888,—about 26 years after the defendants purchased and took possession of said

land. Under the operation of the first section of the act of 1819, c. 28, (Mill. & V. Code,) § 3459, an adverse possession of seven years under a deed, grant, or other title purporting to convey the fee, not only bars the remedy of the party out of possession, but vests the purchaser with a good and indefeasible title in fee to the land described in his assurance of title. Under the second clause of the first section of said act (Mill. & V. Code, § 3460) it is provided, viz.: "And, on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity effectually prosecuted against the person in possession, as in the foregoing section, are forever barred." The second section of said act of 1819 (Mill. & V. Code, § 3461) provides, viz.: "No person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued." Under the proof in this case the defendants are protected by each and all of the provisions of the statute, unless it appears that the complainant was laboring under some disability that exempted her from its operation.

It is insisted on behalf of complainant Mary E. that the defendants, by virtue of their purchase, only acquired such interest as her former husband, James Wilson, had in this land, and that, the said James Wilson having died on the 8th November, 1886, the said Mary E. then became entitled to the whole estate by right of survivorship. It has already been mentioned that the said Mary E. was divorced from her former husband, the said James Wilson, on the 30th October, 1860, but her counsel insist that this divorce did not change the nature of her estate in this land, which she still continued to hold by the entirety with the said James Wilson, with the contingent right to the whole estate in the event she survived him. It is insisted that her right of possession and the devolution of the title did not accrue until the death of the said James Wilson, and that she is not affected by the lapse of time, and the statute of limitations. It will be remembered that the decree of divorce was pronounced on the 30th October, 1860, which was prior to the purchase by the defendants at the chancery sale, which occurred on the 24th January, 1861. What, then, was the effect of the divorce upon the tenure of complainants' title to this land. In the case of *Harrer v. Wallner*, 80 Ill. 197, the supreme court of Illinois had occasion to consider the question now before us. Judge Walker, in delivering the opinion of the court, said: "Now this estate by the entirety is peculiar. The possession of one is the possession of both. The estate is joint for life, and descends to or

vests in the survivor absolutely and in fee, and, by the destruction of the estate of one, it inures to the other. Neither can have partition, nor can either sell the estate so as to effect the rights of the other; and, when their rights to the property are invaded, a suit for a recovery, for the injury, or for the property must be joint, because the property and the right to its enjoyment are joint during coverture. Then appellee could not sue for and recover any interest in the land without joining her husband in the action until the coverture ceased. It is unlike tenants in common, where either may sue and recover for an injury to the property, and may use the names of his cotenants. What effect, then, did the granting of the divorce have on this estate, or the rights of the parties therein? The relation of husband and wife was thereby terminated, and with it all marital duties. Their interest and duties from thenceforth, as related to each other, were as though they never existed. The estate by the entirety is essentially a joint estate, although it differs in one or two particulars therefrom. The power to hold jointly arose from the fact that they were married when the conveyance was made. Had the marriage not existed, the parties would have taken as tenants in common. It was that circumstance, and that alone, which gave to them the joint life estate and the right to joint possession. When the very thing which by operation of law gave them a joint estate was destroyed by operation of the same law, the joint estate ceased, and they then became vested with an estate per *se* as tenants in common. They by that act, and operation of law flowing from it, are not jointly entitled to possession, but, the unity of title and the unity of estate no longer existing with the incidental right of joint possession, it inevitably follows that they then become tenants in common. The termination of the marriage relation having wrought a change in the rights of the parties in the estate, the courts should rather hold that the change is broad enough to convert it into an estate in common, than to hold that whatever change was made it left the right of survivorship. But, on principle, we are satisfied the decree of divorce had the effect to make them tenants in common, and that appellees thereby became entitled to partition." See, also, *Bish. Mar. & Div.* § 718; *Freem. Coten.* § 76. We are not without authority on the question in this state. In the case of *Ames v. Norman*, 4 Sneed, 682, it appeared that Ames and wife were seised of an estate in the land by entirety. Said land was sold at execution sale in satisfaction of judgment against the husband, and the defendant Norman, as a creditor of Mrs. Ames, afterwards redeemed the land from the purchaser at said sale. After Norman's rights had become vested, the wife of Ames, the original judgment debtor, procured a di-

force, and the question was whether the interest or title of the purchaser at execution sale was subject to be divested or in any way affected by a subsequent divorce a vinculo matrimonie to the wife. It was held that the subsequent divorce had no effect whatever upon the rights of such purchaser. It was held that the defendant, by his purchase, became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that if the complainant survives her former husband his estate will then terminate, but if the husband survives he will become absolute owner of the whole estate.

The case at bar is to be differentiated from the case of *Ames v. Norman* in this important particular: that in the present case it appears that the wife was divorced prior to the date of defendant's purchase and possession. At that date the wife's status was that of feme sole, and her estate in this land had, by operation of law, been changed from one by the entirety to a tenant in common. That Judge McKinney, who delivered the opinion of the court in *Ames v. Norman*, recognized this distinction is apparent from the following language. We quote from his opinion, viz: "As one of the necessary results of the unity of person in husband and wife, it has always been held that where an estate is conveyed or devised to them jointly they do not take in joint tenancy. Constituting one legal person, they cannot be vested with separate or separable interests. They are said, therefore, to take by entireties, that is, each of them is seized of the whole estate, and neither of a part. If the rights of husband and wife in relation to an estate held by entireties are not altered by the decree declaring the divorce, what becomes of the joint estate? What are their respective rights in the future in regard to it? They are no longer one legal person; the law itself has made them twain. They are no longer capable of holding by entireties. The relation upon which that tenancy depends has been destroyed. The one legal person has been resolved by judgment of law into two distinct individual persons, having in the future no relation to each other; and with this change of their relation must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold by a joint seisure, they must hold by moieties. The law, in destroying the unity of person between them, has, by necessary consequence, destroyed the unity of seisin in respect to their joint estate, for, independent of the matrimonial union, this tenancy cannot exist."

We think these principles are conclusive of this case. The decree of divorce, while it severed the unity of person of James and

Mary E. Wilson, also severed their unity of estate in this land, making them tenants in common. That decree also removed the disability of Mary E. as a married woman, and left her free to institute proceedings for a partition of this land, or otherwise to assert her rights therein. She neglected to take any steps, and the bar of the statute was complete when the present suit was instituted. It may be remarked, in conclusion, that the whole groundwork of complainants' bill is based upon the assumption that complainant Mary E. was not a party to the original attachment suit, and had no notice of those proceedings. This assumption is earnestly controverted by the defendants. We do not, however, decide that question, as it is wholly immaterial. The title of *Mrs. Hopson* having been extinguished, and her remedy barred by operation of the statute, the decree of the chancellor is affirmed.

POOL et ux. v. MAYOR, ETC., OF CITY OF JACKSON,

(Supreme Court of Tennessee. June 22, 1893.)

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — NOTICE — ACTION FOR INJURIES — EVIDENCE — INSTRUCTIONS — APPEAL — ASSIGNMENT OF ERROR.

1. An assignment of error that "the verdict is against the evidence, which largely preponderates against the finding of the jury," presupposes that there is evidence to support the verdict, and is not well taken.

2. In an action against a city for personal injuries caused by a defective sidewalk, the court properly excluded evidence by plaintiff as to where she obtained money to build certain houses which another witness stated he had helped to build for her.

3. Evidence that the walk where the injury occurred "was laid in the ordinary way walks were laid in the city," and that "the planks were laid of good, sound timber, usual and customary," was competent.

4. Where the question at issue is as to constructive notice to defendant of the condition of the walk, it is not error to permit witnesses to state whether or not the walk was in an apparently safe condition at and before the time of the accident, when they examined it, when the evidence is limited by the court to such issue.

5. A city is not an insurer against accidents on its walks, but is only bound to use ordinary care and attention to keep them in a reasonably safe condition for persons using them, while exercising reasonable care and caution.

6. If there was a defect in the walk, and some officer or agent of defendant, whose duty it was to keep or see the streets were kept in repair, saw it, or some one informed either of them of its existence, such facts constituted actual notice to defendant of the condition of the walk.

7. If there was a defect in the walk, which was so patent as to be generally noticed by persons passing over it, and this continued for such a length of time prior to the accident as that it might be reasonably inferred that some officer or employee of defendant, whose duty it was to keep the streets in repair, had notice of such defects, such facts constituted constructive notice.

8. Plaintiff has no ground for complaint where the court charged that if the proof

showed that the walk was originally defective, and so remained until the time of the accident, no notice, either actual or constructive, was necessary to render defendant liable.

9. Where the charge of the court is correct, and covers fully the entire case, it is not error to refuse requests which are embraced, so far as correct, in the charge given.

Appeal from circuit court, Madison county; L. S. Wood, Judge.

Action by E. C. Pool and wife against the mayor and aldermen of the city of Jackson for personal injuries caused by a defective sidewalk. From a judgment entered on the verdict of a jury in favor of defendant, plaintiffs appeal. Affirmed.

Haynes & Hays, for appellants. Caruthers & Mallony and McCorry & Bond, for appellees.

BRIGHT, Special Judge. This is an action for damages against the city of Jackson, Tenn., brought by plaintiffs, for alleged injuries to Mrs. Pool, by having her arm broken, etc., being thrown down by a defective plank walk. The damages claimed in the declaration are \$10,000. There are three counts in the declaration, setting forth the cause of action with great minuteness. The first count, in short, is for wrongfully and negligently suffering a dangerous hole to be and remain on and across College street, etc., and to be out of repair, with notice to the city, etc. The second count, same as first, but adding "without lights," etc. The third count, same as first, but adding allegations "that defendants did negligently build, construct, and place down the defective foot crossing," etc. The defendant pleaded not guilty, and issue joined on the plea.

This cause has been tried three times: First time, at the May term of 1891 of circuit court. Verdict for defendant. A new trial was granted by the trial judge on account of improper conduct of the jury. The second trial was had at the September term, 1891, of said court, and resulted in a verdict and judgment for \$3,000 in favor of the plaintiffs, which was, on appeal to this court by the defendant, reversed and remanded for errors as set out in the opinion of this court, by Justice Lea, reported in 91 Tenn. 448 et seq., 19 S. W. Rep. 324. The cause was again tried at the January term, 1893, of the circuit court, and resulted in a verdict for the defendant. Plaintiffs' motion for a new trial being overruled by the court, an appeal in error was prayed for and granted to this court, and is before us for determination. The plaintiffs have assigned numerous errors.

The first error assigned is that "the court erred in not granting a new trial on the facts; that the verdict is against the evidence, which largely preponderates against the finding of the jury." This assignment of error is not well taken. It does not state there is no evidence to support the verdict,

but presupposes that there is evidence to support the verdict, of the jury; and there is ample evidence, found in the record, to support the verdict.

The second assignment of error is that "the court erred in sustaining defendant's exceptions to plaintiff's testimony as to borrowing money from the building and loan association, etc., with which to build certain houses." Witness Haughton, in his cross-examination, in stating for whom he had worked, stated he had worked for Mrs. Pool, and, among other work done for her, he had helped to build three houses for her. Mrs. Pool, while on the witness stand, was asked by plaintiffs' attorney where she "got the money to build these houses." She answered, "From the building and loan association," which was objected to by the defendant, and objections sustained by the court, and this is assigned as error. This testimony was clearly irrelevant,—not tending to elucidate any issue in the case,—and wholly immaterial, and was very properly excluded by the court.

The third assignment of error is in overruling plaintiffs' exceptions to the admission of the testimony of John W. Gates, J. T. Beveridge, S. C. Lancaster, H. C. Irby, W. C. Onson, H. C. Jameson, J. H. Duke, John T. Stark, L. B. Shelton, W. F. Price, and G. H. Ramsey. Gates testified that this walk, where the injury was alleged to have occurred, "was laid in the ordinary way walks were laid in the city." Beveridge testified that the "planks were laid of good, sound timber, usual and customary." This testimony was not incompetent. It was only intended by this to show that the walk, when originally laid, was not defectively done, and that this walk was laid like all other walks of the city, and of good, sound timber, etc. We have very carefully read the testimony of these witnesses, and can find no real objections to their testimony, as admitted by the court. Much of their testimony was, upon objections of the plaintiffs, excluded by the court from the jury. The controversy just here was an attempt on the part of the plaintiffs to fix constructive notice upon the defendant that the said sidewalk was out of repair, and that the defect in it was of such a nature and duration as to give constructive notice of same to the defendant; and, to rebut the contention of constructive notice, this testimony was admissible. It is not, nor does it assume to be, an opinion whether the walk was safe or unsafe. The testimony complained of was the question put to these witnesses: "State whether or not the walk was in an apparently safe condition at and before the time of the accident, when you examined it." It was competent to prove that the sidewalk was in an apparently safe condition at and before the time of the accident, in order to show that, from its apparent condition, the defendant would not be chargeable with construct-

ive notice of its being defective or out of repair; and for this purpose it was admissible, and so limited and admitted by the court. *Whart. Ev. § 512; Stevens, Ev. § 103; City of Indianapolis v. Huffer, 30 Ind. 235; Bennett v. Meehan, 83 Ind. 566.* This court, in this case, in 91 Tenn. 457, 19 S. W. Rep. 326, said: "The corporation is not required to take up and examine, from time to time, all the plank walks in the city, lying on the ground, when the same are apparently in good condition." The court further said in that case: "A corporation may be liable for latent defects over dangerous structures, or over dangerous places, and the same should be inspected from time to time, but this cannot apply to a plank sidewalk on the ground." *Id.* We therefore overrule this assignment of error.

The fourth assignment of error is in regard to the charge of the court, as follows: "The defendant is not an insurer against accidents upon its streets and sidewalks, but is bound to keep them in a reasonably safe condition, but not absolutely so. Its duty is only to see that sidewalks and streets are reasonably safe for persons traveling on them, while exercising ordinary care and caution. It is only bound to use ordinary care and attention to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the ordinary modes, by night as well as by day, while exercising reasonable care and caution." This, when taken in connection with the whole charge, is not erroneous. It is almost, if not quite, the identical charge, on this point, given in this case heretofore, which was passed upon and approved by this court. 91 Tenn. 457, 19 S. W. Rep. 324. See, also, *Dill. Mun. Corp. (2d Ed.) § 789.*

The charge of the court upon actual and constructive notice is assigned as error. Upon these points the court charged the jury as follows: "By 'actual notice' is meant that if there was a defect in the sidewalk, and some member of the board of mayor and aldermen, or some agent or employe of the defendant, whose duty it was to keep, or see the streets were kept, in repair, saw it, or that some one notified or informed them, or some of them, of its existence." The court charged as to constructive notice as follows: "By 'constructive notice' is meant that if there was a defect in the sidewalk, and that the defect was so patent and obvious as to be generally noticed by persons passing over it, and thus continued to exist for such a length of time prior to the time of the alleged accident as that it might be reasonably inferred that some members of the board of mayor and aldermen, or employe of defendant, whose duty it was to keep the streets in repair, had notice of such defects." The court further charged the jury that "if the proof should show that the sidewalk where Mrs. Pool was hurt was originally put down in a defective

condition, and so remained in that condition from the time it was first put down until Mrs. Pool was injured, then no notice, either actual or constructive, was necessary to defendant, for, if thus defectively constructed, the defendant would be charged with notice from the time of its original defective construction." The charge of the court as to actual and constructive notice is correct, and he properly defines same, and explains it in a plain manner, to the jury, so that they can easily understand it. On these points the charge is an apt statement of the law on the subject, and is well supported by principle and authority, as is also the charge as to original defective construction of the sidewalk. He tells the jury that if the sidewalk was originally put down in a defective condition, and so remained in that condition from the time it was first put down until Mrs. Pool was injured, then no notice, either actual or constructive, was necessary to defendant, for, if thus defectively constructed, the defendant would be charged with notice from the time of its original defective construction. This is certainly correct, and is the law.

The fifth and last assignment of error is based upon the refusal of the court below to give the special instructions as requested by the plaintiff. The charge of the court is very full and comprehensive, covering fully the entire case, and is a fair and correct exposition of the law governing the case, leaving to the jury to pass upon the facts, applying the plain rules of law, as laid down by the court, to the facts of the case. Most of the special requests—at least, those at all applicable to the facts of the case—had already been embraced in the charge of the court. The others, for obvious reasons, should not have been given.

It is unnecessary to discuss the evidence. This was a matter for the jury to weigh and consider. This they have done. The plaintiffs, upon a full, fair, and correct charge of the court, and without error in the admission or rejection of testimony, have submitted their case to a jury, and they have found the issue joined in favor of the defendant. They have had a fair and impartial trial, and the jury has returned a verdict in favor of the defendant, which verdict is well supported by the evidence. All of the assignments of error of plaintiffs will be overruled. There is no error in the record, and the case will be affirmed, with costs.

STATE ex rel. SIMON v. DAVIS.
(Supreme Court of Tennessee. May 24, 1893.)
DISBARMENT OF ATTORNEYS — JURISDICTION OF COURT — PROCEDURE — TRIAL BY JURY — EVIDENCE.

1. Since *Mill. & V. Code, § 4745*, provides that "the several courts of this state may strike from their rolls * * * any practicing

attorney or counsel upon evidence satisfactory to the court, that he has been guilty of such misdemeanor, or acts of immorality or impropriety as are inconsistent with the character or incompatible with the faithful discharge of the duties of his profession," an attorney may be disbarred for misconduct independent of the provisions of sections 4360 and 4363, which provide summary proceedings for striking from the roll of attorneys one who fails to account for money received in his professional capacity, on motion of the aggrieved client, after securing a judgment, and the return of an execution thereon unsatisfied.

2. The court has jurisdiction to try, with a view to disbarment, charges against an attorney of misconduct in office, without the intervention of a jury.

3. In a prosecution against an attorney for appropriating to his own use money received from a client to be paid on a certain judgment, defendant denied receiving the money. The complaining witness testified that he gave the money to defendant on a certain day, but received no receipt therefor. Another witness for the prosecution testified that he was present, and that defendant gave a receipt to complainant for the money. *Held*, that parol evidence of the payment to defendant was admissible, without further accounting for the absence of the receipt.

4. On appeal in summary proceedings for the disbarment of an attorney, tried to the court without a jury, the cause will be tried de novo in the supreme court.

Appeal from circuit court, Shelby county; L. H. Ester, Judge.

Petition in the name of the state, at the relation of Nathan Simon, against Ralph Davis, praying the disbarment of defendant from practicing as an attorney at law in the courts of the state. From a judgment granting the petition, defendant appeals. Affirmed.

Holmes Cummins, Estes & Fentress, and Malone & Malone, for appellant. Truly & Wright, L. Lehman, and J. M. Greer, for appellee.

MCALISTER, J. This is a proceeding in the name of the state, on the relation of Nathan Simon, commenced in the circuit court of Shelby county, against Davis, for the purpose of having him disbarred as a practicing attorney in the courts of the state of Tennessee. The specific grounds upon which disbarment is moved are thus set forth in the petition, viz.: "That in the year 18— one Lachman was indicted in the criminal court of Shelby county for the crime of arson, and Nathan Simon became a surety on his bail bond in the penalty of five thousand dollars. The said Lachman was found guilty of said charge, and the jury fixed his punishment at eight years in the state prison. Pending a motion for a new trial, Lachman forfeited his bond, and became a fugitive from justice. Such proceedings were had that judgment final was rendered against the said Nathan Simon and his co-surety on the bail bond in the sum of five thousand dollars. Petitioner, desiring to be relieved of said judgment, retained the said Ralph Davis as his counsel for that purpose. Petitioner employed Davis on the 14th De-

cember, 1891, and paid him on that day, at his request, a retainer fee of two hundred and fifty dollars. At a later date petitioner paid Davis an additional fee of two hundred dollars, making, in the aggregate, the sum of four hundred and fifty dollars paid him in fees on account of his employment. The petition further recites that Davis, shortly after his professional employment as aforesaid, informed the said Simon that he had succeeded in getting the criminal court to agree that said judgment might be settled for the sum of twenty-two hundred and fifty dollars, and believing this statement to be true, and confiding in the integrity of said Davis, that Simon, from time to time, paid over to Davis the sum of twenty-two hundred and fifty dollars. Petitioner further states that, after he had delivered the said sum of twenty-two hundred and fifty dollars to the said Davis, for the purposes and on the representations as aforesaid, Davis assured petitioner that this money had been applied to the payment and satisfaction of said judgment, and that the same had thereby been canceled and fully discharged. Petitioner charges that said judgment has not been paid or satisfied, and that said sum of \$2,250 has not been applied thereto, but that of this sum only one thousand dollars has been so applied, and the balance of twelve hundred (1,250) and fifty dollars has been misappropriated by said Davis. Petitioner further avers that the fact of this misappropriation of petitioner's money was recently published in the newspapers of Memphis, which fact so infuriated Davis that he openly and publicly declared his intention to have execution issued against your petitioner on said judgment for the sum of four thousand dollars; that on the 30th January, 1893, which was the next succeeding business and judicial day after said threat was made, a special order was entered in said criminal court of Shelby county for the issuance of an execution for the enforcement and collection of the balance of said judgment, which order the petition charges was caused or procured to be made by said Davis, and this in violation of his employment and professional obligations as an attorney."

In accordance with the prayer of the petition, the defendant, Davis, was cited to appear before the circuit court of Shelby county on the 11th February, 1893, and show cause why he should not be stricken from the rolls, and not be permitted to practice his profession in any court of record in this state. The defendant appeared, and moved to quash the petition, citation, etc., on the ground that the matters therein stated are not sufficient in law to warrant his disbarment, and because the petition and motion to disbar were premature, and because the plaintiff had no right to maintain the cause, or have the relief prayed. On motion of counsel for petitioner, the proceeding was

amended so as to stand in the name of the state of Tennessee, on the relation of Nathan Simon, against Davis, and thereupon the court overruled the defendant's motion to quash the proceedings. It was then agreed between the counsel for both parties that defendant's answer need not be in writing, and the same was stated to be not guilty. The court, after hearing the evidence and argument of counsel, adjudged that the allegations of the petition had been established by the proof, whereupon it was further ordered, adjudged, and decreed by the court that the defendant be stricken from the rolls as a practicing attorney of this court and of the courts of the state of Tennessee, and that he be deprived of his license, and deprived of the right to practice his profession in any court of record in this state. The defendant has appealed, and we are very earnestly pressed to reverse this judgment on account of various errors that are assigned, and for the reason that the weight of the evidence does not support the finding of the circuit judge.

The first assignment of error is that the circuit judge disregarded in his findings the statute relative to motions against attorneys for failing to account for money received in their professional capacity. The statute referred to is section 4360, Mill & V. Code, as follows: "Judgment may in like manner be had in favor of the party aggrieved against any attorney in this state upon five days' notice for any money collected or received by him in that capacity, and not paid over on demand by the person entitled his agent or attorney." Section 4363 further provides, viz.: "Upon the return by the proper officer of an execution issued on the judgment recovered under this article with the indorsement thereon that the money cannot be made, or not sufficient property of the defendant to be found to make the same, it is the duty of the court to strike such delinquent from the roll of attorneys, who shall thenceforward be disqualified to practice in the courts of this state until the debt is paid." The insistence of defendant's counsel is that the above sections of the Code prescribe the practice and set forth the law governing motions against attorneys, and that no motion to strike from the rolls or disbar an attorney can be entertained unless a judgment against him for the money has first been obtained, execution issued thereon, and returned nulla bona. The argument is that it is nowhere shown or alleged that any notice had been given to Davis to account for the alleged shortage, nor had any judgment been recovered against him for failure to pay over; hence it is claimed that the action of the circuit judge was premature, unauthorized, and illegal, and that it was error in the court to refuse to quash the petition, citation, and motion. It has been decided by this court that this statute, giving a summary remedy by motion against attorneys

for money collected in a professional capacity and misappropriated, is a substitute for the more tedious remedy by action of assumpsit, or debt at common law. *Jones v. Miller*, 1 Swan, 151. The primary purpose of the statute is to afford an expeditious remedy to the aggrieved client for the misappropriation or nonpayment of his money, and the suspension or disbarment of the attorney only follows his failure to pay the judgment against him. But we do not understand this statute to restrict or affect in any way the inherent jurisdiction of all courts to deal with its officers in a summary way for malpractice or misconduct in their official character. *Weeks, Attys* 140; *Brooks v. Fleming*, 6 Baxt. 337; *Smith v. State*, 1 Yerg. 228. This power of disbarment is not exercised by the courts for the purpose of enforcing remedies between the parties, but to protect the court and the public against the official ministrations of an attorney guilty of unworthy practice in his profession. If a statute were necessary to enable the courts to exercise this jurisdiction, it is supplied by section 4745, Mill & V. Code, viz.: "The several courts of this state may strike from their rolls any person not authorized to practice in such courts and also any practicing attorney or counsel upon evidence satisfactory to the court, that he has been guilty of such misdemeanor, or acts of immorality, or impropriety as are inconsistent with the character or incompatible with the faithful discharge of the duties of his profession." Section 4746 provides: "If charges are preferred against an attorney or counsel to any court, they shall be reduced to writing and a copy furnished the party accused, who may appear and show cause against the charges." Section 4747 further provides, viz.: "The person stricken from the rolls under either of the foregoing sections or for other good cause shall not be permitted to practice the profession in any court of record in this state." We do not agree with counsel for defendant that the court below had no jurisdiction of this complaint for the reason that there had been no judgment for the money, execution thereon, and return of nulla bona. We think there was ample jurisdiction, both statutory and common law.

The next error assigned is that the trial was by the court, and not by a jury. It is insisted that where the facts are disputed, and the evidence is conflicting, the only proper method of trial is by jury. It may be remarked, in the first place, that there was no demand by Davis in the court below for a trial by jury. Ordinarily, this failure to demand a jury would, as a matter of law and fact, be construed as a willingness on the part of the defendant to submit the matters in controversy to the judgment of the court, without the intervention of a jury; but it is insisted this charge is criminal in its nature, and that the court should not have assumed to strike the defendant from the

rolls as an attorney until a jury of his peers had passed upon the facts. In other words, the contention is, the charge being of a criminal nature, and the facts disputed, the circuit court was without jurisdiction until there had been a conviction of the defendant by a jury in a criminal prosecution. We are of opinion that the great weight of authority is opposed to this contention, and that a proceeding for disbarment is tried summarily by the court without a jury, and that a previous conviction of the criminal offense involved is not necessary. In the case of *Fields v. State*, Mart. & Y. 168, it appeared that Fields, a constable, had been convicted in the lower court of a charge of extortion, and, pending his appeal, he was summarily suspended or removed from office by the county court. It was held that a previous conviction was not necessary to enable the court to suspend from office; that the constitutional privilege of trial by jury for crime does not apply to prevent courts from punishing its officers for contempt, and to regulate them or remove them in particular cases; that removal from office for an indictable offense is no bar to an indictment; that it is in its nature civil and collateral to any criminal prosecution by indictment. In the case of *Smith v. State*, 1 Yerg. 228, which was a proceeding to disbar an attorney, this court, through Justice Catron, said, viz.: "The principle is almost universal in all governments that the power which confers an office has also the right to remove the officer for good cause. In all these cases the tribunal removing is of necessity the judge of the law and fact, to ascertain which every species of evidence can be heard, legal in its character, according to common-law rules, and consistent with our constitution and laws. In this case there was no previous conviction of the offense involved,—nothing but an indictment against the attorney found in another state; and yet this court held that the court below might lawfully proceed with the case." Says Mr. Justice Bradley in *Ex parte Wall*, 107 U. S. 273, 2 Sup. Ct. Rep. 569, viz.: "It is laid down in all the books in which the subject is treated that a court has power to exercise a summary jurisdiction over its attorneys, and to punish them by fine and imprisonment for contempt, and in gross cases of misconduct to strike their names from the roll. It is held in this case that the proceeding to strike an attorney from the roll is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provision which requires an indictment and trial by jury in criminal cases; that it is not a criminal proceeding, and not intended for punishment, but to protect the court from the official ministrations of persons unfit to practice as attorneys therein; that such a proceeding is not an invasion of the constitutional provision that no person shall be deprived of life, liber-

ty, or property without due process of law; but that the proceeding itself, when instituted in proper cases, is due process of law. Justice Bradley in this case draws a distinction between acts charged to have been committed by the attorney in his professional character and acts not committed in such official capacity, and holds that in respect to these latter acts the courts will not strike his name from the roll until he has been regularly indicted and convicted, but that even this last exception to the rule is not an inflexible one." It follows that, under the authorities cited, which we think state the true rule on this subject, this assignment of error must be overruled.

The next assignment is that the circuit judge erred in not allowing the motion of defendant to compel Harry Simon to produce the receipts for \$2,250 alleged to have been paid Davis. In explanation of this assignment of error, it is necessary to state that the relator, Nathan Simon, testified on the trial that he made certain payments in cash and by notes to Davis, amounting to \$2,250, and that he took no receipts from Davis. Harry Simon, brother of relator, was introduced as a witness, and testified that he was present at the meeting on the 30th March, 1892, and that Davis wrote, signed, and delivered to Nathan Simon a receipt for \$2,250, covering the payment of \$1,500 on the 17th December, 1891, and the two notes for \$250 each, and \$250 in cash delivered to Davis on the 30th March, 1892. It is contended by counsel for defendant that the receipts themselves were the best evidence, and, on failure to produce them, or account for their absence, it was error to allow oral proofs of payment of such moneys to defendant covered by such receipts. Davis himself testified that he made no such payments, and hence he could not have executed such a receipt as that described by Harry Simon. The theory of the state was that no receipt was in fact executed, and that Harry Simon was in error in so stating. The state of the case, then, was simply this: that a witness introduced by a party to the suit states a fact differently from the statement of the party himself. Is the party bound by the statement of his witness, or may he show a different state of facts by other witnesses? While a party cannot ordinarily discredit his own witness, his right to prove facts by other witnesses inconsistent with those stated by his witness is unquestioned. 2 Whart. Ev. § 549. The discrepancy in the statements of these two witnesses simply went to their credibility, and was a proper matter for consideration in determining the weight of their testimony. It was clearly no ground for the exclusion of all oral proofs of payment of this money that one of the witnesses had testified that a receipt was given, and the receipt itself was not produced or its absence explained. The witness may have been mis-

taken, and the question of fact was for the determination of the court, on all the evidence submitted.

The remaining question to be considered is whether the finding of the circuit judge is supported by the evidence. It will be remembered that this case is not within the rule of practice established by this court which requires the affirmance of a judgment pronounced by a circuit judge, without the intervention of a jury, when, upon an examination of the record, any material evidence is found to support it. This is a summary proceeding, bearing an analogy to an action for the removal of a sheriff or other public officer, and is to be tried by this court like a case in equity *de novo*, requiring a preponderance of the evidence on all disputed questions of fact which are material to support the judgment.

Nathan Simon, the petitioner in the case, was introduced as a witness on the trial, and testified that he had employed Davis as his attorney in the matter of the forfeited bail bond for the purpose of procuring a reduction of that judgment; that Davis shortly afterwards informed him that he had succeeded in getting the criminal court to reduce that judgment of \$5,000 down to \$2,250; and that it could be settled by the payment of that amount. Simon testified that, at a later date, Davis told him that he must at once pay \$1,500 on the judgment; that thereupon he borrowed \$1,500 from the Manhattan Savings Bank, upon the pledge of a certificate of building and loan association stock, and that he immediately turned over the money to Davis, who promised to pay it into the criminal court on that judgment. Simon admits that he took no receipt from Davis for the money, but states that he asked Davis if it was necessary to make a receipt for this, to which Davis replied: "No; I am going to call on you for seven hundred and fifty dollars later on." Simon further testified that this money was paid over to Davis on the 17th December, 1891, (the same day it was borrowed from the Manhattan Bank,) and that he gave Davis the money between 2 and 3 o'clock in the afternoon, according to the best of his recollection. The witness further states that three days afterwards Davis told him he had paid the money into the criminal court. Simon further testified that on the 30th March, 1892, Davis told him he wanted \$750 more for the settlement of the judgment, and on that day he paid him \$250 in money, and delivered to him two notes for \$250 each, which were indorsed by his brother Harry Simon. Simon produced in evidence a check dated March 30, 1892, payable to himself, for \$250, stating that he drew the money on his way to Davis' office, and paid it to Davis, as already stated. Simon states further that on the same day, to wit, the 30th March, 1892, on the demand of Davis, he executed another note for \$200 in payment of balance of Davis' fee, having

already paid him on the 14th December, 1891, the sum of \$250. The two notes for \$250 each and the third note, for \$200, were all dated March 30, 1892, "payable to the order of myself," (N. Simon,) indorsed by Harry Simon, and, viz.: "For collection, Ralph Davis." Simon testifies that those notes were all paid by him, (not until he had allowed two of them, however, to go to protest,) and that Davis got in fees and money to be applied on the judgment the sum of \$2,700, and that of this amount only \$1,000 had been applied to the payment of the judgment. Simon further states that, as the result of having charged Davis with a misappropriation of this money, he has been arrested, and is now being prosecuted on a charge of criminal libel, and that an execution had issued against him for the balance of the criminal court judgment, to wit, the sum of \$4,000, and that his store was in the hands of the sheriff at the time he testified.

Defendant, Davis, testified in his own behalf. He admitted his professional employment by Simon to secure a reduction of the judgment on the forfeited bail bond, and the payment to him by Simon of a retainer fee of \$250. Davis states that he obtained a reduction of the criminal court judgment to \$2,500, but admits that no petition was filed by him in the case, and no entry of the action of the court in granting the reduction was made upon the minutes. Davis testifies that he reported this reduction of \$2,500 to Simon, and advised him to settle on that basis; that Simon told him he did not have the money; that he had been trying to make arrangements to borrow some money from a building and loan association on some stock. Defendant testifies that he told Simon the matter would have to be fixed up on the following day, at 12 o'clock, and that on the next day Simon came to his office without the money, and suggested to Davis the advisability of his making a loan to him, (Simon.) Davis states he then said to Simon he thought the judgment could be temporarily suspended for \$1,000, and that Simon then asked him for a loan of \$1,000. Davis states he then asked Simon what interest he could pay, and Simon replied he would give him \$50 for 60 days. Defendant testifies he then sent for his brother David Davis, who was credit man at B. Lowenstein & Bros., and, upon inquiry in respect to Simon's financial standing, his brother told him Simon was indebted to a number of persons and to B. Lowenstein & Bros. for \$2,280, but that he considered him good, as he had an interest in the Simon estate, and his brother, he says, advised him to make the loan. Davis states he then drew up a note for \$1,050, payable 60 days after date, and Simon signed it; that witness and his brother went to the wholesale department of B. Lowenstein & Bros., and procured a package of \$1,000 belonging to defendant from a safe where it had been previ-

ously deposited. Defendant further states that, after getting his dinner, he went immediately to the criminal court, and paid over this \$1,000, which had come out of the box, to Hunter, deputy clerk of the criminal court, and that Hunter gave him a receipt, which he turned over to Simon. This money, the witness states, was paid to Hunter on the 17th December, 1891, and not later than half past 1 o'clock of that day. Defendant states that the note for \$1,050 which Simon had given him he deposited with his brother David Davis; that this note was not paid at maturity; but that in the latter part of February, Simon paid him \$300 in cash, which was credited on the note, and that on the 30th March, 1892, Simon executed three notes for the balance; that is to say, two notes for \$250 each, and one note for \$200. Davis further testifies that on the same day, to wit, the 30th March, 1892, Simon paid him the sum of \$200 balance due on his fee, which was originally fixed at \$500, but which he had agreed to reduce to \$450. Davis denies that Simon paid him \$1,500 or any other amount on the 17th December, 1891, but, on the contrary, he states that Simon borrowed \$1,000 from him on that day, and gave him his note for \$1,050, covering principal and agreed interest. According to the testimony of Davis, the state of the account between him and Simon was as follows: December 14, 1891, retainer fee paid Davis, \$250; December 17, 1891, loan of \$1,000 by Davis to Simon; latter part of February, 1892, cash on loan paid by Simon to Davis, \$300; three notes, dated March 30, 1891, executed by Simon to Davis, two for \$250 each, and one for \$200, amounting in all to \$700, for balance on original loan note; cash paid Davis for balance of fee March 30, 1892, \$200; interest on loan, \$50,—total, \$1,500. As opposed to the statement of Davis, Simon claims the matter stands thus, viz.: December 14, 1891, fee paid Davis, \$250; December 17, 1891, cash paid Davis, \$1,500; March 30, 1892, cash paid Davis, \$250; March 30, 1892, two notes, \$250 each, \$500; March 30, 1892, note balance fee, \$200,—total, \$2,700. An analysis of the respective statements of these witnesses will show they are in entire accord on only one proposition, to wit, the payment of a retainer fee of \$250 paid Davis on December 14, 1891. They agree that an additional fee of \$200 was paid Davis, but disagree in respect to the mode of payment, Simon stating it was paid by note made March 30, 1892, while Davis claims it was paid in cash at said date. Again, the parties disagree in respect to the amount of reduction reported by Davis to have been granted by the criminal court on the judgment, Simon stating that Davis told him it had been reduced to \$2,250, while Davis claims he told Simon the judgment had been reduced to \$2,500. Again, Simon affirms he paid Davis, December 17, 1891, on account

of the judgment, the sum of \$1,500; while Davis denies this payment, and asserts that on that day he loaned Simon \$1,000, for which he took his note at 60 days. Again, Simon testifies that on March 30, 1892, he made to Davis a further payment of \$250 in cash, to be applied to said judgment; while Davis claims that on that day Simon paid him \$200 in cash, which was balance on his fee. Again, Simon and Davis both agree that on March 30, 1892, Simon executed and delivered to Davis two notes for \$250 each, and one for \$200. Davis swears that these three notes, amounting to \$700, were delivered to him in payment of the balance due on the loan note. It will be noticed that these notes, in the aggregate, fall short of the balance due on the alleged loan note by the sum of \$50, but Davis undertakes to explain that discrepancy by stating that Simon promised to pay him the sum of \$50, which was the interest on the original loan, before the maturity of the last note. Simon swears that the \$250 in cash, paid Davis on March 30, 1892, and the two notes for \$250 each delivered to Davis on that day, amounting to \$750, was in settlement of balance due on the judgment. Simon swears that the third note for \$200, executed and delivered to Davis March 30, 1892, was in settlement of balance due on fee. Simon denies the alleged loan of \$1,000 claimed to have been made him by Davis, and the alleged payment of \$50 as interest on said loan. The claim of Simon is that Davis has misappropriated \$1,250 of Simon's money.

In this irreconcilable conflict in the testimony of the two principal actors in this transaction, the cardinal inquiry for the court is to ascertain which one of the parties is sustained by the facts and circumstances disclosed in the proof and by the inherent probabilities of the case. It may be remarked at the outset that the testimony of Davis that he loaned Simon \$1,000, and took his note at 60 days, without security, is improbable, and the only witness who corroborates him is his brother David Davis. It is improbable, in the first place, that Davis would have \$1,000 deposited with his brother in the safe at B. Lowenstein & Bros., since the evidence shows that Davis and his brother each kept a bank account, and the safe in question was not a place for the deposit of money even by the firm of B. Lowenstein & Bros. It is improbable that Davis would lend Simon \$1,000 without demanding security when Davis knew at that very time of the existence of this large judgment against Simon in the criminal court, and when, in addition to this knowledge, his brother had just informed him that Simon owed B. Lowenstein & Bros. an account for \$2,280, which they had been trying to collect, and that he was indebted to other parties, which amounts he was wholly unable to pay. Again, Davis

claims that he knew prior to making this loan that Simon had some stock in a building and loan association upon which he was trying to negotiate a loan, and yet Davis, with knowledge of Simon's ownership of this stock, did not ask that it should be hypothecated as collateral security for the loan he was about to make. In the face of all these facts, Davis testifies he was perfectly satisfied to make the loan without security. It is also a matter for observation that, notwithstanding Davis is shown to have kept a bank account, and to have carried on an extensive business with the bank, he does not claim to have deposited this \$1,050 note in the bank for collection; nor is there any record of any deposit of the \$300 which Davis claims Simon paid him on the loan note in the latter part of February. There is, however, a record in his bank book of the three notes executed by Simon on the 30th March, 1892. The facts and circumstances already adverted to, we think, illustrate the inherent improbability of Davis' version of this transaction, and we find no testimony in the record which corroborates him on the fundamental facts of the controversy, excepting the evidence of his own brother. We do not discredit the testimony of the brother simply on account of relationship, but we give it due consideration in our investigation of the facts, and in determining the question whether the theory of the Davis brothers is sustained by the preponderance of the evidence.

Our next inquiry is whether Simon is corroborated by material facts and circumstances presented in proof. The fact is incontrovertible that on the 17th December, 1891, Simon borrowed from the Manhattan Savings Bank the sum of \$1,500 by hypothecating a building and loan association certificate of stock. Samuel Hirsh testified that he assisted Simon in securing the loan from the bank, and that Simon told him on that day his object in borrowing the money was to pay it on the criminal court judgment. H. Simon, brother to Nathan Simon, testified that his brother told him on that day his object in wanting the money, and, after he had borrowed it from the bank, showed it to him, and told him he was going to pay it to Davis on the Lachman bond judgment. Nathan Simon, it will be remembered, testified that Davis told him on December 17th he must have \$1,500 to pay on that judgment. Hon. George B. Peters, attorney general of the criminal court, testified that Davis had promised that \$1,500 would be paid on the judgment on that day; so that the borrowing of \$1,500 on December 17th by Simon was in furtherance of the promise made by Davis to the attorney general of the criminal court. It is a striking coincidence that the sum claimed to have been borrowed by Simon on that day was the exact amount which Davis had promised the attorney general would be paid in on that

day. The fact that Simon actually borrowed \$1,500 from the Manhattan Savings Bank on the 17th December, 1891, is further established by the testimony of James Nathan, the cashier of the bank, and by the production in evidence of the original loan note itself, dated December 17, 1891. James Nathan also testified that, according to the best of his recollection, Simon told him, at the time, the object of borrowing the money was to pay it on the Lachman judgment. Now, why should Simon borrow \$1,000 from Davis for 60 days and agree to pay him \$50 for the use of the money, which was at the rate of 30 per cent. interest, when the proof shows that on that very day Simon had borrowed \$1,500 from the bank for four months, at 8 per cent. interest? The proof shows that Davis only paid in \$1,000 on the judgment, notwithstanding his agreement with the attorney general that he would pay in \$1,500 on that day. Mr. Peters states: "He (Davis) asked me, if he would raise \$1,500, if I would hold up on the balance. I asked him when that amount could be paid. He said within a day or two. I told him that if he would pay that amount, so far as I was concerned, I would be willing to give Mr. Simon a chance to pay the residue of the bond. Mr. Davis came to see me on a certain day in December; it was the day the \$1,000 were paid into court. [This date is admitted by all parties to have been December 17, 1891.] Davis said to me the Simons did not have or could not pay but \$1,000. I told him our understanding had been that he was to pay \$1,500 in. Well, he said they could not pay but this amount, and he insisted that I would consent to let them pay in the \$1,000. I asked him when he could get this \$1,000. He said that afternoon, or right away. Mr. Davis came up within a short while afterwards, quite late in the afternoon, and told me that he paid the money to Mr. Hunter, the clerk of the court,—paid the \$1,000. Within a few minutes [continues the witness] I chanced to meet Mr. Hunter, and he said the money had been paid in by Davis." Mr. Peters states, further, that, according to his recollection, it could not have been before 4 o'clock in the afternoon when the money was paid in. "It was quite late in the evening. I remember that distinctly." The evidence is convincing that at the time Davis was importuning the attorney general for permission to pay in \$1,000 instead of \$1,500, as originally agreed, Davis had already collected \$1,500 from Simon. This fact was, of course, not known to the attorney general. It will be remembered that Davis and his brother both testify that the sum of \$1,000 was paid to the clerk of the criminal court not later than half past 1 o'clock of December 17, 1891. In this statement they are both contradicted by Atty. Gen. Peters, an entirely credible and disinterested witness, who tes-

tified, as already seen, that the money was not paid until quite late in the evening, certainly not before 4 o'clock. Simon testified that the money he borrowed from the bank was in three packages, of \$500 each. Hunter, the deputy clerk of the criminal court, testified that the sum of \$1,000 paid into the criminal court by Ralph Davis was, to the best of his recollection, in two packages, of \$500 each.

Another significant circumstance in this connection is that James Smith, cashier of the Memphis National Bank, testified that Davis kept his account with said bank, and that on the 18th December, 1891, the next day after this money is claimed to have been paid him, he made a deposit in that bank of \$500, and the witness produced the deposit ticket in Davis' handwriting. Davis denies that this deposit of \$500 was part of the money collected from Simon. He claims that part of it was the sum of \$325 left in the safe at Lowenstein's after the loan of \$1,000 to Simon, and which his brother handed him the next day, and he thinks the balance of that deposit was made up of fees collected at that time. No specific amounts in fees which, added to the \$325 handed him by his brother from the safe, would amount to \$500, are shown in evidence, and we think the explanation of this deposit is unsatisfactory.

Without further discussion of the facts, we are constrained to believe that the finding of the circuit judge is well supported by the weight of the evidence. It is unnecessary, in this view of the case, to go into an examination of the charge made in the complaint that Davis procured the issuance of an execution against his client for the collection of \$4,000, balance of criminal court judgment. Affirmed.

COMPTON et al. v. PERKINS.

(Supreme Court of Tennessee. June 29, 1893.)
EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO
WIDOW AND CHILDREN—CONSTRUCTION OF STAT-
UTE.

In Mill. & V. Code, § 3128, providing that exempt personal property on the death of the head of a family, who leaves a wife or children surviving, shall go to the widow for herself and in trust for the benefit of her children of the deceased, or of the widow, or of both, the word "children" means the young sons or daughters of either deceased or his widow, who may form part of the family of which deceased was the head, and in default of such children the widow takes the exempt property absolutely.

Appeal from chancery court, Carroll county; A. G. Hawkins, Chancellor.

Bill by John A. Compton and others against W. W. Perkins. From a decree for complainants, defendant appeals. Reversed.

J. R. Hawkins, for appellant. J. P. Wilson, for appellees.

SNODGRASS, J. Thomas S. Compton died in 1888, leaving a widow. He had been twice married, and several children of the first marriage survived him, all of them being of age. There were no children of the second marriage. The exempt property was assigned to the widow, and she retained, used, and in part disposed of it during her life. She married again in 1890, and died in 1893. Her second husband was the defendant, W. W. Perkins. He retained such part of the exempt property as was on hand at the death of his wife, claiming it *jure mariti*. The complainants brought the bill in this cause to replevy the property, and have their right to it determined as children of the original owner, Thomas S. Compton. They averred substantially the facts stated, and insisted that upon the death of their stepmother (with whom it was not averred that they had ever at any time resided) they were entitled to the property. The defendant demurred, on the ground that the bill showed no right in complainants, but, on the contrary, that defendant was entitled to the property. The chancellor overruled the demurrer, and allowed defendant to appeal, which he did, and assigned error to the same purport as the demurrer.

The decree is erroneous. Exempt personal property, on the death of the head of a family, who leaves a wife and children surviving, goes to the widow for herself and in trust for the benefit of the children of the deceased or of the widow or of both. Mill. & V. Code, § 3128. The "children" here designated are not necessarily the heirs or distributees of either the husband or wife, for they may be either his children alone or hers alone or those of both. The statute, therefore, is not intended to pass such property to heirs or distributees in the ordinary sense or in the ordinary way. It designates a class or classes of persons as the objects of its beneficial operation in connection with the widow. Neither is the term "children" used in the more enlarged sense of sons and daughters of either, for it was not intended to provide for the grown and married descendants of husband or wife out of the exempt property of the husband thus vested in the wife "for herself and in trust for the benefit of the children," etc. The word "children" was used in the ordinary sense in which it is understood,—as the young sons and daughters of husband or wife who might constitute properly a part of the family of which the deceased was the head; children in fact, in contradistinction to any descendant who was no longer a child. This is clearly indicated by the further provision that, where there is no widow, the property is to be exempt for the benefit of the minor children under 15. In this instance we have the case of a widow surviving, but no children of either of the class entitled to share with her in the beneficial use and enjoyment of the exempt property. By the plain terms

of the statute she was therefore entitled to the property absolutely. It is "vested in the widow for herself and for the benefit" of others. If there be no others, the entire beneficial interest is in her. The exempt property is to serve a special purpose of benefit to the family of a deceased, or that of which he was the head. The widow takes it as a trust for this special use, her own and that of those thus declared entitled to share it with her as a family. If one die an interest is not distributed. It remains an entirety for use of survivors. *Sneed v. Jenkins*, 90 Tenn. 137, 16 S. W. Rep. 64. If there be no family, but the widow, surviving, she is the sole object of the provision of the statute, the sole beneficiary for whom she holds, and therefore the absolute owner. The decree is erroneous. It is reversed, and the bill dismissed, with costs.

CHAMBERS v. CHAMBERS et al.

(Supreme Court of Tennessee. June 23, 1893.)

HUSBAND AND WIFE — CONVEYANCE OF LAND TO BOTH—RIGHT OF SURVIVORSHIP.

Where land is conveyed to a husband and his wife during the existence of the marital relation, they hold it by entireties during their joint lives, and on the death of either the survivor takes the entire estate.

Appeal from chancery court, Carroll county; A. G. Hawkins, Chancellor.

Bill by R. P. Chambers against Tellulah Chambers and others to enjoin the confirmation of proceedings to set apart a homestead and dower in certain lands. Decree for complainant, and defendant Tellulah Chambers appeals. Affirmed.

L. L. Hawkins, for appellant. J. & R. Hawkins, for appellee.

WILKES, J. Henry Chambers died in October, 1888, leaving his widow, Tellulah, and one son, surviving him. At the time of his death he and his wife owned a residence and furniture situated in Huntingdon, Tenn., and conveyed to them during the existence of their marital life by Joe McCracken. The consideration agreed to be given by them for the house and lot and furniture was \$3,000, and of this amount \$1,500 was unpaid at his death, and was a lien upon the house and lot and furniture. R. P. Chambers, the father of Henry, administered upon his estate. A controversy soon arose between the father, R. P. Chambers, as administrator, and Tellulah, the widow, as to the ownership of the furniture, and an agreed case was made up, and submitted to court, to determine this question. In this agreed case it was by the court determined that, inasmuch as the furniture was conveyed to the husband and wife during their married life, it passed to the widow, and became her property, upon the death of the husband, and did not pass to his administrator. After the death of her

husband the widow sold the Huntingdon house and lot for \$2,250, and out of the proceeds paid off the incumbrance of \$1,500, and now claims the remainder by virtue of her survivorship of her deceased husband. Her husband, at the time of his death, was the apparent owner of certain other real estate besides the Huntingdon house and lot, the title to which was vested in him alone, so far as appeared of record. The widow filed her petition in the county court of Carroll county, asking to have homestead and dower assigned to her out of this real estate. That court adjudged that she was entitled to homestead out of this real estate, and, if the property exceeded \$1,000 in value, then to dower out of the excess over \$1,000, and appointed commissioners to set the same apart. These commissioners assigned the entire property, exclusive of the Huntingdon lot, to the widow, as her homestead, reciting in their report that it did not exceed \$1,000 in value. Pending the confirmation of this report, complainant filed the present bill, enjoining the confirmation, and all other proceedings to set apart homestead and dower out of said lands, upon the grounds: First. Upon the idea that the widow was entitled to homestead in the Huntingdon house and lot, and having sold the same, and realized therefrom, after paying the incumbrance, as much as \$1,000, she must take the same as her homestead, and was estopped to claim homestead in any other real estate belonging to her late husband. Second. That the real estate beside the Huntingdon house and lot, which the commissioners were about to set apart to her as homestead, was in truth and fact not the property of the husband, when he died, but was the property of complainant, his father, and held in trust for him by the son. It was claimed in the bill that the property was bought by the father, and paid for, in the main, by him, but that by agreement between the father and son the title was taken to the son, because the father was at the time involved, and could not hold property in his own name, and that it was further agreed that the title should so remain in the son until such time as it could be safely vested in the father, and also until certain indebtedness of the father to the son could be paid and satisfied; the son thus holding the title to the property to secure the amount due him, and to protect the same from other creditors. It was further stated in the bill that the indebtedness of the father to the son amounted, in 1883, to \$1,858, and at that time the son executed to the father two bonds, conditioned to make title to the two pieces of property upon the payment of two certain sums, aggregating the indebtedness of \$1,858. These bonds for title were signed by the son, and witnessed, but were never recorded, and were not made public, or known to the widow, until after her husband's death, and until the filing of this bill. Upon their faces, they purport to be ordinary

bonds for title, reciting the sale of the property by the son to the father for a certain price, and providing that on the payment of that price the son would convey the lands to the father. They were not signed by the son's wife. The widow, defending this bill, insists that the Huntingdon house and lot, conveyed by McCracken to her husband and herself during their married life, vested upon his death in herself, absolutely, as his survivor, and that the other real estate was the property of her husband when he died, and not of his father, and that she was entitled to homestead and dower out of the same, not having joined in the bonds for title. Much proof was taken to sustain the contention of the opposing parties. On the hearing the chancellor decreed that the widow was entitled to homestead in the Huntingdon house and lot, which she and her husband owned together at the time of his death, and reserved the question whether she was entitled to homestead in the other real estate until a reference could be executed by the master to ascertain whether the widow had received net as much as \$1,000 out of the sale of the Huntingdon property. This reference being executed, it appeared that the net amount received by her from the sale of the Huntingdon property, after paying off the incumbrance, was as much as \$1,000, and perhaps more; and thereupon the chancellor, in a final decree, held that the widow was not entitled to any homestead or dower in the other real estate. While the final decree does not so recite, upon its face, it is evident, when it is considered in connection with the former decree, and proceedings thereunder, that homestead in this real estate, outside of the Huntingdon house and lot, was denied because the widow had already received its net value out of the proceeds of sale of the Huntingdon property. From the decree of the chancellor, the widow appealed, and she has assigned errors: (1) That the chancellor erred in holding that the widow's homestead right attached, upon the death of her husband, to the Huntingdon property, and that she was required to take her homestead out of it; (2) in not holding that she was entitled to homestead in the real estate other than the Huntingdon property; (3) in enjoining the proceeding to allot homestead and dower out of this real estate under the county court proceeding; (4) in holding that, inasmuch as the widow had received as much as \$1,000 net out of the Huntingdon property, she could not have homestead out of any other property; and (5) in taxing her with any costs incident to her attempt to obtain homestead and dower.

We are of opinion that the chancellor erred in holding that the widow was entitled to, or required, to take homestead or dower out of the Huntingdon property. This property was deeded to the husband and wife during the existence of the marital relation. They held it by entireties during their joint lives,

and upon the death of either the survivor took the entire and absolute estate. In this case, upon the death of the husband, the entire and absolute title to the land vested in the surviving widow, and she took the same under the rules of law in such cases. The husband's estate, and all his interest in said lot, ceased with his life, and after his death he had no estate in the lands, out of which the widow could be required, or was even entitled, to take dower or homestead. *Ames v. Norman*, 4 Sneed, 683; *Taul v. Campbell*, 7 Yerg. 319; *Berrigan v. Fleming*, 2 Lea, 275. It is true that the homestead right of the husband attaches to lands thus held during his lifetime, but this will not prevent the entire property, upon his death before the wife, passing to the widow by right of survivorship, and not as a homestead. *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. Rep. 142; *McRoberts v. Copeland*, 85 Tenn. 211, 2 S. W. Rep. 33.

We have examined the record carefully upon the question raised as to the true ownership of the real estate other than the Huntingdon house and lot, and we are satisfied from the proof that this real estate is the property of the father, and not of the son. It appears that the father bought it, and paid for it, using some property of the son's, and borrowing some money from him for that purpose; that he has been in continuous use and enjoyment of the property since its purchase, receiving its rents and profits, and paying taxes thereon; and we think the contention of the father in his bill, as to this property, is sustained by the proof. This being so, the widow of the son is not entitled to either homestead or dower out of the same. The decree of the chancellor, refusing to allow homestead and dower out of this real estate, is correct, as to result reached, but based on the wrong ground; and we affirm the same, in its results, and enjoin the proceeding to set apart to the widow homestead and dower out of this property by the county court of Carroll county. Inasmuch as the true state of the title to this real estate, other than the Huntingdon property, was withheld by complainant from the widow until the commencement of this litigation, she is relieved from all costs incident to her attempt in the court below, and in the county court and in this court, to obtain homestead and dower out of said real estate, and the same will be paid by complainant out of the assets of the estate of Henry Chambers, which is being administered by him as insolvent.

MITCHELL et al. v. STATE.

(Supreme Court of Tennessee. June 1, 1893.)
CRIMINAL LAW — CONTINUANCE — JOINT DEFENDANTS — APPLICATION FOR SEVERANCE — LARCENY — WHAT CONSTITUTES.

1. A motion for a continuance is properly denied when not supported by an affidavit.

2. An application for a severance by joint defendants is properly denied when not supported by an affidavit.

3. Defendants represented to another negro that they were officers of an association owning land on which they desired to locate poor negroes, giving them homes on easy terms; and they told him that if he would give them what money he had—about \$20—they would move him and his family on the land, and stock it for him, allowing him to pay for it when able. He accordingly turned over his money, which defendants took, and never accounted for. There was no such association, and defendants' statements were all false. *Held*, that this constituted larceny, under Code, § 4679, providing that "if a contract of loan for use, or of letting and hiring, or other bailment or agency be used merely as the means of procuring possession of property, with an intent to make a fraudulent appropriation at the time, it is larceny."

Appeal from criminal court, Shelby county; J. J. Dubose, Judge.

Stanley Mitchell and James Washington were convicted of larceny, and appeal. Affirmed.

W. A. Duncan, for plaintiffs. The Attorney General, for the State.

CALDWELL, J. Stanley Mitchell and James Washington have appealed in error from a joint conviction for the larceny of \$20, the money of Patton Walker, the prosecutor. They seek a reversal upon three grounds: (1) Because the trial judge refused them a continuance; (2) because he refused them a severance; (3) because the evidence, as they contend, does not sustain the verdict.

1. The motion for continuance was properly disallowed, because not supported by an affidavit.

2. The application for a severance was properly disallowed for the same reason.

3. It is well established by the proof that plaintiffs in error and the prosecutor are negroes; that on the 15th day of May, 1892, Mitchell and Washington went together to the house of Walker, a newcomer in the city of Memphis, and represented to him that they were president and secretary, respectively, of an anti-Oklahoma association, which association they said owned a large tract of land near Memphis, in Shelby county, upon which they desired to locate poor colored people, and give them homes on easy terms; that they further said to him that if he would turn over to them such money as he then had they would move him and his family upon that land, and stock it for him, and allow him to pay for the land and stock as he might become able; that, believing their representations to be true, Walker and his wife at once turned over to Mitchell and Washington the sum of \$20, all the money they had; that Mitchell and Washington went away with the money, never returned or accounted for any part of it, but appropriated it as their own, and never offered to comply with the promise under which they received it. The

proof further shows that there was in reality no such association as that of which the plaintiffs in error claimed to be officers; that they knew all of their representations to be utterly false; and that they made them alone for the fraudulent purpose of obtaining the prosecutor's money, and applying it to their own private use. These facts constitute larceny, under section 4679 of the Code, which is in the words following: "If a contract of loan for use, or of letting and hiring, or other bailment or agency be used merely as the means of procuring possession of property, with an intent to make a fraudulent appropriation at the time, it is larceny." From the prosecutor's standpoint, Mitchell and Washington, upon their own suggestion, became his bailees and agents to receive his money and turn it into the treasury of the supposed association in his name and for his benefit. With no other view did he hand them his money; in no other relation can they be held to have received it. In legal contemplation, the transaction constituted a contract of bailment and agency. By using that contract merely as a means of obtaining possession of the prosecutor's money, intending at the time to make a fraudulent appropriation of it, the plaintiffs in error became guilty of larceny, under the statute just quoted. That statute seems to have originated with the Code of 1858, and was no doubt intended primarily to change the rule announced in *Felter v. State*, 9 Yerg. 397, and other cases therein cited, to the effect that there can be no larceny in the absence of a technical trespass, though the party charged be shown to have obtained possession of the property by fraud upon the owner, and with a felonious intent of converting it to his own use. An application of that statute to facts practically identical with those disclosed in *Felter's Case*, with a result exactly the reverse, is found in *Caldwell v. State*, 3 Baxt., at page 430. In *Defrese's Case* it was said that the trespass in such a case is in the fraud and deception practiced upon the owner, by which the possession was acquired with felonious intent, and that the statute is but a return to the ancient principles of the common law. 3 Helsk. 61, 62. The statute was not mentioned in the case of *Robinson v. State*, 1 Cold. 120, and need not have been, for the reason that the facts did not call for or justify its application. *Robinson* was not shown to have practiced any fraud or deception in obtaining possession of the trunk from which he took the prosecutor's money, but only to have taken the money and converted it to his own use, after the owner had of his own accord placed the trunk in his charge for safe-keeping. This court held that the taking of the money, under such circumstances, constituted the crime of larceny at common law, only the trunk, and not the money, having been placed in the defendant's keeping. *Id.* 121,

122. The statute seems not to have been considered, or, if considered, it was not applied, in the case of *Collins v. State*, 15 Lea, 69. The facts stated in the report of that case do not bring it clearly within the operation of the statute in question.

Mitchell and Washington are also under conviction upon another indictment for the larceny of \$39, the money of Eulos Rodgers. They are shown to have obtained his money at the same time, with the same intent, and under precisely the same circumstances, as they received that of Patton Walker, and to have converted it to their own use, as they did his. In fact the two cases were tried together, upon evidence largely the same; hence what has been said of the one case in this opinion is equally applicable to the other one, and need not be repeated. It was proper that the judgment in one of the cases should provide that the imprisonment thereunder should commence at the expiration of the imprisonment imposed in the other case, the offenses being separate. Code, § 5228. The punishment in each case was fixed at five years in the state penitentiary. Affirm both judgments.

PULLMAN PALACE-CAR CO. v. GAVIN et al.

(Supreme Court of Tennessee. June 21, 1893.)

SLEEPING-CAR COMPANY — LIABILITY — MONEY
STOLEN FROM PASSENGER—ACTION TO RECOVER
—WHO MAY BRING.

1. A sleeping-car company is liable for money stolen from a passenger by the porter of the car on which he is traveling.

2. Plaintiff, when about to go on a journey with his family and some friends, was given some money by the parents of a lady who had been put in his care, with which to pay her traveling expenses. This he placed in his trousers pocket, and it was stolen by the porter of the sleeping car during the night. Held that, the money being rightfully in plaintiff's possession, he was entitled to bring an action for its loss.

Appeal from circuit court, Shelby county;
L. H. Estes, Judge.

Action by M. Gavin and others against the Pullman Palace-Car Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thos. H. Jackson, for appellant. H. C. Wariner, for appellee.

McALISTER, J. The object of this suit is to recover the sum of \$150 alleged to have been stolen from M. Gavin while a passenger on a Pullman palace car. It appears from the record that on the night of the 30th of August, 1889, M. Gavin, with his immediate family, and a few friends, left Memphis for a summer excursion. Among the party was Miss Kelly, and just before the train started at 10 o'clock, Mrs. Kelly, the mother of Miss Kelly, who had accompanied her to the cars, handed to Gavin, across the

aisle, the sum of \$150, to be used in defraying the expenses of her daughter during the trip. Gavin deposited the roll of money without opening it in his trousers pocket, and, when he retired to his berth, (a lower one,) about 11 o'clock, he felt the roll of money in his pocket. He then rolled up his trousers, and placed them in the receptacle provided for clothes at the head of his berth. The next morning, when Gavin awoke, he felt for his trousers, and discovered that they were missing. Robinson, the colored porter, was called, and, in response to inquiries, told Gavin that he had found a pair of trousers on the floor that morning, but, supposing they belonged to the section adjoining the head of Gavin's berth, he had placed them in that section. This section was occupied by two well-known and reputable citizens of Memphis. Robinson then brought the trousers to Gavin, but the money was missing. Gavin also discovered that a bunch of keys was missing from his pocket, but he found therein a sleeve or collar button, which was not his property. Robinson informed Gavin that the other porter, one Lind, had found a bunch of keys in the aisle during the night. Robinson then brought Lind to Gavin, and Lind handed him the bunch of keys, and also one or more baggage checks. Gavin, upon discovering the loss of the money, had the conductor called, and reported his loss. The conductor made some search, but failed to find the money. During the investigation it was reported to Gavin that the porter Lind had lost one of his sleeve buttons, and this fact, coupled with the finding of a strange sleeve button in Gavin's trousers pocket, at once fixed suspicion upon Lind. Gavin called Robinson, and questioned him about the sleeve button, and was told by Robinson that Lind had asked him about his lost sleeve button. The car containing Gavin's party was occupied entirely by reputable citizens of Memphis, and many were also in the other sleepers. The train was a special train of five sleepers, and was to run from Memphis to Norfolk without change of cars, and all the sleepers were in charge of only one conductor. No new passengers came aboard at any place between Memphis and Chattanooga. The conductor testified in regard to the feasibility of one passenger robbing another behind the curtain that it is possible to be done, but not probable, if the porter is on watch, and attending to his duty. The record shows that Lind went on watch about 12 o'clock, and remained on watch until 3 o'clock, when he was relieved by Robinson, who then continued his watch until half past 6 the same morning. Robinson testified that, if the porter was at his post and on watch, it would be impossible for any one passing along the aisle, or for a passenger occupying an adjoining berth, to abstract anything from Gavin's berth without attracting the party's attention; that such a robbery was impos-

sible without detection when the porter was on watch and doing his duty. The porter Lind testified that no one passing along the aisle could have stolen anything from a berth without being seen by him while on watch, but that a passenger in a berth might steal from an adjoining section at the head or foot. The circuit judge tried the case without the intervention of a jury, and, being of opinion that the money was stolen by porter Lind, rendered judgment against the company for \$150. The Pullman Palace-Car Company appealed, and assigns errors.

The law is well settled that a sleeping-car company is not a common carrier. They differ radically in the kind of service rendered the public. The contract of the sleeping-car company is to lodge the passenger, while that of the carrier is to carry him. Sleeping-car companies are not liable as inn-keepers for the loss or theft of articles from a guest, for the reason that the passenger on a sleeping-car retains the exclusive personal possession and control of his valuables. The company does not undertake to receive the property of the guest, but expressly declines to do so, and for this reason is absolved from the liability of an inn-keeper. It has been so difficult to define the precise legal status of this class of public servants, and the measure of their accountability, that they have been facetiously characterized as "flying nondescripts." It is, however, universally recognized by the courts that it is the duty of a sleeping-car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property of the passenger is stolen by a fellow passenger, or by an intruder on the train, in consequence of the failure of the company to maintain this careful and continuous watch, the company will be liable for its value. *Carpenter v. Railroad Co.*, 124 N. Y. 58, 26 N. E. Rep. 277. It follows, as a corollary from this proposition, that, if the servant or agent of the company charged with the duty of watching and protecting the property of the guest purloins it himself, the company is responsible. Says Mr. Wood, in his work on Master and Servant, (section 321:) "In that class of cases where the master owes certain duties, either to third persons or the public, whether the same arise from contract or statutory obligations, a different rule of liability exists from that which prevails when the liability sounds entirely in tort. When, by contract or statute, the master is bound to do certain things, if he intrusts the performance of that duty to another he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act. Where the master, by contract or operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that

he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does it by another he is treated as having done it himself; and the fact that his servant or agent acted contrary to his instructions, without his consent, or even fraudulently, will not excuse him." *Palace-Car Co. v. Matthews*, 74 Tex. 654, 12 S. W. Rep. 744.

The first assignment of error is, viz.: "There is no evidence to support the finding of the circuit judge, for the reason that the evidence introduced by the plaintiff shows that the servants of defendants were watchful and diligent, and were guilty of no negligence." The circuit judge found that the larceny was committed during Lind's watch, between 12 and 3 o'clock, and he found, further, that Lind was the guilty party. Upon an examination of the record, we find material evidence to sustain the finding of the circuit judge.

The second assignment is that the circuit judge erred in finding that the defendant, as a matter of law, was liable to the plaintiff for the loss of the money, for the reason that one passenger has no right to carry upon his person the money of another passenger, and to hold the defendant company liable for the loss. The third assignment of error will be considered in connection with the second. The third assignment is, viz.: "The evidence shows that the money sued for was not the money of M. Gavin, but the money of Martin Kelly, who was not a passenger upon the cars." The gravamen of this suit is to recover the value of the property claimed to have been stolen by the employees of the company who were charged with the duty of preserving it. As already stated, this money came into the hands of M. Gavin as a depositary, to be used and expended by him in defraying the traveling expenses of Miss Kelly. It has been held in this state that an actual and exclusive possession by a party, even though it be by a wrongdoer, is sufficient to support an action of trespass against a mere stranger or wrongdoer, who has neither title to the possession in himself, nor authority from the legal owner. *Criner v. Pike*, 2 Head, 397. "Ordinarily," says the court in that case, "the party in possession is either the owner of the property, or answerable over to the owner; and in either case he is entitled, not only to damages for the taking, but also for the value of the property. This is the general rule. A defendant has been allowed to prove in mitigation of damages that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner, either by being restored to him in specie, or taken upon legal process in payment of his debts, for in such case the plaintiff is not answerable over. But Mr. Sedgwick thinks the principle of these decisions has been carried quite far enough, * * * and that it will not do to permit acts of will-

ful or wanton trespass to be excused by the defense of outstanding titles in third persons." See, also, *Logan v. Coal Co.*, 9 Heisk. 690, where it is held that "mere possession is a sufficient title upon which to maintain trespass against a mere wrongdoer." *Crawford v. Bynum*, 7 Yerg. 381. Miss Kelly having been placed in charge of Mr. Gavin, the latter had become the depositary of this money, for the purpose of defraying her current expenses, as they arose upon the journey. It has been held that members of the same family, traveling together, may carry each other's effects. *Dexter v. Railroad Co.*, 42 N. Y. 326; *Curtis v. Railroad Co.*, 74 N. Y. 116. We think that Miss Kelly, having been placed in charge of Mr. Gavin, was "pro hac vice," for the purposes of the journey, a member of his family, and that a gentleman in charge of ladies on such an occasion was their protector, and the proper custodian of their money and personal effects intrusted to him. In this view of the case, we think it unnecessary to determine whether, at the time the theft was committed, the money was the property of Miss Kelly or her father, Martin Kelly. The proof shows the money was in the actual possession of Gavin, as its rightful depositary. Other questions of minor importance were considered and decided orally.

Affirmed.

ROBINSON et al. v. BOYD et al.

ROBINSON v. ROBINSON et al.

(Supreme Court of Tennessee. June 1, 1893.)

FAMILY SETTLEMENT—RES JUDICATA—CONSTRUCTION OF WILL—PERSONS ENTITLED—"HEIRS."

1. Family settlements will be sustained in courts of equity unless it clearly appear that there is manifest error, and even in case of persons under disability a settlement will not be disturbed after a long lapse of time, and the accrual of other rights.

2. A judgment, except in special cases, is *res judicata*, not only on the points as to which the court was required by the parties to form an opinion and pronounce judgment, but also on every point which properly belonged to the subject of litigation, and which the parties exercising a reasonable diligence might have brought forward at the time.

3. The second item of a will gave all testator's estate to his two sons, and provided that if either should die before testator, leaving children, then his share should go to his children, "but in the event of the death of either of my two sons before reaching his majority, or in the event of his dying intestate and without children born in lawful wedlock, then his share to his surviving brother." Item 3 provided that, "in case of the death of both of my said sons, neither leaving children born in lawful wedlock, then I give my whole estate to my daughter." *Held*, that the two items should be construed together, and that testator intended to carry his property over to his daughter in case only that both sons died without issue and intestate.

4. A testator gave his estate to "my brother J., and his lawful heirs. If he dies without such heirs, then I give everything to my sister." *Held*, that the word "heirs" should be construed "children."

5. If the word "heirs" should be given its usual technical meaning, then this is a proper case for the application of Mill. & V. Code, § 2815, providing that a contingent limitation made to depend on a person dying without heirs, children, etc., shall be a limitation to take effect when such person dies with heirs, children, etc., living at the time of his death, or born within 10 months thereafter, unless the intention be expressly declared otherwise.

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Bill by Alston Boyd and wife, Lella R. Boyd; Alston Boyd as administrator *de bonis non* of John B. Robinson, deceased, and of William H. Robinson, deceased; and Alston Boyd as the next friend of his five minor children, Bessie, Mary, Alston, Jr., Lella, and Martha Boyd,—against Eula C. Robinson (now Farnsworth) in her own right, and against Eula C. Robinson and L. B. McFarland as executrix and executor of John B. Robinson, Jr., deceased,—to obtain a construction of the wills of John B. Robinson, Sr., and William H. Robinson, and that the limitations over in said will to complainants be declared valid, and that complainants be put into possession of the estates of John B. Robinson, Jr., and William H. Robinson, and for other relief. Annie Douglas Robinson was subsequently made a party defendant. From the decree, Eula C. Robinson individually and as executrix of John B. Robinson, Jr., and L. B. McFarland as executor, appealed. The Boyds and Annie Douglas Robinson made assignments of error. Modified.

Bill by Annie D. Robinson, by her next friend, against Eula C. Robinson and others, for a writ of possession of certain land and for an accounting, etc. From the decree, Annie D. Robinson appeals. Affirmed.

The two cases were heard together.

Metcalf & Walker, for appellant, Annie D. Robinson. Malone & Malone and B. M. Estes, for complainant Boyd. Morgan & McFarland, Wurlly & Wright, M. B. Trezvant, and Metcalf & Walker, for defendant Eula C. Robinson. Morgan & McFarland and B. M. Estes, for appellee E. C. Robinson.

WILKES, J. The main question of this first-named clause is to have the court construe the wills of John B. and William H. Robinson, devising property valued at over \$100,000. The original bill was filed by Alston Boyd and wife, Lella R. Boyd, Alston Boyd as administrator *de bonis non* of John B. Robinson, deceased, and of William H. Robinson, deceased, and by Alston Boyd as the next friend of his five minor children, namely, Bessie, Mary, Alston, Jr., Lella, and Martha Boyd, against Eula C. Robinson (now Farnsworth) in her own right, and against Eula C. Robinson (now Farnsworth) and L. B. McFarland as executrix and executor of John B. Robinson, Jr., deceased. The bill was sworn to by Alston Boyd on October 16, 1889, and on the same day a motion was made for an injunc-

tion restraining the defendant from removing or opening the iron safe of W. H. Robinson, and removing therefrom all of the valuable papers of W. H. Robinson and John B. Robinson, Sr. Upon hearing the application on October 17, 1889, the chancellor overruled the motion for an injunction. As no injunction was obtained, complainants prepared an amendment to the original bill, and the two, being attached, were together filed as one bill on January 15, 1890. The complainants averred that John B. Robinson died in 1885, having first made his will, by which he directed as follows: "Item 2. I give and bequeath all my estate, real and personal, of every description, and wherever situated, absolutely to my sons William Henry Robinson and John Beverly Robinson, Jr., to be equally divided between them. In case of the death of either of my sons before my death, leaving children born in lawful wedlock, then his share to his child or children, as the case may be; but in the event of the death of either of my two sons before reaching his majority, or in the event of his dying intestate and without children born in lawful wedlock, then his share to his surviving brother. Item 3. In case of the death of both of my said sons, neither leaving children born in lawful wedlock, then I give my whole estate to my daughter, Mrs. Lella Boyd; the personalty to her absolutely, the realty to her sole and separate use for life, with remainder over to her children." That his two sons mentioned in this item of the will had both died without any children, and therefore complainants were entitled to the estate of John B. Robinson, Sr. That William H. Robinson died two years after the death of his father, namely, in 1887, having first made his will, the second item of which is in these words: "Second. I give all of my estate of every kind, real and personal, and wherever situated, to my brother Jno. B. Robinson, and his lawful heirs. If he dies without such heirs, then I give everything to my sister, Lella Boyd; the personalty to her absolutely, and the realty to her for life, with remainder over to her children." That the said John B. Robinson, Jr., mentioned in this item of the will, had, two years after the death of his brother, namely, 1889, died, without leaving any child him surviving, no child ever having been born to him. Wherefore Mrs. Boyd and her children claim that under this section of the will of W. H. Robinson they were entitled to all of the estate of which W. H. Robinson died seised and possessed.

The bill further avers that the said John B. Robinson, Jr., by his last will, devised everything of which he was possessed to his wife, Eula C. Robinson, (now Farnsworth,) and that the said John B. Robinson, Jr., being in possession of the estate of his father, John B. Robinson, Sr., and his brother

W. H. Robinson, under their wills, the possession passed to the said Eula C. Robinson, (now Farnsworth,) who refused to give possession to the complainants to any part of the estates either of John B. Robinson, Sr., or W. H. Robinson; she insisting that the limitations over in the wills of these two testators in favor of Mrs. Boyd and her children were void, and that John B. Robinson, Jr., took a fee both in the estate of his father and his brother. The bill avers that John B. Robinson, Sr., was a man of great prudence, and skilled in business affairs, and that, having received by his wife, (Mrs. Boyd's mother,) soon after his marriage, some \$10,000 in cash, and using this as a nucleus, he had from time to time invested, and reinvested, and by his speculations and trades had accumulated a large estate; and that in the fifties he began taking title to this property, either in his name, as trustee for his wife and children, or else had conveyances made to his wife for her life, with remainders over to his children and their children, upon certain conditions and limitations; while other property, and notably the Planters' Insurance property, and the property on Vance street, was conveyed by John B. Robinson, Sr., directly and unconditionally to his children in the year 1875.

In 1873, Lella Boyd intermarried with Alston Boyd, by whom she had five children, all living at the date of the filing of the bill, and two of whom had been born prior to the year 1877. In April, 1877, a family settlement was had with regard to the entire trust estate, the immediate cause of the settlement being an application of Mr. and Mrs. Alston Boyd to have set apart to Mrs. Boyd in severalty her one-fourth of the trust estate, there being at that time four children of John B. Robinson, Sr., namely, John Douglass Robinson, Lella R. Boyd, William H. Robinson, and John B. Robinson, Jr. At this date Douglass and Lella were over 21 years of age; W. H. was 20, and John B., Jr., was 13 years of age. Valuations were put upon all of the trust estate, and the indebtedness of the estate was then set out, amounting to something over \$10,000. Mrs. Boyd was required to account for what she had theretofore received. John B. Robinson, Sr., put in certain personal property disclosed by the bill, and insisted that as to a part of the property he had a life estate, and that as to all of the property he had a right to control it as one estate during his life. Considerable irritation arose out of the different views and contentions of the parties, but the result was a strictly family settlement, by the terms of which each child was to take one-fifth of the entire trust estate, and assume one-fifth of the debts of the estate; and John B. Robinson, Sr., was to take one-fifth of the entire trust estate, and assume one-fifth of the debts. In other words, instead of the estate being divided

into four parts between the four children of John B. Robinson, Sr., John B. Robinson, Sr., was to get a child's part of the estate, and the estate was divided into five equal parts.

A bill was filed in the name of John B. Robinson, Sr., Alston Boyd and his wife, Lella, in order to ratify and confirm the family settlement, and to have set apart to Lella Boyd one-fifth of the estate, she having selected the house and lot on Front street as her one-fifth of the entire estate, and agreed to pay her father \$4,400 in order to equalize her share with the others, which she afterwards did. That while the agreement was in fact that Mrs. Boyd should receive only one-fifth, and while she only received this amount, yet the chancery proceedings were so conducted as to make it appear to the court that she was in truth receiving one-fourth thereof. Upon the death of Douglass Robinson litigation sprung up between John B. Robinson, Sr., and his two sons on the one side and Annie D. Robinson, the widow of Douglass, on the other, in which John B. Robinson, Sr., and his two sons John B., Jr., and William H. filed a cross bill, in which they set up the terms of the family settlement of 1877, and averred that by and under that settlement John B. Robinson, Sr., was possessed with a child's part of the estate, and averring that after the setting apart of Lella Boyd of the Front street house the entire trust estate was owned equally by the three children and their father; and the cross complainants prayed a partition of the estate in these proportions. That in this cause (to which Boyd and wife were not parties) the chancellor decreed that there had been a family settlement in 1877, and that John B. Robinson, Sr., by the terms thereof was to receive and be vested with a one-fifth interest therein; but, the representatives of Douglass Robinson having pleaded the statute of frauds, the plea was sustained, and after this such proceedings were had in the cause that the estate of Douglass Robinson was declared insolvent, and all his part of the trust estate was set apart in severalty, incumbered with his widow's dower, and the same was sold to pay debts adjudged to be due from his estate, when it was bought in at chancery sale by W. H. Robinson, who paid for the same by using the claims of John B. Robinson, Sr., adjudged due him from the estate of Douglass, and nearly sufficient in amount to liquidate the entire purchase money due from him. That W. H. Robinson probated the will, and qualified as executor of J. B. Robinson, Sr., deceased, but took no further steps whatever so far as the records of the probate court disclosed. That upon the death of W. H. Robinson, John B. Robinson, Jr., probated his will, and took out letters testamentary, but never took any other steps in the administration of the es-

tate, so far as the records of the probate court disclose. That soon after the death of John B. Robinson, Sr., namely, in 1886, the two brothers William H. and John B., Jr., divided the entire trust estate standing in their names or in the name of their father, each one taking property supposed to be in the aggregate of equal value. In this division no distinction was taken with regard to any of the property owned by them, or the source from which it came. There was thrown into the division 13 acres of land owned by John B. Robinson, Sr., near the National Cemetery, and which had never belonged to the trust estate. That the brothers remained in possession of the property received by each in the division of 1886 until the death of W. H. Robinson, and thereafter John B., Jr., continued in the possession of the entire estate to his death, after which time his widow succeeded him, and refused to allow Mrs. Boyd to enter and take possession of the estate of her father and brother under the wills above named, claiming that the limitations over in her favor were void, and that her husband took an absolute fee, which passed to her upon his death, under the terms of his will.

A. D. Robinson v. E. C. Robinson.

During the pendency of the present suit, namely, on November 12, 1891, the posthumous child and only heir at law of John Douglass Robinson filed her bill against the complainant E. C. Robinson (now Farnsworth) and Alston Boyd et al., in which she insisted that by the terms of the deed made by John B. Robinson, Sr., in 1859, in which he conveyed to his wife for life, with certain limitations over to her children, the property on Main street, commonly called the "Trunk Store," J. D. Robinson had a mere life estate, and that upon his death she took a fourth interest therein, as purchaser under the deed of 1859, and not as heir of her father; and that by the terms of the same deed, upon the death of W. H. Robinson, she took a third of his interest in said lot, and likewise upon the death of John B. Robinson, Jr., she took a half interest in said lot; and she prayed for a writ of possession, for an account of back rents, and for the establishment of her title, etc. Answers were filed by all of the defendants, and the cause was regularly put at issue, but, in order that the whole subject-matter of the litigation might be settled in the present case, an amended and supplemental bill was filed herein on January 11, 1892, setting up the filing of the bill in Robinson v. Robinson, making said Annie Douglass Robinson a party to this bill, and insisting that, in case it should turn out that Annie Douglass was entitled to the interest she claimed, then that J. B. Robinson, Jr., and W. H. Robinson, in making the division in 1886, were under a clear misapprehension as to their

rights and title to this lot, which was very valuable; and praying that, in case said Annie Douglass Robinson recovered, then that complainants have compensation over against Eula C. Robinson for the loss occasioned by such recovery.

In the case of Robinson v. Robinson said Annie Douglass also insisted that she took as purchaser, under another deed of Newton Ford and others to John B. Robinson, the lots situated at the corner of Main and Winchester streets; but as to this property in the division of 1886 half thereof fell to John B., Jr., and half to W. H. Robinson, while as to the trunk store lot the whole thereof fell to W. H. Robinson.

Suit as to Mrs. Dennison.

The first amended bill also brought before the court Dennison and wife, and relief was prayed against them upon the following facts, stated briefly: That W. H. Robinson had purchased a claim owned by A. P. McNeal, administrator, etc., against J. P. Caruthers, which claim was a lien upon certain real estate near the city of Memphis. That one B. M. Stratton was jointly interested with said Robinson in the profits of the venture. That before the death of Robinson, McNeal and Stratton conveyed their interest in the claim to said W. H. Robinson, who, at the time of his death, was prosecuting a suit in the chancery court to subject the real estate of Caruthers to the payment of his claim. That after the death of W. H. Robinson, John B., Jr., as his executor, prosecuted the chancery case, had the land sold, and bought it in for \$3,700, paying for the same by crediting his bid with the claim belonging to the estate of W. H. Robinson. After this, John B., Jr., sold and by his deed conveyed to Mrs. Dennison a part of the Caruthers property, the consideration being \$2,200, of which \$400 had been paid before the filing of the bill, and the remainder, or \$1,800, being still due and unpaid. The bill insisted that as to this Caruthers property, it having been purchased by John B. Robinson, Jr., with the claim of his brother, in which he had only a limited interest, upon his death the title thereto vested absolutely in complainants, and they prayed that it be so declared, and, if this relief was not proper, then for general relief.

Suit as to Patterson and Cooney.

The bill showed that W. H. Robinson had acquired considerable property after the division between himself and his brother in 1886, and that he had sold a part of this property to Patterson and Cooney, receiving a part of the consideration in cash and the balance being on time. That John B., Jr., as executor of W. H. Robinson, had collected of Patterson and Cooney a considerable amount due on their purchase, and that a considerable amount still remained due

and unpaid, as to which the bill sought to recover the amount so paid by them to John B. Robinson, Jr., and as to the remainder it seeks judgment against Patterson and Cooney therefor.

Prayer of the Bill.

The prayer of the bill was for a construction of the wills of John B. Robinson, Sr., and William H. Robinson, and that the limitations over in said wills to the complainants be declared good and valid, and that complainants be put into possession of the estates of said John B. Robinson, Jr., and William H. Robinson. That under and by the family settlement of 1877, John B. Robinson, Sr., be declared to have a child's interest in the entire trust estate, and that this be ascertained, and complainants put in possession thereof. That the defendants be charged with all rents from the date of the death of John B. Robinson, Sr. For an account and general relief.

Porter v. Boyd.

In this case the Planters' Insurance property, under a bill by D. T. Porter against all of the persons claiming to be heirs or devisees of W. H. Robinson, was sold; said Porter and Robinson having been tenants in common of this property. At the sale Alston Boyd became the purchaser of the property at the sum of \$51,000, and the half thereof going to the representatives of W. H. Robinson is in court to be disposed of by decree in this cause.

Levy v. Robinson.

This bill was filed by Levy against E. C. Robinson (now Farnsworth) and Alston Boyd and wife, in which Levy averred that he had rented the property on Main street, commonly called the "Trunk Store," from John B. Robinson, Jr., for a term of years, at a rental of \$300 per month. That Boyd and wife were claiming to be entitled to the rent, as also was Mrs. E. O. Robinson, (now Farnsworth;) wherefore he filed this bill of interpleader, in order that the court might decide which was entitled to the same. Under a decree in this cause Levy paid into the court his monthly rent, which had accumulated to the amount of about \$5,000, after which the house burned down, and by the terms of the lease the rent ceased. This fund is now in this court, to be disposed of by decree in this cause.

Malone v. Boyd.

This was a bill brought by Malone to sell a lot on Orleans street, which he and W. H. Robinson owned in equal moieties as tenants in common. The land was sold for partition, and the proceeds (\$1,950) are now in the hands of the clerk and master of the chancery court to be disposed of under a decree in this cause.

Decree on the Hearing.

The case was heard before his honor, Chancellor W. D. Beard. The result was that the chancellor ruled as follows:

I. That under the third item of John B. Robinson's will, Mrs. Boyd took a life estate in all of his realty, with remainder in fee to her children; and as to the personality Mrs. Boyd took an absolute estate; and that she was entitled to collect the rents from the realty from the death of her brother John B. Robinson, Jr.

II. That under the second item of William H. Robinson's will, Mrs. Boyd took an estate for life in his realty, with remainder in fee to her children; she taking his personality absolutely, with the right to demand rents of the real estate from the death of her brother John B. Robinson, Jr., Mrs. Boyd being adjudged entitled to all the rents of the property of William H. Robinson, except as to the piece mentioned, commonly called the "Trunk Store," as to which she was entitled to eight-ninths of the rents, and Annie Douglass Robinson to the remaining one-ninth.

III. As to the rents which had accumulated in court from this trunk store property in the case of Levy v. Robinson, the same was ordered transferred to the credit of this cause, there to be disposed of under the principles of the decree herein, namely, Mrs. Boyd to take eight-ninths and Annie Douglass Robinson one-ninth of the rents.

IV. As to the fund in court arising from the sale of the Planters' Insurance building, sold in the case of Porter v. Boyd, it was decreed to be treated as real estate; Mrs. Boyd to have a life estate therein, remainder to her children.

V. That the fund arising from the sale of the Orleans street property in the partition suit of Malone v. Boyd was to be treated as real estate, and disposed of as the fund in Porter v. Boyd.

VI. The bill was dismissed as to Dennison and wife, the court holding that John B. Robinson, Jr., having a life interest in the claim against the Caruthers property, could dispose of that claim in any manner he saw proper, and that there was no resulting trust in favor of the remainder-men, such as would entitle them to follow the land itself, and oust Dennison and wife therefrom.

VII. In pursuance to the ruling made next above (No. 6) the chancellor decreed that there was no resulting trust against Mrs. Farnsworth as to the 3.83 acres Caruthers land; but further held that the estate of John B. Robinson, Jr., was chargeable with whatever might be the interest of William H. Robinson in the claim purchased from the Bills estate against this Caruthers property, to the extent it was used by John B. Robinson, Jr., in the purchase of the Caruthers place.

VIII. In so far as the bill sought to recover the one-fifth interest, or child's share, which it was claimed John B. Robinson, Sr., had in the trust estate under the family settlement of 1877, or in so far as alternative relief was sought to the effect that, in case the family settlement was not enforced, then that compensation be made for the repudiation of the same, the bill was dismissed.

IX. It was adjudged that, inasmuch as Annie Douglass Robinson, in the case of Robinson v. Robinson, should recover a one-ninth interest in what is known as the "Trunk Store," it would result in a loss to Mrs. Boyd, to that extent the chancellor decreed that under all the circumstances of the case it would be equitable to make this loss fall equally upon Mrs. Boyd and upon Mrs. Farnsworth; that is, that Mrs. Boyd should recover of Mrs. Farnsworth one-half of the value of the one-ninth interest so recovered by Annie Douglass Robinson.

X. Upon the same equitable principles, inasmuch as Mrs. Farnsworth would lose the 13 acres of land which formerly belonged to John B. Robinson, Sr., the chancellor ordered that one-half of this loss should be charged to Mrs. Boyd.

XI. The court ordered a reference to the clerk and master to take proof and report (1) what the personal estate of John B. Robinson, Sr., consisted of; (2) of what did the personal estate of Wm. H. Robinson consist; (3) what rents Mrs. Farnsworth had collected from the real estate belonging to the estate of John B. Robinson, Jr., and William H. Robinson; (4) what debts of William H. Robinson were paid by the executor of John B. Robinson, Jr.; (5) he was directed to report on all other matters of charge and discharge equitably existing between the parties.

XII. On August 17, 1892, Mrs. Eula C. Robinson (now Farnsworth) individually and as executrix of John B. Robinson, Jr., and L. B. McFarland, executor, prayed a broad appeal from the foregoing decree. The Boyds did not pray an appeal, but sued out a writ of error, and assign as error to the action of his honor the following. Annie Douglass Robinson also appealed.

Errors Assigned by Mrs. Boyd.

First. In dismissing the bill as to Dennison and wife. Second. In declaring that there was no resulting trust in favor of Mrs. Boyd and her children in and to the 3.83 acres Caruthers land. Third. In dismissing the bill as to the one-fifth interest of John B. Robinson, Sr., in all the property involved in the case, as shown in the decree. Fourth. In adjudging and decreeing that the limitations of the deed of November 1, 1859, from John B. Robinson to Elizabeth B. Robinson were valid, and that under the deed Annie D., the child of John Douglass Robinson,

took, or was entitled to receive, one-ninth of the lot on Main street in Memphis, known as the "Trunk Store" lot, or any interest in or share of it whatever; and in adjudging and decreeing that the complainant Lella Boyd and her children were not the true owners of and entitled to this entire property. Fifth. In adjudging and decreeing that Eula C. Robinson was entitled to recover of complainant or to be compensated for the one-half of the value of the 13 acres of land formerly belonging to John B. Robinson, Sr. Sixth. In adjudging and decreeing that Annie D. Robinson was entitled to recover any share of or interest in the trunk store lot.

For Mrs. Robinson it was assigned as error: First. As to the two deeds,—the one to the Winchester lot and the other to the Main street lot,—the court held that these two deeds had been construed in the two cases of Annie D. Robinson against John B. Robinson, Sr., et al. and John B. Robinson, Sr., administrator, against Annie D. Robinson et al., referred to above. That under this construction it was held that the interest of John D. Robinson in said two pieces of property was a fee-simple interest. That, inasmuch as Annie D. Robinson, the daughter of John D. Robinson, was a regular party to said two cases, such construction was res adjudicata as to her. The court further held, however, that this adjudication did not extend to or include the interest represented by W. H. Robinson in the Main street lot, and, as this interest had fallen in after the decrees in said two cases, said decrees were not res adjudicata as to such interest. As to this interest the court held that under the deed to the Main street property. W. H. Robinson having died without children, his one-third thereof passed by the terms of said deed to Annie D. Robinson, Mrs. Boyd, and John B. Robinson, Jr. Under this ruling a one-ninth interest in said Main street lot was decreed to the said Annie D. Robinson. The action of the chancellor in decreeing this one-ninth interest to Annie D. Robinson in the Main street lot was assigned as error. Second. The court further construed the wills of John B. Robinson, Sr., and W. H. Robinson. Under this construction it was held that the real and personal property of both John B. Robinson, Sr., and W. H. Robinson on the death of John B. Robinson, Jr., passed to Mrs. Boyd and her children; the personality to Mrs. Boyd absolutely, and the realty to her for life, with remainder to her children. This is assigned as error.

Various assignments of error are made on behalf of Annie Douglass Robinson, all of which have been duly considered in the cause of Annie D. Robinson et al. v. Eula C. Robinson et al., heard herewith. It is claimed the court erred as follows:

(1) In that it adjudged that complainant was, in legal effect, a party to the cause of John B. Robinson v. Annie D. Robinson et al., No. 3,210, R. D. of said court, and was party thereto in such a capacity and under such state of pleadings therein that her interest in the properties involved in this cause and controversy are concluded by the proceedings and decrees in said cause. It is insisted that complainant was not, in legal effect, a party to said cause at all, the bill having been filed before her birth, and she having been made a defendant thereto by a mere order of court, without any supplemental or additional pleadings reciting the fact of her birth, and ordering summons to issue requiring her to appear on or before a named rule day. The said order was void, and complainant was never legally made a party to said cause.

(2) If complainant was ever legally made a party defendant to said cause she was made such defendant only as the heir at law of John Douglass Robinson, her deceased father, and not in her capacity as claimant of an independent interest in the property as purchaser under the deeds, Exhibits A and B to the original bill herein.

(3) The said cause, No. 3,210, being a bill filed to administer the estate of John Douglass Robinson as insolvent, could not be used for the purpose of settling questions of conflicting title to the estate belonging or supposed to belong to the intestate.

(4) Whether it be true or not that an insolvent bill in chancery could be used for the purpose of settling conflicting and hostile claims of title, it was not in said cause No. 3,210 undertaken to be used for that purpose within the proper meaning of the pleading, proceedings, and decrees in that cause, the court intending only by the proceedings and decrees therein to sell the property there involved on the assumption that it belonged in fee simple absolute to John Douglass Robinson, but without an adjudication to that effect as against this complainant's interest as purchaser under said deeds, the record not showing any such adjudication against this petitioner, but, on the contrary, that the intent was to sell the interest of the intestate's heir therein as heir, without undertaking to determine, as against this complainant's claim as purchaser, what that interest was. Said record fails to show any pleadings, issue, or adjudication as to the claims of this complainant as purchaser under said deeds.

(5) The proceedings and decrees in said cause cannot be determined to be conclusive of complainant's interest as purchaser under said deeds, Exhibits A and B, by argument, inference, or construction from the points that were actually adjudicated in said cause.

(6) This complainant having prosecuted a broad appeal in said cause No. 3,210, the

decrees rendered therein were thereby vacated. The effect of the record, therefore, upon the interest of this complainant under said deeds, Exhibits A and B, must be determined by a consideration and determination of the true intent, meaning, and legal effect of the decree rendered by the supreme court of the state in said cause. That decree was a consent decree, based upon a contract of compromise. The evidence herein shows that said contract of compromise was not intended to affect the interests of complainant in the properties involved in said cause No. 3,210, except in her capacity as heir at law of her deceased father, John Douglass Robinson. The said contract of compromise, construed in the light of the contents of said record, No. 3,210, R. D., and of the record of *C. W. Metcalf, guardian, v. Annie D. Robinson*, No. 5,700, R. D. of said court, will not be construed as meaning more than a final cession and surrender of all of the matters involved in said litigation affecting this complainant (defendant therein) as the heir at law of her said father. The said decree of this court affirming the decrees of the court below will be construed, and the legal effect thereof determined, just as and upon the same principles that would govern in the consideration and determination of the construction and legal effect of the decrees of the court below, if this court should hold that its said decree, under any circumstances, should be given any more effect than was intended by the contract of compromise.

(7) The court below, in and by the decree therein entered, adjudged that the petitioner was entitled, as purchaser under said deeds, Exhibits A and B, to a four-ninths interest in said property on Main street, near Monroe, and a one-third interest in said property at the corner of Main and Winchester streets; that such interest, not coming to her by descent from her father, was not subject to sale for the payment of her father's debts, and that the decree for sale thereof, made in said cause No. 3,210, was erroneous. The said error, if the record and proceedings in said cause No. 3,210 be taken, as was done by the court below, as an adjudication against the claim of petitioner as purchaser under said deeds, was error apparent; and both because petitioner was then an infant and because said error was and is error apparent, the decrees in said cause No. 3,210 should have been reviewed and corrected to conform to the rulings made by the court below as to the original rights of petitioner in said property. Petitioner should not have been precluded from relief, on this aspect of the case, by the fact that said decrees in No. 3,210 were affirmed by this court, such affirmation having been made by consent under the contract of compromise made by

petitioner's guardian, and the same having been intended only to consummate the cession and surrender of all petitioner's interest in said property, and the rents thereof, as the heir at law of John Douglass Robinson, upon the terms agreed upon by way of compromise. There has been no adjudication by the supreme court of the state upon the claims of petitioner as purchaser under said deeds, Exhibits A and B, and petitioner, in asking that the decrees in said cause No. 3,210 be reviewed and corrected, does not ask to review and correct any ruling made by the court of last resort.

(8) The court below should have decreed in favor of this complainant to the extent of a two-thirds interest in the property on Main street, near Monroe, and of a one-third interest in the property at the corner of Main and Winchester streets, under the last paragraph of the amended bill, the substance of which is that, if the contract of compromise and the decree of the supreme court of the state entered thereon be held broad enough in their general terms to embrace and conclude the interests of this complainant as purchaser under said deeds, such contract and decree ought to be set aside and reformed to that extent, upon the ground that the said contract was made and the said consent given by mistake on the part of the representatives of this complainant, and in ignorance of the material facts involved, and upon the further ground (shown in said paragraph) that William H. Robinson and his solicitor knew or had reason to know or believe that the representatives of this complainant did not at the time of said compromise and consent decree, intend to embrace and conclude her interests as purchaser under said deeds.

(9) The court erred in holding that the limitation over of the interest vesting primarily in John B. Robinson, Jr., was void, because violating the rule against perpetuities.

A very able, exhaustive, and ingenious argument is made to sustain these assignments and to protect the interest of Annie Douglass Robinson, which has been carefully considered, and to which due weight has been given, but which we cannot set out at length in this opinion. Without attempting to dispose of each of these matters *seriatim* we only deem it necessary to pass upon the controlling features.

1. The family settlement, made in 1877, should be sustained in every respect, and all rights growing out of the same should be rigidly enforced. Family settlements are always sustained in courts of equity, unless it clearly appear that there is manifest error, and even in case of persons under disability will not be disturbed after a long lapse of time, and the accrual of other rights

thereon. *Summers v. Wilson*, 2 Cold. 469; *Williams v. Sneed*, 3 Cold. 533; *Farnsworth v. Dinsmore*, 2 Swan, 38; *Owen v. Hancock*, 1 Head, 563; *Reynolds v. Brandon*, 3 Helsk. 593; *Andrews v. Andrews*, 7 Helsk. 235; *Darden v. Harrill*, 10 Lea, 421.

Annie Douglass Robinson is bound by the decrees made in the causes of Annie D. Robinson v. John B. Robinson et al., No. 3,102, rule docket, and John B. Robinson, administrator, v. Annie D. Robinson et al., No. 3,210, rule docket, and C. W. Metcalf v. Annie D. Robinson et al., No. 5,700, rule docket. She was properly before the court in these causes. The pleadings in the first-named case referred to her as an unborn child and necessary party. In one case she was made complainant by next friend, and in the others she was served with process and represented by guardian ad litem. In each case it was necessary to determine the interest of John D. Robinson in the real estate, in order to determine in the one case the lands in which the widow was entitled to dower, and in the other to determine what lands were subject to be sold for the debts of John D. Robinson. In both cases the court must necessarily have passed upon the rights of the minor child, and in the last-named case the interest of the minor was the special matter under consideration.

The prayer for the construction of the two deeds was sufficient to give the court authority to construe them, and whether it construed them according to the present contention is not now material. The pleadings in the consolidated causes raise the construction of said deeds, and were sufficient to prevent defendants from being surprised or misled in any way. *Shepherd v. Shepherd*, 12 Helsk. 280; *Whiteley v. Davis*, 1 Swan, 333; *Bartee v. Tompkins*, 4 Sneed, 638; *Hayal v. Bryson*, 6 Helsk. 141; *Scott v. Fowlkes*, 12 Helsk. 700; *Allum v. Stockbridge*, 8 Baxt. 358. Annie D. Robinson was a party to said proceedings, not only as heir, but also as child of John D. Robinson by apt designation, if that be material, which it is not necessary to determine. She, however, was described before the court for all the purposes essential to determine her interest and dispose of the property in controversy. Even if the court's attention was not actually called to the particular points now made in argument on behalf of the minor Annie D., still that would not prevent the decree rendered from being conclusive as to the parties in said consolidated causes. The rule is that the pleading of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belongs to the subject of litigation, and which the parties exercising a reasonable diligence might have brought forward at the

time. *Beloit v. Morgan*, 7 Wall. 623; *Nicholson v. Patterson*, 6 Humph. 394; *Thomson v. Blanchard*, 2 Lea, 528; *Parkes v. Clift*, 9 Lea, 524; *Nolan v. Cameron*, Id. 234; *Embury v. Conner*, 53 Amer. Dec. 325; 5 Amer. & Eng. Enc. Law, 384, note 6; *Freem. Judgm.* §§ 253, 260, 266. Besides, after decree in these consolidated causes and pending appeal in the supreme court on application of her regular guardian to the chancery court, she was permitted to compromise and receive a large consideration for and in settlement of her interest involved. This was fairly done, and it does not matter that the consideration, on a better view and investigation, was inadequate. There was no fraud, and she was bound by this settlement; and the decree of the court below in the case of Annie D. Robinson v. Eula C. Robinson et al. is in all things affirmed.

The chancellor erred in the construction of the will of John B. Robinson, Sr. This will is as follows: "Item 2. I give and bequeath all my estate, real and personal, of every description and wherever situated, absolutely to my sons William H. Robinson and John Beverly Robinson, Jr., to be equally divided between them. In case of the death of either of my sons before my death, leaving children born in lawful wedlock, then his share to his child or children, as the case may be; but in the event of the death of either of my two sons before reaching his majority, or in the event of his dying intestate and without children born in lawful wedlock, then his share to his surviving brother. Item 3. In case of the death of both of my said sons, neither leaving children born in lawful wedlock, then I give my whole estate to my daughter, Mrs. Lella Boyd; the personality to her absolutely, and the realty to her sole and separate use for life, with remainder over to her children." The second and third items must be construed together, and in the light of the whole will, and the circumstances surrounding the parties at the time. When so considered, we are of opinion that the testator intended to divide his property equally between his two sons, and that each should take title in fee simple, conditioned to be defeated upon the happening of two contingencies: (1) Dying without children; and (2) dying without making a will. If either son should die leaving children or leaving a will, his estate was at once freed from all conditions and limitations, and became absolute. It was only in the event that both contingencies occurred, to wit, the dying without children and without a will, that the limitation over was to take effect. The brothers stood upon the same footing, and the right of either to dispose of his property by will was not abridged or affected in any way by the fact that he survived his brother. The limitation over to Mrs. Boyd was defeated as to the share of either when such one died leaving a will disposing of his prop-

erty. Under the facts in this case the devolution of the property of John B. Robinson, Sr., after the death of both his sons depended not on the will of the father, but was removed from its operation by the happening of the contingencies therein provided for, to wit, the fact that each son left a will disposing of his property; and under these wills of the sons their legatees and distributees took their estates free from the limitations of the father's will. The share of John B. Robinson, Jr., passed under his will to his widow; the share of W. H. Robinson passed under his will as hereinafter indicated. Under the construction placed on this will by the chancellor the son last dying without issue is deprived of the power of disposition by will; but we think no such distinction was intended. The power to will was given equally to each son. No reason can be assigned why the one last dying should be deprived of such power simply because he was survivor. It was evidently the intention of the testator to carry the property over to his daughter only in the event of both sons dying without issue and intestate. The last clause provides that, in case of the death of both sons, neither leaving children, then the estate is to go to Mrs. Boyd. Now, if this clause is literally construed, it is utterly destructive of the prior provisions of the will. For instance, if William H. Robinson had willed his interest in the property absolutely immediately upon his death, his devisee would have taken possession of the property under his will, and the power of John B. Robinson, Jr., to will his interest in the property would have been destroyed unless children had been born to him and survived him, and upon the death of John B. Robinson without children the title to the devise under the will of W. H. Robinson would be instantly defeated, and the whole estate would go to Mrs. Boyd. Certainly the testator never intended any such result. Such construction would be a radical revocation of an untrammelled power to dispose by will, previously conferred; or, if it be said that the first son dying might will away his interest in the property, then we would have the anomaly of one son being given one-half the property with full power to dispose of the same by will, and the other being given one-half of the property without power to dispose of it by will, or with the power of disposition by will, which would only take effect upon his dying and leaving children surviving him. The language of the will admits of no such construction. Each son is put on the same footing, and is given the same interest and the same power of disposition. All these difficulties will be obviated, and each clause of the will reconciled, by a different construction, and the manifest intention of the testator carried out. The testator manifestly intended that if either of his sons arrived at majority, then he might dispose of his in-

terest in the property by will; but if he died without making any will, and without any children surviving him, then his interest should go to Mrs. Boyd; and, of course, if both died without making any will, and without children surviving them, the whole estate would go to Mrs. Boyd.

It was contended that John B. Robinson, Sr., never intended that either of his sons should have the right to will any of his property to a stranger; that is to say, that neither son could make any will under which any portion of the property could be willed away from the blood of John B. Robinson, Sr. This proposition is clearly erroneous. For instance, suppose William H. Robinson had married, and died without children, and left a will devising all his interest in the property to his widow, and then John B. Robinson had died, leaving children surviving him, clearly, in such an event, Mrs. Boyd could take nothing under the will, because the contingency of both sons dying without children would not have occurred; and thus we have a case where part of the property by the will of one brother would have been carried to a stranger to the testator's blood. We are of opinion that the shares of W. H. Robinson and John B. Robinson, Jr., in their father's estate passed by the will of each according to its terms and provisions, and was not any further controlled by the will of John B. Robinson, Sr.

We come next to consider whether, under the will of W. H. Robinson, his property, whether derived from his father or from his own labor, passed to John B. Robinson, Jr., absolutely, or whether it vested in him a conditional fee, or whether the language employed created an estate tail, which, under the statutes, would become an estate in fee. The second item of his will says: "I give all my estate of every kind, real and personal, and wherever situate, to my brother John B. Robinson, and his lawful heirs." It will be conceded that if the will had stopped at this expression then John B. Robinson, Jr., would have taken a fee-simple estate absolute upon the death of W. H. Robinson. But the item proceeds: "If he dies without such heirs, then I give everything to my sister, Lella Boyd; the personality to be hers absolutely, and the realty to belong to her for life, with remainder over to her children." The word "such" refers to and is correlated with the word "lawful," and the item is properly read: "If Jno. B. dies without 'lawful heirs' then the limitation is to take effect." The important question is, shall we give the words "lawful heirs" their strict legal technical signification of "heirs under the law," and "next of kin," or shall we give it the meaning of "children?" If the latter, the limitation to Mrs. Boyd would be legal, and take effect; if the former, then the limitation would be void, and must fail. The case of *Middleton v. Smith*, 1 Cold. 144, was

decided by Judge McKinney, 1880. The court says: "A devise for a daughter and a bodily heir is operative to invest the daughter with an estate in fee simple, under Mill. & V. Code, § 2813, (2007,) and section 2814 (2008) has no application to such a case. Under the common law this would have been a conditional fee, and under our statute vests the fee in the first taker." The same doctrine was announced in the case of *Kirk v. Ferguson*, 6 Cold. 484, 485. The gift was to Rachel Means and to her heirs, the natural issue of her body, forever. This was held to create an estate tail, and to come under the provision of the Code above referred to. In that case there was a limitation over, but it did not take effect. The same doctrine was held in the case of *Skilkin v. Loyd*, 6 Cold. 563. In this case the will gave to Valentine Spring and the heirs of her body, for her sole and separate use during her natural life, certain real estate. The court held that an estate tail was created, and the title vested absolutely in the devisee. It was sought to make a life estate in the devisee, because of the words, "to her sole and separate use for life." Under section 2812, (2006,) Mill. & V. Code, upon the ground that the will intended to pass a less estate than a fee, the court held that she took a fee, only restricting the marital rights of her husband. In the case of *Wynne v. Wynne*, 9 Heisk. 308, it was held, Judge McFarland delivering the opinion of the court, upon the following words in a will: "For the natural love and affection I entertain for my son Peter D. Wynne I do at my death lend to him and the lawful issues of his body a tract of land," etc.—that this was an estate in tail, and that Peter D. Wynne took an absolute fee. The court said lawful issues of his body and bodily heirs at common law would have created an estate tail or conditional fee, and that it was converted into an absolute fee under the statute. The limitation of an estate upon contingency of the first taker dying without issue or bodily heir or heirs is bad, as being too remote an event to suspend a limitation. This is the view insisted on by Mrs. Farnsworth. On the other hand, it is insisted that the testator used the word "heirs" as synonymous with the word "children." That he used it in this sense is apparent, for he says, "if he die without such heirs, then I give everything to my sister," etc. It is also said the word "heirs" has been construed to mean "children" in the construction of a deed; as in *Grimes v. Orrand*, 2 Heisk. 298-300; *Read v. Fite*, 8 Humph. 328. But in each of these cases the deeds conveyed lands in praesenti to the heirs of a living person, and the court properly held that a person in life could have no heirs, and therefore the word "heirs" was not used in its technical or usual sense when coupled with a present disposition, but must be construed as "children;" so that we do

not consider these cases as in point. It is also insisted that in cases of wills in the main similar to this the word "heirs" has been construed to mean "children," and not "next of kin,"—as in *Petty v. Moore*, 5 Sneed, 126; *Cowan v. Wells*, 5 Lea, 682; *Franklin v. Franklin*, 91 Tenn. 123, 124, 18 S. W. Rep. 61; and the trend of our more recent decisions has been in this direction.

It is replied, however, and with much force, that while the rule is a technical one, which gives to the word "heirs" its technical legal sense, still it has grown into a rule of property as binding on the court as would be a statutory enactment, and that the courts will not regard it as a mere matter of construction or intention. It was so held in *Polk v. Faris*, 9 Yerg. 234, and sustained as to the general principle of the force and effect to be given a rule of law in *Turley v. Massengill*, 7 Lea, 356; *Hooberry v. Harding*, 8 Tenn. Ch. 677, and other cases. But in the more recent case of *Armstrong v. Douglass*, 89 Tenn. 223, 14 S. W. Rep. 604, this court said: "Through the zeal of the courts to prevent perpetuities, the words 'dying, leaving no legal descendants,' and other like phrases, were long ago given a uniform and technical meaning, whereby they were held to import an indefinite failure of issue, and limitations over depending on them were declared inoperative and void. But finally, to avoid an equally hurtful extreme, it became the practice of the courts to explore the whole will, and lay hold of some other expression or circumstance, if necessary, to defeat the arbitrary meaning of such words, and thereby give force and effect to the manifestly lawful intention of the testator. Such is the rule of construction to-day when the common law on this subject is enforced. *Bramlet v. Bates*, 1 Sneed, 555; 4 Kent. Comm. *277-279; 1 Jarm. Wills, p. 519, note 15."

Looking at this entire will and all the circumstances surrounding the testator, it appears that at the time W. H. Robinson made his will his brother John B. Robinson and his sister Mrs. Boyd were his only surviving brother and sister and next of kin. He was attempting to provide for the contingency of his brother dying, leaving only his sister, Mrs. Boyd, surviving. He evidently contemplated that his sister, Mrs. Boyd, might survive his brother John B., and if we construe the words to mean "children," then it is plain he intended Mrs. Boyd to take the property if his brother died without children. But, as Mrs. Boyd was his "heir," we have him providing for her to take as his sister only in the event she was dead, as otherwise the brother would not die without heirs; in other words, if Mrs. Boyd were dead, so that she could not be heir, then she was to take under the designation of "sister." We think it very clear that W. H. Robinson by his will intended his property to go to his sister, Mrs. Boyd, in the event his

brother John B. Robinson died without children; and under that will she takes all the property accumulated by W. H. Robinson in his lifetime, and not disposed of by him, nor since used in paying his debts, as well as his one-half the trust estate and his one-half of the estate of his father, John B. Robinson, Sr., if not disposed of by him in his lifetime or paid upon his debts, as was held by the chancellor. This holding is strictly in accord with the case of *Franklin v. Franklin*, 91 Tenn. 124-134, 18 S. W. Rep. 61, in which the will of J. A. Franklin was construed, and which was almost identical in its terms and provisions with the will now under consideration. In that case, J. A. Franklin, by his will, gave to his brother Edward N. Franklin his entire estate, etc. The will contained this further provision: "In case he dies without heirs, I want my sister, Mrs. Adele Van Bibber, to have it on the same conditions." It was held that the word "heirs," used in the will, manifestly meant "children;" Mrs. Van Bibber herself being an heir within the terms of the will, unless the word "heirs" there used was intended to mean "children." If the word "heirs," used in this will, must be given its usual technical interpretation, we think it a proper case for the application of the rule laid down in the statute, (Mill. & V. Code, § 2815,) providing for the construction of limitations made to depend upon the dying without heirs; and there is nothing in the will of W. H. Robinson, when properly construed, which provides for a limitation to take effect upon an indefinite failure of issue, but rather upon such failure at the death of W. H. Robinson.

The decree of the chancellor is in all respects affirmed, except so far as it construes the will of John B. Robinson, Sr., and as to that will must be modified as herein indicated, with the results growing out of the changed construction; and the cause will be remanded to the court below to be proceeded with in accordance with this decree. The costs of the appeal in case of *Annie D. Robinson v. Eula C. Robinson et al.*, No. 8,115, will be paid by the complainants in that cause; the other costs as adjudged below. The costs of the appeal in the cause of *Boyd and wife v. Eula C. Robinson et al.* will be paid by the complainants Boyd and wife, and the other costs in that cause will

be adjudged in the court below, but none of them will be adjudged against *Annie D. Robinson*.

TEXAS & N. O. RY. CO. v. LUDTKE.

(Court of Civil Appeals of Texas. May 25, 1893.)

REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

The finding of the jury will not be disturbed on appeal unless there is no evidence to support it, or it is palpably against the weight of the evidence.

Appeal from Harris county court; W. C. Anders, Judge.

Action by J. M. Ludtke against the Texas & New Orleans Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. N. Shaw, for appellant. G. M. Beauchamp, for appellee.

PLEASANTS, J. This suit originated in the court of a justice of the peace for Harris county. Appellee sued for the value of a horse alleged to have been killed by appellant's train, through the negligence of the trainmen, on the 4th of August, 1891. Judgment for plaintiff for \$100. The alleged value of the horse was \$150. Upon appeal to the county court a judgment for the same sum was rendered for appellee. Appellant's motion for new trial being overruled, it appealed to this court, and presents for our consideration but two assignments of error: "(1) The verdict and judgment are contrary to the law and evidence, in this: that, even if it be conceded that no bell was rung or whistle blown, there is no proof that the omission to give said signals contributed in any manner to the death of said animal. (2) Because the proof shows that only one animal was struck at the crossing in question on the day alleged, to wit, the 4th of August, 1891, and that said animal was struck at half past 12 o'clock at night; that the night was dark and cloudy; that the whistle was blown for the crossing; and no negligence shown on the part of those operating defendant's engine."

As to the second assignment, it suffices to say that the hour at which the animal was killed was controverted. The testimony for plaintiff by one who testified as an eyewitness of the killing is that it occurred at about 6 o'clock in the morning of the 4th of August, and the testimony of the engineer in charge of the locomotive is that he struck the animal 5½ hours earlier than the time stated by plaintiff's witness when he saw the animal killed. Upon this issue it was the province of the jury to determine whether the killing occurred in the nighttime or in the daytime. They might, in their discretion, have found upon this issue for the appellant; but if they found otherwise it is not for us to say that the finding is erroneous. The jury heard the two witnesses testify, and

¹ Mill. & V. Code, § 2815, provides: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir, or heirs of the body, or without issue of the body, or without children, or offspring, or descendants, or other relative, shall be a limitation to take effect when such person dies without heir, issue, child, offspring, or descendants, or other relative, as the case may be, living at the time of his death or born to him within ten months thereafter; unless the intention of such limitation be otherwise expressly and plainly declared in the face of the deed or will creating it."

they were therefore better able to decide upon their relative credibility than we are.

As to the first assignment, we have to say that it may be true that, if the bell had been rung and the whistle blown, such signals would not have prevented the animal from coming in collision with the train. On the other hand, it cannot be said that, had the signals required by the statute been given, a collision would not have been avoided; and assuming, as the assignment under consideration does, that the statutory signals were not given, the culpable omission of those in charge of the locomotive in not ringing the bell or blowing the whistle, coupled with the testimony of plaintiff's witness as to the time and place and circumstances of the killing, are, in our judgment, sufficient to sustain the verdict. We are not authorized to set aside a verdict when the evidence is conflicting. It is only when there is no evidence to support the verdict, or when it is palpably against the weight of the evidence, that an appellate court can disturb the findings of a jury. The judgment must be affirmed.

YOUNG v. YOUNG.

(Court of Civil Appeals of Texas. May 18, 1893.)

ACTION FOR DIVORCE—DECREE—VALIDITY.

1. A judgment of divorce will not be reversed because it recited that it was taken by default, and the allegations of the petition were taken as confessed, if it nevertheless appears from further recitals therein that the decree was granted on full proof of the grounds alleged in the petition.

2. Where a judgment in a divorce proceeding adjudges to plaintiff property which it specifies only as lots described in deeds to plaintiff, without further identifying the deeds or the lots, the judgment will be reversed.

3. Rev. St. art. 2864, providing that neither party in a divorce proceeding shall be compelled "to divest him or herself of the title to real estate," does not forbid a decree adjudging to one party the whole of certain lots held as community property in satisfaction of his or her interest in the entire estate.

Error from district court, Gregg county; Felix J. McCord, Judge.

Action by Mattie Young against Abe Young for a divorce. From a judgment for plaintiff, defendant brings error. Reversed.

C. G. White, for plaintiff in error. W. S. Davis, for defendant in error.

WILLIAMS, J. This is a writ of error prosecuted from a judgment granting to defendant in error a divorce from plaintiff in error, and adjudging to her certain town lots. The assignments of error attack the judgment—First, because it appears from its recitals that it was taken by default, and the allegations of the petition were taken as confessed; and, second, because it compels plaintiff in error (defendant below) to divest himself of title to the lots.

1. The judgment does recite that defendant made default, and that the petition was

taken for confessed, but this is probably an error in the form of the decree. At any rate, it appears from further recitals that the divorce was granted upon full proof of the grounds alleged in the petition. No effect was given to the default of defendant.

2. The judgment does adjudge to the plaintiff two lots, situated at Longview Junction, of which the only description given consists in the statement that they are described in deeds to plaintiff. By whom the deeds were executed, and where they may be found, is in no way indicated. This is plainly an insufficient designation of the property. The deeds are not specified any better than the lots. The judgment, so far as it relates to the property, must be reversed, because of this defect. The petition is defective in the same particular. It is further indefinite and uncertain in its allegations as to plaintiff's claim to the lots. Some of the averments seem to claim them as her separate property, while others seem to concede that the defendant has some interest in them as community property, and seeks to have them set aside to plaintiff as alimony. If the facts show that the lots belong to plaintiff in her separate right, there could be no error in decreeing them to her upon proper allegations and proof. Should they belong to the community estate, it would be the duty of the court to order a division in such way as shall seem just and right, under the facts developed. If, in the division of the community estate, it should be found proper to adjudge to her the whole of the lots, in satisfaction of her interest in the entire estate, such a decree would not be forbidden by the provision of the statute that neither party shall be compelled "to divest him or herself of the title to real estate." Article 2864, Rev. St.; *Fitts v. Fitts*, 14 Tex. 443; *Simons v. Simons*, 23 Tex. 844. The judgment decreeing the divorce will be affirmed, but so much of it as attempts to adjudge the property to plaintiff will be reversed, for want of a sufficient description, and the cause remanded for further proceedings.

GALVESTON, H. & S. A. RY. CO. v. TURNER.

(Court of Civil Appeals of Texas. June 8, 1893.)

CARRIERS—INTRUDER ON TRAIN—EJECTMENT—OFFER TO PAY FARE—REFUSAL BY CONDUCTOR—LIABILITY OF CARRIER—CONDUCT OF PASSENGER AFTER EJECTMENT—NEGLIGENCE—DAMAGES.

1. Where an intruder on a train of cars refuses to pay his fare on demand by the conductor, the latter is authorized to remove him; and, after such removal has been begun, an offer to pay the sum demanded may be accepted or not, at the discretion of the conductor.

2. In an action against a railroad company for the wrongful ejectment of plaintiff from a train several miles from his place of destination, when he was ill, it is error to refuse to charge that if he was wrongfully ejected, and he walked to such place through rain and darkness, and sustained greater injury than he

would if he had sought shelter nearer where he was ejected, as a reasonably prudent person would have done, then his injuries occasioned by his walk are the proximate result of his own negligence, for which he cannot recover, and he can recover only such sum as will compensate him for the actual injury which he must have sustained had he acted as an ordinarily prudent person would have done.

Appeal from Colorado county court; Charles Riley, Judge.

Action by Henry Turner against the Galveston, Harrisburg & San Antonio Railway Company to recover damages for wrongful ejectment from defendant's train while plaintiff was a passenger thereon. From a judgment for plaintiff, defendant appeals. Reversed.

Brown, Lane & Jackson, for appellant. Foard, Thompson & Townsend, for appellee.

PLEASANTS, J. The appellee brought suit in justice's court for the recovery of damages for his alleged wrongful ejectment from the cars of appellant while a passenger thereon from Flatonia to Columbus. The petitioner laid his damages at \$190. He averred that he was ejected from the train between Welmer and Columbus, and was compelled to walk through a cold rain to Columbus, and from the exposure he contracted disease, and was much humiliated and wounded in his feelings. Defendant answered by a general denial, and specially that if he was injured the injury was the result of plaintiff's own negligence. Trial was had before the justice of the peace, and judgment was given for the plaintiff for \$10, and upon appeal to the county court he recovered judgment for \$190. Defendant's motion for a new trial being overruled, it appealed to this court.

The plaintiff proved by his testimony and that of one who came with him from West Point to Flatonia, and who boarded the train with plaintiff at Flatonia, that he purchased a ticket from defendant's agent at the latter place for Columbus, for which he paid said agent the regular price, \$1.30. The evidence shows further that the conductor of the train approached the plaintiff just after the train left Schulenburg, at which place the passengers dined, and demanded his fare, when he was informed by plaintiff that he had delivered to him, some time before, his ticket, which entitled him to his passage to Columbus from Flatonia; that he owed nothing, and should pay nothing more; whereupon the conductor informed plaintiff that he must pay him his fare from Schulenburg to Columbus, which was 75 cents, and if this sum was not paid when they reached Welmer, the next station, he would be put off the train. After the train had passed Welmer the conductor again demanded the payment of 75 cents, and plaintiff again refused to pay, and by orders of the conductor the train was stopped, and the plaintiff, without

any resistance on his part, or any unnecessary force whatever by the brakeman, who acted for the conductor, and under his express order, was led from the car, and placed upon the ground, and there left. Plaintiff offered to pay his fare after his expulsion, and after the train had started, according to the testimony of the brakeman; but according to the testimony of plaintiff himself he offered to pay the sum demanded before his expulsion was completed, though he admits that he did not offer to pay until after the order to eject him had been given by the conductor to the brakeman, and the latter had led him from his seat to the platform of the car. The conductor's testimony was that he first observed the plaintiff just as the train was leaving Schulenburg, at which point several passengers had boarded the cars, and he supposed plaintiff to be one of them; that plaintiff, when asked for his fare, had no check or card indicating that his ticket had been delivered to him, or his fare paid him; that he received on that trip but two tickets from Flatonia to Columbus, and that plaintiff delivered neither one of them to him. He remembered, as he thought, at the time he was speaking to plaintiff, from which of his passengers these tickets were received, and he immediately left plaintiff, and went to these persons, and from conversation with them found that his impression was correct. The statement of the conductor that there were but two tickets for passage between Flatonia and Columbus by the train from which plaintiff was ejected was sustained by the testimony of the auditor of the defendant company, to whom, under the rules and regulations of the company, the conductor of each train makes a report, and delivers each ticket received by him on the trip; and upon each of such tickets the conductor is required to place his seal or private mark, to distinguish them from tickets received by other conductors. Plaintiff did not reach Columbus until some time after night. He had money with him, sufficient, when put off the train, to pay for his lodging during the night at some place between Welmer and Columbus. He saw houses not far from the track as he pursued his journey towards Columbus, but made no effort to obtain shelter until he reached Columbus. Plaintiff was sick when he left the car, and the walk of 15 or 20 miles through a cold rain aggravated his disorder, and he was thereby confined to his bed for several days.

The appellant has assigned several errors, but we shall notice only so much of them as will be necessary to properly indicate to the court below, for its guidance upon another trial, what we conceive to be the law of the case. At the request of plaintiff's counsel the court instructed the jury that, if they found from the evidence that plaintiff was on the defendant's train without

having purchased a ticket, then the conductor had no right to eject him from the car, provided he tendered to the conductor, or to the person who, under the orders of the conductor, was proceeding to eject him, the amount of fare demanded of him. This charge was misleading, to say the least, and the charge asked by the defendant's counsel should have been given, for the purpose of explaining and qualifying the one given. When one who is an intruder upon a train of cars, and is not rightfully there, refuses to pay, upon demand made by the conductor, his fare, the conductor is authorized to remove him from the train; and, after such removal has been begun, an offer to pay the sum demanded may be accepted or not, at the discretion of the conductor, and his refusal to accept under such circumstances gives no ground for complaint or cause of action to the person ejected.

The court further erred, in our opinion, in refusing to give the following charge, asked for by defendant: "If you believe from the evidence that plaintiff purchased a ticket or paid fare for his passage from Flatonia to Columbus on the day in question, it was wrong for defendant to eject plaintiff, or require him to leave the car before reaching Columbus; but you are further instructed in this connection that if plaintiff was thus wrongfully ejected it was nevertheless incumbent upon him to use the efforts of an ordinarily prudent and careful man, to avoid and modify as far as possible the damages and hardships of his situation. Therefore, if you believe from the evidence that plaintiff was wrongfully ejected from defendant's car by its agents, and that thereafter plaintiff walked to Columbus, through the rain and darkness, whereby he sustained injury and damage greater than should have resulted to him if he had sought shelter and protection nearer the point at which he was ejected; and if you further believe that a reasonably prudent and cautious person, under similar circumstances, would not have acted as plaintiff did, but would have sought protection and shelter nearer the place at which he was ejected from the cars,—then you are instructed that plaintiff's excessive injuries, occasioned by his walk to Columbus from the said point of ejection, under the existing circumstances, are the proximate result of his own negligence, and for such injuries he cannot recover, and for the act of defendant in ejecting plaintiff from the cars, if the same was wrongfully done, plaintiff is entitled to recover only such an amount of money as would compensate him for the actual injury, damage, and loss, if any, which he must have sustained and incurred, had he acted as an ordinarily prudent and cautious person would have done in plaintiff's situation."

For the errors indicated in this opinion this cause is reversed and remanded.

BONNER et al. v. HICKEY.

(Court of Civil Appeals of Texas. June 22, 1896.)

NEGLIGENCE—INJURIES TO BRAKEMAN—DEFECTIVE TRACK—EVIDENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. In an action by a brakeman against a railroad company for personal injuries sustained while endeavoring to couple the engine to a car in a switch yard, and caused by a hole in the track between the rails, it is not error to exclude evidence as to how such track compared with the other yard railroad tracks in the state, and with other yard tracks generally.

2. The only evidence as to a coupling knife was given by plaintiff, who testified that he had been given one, and told to use it, but that it was more dangerous than the hands, and he did not use it. *Held*, that it was not error to refuse to charge that, if the failure to use the coupling knife contributed to plaintiff's injury, he could not recover.

3. Where the evidence is sufficient to support the conclusion that the accident would not have occurred but for the bad condition of the track, a verdict for plaintiff is supported by the evidence, though there is evidence of carelessness on the part of the engineer, plaintiff's fellow servant.

Appeal from district court, Galveston county; W. H. Stewart, Judge.

Action by Martin A. Hickey against Thomas R. Bonner and T. M. Campbell, receivers of the International & Great Northern Railroad Company, for personal injuries caused by defendants' negligence while plaintiff was in their employ as a brakeman. From a judgment entered on the verdict of a jury in favor of plaintiff, defendants appeal. Affirmed.

Willie & Ballinger, for appellants. Wheeler & Rhodes, for appellee.

GARRETT, C. J. This is an action to recover damages for personal injuries received by the appellee while in the employment of the appellants, who were receivers of the International & Great Northern Railroad Company, as a brakeman. Defendants pleaded the general issue, and also contributory negligence, and the negligence of a fellow servant. Trial by jury was had February 25, 1892, and plaintiff recovered judgment for the sum of \$5,500.

Conclusions of Fact.

First. On November 10, 1890, the International & Great Northern Railroad was in the hands of the defendants, as receivers, and was being operated by them, as alleged in plaintiff's petition; and plaintiff was in their employment as a brakeman, but had been for only about five days. He was working on the line of the road between Galveston and Willis, which runs through Houston. Second. On said date, at night, he was engaged in the performance of his duty, as brakeman on a freight train in the yard of the railroad at Houston, and, in obedience to an order of the conductor of the train, he undertook to couple an engine to some cars which stood on a track called

the "Cotton Track." The engineer ran the engine in upon the track, and the plaintiff went in between the cars upon the track to make the coupling, and stepped in a hole in the track between the rails, which caused him to fall. In falling, he caught the hand hold on the car next to him, which was pushed along a car length or more by the engine, dragging the plaintiff until the truck of the tender ran upon the leg of his pants, broke his hold loose, and caught his right leg, and crushed it so that it had to be amputated above the knee. Third. The evidence fully sustained the fact necessarily involved in the finding of the jury,—and we so find,—that defendants were negligent as to the condition of this track. It was in bad order, had holes in it between the ties, and grass grown over it. Hickey was not acquainted with the track, and the accident was caused by his stepping into the hole, and falling. Fourth. When plaintiff was employed by the defendants, he was furnished with a coupling knife. He did not use it on the night he was hurt, and never did use it. The only evidence with regard to the coupling knife was in the testimony of the plaintiff. He stated that a coupling knife was more dangerous to use than the hands; that the orders of the receivers were to use the knife; that he was told that it was used for coupling; was not told that he had to use it; was not told to use that knife; he had never used one before; they simply gave it to him, and said it was for coupling cars; he did not use it; that, in his opinion, it would not be safe to use a knife, but had no reasons. Fifth. There was evidence to show that the carelessness of the engineer, in running the engine back too hard, contributed to the injury of plaintiff. While the plaintiff was in the hospital, his written statement, composed of questions and answers, was taken, as follows: "(1) In your opinion, was there carelessness on the part of any one in the company's employ tending to cause the accident; and, if so, who? Answer. Yes, carelessness of the engineer, Mr. Allen, and my lamp going out. (2) Could you, by more care on your part, have prevented the injury? A. No. (3) How long have you been in the company's employ? A. Four or five days. (4) State all other particulars that you may know relative to the accident. A. Nothing more. (5) If married, of whom does your family consist? A. ——. The above is a true statement, to the best of my knowledge and belief. [Signed] M. A. Hickey. Witness: G. A. Howard. Date, November 26th, 1890." At the trial, plaintiff testified that he signed the statement without reading it, or knowing what was in it; that they said it was a mere matter of form. He testified that he made the statement as to the carelessness of the engineer, but none as to his lamp going out. He did say it was carelessness

of the engineer,—not really carelessness, but partial carelessness. His statement was not taken down in full, and does not embrace the whole statement, at all. He paid no attention to the paper signed; was told that it was a mere matter of form, and was the rule of the hospital to make a statement.

Conclusions of Law.

1. The first assignment of error is on the action of the court in sustaining the objection to the question propounded by defendants to the witness R. Gaunt, as follows: "Please state how the condition of the cotton track—the track upon which plaintiff alleges he was injured—compared with the other yard railroad tracks in the state of Texas, and how the track generally compared with other yard tracks." There was no error. The issue was not whether the defendants had failed to exercise due care in constructing and maintaining a roadbed of such a character as to be reasonably safe for its employees, but as to whether or not it was out of repair, or defective, by reason of its having holes in it, which rendered it unsafe.

2. There was no evidence in the case to show what a coupling knife is; how it is used; whether or not the defendants had an established rule requiring it to be used; whether or not such a rule would be a reasonable rule; nor that the failure to use it would have been negligence, in this case. Nor was there any evidence in the case to show that the failure to use the coupling knife contributed to the injury. On the contrary, the plaintiff testified that it was more dangerous than the hands. Hence, we do not think the court should have given the requested instruction, that, if the failure to use the coupling knife contributed to plaintiff's injury, he would not be entitled to recover. The evidence did not call for a special charge on the subject, and all the charge that should have been given under the facts was embraced in the instruction given at defendants' request.

3. The seventh and eighth assignments of error raise the same issue, which is the sufficiency of the evidence to support the verdict and judgment; the contention being that the evidence clearly showed that the injury was caused by the negligence and carelessness of the engineer,—a fellow servant of the plaintiff. We are of the opinion that the evidence is sufficient to support the conclusion that the accident would not have occurred but for the bad condition of the track, and conclude the assignments are not well made.

The case was submitted to the jury upon a charge fully as favorable to the defendants as they could have asked; and, the evidence being sufficient to support the verdict, the judgment of the court below will be affirmed.

ROEMER et al. v. SHACKELFORD et al.

(Court of Civil Appeals of Texas. Oct. 12, 1892.)

PRACTICE—DISMISSAL—TRESPASS TO TRY TITLE—EVIDENCE.

1. Where sufficient diligence is not being used by plaintiffs to bring a suit to trial, but they duly appear to represent their cause, defendant's remedy is to force them to trial, and not to have the suit dismissed for want of prosecution.

2. In trespass to try title by the heirs of one S., plaintiffs, to show title in themselves, may introduce in evidence a deed of the property in dispute, made to one of them, which recited that it was made in consideration of the conveyance of certain claims against the state belonging to the heirs of S.

3. They may also introduce a declaration of trust made in their favor subsequently by the grantee in such deed.

Appeal from district court, Calhoun county; S. F. Grimes, Judge.

Trespass to try title by A. R. Shackelford and others against John Roemer and others. From a judgment for plaintiffs, defendants appeal. Reversed.

A. B. Piticolas, for appellants.

Conclusions of Fact.

WILLIAMS, J. (1) The land sued for was granted to Samuel Cassady and the heirs of Robert T. Walker in equal moieties. (2) The interest of Samuel Cassady was conveyed to A. A. Cassady, December 4, 1860. (3) A. A. Cassady, on the 25th day of October, 1871, executed a deed to Edmond Shackelford, in which he conveyed the legal title to his interests in the land, reciting that the deed was made "for and in consideration of the conveyance of the claims of the heirs of Samuel Shackelford, deceased, on the state of Texas, granted or to be granted them for compensation for his services in the war which separated Texas from Mexico in 1836." (4) On the 25th day of October, 1873, Edmond Shackelford executed and delivered to his brothers and sisters an instrument in writing, acknowledging that at the time of the execution of the deed from Cassady to himself he was acting for himself and the other heirs of Samuel Shackelford, and for himself and them received such conveyance in exchange for their claims as such heirs against the state for services rendered in the revolution by Samuel Shackelford, and that the others named were each entitled to one-seventh of the land; and bound himself to convey to them respectively one-seventh part of same, whenever requested, or to pay to each of them, in case he should sell the land, one-seventh part of the proceeds. There is no evidence that Edmond Shackelford or his heirs ever in any way repudiated the trust, or asserted claim to the land, adverse to that of their coheirs. On the contrary, there is that tending to show that Edmond Shackelford ever recognized it. (5) The heirs of Samuel Shackelford are his broth-

ers and sisters or their descendants, as follows: Mrs. M. C. Delong, Mrs. Harriet S. Cook, Mrs. Sarah E. Wilkens, J. M. Shackelford, John K. Shackelford, and the descendants of A. P. Shackelford,—George N. Shackelford and Edmond Shackelford,—making eight shares inherited. (6) The following were plaintiffs in the original petition: Sarah E. Wilkens, Harriet S. Cook, John R. Shackelford, M. C. Delong, and the heirs of A. P. Shackelford. The other heirs were introduced as plaintiffs by amended petition filed April 23, 1891, except the descendants of Edmond Shackelford, who were never brought into the suit. Mrs. Cook's name was omitted from that amendment. (7) The defendants are admitted to have acquired the title to half of the land, since the suit was brought, from the heirs of Robert T. Walker. They were in possession, when sued, under deeds from one Dick, who is not shown to have had any title. They had not held such possession for five years prior to February 29, 1884, when the original petition was filed, but had held it for more than five years before the amendment of 1891 was filed, under deeds duly registered, and had paid all of the taxes, and their possession had been peaceable and adverse, except as it may have been interrupted by this suit.

Conclusions of Law.

1. We have not thought it necessary to give a history of the case, as the record speaks for itself, but have deemed it sufficient to indicate our conclusions upon the evidence. There was no error in the refusal of the court to dismiss the suit in 1889 for want of prosecution. The plaintiffs were prosecuting it, continuances being entered from term to term, generally by agreement. If sufficient diligence was not being used, defendants' remedy was to force plaintiffs to a trial, and not to dismiss for want of prosecution when plaintiffs appeared to represent their cause. The amended petition, filed in 1891, did not set up a new cause of action, except perhaps in so far as it brought in new plaintiffs. The court below held those thus newly brought in to be barred by limitation, and this was all appellants could claim as to them. The suit, as first brought, was an action of trespass to try title, in which plaintiffs set out the character of their right, and showed that their claim was an equitable title, which entitled them to recover as against strangers. The amended petition simply alleged title in plaintiffs and the heirs of Edmond Shackelford, thus changing somewhat the form of their allegations, but attesting neither the form nor substance of the cause of action. The court did not err in refusing to treat the amendment as the institution of a new suit, and to render judgment for defendants on the original petition.

2. The recital in the deed from Cassady

to Edmond Shackelford was correctly admitted. It was available to plaintiffs, to enable them to deraign title from Cassady to themselves, through Edmond Cassady and was admissible in developing their claim to the land. *Wallace v. Pruitt*, (Tex. Civ. App.) 20 S. W. Rep. 728, and authorities cited.

3. For the same reason the acknowledgment of the trust by Edmond Shackelford was admissible.

4. The statute of limitations was not available to defendants against the title of the original plaintiffs, nor was their plea of stale demand.

5. The plaintiffs exhibited an equitable title to a part of the land, which authorized judgment in their favor. The legal title in Edmond Shackelford's heirs was not an outstanding title which would defeat them.

6. The defendants did not claim under Edmond Shackelford, and cannot, therefore, be treated as innocent purchasers, entitled to protection against plaintiffs' equity.

7. There was error in the charge instructing a verdict for Mrs. Cook. She was no longer in the case, having been dropped from the petition. The interest which plaintiffs were entitled to recover was also incorrectly stated in the charge.

As appears from the above statement of kinship, plaintiffs, omitting Mrs. Cook, are entitled to an undivided one-fourth of the two tracts of land. The judgment will be reversed, and rendered for appellees for that quantity, omitting Mrs. Cook, and in favor of appellants for costs of their writ of error.

HANN et al. v. BROUSSARD et al.

(Court of Civil Appeals of Texas. June 15, 1893.)

PLEADING—ANSWER—PLEA OF PAYMENT—SUFFICIENCY—HARMLESS ERROR.

1. An answer, in an action on a note, which alleges various payments to plaintiff's attorney, who had the note for collection, and final payment to such attorney, but fails to state the times or amounts of such payments, or how made, is insufficient, under Rev. St. art. 1266, which provides that, where defendant desires to prove any payment, he shall file with his plea an account stating the nature of such payment, and the several items thereof, and shall not be entitled to prove the same unless it is so particularly described in the plea as to give plaintiff full notice of the character thereof.

2. Where the only issue tried was that arising on the plea of payment, the error in overruling an exception to the sufficiency of the plea of payment was not harmless.

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Action by Laura Hann and others against J. A. Broussard and others on a promissory note. From a judgment for defendants, plaintiffs appeal. Reversed.

Thomas J. Russell, for appellants.

WILLIAMS, J. Suit by appellants against appellees upon a promissory note, in which the only issue arose upon defendants' plea of payment. That plea averred that the principal defendant, at various and sundry times, made payments on the said note to plaintiffs' attorney, who held same, with authority to collect it, and that defendant finally paid the balance due on said note, both principal and interest, to said attorney. To this plea, plaintiffs excepted, on the ground that it did not state the times when the payments were made, nor the amounts of them, nor how they were made,—whether in money or property. The exception was overruled, and at the trial the issue presented by the plea was submitted to the jury, and they found for the defendant. The plea showed, on its face, that the alleged payment of the note was made in several amounts or "items" made at different times. In this it differed in cases relied on by appellants to sustain the ruling below. *Hoffman v. Rogers*, 6 Tex. 91; *Able v. Lee*, Id. 427. In those cases there was a general allegation of payment; in the first case the time being given, and in the last the allegation being that the payment was made after the institution of the suit. The payment in each case was alleged as being made at one time, and in one amount; at least, the court treated the allegation as conveying that meaning. In *Wells v. Fairbank*, 5 Tex. 582, no exception was taken to the plea. Where, as in this case, the payment is made in instalments, at different times, and under different circumstances, Rev. St. art. 1266¹ applies, and the plea should be more specific, as to the dates and amounts of the sums paid. The payment consisting of different items, the opposite party should be put upon notice, by the plea, of the different instalments, the payment of which is sought to be proved, in order that he may prepare to meet the defense. There is no statement of facts in the record, but the charge of the court shows that the only issue upon which the case was tried was that presented by the plea of payment. We cannot, therefore, say that the error committed by the court in overruling the exception was harmless.

The other assignments of error cannot be considered, in the absence of a statement of facts, as they relate to the refusal to grant a new trial. We do not think it proper to pass by in silence the manner in which this case has been presented in the brief of appellants. The brief consists only of a statement of the nature and result of the suit, as-

¹Rev. St. art. 1266, provides as follows: "In every action in which a defendant shall desire to prove any payment, counterclaim or set-off, he shall file with his plea, an account stating distinctly the nature of such payment, counterclaim or set-off, and the several items thereof; and on failure to do so he shall not be entitled to prove the same unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."

signments of error, propositions, and citations of authorities. There are no proper statements of the contents of the record, under the propositions relating to, or affecting, the points made. We do not feel that we are required to consider a case thus presented, and, when counsel are not more observant of the rules of the court, they must take the risk of having their cases disposed of without an examination of the record. The facts in the record affecting the ruling on the exceptions, already passed on, are stated in appellees' brief, and we have therefore determined the question raised; otherwise, we would have felt warranted in making a different disposition of the case. For the error pointed out, the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. DARTON.
(Court of Civil Appeals of Texas. June 8, 1893.)

REVIEW ON APPEAL—HARMLESS ERROR—DAMAGES.

Error in submitting to the jury elements of damage, as to which there was no allegation or evidence, cannot be regarded as harmless, in the absence of anything in the record to show on what the verdict rendered for plaintiff was based.

Appeal from Montgomery county court; B. H. Powell, Judge.

Action by G. W. Darton against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant. W. P. McComb, for appellee.

WILLIAMS, J. The clause of the charge of the court, submitting to the jury the value of the use of the goods detained or delayed, as a measure of damages, was erroneous, there being no allegation or evidence seeking a recovery therefor. The record does not show upon what the verdict of the jury was based, and we cannot say that the error was not prejudicial to the defendant. The other parts of the charge, assigned as error, were correct, and were warranted by, and applicable to, the facts. We find no error but that pointed out, for which the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. SMITH.
(Court of Civil Appeals of Texas. June 15, 1893.)

LANDLORD AND TENANT—INJURY TO CROP BY THIRD PARTY—WHO MAY SUE.

1. The right of recovery for the destruction of a crop of growing grass by fire from a locomotive is in the lessee, and not the owner, of the land.

2. The owner of land may recover for the destruction of fences thereon by fire from a locomotive, though the land is in the possession of another person under a lease.

Appeal from Harris county court; W. C. Anders, Judge.

Action by Francis Smith against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry and H. S. Downey, for appellant.

PLEASANTS, J. Appellee sued appellant on April 27, 1891, in the county court of Harris county, for the recovery of compensatory damages for destruction of grass and fences upon lands of plaintiff, caused by fires produced by sparks which escaped through the negligence of defendant, as alleged in petition, from its locomotives. The fires occurred on December 1, 8, 12, and 16, 1890. Damages to fencing were laid at \$75, and to grass at \$925. Defendant answered by general exceptions and general denial. Verdict and judgment for appellee for \$144 for grass burned, and for \$33.50 for fence posts. The evidence establishes the following facts: The plaintiff was a resident of the state of Indiana, and owned about 1,500 acres of land in Ft. Bond county, over which defendant's railway ran. Said lands were used partly for farming purposes, partly for hay, and partly for pasturage. On the 2d day of December, 1890, the plaintiff leased said lands to one Stone, the lease to expire on the 1st of December, 1891. That on said 2d day of December, 1890, the lessee, the said Stone, entered upon said lands, and held exclusive possession thereof until the expiration of his lease, and the fires which destroyed the grass and fencing all occurred while the lands were in the exclusive occupancy of said Stone. Stone had his cattle upon the lands, and neither the plaintiff, nor any one else, had the right to put cattle upon the lands during the continuance of the lease. The fires destroyed the grass upon some of the lands, and they were thereby rendered worthless for pasturage until covered by another crop of grass. Upon the introduction of evidence by the plaintiff to show the value of the lands immediately before the burnings, and their value immediately thereafter, defendant objected on the grounds that it had been shown by uncontroverted evidence that the fires occurred while the lands were in possession of plaintiff's lessee; that the lessee, and not the plaintiff, was entitled to recover for any damages done the grass. The objection was overruled, and the evidence admitted; and to which ruling and action of the court, defendant duly objected, and assigns as error the refusal of the court to sustain its objection to the evidence.

This assignment presents for our decision the question whether the lessor of lands can maintain an action for injury or damage to premises while in the exclusive possession of the lessee, when such damage to the premises does not affect or lessen the value of the freehold. That such suits cannot be main-

tained is, we think, well established. The person who is rightfully in the actual and exclusive possession of the land is alone authorized to sue for trespass committed upon his possession. *Reynolds v. Williams*, 1 Tex. 311; *Lyford v. Toothaker*, 39 Me. 28; *Bartlett v. Perkins*, 13 Me. 87. Grass growing upon leased premises is as much the property of the lessee as crops produced upon the lands by his industry, and the lessor has no property in the grass pending the lease. We think the evidence objected to should have been excluded, and upon the pleadings and the facts the plaintiff could only have recovered for the value of the fencing destroyed by the fires. If the fires resulted from the negligence of the defendant, the defendant would be liable to plaintiff for any damage done to the fences by its negligence. The tenant or lessee is under obligation to make repairs, but such obligation does not require the tenant to replace improvements which have been destroyed by the acts of a stranger, without fault of the tenant, and for such injuries to the realty the owner may recover damages from the wrongdoer. *Tied. Real Prop.* § 189. For the error indicated in this opinion the judgment of the lower court is reversed, and the cause remanded.

MUNDINE v. BROWN et al.

(Court of Civil Appeals of Texas. June 15, 1893.)

JUDGMENT—SCIRE FACIAS TO REVIVE—LIMITATIONS.

A judgment was rendered December 3, 1875, and the first execution issued March 7, 1876, and was returned the same day; the second issued the same day, and was directed to the sheriff of another county; the third issued January 12, 1877; and the fourth, March 21, 1884. Held that, under the statute of 1866, in force at the date of the judgment, it was not barred at time of filing a petition for a writ of scire facias, January 13, 1892.

Error from district court, Galveston county; W. H. Steward, Judge.

Scire facias by James M. Brown, Clara Specht, and Herman Specht to revive a judgment against Frank M. Mundine. From a judgment for petitioners said Mundine brings error. Affirmed.

Howard Finley, for plaintiff in error. H. C. Mayer and Wm. M. Jerdone, for defendants in error.

PLEASANTS, J. The defendants in error instituted proceedings by writ of scire facias in the district court of Galveston to revive a judgment rendered in said court on the 3d day of December, 1875, in favor of appellee Brown and John W. Lang against the plaintiff in error. At the time of the judgment Brown and Lang were partners in trade, and the judgment was rendered for the firm. The defendant in error Clara was the wife of Lang at the time of his death, and by the will of her husband she became the owner

of his interest in said judgment. She, at the institution of this proceeding, was the wife of defendant in error Herman Specht. The plaintiff in error resisted the defendants' proceedings to revive the judgment and restore the lien which the law gave to it when rendered, and pleaded 10 years' statute of limitation. The court gave judgment for defendants in error, and plaintiff in error sued out writ of error. The only defense made to the scire facias is that the judgment was barred when the petition for writ of scire facias was filed, to wit, January 13, 1892. The date of the judgment is December 3, 1875, and the first execution issued on March 7, 1876, and was returned the same day. The second issued also on the 7th of March, and was directed to sheriff of another county than that of Galveston. The third issued January 12, 1877, and the fourth issued 21st of March, 1884. From this statement it is apparent that under the statute of 1866, which was in force at the date of the judgment, as that statute has been construed in the decisions rendered in *Masterson v. Cunliff*, 58 Tex. 472, and *Anderson v. Boyd*, 64 Tex. 108, the judgment was neither barred nor dormant, and the court below, under the authorities cited, and under the later case of *Millican v. Ware*, (Tex. Sup.) 19 S. W. Rep. 475, committed no error in sustaining the suit under the scire facias proceedings, and the judgment is therefore affirmed.

GULF, C. & S. F. R. CO. v. MATTHEWS.

(Court of Civil Appeals of Texas. June 22, 1893.)

RAILROAD COMPANIES—BURNING OF GRASS—MEASURE OF DAMAGES—EVIDENCE.

1. In an action against a railroad company to recover damages caused by a fire which burned posts and grass on plaintiff's land, the measure of damages is the value of the posts and of the grass destroyed, and the injury caused to the land by the destruction of the turf, and not the difference in the value of the land caused by the burning of the grass.

2. Evidence is admissible as to the value of the grass as hay as well as for pasturage.

3. Where the grass has a market value, that should be the criterion; but, where there is no market value, its value when put to any of the uses for which it was valuable should be taken.

Appeal from Burleson county court; John Alexander, Judge.

Action by J. W. Matthews against the Gulf, Colorado & Santa Fe Railroad Company to recover for damages caused by fire set by defendant, and which burned posts and grass on plaintiff's land. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry, for appellant.

WILLIAMS, J. The court erred in the portion of the charge defining the measure of damages. The correct measure was not the difference in the value of land caused by the burning of the grass, because that was

temporary. *Railway Co. v. Horne*, 69 Tex. 644, 9 S. W. Rep. 440. The measure of damages is the value of the posts and of the grass destroyed, and the injury caused to the value of the land by the destruction of the turf. Evidence of the value of the grass as hay, as well as for pasturage purposes, should be admitted for the consideration of the jury; and from a showing of all the purposes for which plaintiff's grass was useful and valuable the jury should determine what its value was at the time at which, and state in which, it stood when burned. If the grass possessed a market value, that should be the criterion; but if, as is probable, there was no market value, considering it as useful for pasturage, its value when thus used should be taken. Any evidence tending to show what the grass was worth when put to any of the uses for which it was valuable should be admitted. Evidence as to any temporary diminution of the value of the land resulting from the burning of the grass should be excluded. Reversed and remanded.

WELLS-FARGO EXP. CO. v. HOLLIDAY.

(Court of Civil Appeals of Texas. June 22, 1893.)

APPEAL FROM JUSTICE'S JUDGMENT—SUFFICIENCY OF APPEAL BOND.

Where a judgment rendered by a justice of the peace is transferred by the judgment plaintiff to third persons before an appeal is taken, an appeal bond afterwards made to such plaintiff, and not to the transferees, is sufficient.

Appeal from Brazos county court; W. H. Harmon, Judge.

Action by L. Holliday against the Wells-Fargo Express Company, commenced in justice's court, and taken on appeal by defendant to the county court. From a judgment of the county court dismissing the appeal for want of sufficient appeal bond, defendant appeals. Reversed.

Talliaferro & Butler, for appellant.

PLEASANTS, J. This cause came to us upon appeal from the county court of Brazos county. Appellee obtained judgment in justice's court against appellant, and, upon appeal by the latter to the county court, the appeal, upon motion of appellee, was dismissed; the ground of the motion to dismiss being that there was no sufficient appeal bond filed by appellant, in this: that after the judgment in the justice's court, but before the appeal was perfected, said judgment was transferred by the plaintiff to one W. T. Young and one George M. Michael, and the bond was not made payable to them, but to the plaintiff, L. Holliday. The bond is in accordance with the statute, and the judgment of the county court, sustaining the motion and dismissing the cause, is erroneous, and the cause is remanded for trial by said court.

BURKE et al. v. ADOUE et al.

(Court of Civil Appeals of Texas. June 23, 1893.)

On rehearing. Motion denied.

For report of decision on appeal, see 22 S. W. Rep. 824.

WILLIAMS, J. Having examined the motion for rehearing, we see no reason to alter or modify the opinion heretofore rendered. At request of appellees, the judgment of this court will be so modified as to remand the case, in order that they may so amend as to bring their cause within the jurisdiction of the county court. If they shall amend their petition so as to wholly abandon their claim for attorneys' fees, it will be proper for the county court to entertain their suit, adjudging against them the costs accrued prior to the filing of such amendment. Unless such amendment is made, the court below will dismiss the suit.

ST. LOUIS & S. W. RY. CO. v. KAY et al.

(No. 245.)

(Court of Civil Appeals of Texas. June 22, 1893.)

Appeal from Smith county court; B. B. Bealrd, Judge.

Action by J. A. Kay & Co. against the St. Louis & Southwestern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

For opinion of the supreme court on certified question, see 22 S. W. Rep. 665.

Sam H. West and Finley Marsh & Butler, for appellant. Lindsey & Butler, for appellees.

WILLIAMS, J. This suit is brought to recover the penalty prescribed by article 279, Rev. St., against carriers of freight for their refusal to receive and transport goods tendered to them for shipment. Judgment was rendered in the county court for the penalty, from which this appeal is prosecuted.

The question being made as to whether or not the article above referred to was repealed by the act of 1887 amending article 4227, Rev. St., it was certified by this court to the supreme court for decision. That court has held that article 279 was thus repealed, and the judgment of the county court will be reversed, and judgment entered dismissing the cause.

ST. LOUIS & S. W. RY. CO. v. KAY et al.

(No. 192.)

(Court of Civil Appeals of Texas. June 22, 1893.)

Appeal from Smith county court; B. B. Bealrd, Judge.

Action by J. A. Kay & Co. against the St. Louis & Southwestern Railway Company.

From a judgment for plaintiffs, defendant appeals. *Reversed.*

Sam H. West and Finley Marsh & Butler, for appellant. Lindsey & Butler, for appellees.

WILLIAMS, J. This action depends on the question decided in No. 245, between the same parties, (23 S. W. Rep. 91,) and in accordance with the opinion of the supreme court and of this court in that cause the judgment appealed from is reversed, and the cause dismissed.

ALBERGER et al. v. WHITE, (WAUGH et al., Interveners.)

(Supreme Court of Missouri. June 27, 1893.)

FRAUDULENT CONVEYANCES—INSTRUCTIONS.

1. C. sold to W. his business. W. paid some cash, gave his note, agreed to assume existing obligations, turned over the accounts due, and agreed to pay half the loss on the accounts not collected. As collateral security for these obligations, W. gave to C. a note secured by deed of trust on the stock. It was contended by creditors that there was fraudulently included in the note more than the amount of all these obligations. *Held*, that an instruction that though C. had a right to take a note, secured on the property of W., for "any bona fide debt of W. to him," whether due or to become due, yet if, at the time the note and deed were executed, W. was indebted to others, and the note was for a larger amount than W. owed, or was liable for, to C., and both knew this, then the note and deed were fraudulent as to such creditors, was not open to the construction that C. could not be secured by such note and mortgage against the old obligations which W. had assumed.

2. An instruction that direct evidence is not required to establish fraud, but it may be inferred from all "the facts and circumstances of this case," and that, if the jury believe certain facts, they shall find that there was a fraudulent conveyance, does not charge the jury that the facts show fraud.

3. Though a creditor may take security, even when he knows that it will delay the debtor's other creditors, and that the debtor's purpose is to hinder such other creditors, provided the creditor does not participate in the fraudulent purpose of his debtor, still there was no error in instructing, if W. gave the note and deed to C. with intent to hinder his creditors, and C. knew of such intent, and aided or "in any manner" assisted him in carrying out such fraudulent intent, the security would be void. Black, C. J., and Brace and Macfarlane, JJ., dissenting.

4. There is no error in an instruction that if the debtor made the instruments with intent to hinder, delay, or defraud his creditors, and the secured creditor knew this, and "participated in such intent," in any manner, the instruments would be void, though the creditor had a valid debt secured thereby. Black, C. J., and Brace and Macfarlane, JJ., dissenting.

In bank. Appeal from circuit court, Randolph county.

Action by Alberger, Stoer & Co. against Eugene White. James H. Waugh and James A. Carlisle intervened. Judgment for plaintiffs. Interveners appeal. *Affirmed.*

In a suit by attachment instituted by respondents in the circuit court of Boone county against Eugene White, among several other creditors, a stock of goods, wares, and merchandise, and other property, was levied upon, which theretofore, on the 17th of May, 1889, had been conveyed by deed of trust, by

the said White, to J. H. Waugh, to secure the payment of a promissory note of \$4,000 of that date, to the said James A. Carlisle. The said Waugh and Carlisle interpleaded in said suits, claiming the property under said deed of trust. The respondents answered, admitting the execution of said deed of trust, but charging that the same was executed for the purpose of hindering, delaying, and defrauding the respondents, and other creditors of the said Eugene White, and to secure an amount largely in excess of any bona fide indebtedness from the said White to the said Carlisle. Upon this answer, issue was joined by the interpleaders, the issue submitted to the jury, and found for the respondents, and the interpleaders appealed.

The undisputed facts are that prior to the 30th day of January, 1889, the said Carlisle and one C. Mead White, a brother of the said Eugene White, were engaged in the merchant tailoring business in the city of Columbia, under the firm name of White & Carlisle. That on that day Eugene White, under the firm name of Eugene White & Co., purchased all the interest of the said Carlisle in said concern of White & Carlisle for the sum of \$4,000; \$1,518.55 to be paid in cash, \$500 by note payable one day after date, and the remainder, \$1,981.45, in the accounts due the firm of Carlisle & White; the said Eugene White, by the firm name of Eugene White & Co., further agreeing to stand half the losses on all accounts of Carlisle & White not collected.—losses to be adjusted on the 1st of May, 1889,—and to assume all liabilities of said concern, and to have all bills not due against said firm transferred to account of Eugene White & Co. That, contemporaneously with this purchase, Eugene White also bought all the interest of his brother, the said Mead White, in said concern, for which he gave his brother his note for the sum of \$1,800. That the cash payment was made to Carlisle, the note of Eugene White, for \$500, executed and delivered to him, and the accounts of Carlisle & White transferred to him, and the accounts of creditors, for goods sold, including that of respondents, against the firm of White & Carlisle, transferred to account of Eugene White & Co., at the request and on the representations of Eugene White. The following letter from respondents, received by Eugene White, was shown to Carlisle: "Philadelphia, February 13, 1889. Mr. Eugene White, Columbia, Mo.—Dear Sir: Yours of the 8th received, and appears satisfactory. On the strength of your statement, we have decided to transfer the account of White & Carlisle to Eugene White & Co., thus releasing Mr. Carlisle from any pecuniary responsibility. We trust our dealings may be mutually satisfactory. Yours, truly, Alberger, Stoer & Co."

The main witness for the interveners was Carlisle. His evidence tended to show that it was the understanding that Mead White remained a member of the firm of Eugene White & Co. That on the same day the writ-

ten agreement was signed, evidencing the sale aforesaid, to wit, the 30th of January, 1889, Eugene White executed and delivered to him a note in the name of Eugene White & Co., of that date, payable one day after date, for the sum of \$6,000. That said note was taken as collateral security for the performance by the said Eugene White & Co. of their obligations under said contract, which were estimated to be about that amount. That about the 1st of May, Eugene White & Co. having failed to pay the debts of White & Carlisle, which they had assumed, and being himself pressed for payment of one of those debts, of about \$2,000, due the Exchange National Bank, he placed the note for \$6,000 in the hands of his attorney. That suit was brought on it in the circuit court of Audrain county, in which county Mead White lived. That on the 17th of May he had an adjustment with Eugene White of the accounts between himself and the firm of Eugene White & Co., under said contract, which resulted in the execution by the said Eugene White, in the name of Eugene White & Co., of the note for \$4,000, secured, as aforesaid, by the deed of trust under which interveners claim. That said note was given for the balance approximately ascertained by an estimate of the liabilities of said Eugene White & Co. to Carlisle on the 1st of May under the contract, as per the following account:

Eugene White & Co. in Account with J. A. Carlisle.

1889. May 1. To purchase price of goods, as per contract, January 30, 1889	\$4,000 00
Interest on same, 3 months, 8%	80 00
To liabilities, as per said contract, assumed by White & Co., and not discharged per contract:	
Alberger, Stoer & Co.	584 00
To note at Exchange Bank	2,000 00
To interest on note at Exchange Bank	42 72
To rent to Trimble	250 00
To balance cash advanced	160 85
To error in charging L. S. Gordon's account to Carlisle	37 50
To error in charging Reynolds' account to Carlisle	45 00
To probable repairs of store, as per contract	50 00
	<u>\$7,250 07</u>

Credits:

January 30. By cash on contract	\$1,518 55
By interest on same, 3 months, 8%	30 37
By accounts collected on contract	1,430 51
By $\frac{1}{2}$ losses on account, as per contract	234 22
	<u>3,213 65</u>
To balance	\$4,036 42

That after the execution and delivery of the note for \$4,000, and the deed of trust, the suit on the note for \$6,000 was dismissed.

The principal witness for the respondents was Eugene White, who testified that all the accounts of the creditors, for goods,

against the firm of White & Carlisle, were transferred to the account of Eugene White & Co., and that about the middle of February he showed the letters of such creditors to Carlisle, advising him of that fact; that he executed the note to Carlisle for \$6,000 on the 27th or 28th day of February, but dated it on the 30th of January, the day of the consummation of the trade. "Question. At that time, what amount of money did you actually owe Carlisle? Answer. By assumption, I owed him the \$2,000 note at the Exchange Bank, my personal note for \$500, and about \$158 that he had loaned me, making a total of about \$2,600. This was all I owed him. Q. If you only owed Carlisle \$2,600, why did you execute him a note for \$6,000? A. We had talked the matter over, and had come to an understanding about the thing, and agreed that if the note was made for that amount I should, if I got into any trouble, have the balance of the money myself, over and above his amount; that is, if I should fall in business, or in any way have trouble, and need the money, I should have the balance of the note, over and above the amount I owed him. I was to get the surplus, in other words. Q. Who were you to get it from? A. From Mr. Carlisle. He would close the trade, and I should have the balance of the money. In other words, if anybody got left, it would be the eastern creditors, but he and I would be safe. Q. What did he say to you regarding this transaction? A. He said that, 'if anybody had to stand any loss on account of it, I think it had better be the eastern creditors, for they are better able to afford it than we are. We will fix ourselves first. I will protect you, and, if anybody has to lose anything, it will be them.' Q. That was the arrangement and understanding between you, was it? A. It was. Q. What became of the \$6,000 note? A. Mr. Carlisle has it now. After I bought out the firm of White & Carlisle, I conducted the business under the name of Eugene White & Co. (the company being nominal) until closed by these attachments. * * * There were no further transactions between us until the 17th of May. At this time he had my note for \$500, and the \$6,000 note. He said he wanted to be protected in the \$2,000 at the Exchange Bank that I had assumed. He had agreed to keep it running until I could pay it. He said the bank wanted the note paid, or more security, and that he would have to get his father to go on it. Mr. Carlisle said to me, on this occasion, that I ought to protect him and protect myself, and there was only way to do it: that was to make a deed of trust to cover the property. That would protect him and myself, in case the eastern creditors jumped on me. * * * Q. What did you owe him at that time? A. \$2,650. Q. What did

you give him the note for \$4,000 for, when you only owed him \$2,850? A. I gave him a note for \$4,000, and owed him \$2,850; and the understanding between us was that the \$1,350 over and above the debt I owed him was to come back to me, in case there was a foreclosure. Q. Was to come back to you from whom? A. Mr. Carlisle. Q. Was that the agreement between you and him? A. Yes, sir; it was. Q. Did you execute the note and deed of trust? A. Yes, sir; the deed of trust was on my entire store, fixtures, and books, accounts, etc. I gave the deed of trust on Saturday, about noon, and the next day I found that it had been filed for record." This evidence of White's was flatly contradicted by Carlisle.

It further appeared from the evidence that the deed of trust was filed for record on the 17th of May, 1889. The petition in the suit against Eugene and Mead White on the \$6,000 note was filed in the Audrain circuit court on the same day, and on the 20th Carlisle wrote the following letter to the respondents: "Gentlemen: Please inform me by return mail whether or not the last order made of your firm by White & Carlisle, and subsequently assumed by Eugene White & Co., has been paid, and oblige. [Signed] J. A. Carlisle." To which he received an answer, dated May 23d, that the account had not been settled, and afterwards received another letter from respondents, dated May 27th, that they would look to him for payment of their account. On the 21st of May, Eugene White, Waugh, the trustee, and Carlisle entered into a written agreement by which G. W. Trimble was placed in charge of the property conveyed by the deed of trust, with power to conduct the business, and apply the proceeds to the payment of the trust deed. On the 24th of May the creditors of Eugene White & Co. began filing suits by attachment. On the 4th of June, 1889, the suit of Carlisle against the Whites, in Audrain county, was dismissed, and in October Carlisle wrote the respondents the following letter:

"Messrs. Alberger, Stoer & Co.: You are among the attaching creditors of Eugene White & Co., insolvent firm, late of this city. The net proceeds of receiver's sale under order of sale in attachment cannot possibly exceed \$4,000. The attaching creditors, dates of attachment, and amounts sued on, are as follows:

C. M. White, May 24, \$1,800, with interest	\$1,920 00
Columbia Savings Bank, May 24, \$1,000, with interest	1,060 00
Joseph M. Hays Woolen Co., May 24, \$300	300 00
Longley, Lowe & Alexander, May 28	240 00
Longley, Lowe & Alexander, May 29	170 00
John B. Ellison & Sons, May 30....	1,350 00
Balm Bros. & Co., May 30.....	260 00
Excelsior Laundry Co., May 31.....	150 00
Alberger, Stoer & Co., May 31.....	580 00

"You will thus discover that about \$5,400 must be paid out of \$4,000 before a cent can be paid to you. The undersigned was a member of the old firm of White & Carlisle, to whom your above-named account was first charged, and who were predecessors in business to said Eugene White & Co. I shall be interested in each of said suits as interpleader for property attached. Your interest and mine in the suits are identical, if the original liability of White & Carlisle to you has not been discharged. If such be the fact,—concerning which I do not commit myself,—and my interest prevails, you will enjoy the full benefit of my success. Owing to your present attitude in court, and consequent complication with other attaching creditors, which I need not explain, I cannot now give you the facts from which your above-mentioned relations to me arise; but if you will, in honorable confidence, keep this statement from all persons here, whomsoever, and send a man here with power to act, I can show him how your debt will be saved, whereas, in the present condition of things, it will certainly be lost. It is important for us both that you communicate with me directly, and with no one else. If you send a man, send immediately, and notify me of the fact when he will be here, as I live some distance in the country. Very respectfully, J. A. Carlisle."

To which respondents replied, on the 7th of October, that their claim was in the hands of their attorneys, and referring him to them.

The foregoing summary presents the salient features of the case presented by the evidence, on which the court gave the following instructions for the respondents, of which the appellants complain of Nos. 2, 3, 4, and 5 as erroneous: "(No. 1) The court instructs the jury in this case that if they believe, from all the facts and circumstances admitted in evidence, it was agreed between the interpleader J. A. Carlisle and Eugene White, at the time the deed of trust and note of \$4,000 dollars were executed and delivered, a part of said amount of \$4,000 was, when collected, to be paid back to said Eugene White, and thereby prevent his other creditors from getting such part, then said deed of trust and note are fraudulent and void, and your verdict must be for the plaintiffs in the attachment. (No. 2) Although interpleader J. A. Carlisle had a legal right to take and receive a note, and have it secured by deed of trust on the property of Eugene White, for any bona fide debt or liability of said White to him, whether due or to become due, yet if the jury believe that at the time of the execution of the note and deed of trust from White to Carlisle, offered in evidence, said White was largely indebted to other parties, and that said note was for a larger or greater amount than said White owed or was liable to said Car-

lisle for, and both White and Carlisle knew that fact at the time of the execution and delivery of said note and deed of trust by White to Carlisle, then the note and deed of trust are fraudulent and void as to such creditors, and your verdict should be for the plaintiffs in the attachment. (No. 3) The jury are instructed that direct and positive evidence is not required to establish or prove fraud, but it may be gathered or inferred from all the facts and circumstances in this case; and if the jury believe, from all the facts and circumstances in evidence in this case, that Eugene White gave the note and deed of trust read in evidence to James Carlisle with the intent to hinder, delay, or defraud the said Eugene White's creditors, and that Carlisle had knowledge of such fraudulent intent, and aided or in any manner assisted him (White) in carrying out said fraudulent intent, then your verdict must be for plaintiffs in attachment, to wit, Alberger, Stoer & Co. (No. 4) The jury are instructed that, although they may believe from the evidence that the note and deed of trust read in evidence were executed by White to the interpleader Carlisle, and that White, Carlisle, and Waugh afterward executed an instrument of writing (read in evidence) to G. W. Trimble, authorizing him to take possession of the stock of goods levied upon under the writ of attachment issued in this cause, still, if the jury further believe from the evidence that said deed of trust and said other instrument of writing were made by White with the intent to hinder, delay, or defraud the creditors of White in the collection of their debts, and that Carlisle knew of the purpose of White in making and executing said instrument, and participated in such intent in any manner, then such instruments were void as to the attaching creditors of White, whether said Carlisle had a valid debt secured by said deed of trust or not. (No. 5) If the jury believe from the evidence that Eugene White, defendant in the attachment, executed and delivered to interpleader James A. Carlisle the four thousand dollar note read in evidence, and the deed of trust conveying to James H. Waugh, as trustee, the said stock of goods, wares, and merchandise in controversy in this case, with the intent or purpose to hinder, delay, or defraud the creditors of said White other than Carlisle, and that Carlisle had knowledge of, and participated in, such fraudulent intent, then the verdict of the jury must be for the plaintiffs in the attachment, to wit, Alberger, Stoer & Co."

Odon Gultar, for appellants. W. Gordon, Gordon & Bass, C. B. Sebastian, S. Turner, and E. W. Hinton, for respondents.

GANTT, J. The foregoing statement of the case was made by Judge BRACE in division No. 1, and, being so satisfactory,

was, in bank opinion, by his consent, adopted by court.

The interpleader complains only of instructions. The second instruction is challenged for the reason that he conceives it limited the right of the interpleader "to take and receive a note, and have it secured by deed of trust on the property of Eugene White for any bona fide debt or liability of said White to him," (Carlisle,) thereby excluding the right of the said Carlisle to take a note and deed of trust to secure himself against the old firm obligations of White & Carlisle. Under the issues and facts in this case, this point is not well taken. The instruction referred to the evidence in the case. It covered fully the liability of White to Carlisle. This liability grew out of his assumption of the very firm debts which counsel claim were excluded by the instruction. The word was used to cover the contingent liability of Carlisle in case Eugene White should not discharge the firm obligations of White & Carlisle, which he assumed, and stand half of the losses on the firm accounts. The sole issue was whether the note only included these bona fide obligations. The creditors claimed that White and the interpleaders had fraudulently included in the note a sum largely in excess of White's debt or liabilities growing out of his purchase of the said firm's assets. No other liabilities were under consideration, and there is not the slightest probability the jury construed the instruction in the way learned counsel claims they were authorized to do. The instruction was pertinent, and, we think, comprehensive enough to cover the issues on trial.

2. Learned counsel urges that in the third instruction the court invaded the province of the jury, usurped their functions, and practically decided the case against the interpleader. That instruction is as follows: "(No. 3) The jury are instructed that direct and positive evidence is not required to establish or prove fraud, but it may be gathered or inferred from all the facts and circumstances in evidence in this case; and if the jury believe, from all the facts and circumstances in evidence in this case, that Eugene White gave the note and deed of trust read in evidence to James Carlisle with the intent to hinder, delay, or defraud the said Eugene White's creditors, and that Carlisle had knowledge of such fraudulent intent, and aided or in any manner assisted him (White) in carrying out said fraudulent intent, then your verdict must be for plaintiffs in attachment, to wit, Alberger, Stoer & Co." The criticism is that the court gave the jury his opinion that the facts and circumstances in this particular case established fraud. It may be conceded that a particular emphasis upon the article "the," and the clause "in this case," at first blush, are open to the construction now placed upon them by the appellants, but let us look

at the instruction in another light. The court was instructing in this case, not another, and the jury were trying this case, not another. Let us transpose the clause "In this case," and place it at the commencement of the instruction. It will then read: "In this case the court instructs the jury that direct and positive evidence is not required to establish or prove fraud, but it may be gathered or inferred from all the facts and circumstances in evidence." Had it been in this last form, certainly it would have been authorized by repeated decisions of this court. *Burgert v. Borchert*, 59 Mo. 84; *Albert v. Besel*, 88 Mo. 154. But, reading it as it was given, has the court said more than this: Fraud may be shown by the facts and circumstances in evidence in this or another case, where it is the issue. If it may be so shown in any case, was it transcending upon the privileges of the jury to inform them they might so find in this case? Clearly, if the trial court had considered that the facts were not debatable, and established fraud, as a matter of law, he would not have submitted it to the jury to find it from the facts and circumstances; and, on the other hand, if there were no facts and circumstances from which fraud could properly be found in this case, it was error to submit it in any form to the jury. If there was evidence from which fraud might have been found,—and this the interpleader does not controvert,—then the jury were properly instructed that it was not necessary to prove the fraud by direct or positive evidence, but they might so find it from the evidence in this case. But the instruction is not to be declared erroneous by a hypercritical test of the first clause alone. This first part is but the reiteration of the law, in an abstract way, as to the amount and character of proof demanded in these cases; and following it, in the same immediate and direct connection, and coupled with it by the copulative conjunction, the jury are told that if, from all the facts and circumstances in evidence, they (the jury, not the court) shall find certain ultimate facts existed, then they must find for the attaching creditor; so that, when taken as a whole, the jury were simply authorized to find that Eugene White executed the note and deed of trust with the intent to delay, hinder, or defraud his other creditors, from the facts and circumstances, and it was left for them to say whether they found and believed White was guilty of fraud, and that Carlisle knew it, and, knowing it, aided or assisted him, in any manner, in carrying out the fraudulent intent. The meaning of this instruction must be gathered from it as a whole, and not by critically separating it, and then attacking the detached sections in detail. *State v. Mathews*, 98 Mo. 130, 10 S. W. Rep. 144, and 11 S. W. Rep. 1135; *Burdoin v. Town of Trenton*, 22 S. W. Rep. 728, (division No. 1, this

term.) This is the rule for the construction of any writing or instrument, and we see no good reason why it should not be applied to an instruction drawn often hurriedly, but whose meaning is rarely misunderstood. Had it been construed by the counsel for the attaching creditors in the argument as it is here by interpleader, we doubt not the interpleader would have had the court repudiate instantly the charge that he was assuming to find fraud for the jury. So much, for the verbal criticism. Let us see if the instruction is otherwise obnoxious to the principles of the law. The law, in cases similar to this, seems to be well defined in this state. A creditor has a perfect right to take security for an honest debt from his debtor, although he may know that the effect of taking it will be to delay or hinder the other creditors of his debtor in the collection of their debts, and though he may also know that the debtor thereby intends to hinder, delay, or defeat his other creditors, provided, always, the creditor so preferred does not participate in the fraudulent purpose or intent of his debtor. *Shelley v. Boothe*, 73 Mo. 74; *Holmes v. Braidwood*, 82 Mo. 610; *Albert v. Besel*, 88 Mo. 150; *Frederick v. Allgaler*, Id. 568. Measured by these decisions, there can be no objection to the instruction. It recognizes fully interpleader's right to take security for his honest debt, even though he knew White was intending to defraud his other creditors; but it required that he should stop at securing his debt, and declared that if he did not, but went further, and aided or assisted the fraudulent debtor in carrying out his fraudulent purpose, his preference so obtained should be avoided. Some criticism is also indulged because of the use of the expression, "in any manner assisted in carrying out said fraudulent intent." Certainly, one who assists another, in any manner, in carrying out a fraudulent purpose, is a *particeps criminis*. It is utterly immaterial what means he resorts to, if he invokes and adopts them to aid in the perpetration of a fraud, he forfeits thereby the countenance of the law, and is a joint fraudfeasor. It is his assistance in carrying out the fraud that vitiates the whole of his security, (*Seger v. Thomas*, 107 Mo. 635, 19 S. W. Rep. 313,) and is quite a different thing from honestly taking a security for the sole purpose of saving his own debt, which may result in a delay of other creditors, (*State v. Hope*, 102 Mo. 410, 14 S. W. Rep. 985.) We find no error in this instruction that would justify a reversal of this cause. *McGowan v. Steel Co.*, 100 Mo. 518, 19 S. W. Rep. 199.

3. The error assigned in the fourth instruction is that it enunciates a proposition legally and morally impossible. The instruction declares that notwithstanding the jury should find that White executed the note and deed of trust to Carlisle, and that White, Carlisle,

P. H. Swearingen

and Waugh placed Trimble in possession of the goods attached in this case, still, if the jury shall further find from the evidence that the said deed of trust and the instrument by which Trimble was put in possession were made by White with the intent to hinder, delay, or defraud the creditors of White in the collection of their debts, and that Carlisle knew of the purpose of White in making and executing said instrument, and participated in such intent, in any manner, then such instruments are void, as against the attaching creditors of White, whether Carlisle had a valid debt secured by said deed of trust or not. The instruction, in all essential particulars, is based on the same principles already discussed as to the third instruction; but the specific error, it is claimed, is in holding that Carlisle could participate in the fraudulent intent of White. We do not know that we fully appreciate the point made. We do not see why two men may not have a common intent or purpose to do an unlawful or fraudulent act, or commit a crime, with common intent or purpose, and, if so, why each may not be said to participate in the other's intent. In *Albert v. Besel*, 88 Mo. 150, Judge Black used this language: "They had a perfect right to buy the goods for that purpose, though the purchase might operate to hinder and delay the other creditors in the collection of their demands, and though, to their knowledge, Besel intended the sale should have that effect, provided they did not participate in the fraudulent purpose of Besel." In *Frederick v. Allgaler*, 88 Mo. 598-603, Judge Sherwood says, speaking of the difference between a creditor purchasing to save a debt or taking a security, and a purchaser who was not a creditor: "In the one instance, mere knowledge on the part of plaintiff of Rhodes' fraudulent intent is sufficient to defeat his action. In the other, he must have been a participant in that fraudulent intent in order to defeat his recovery." For an illustration we need not go beyond the facts of this case. It may have been—indeed, it does not seem to be questioned—that White honestly owed Carlisle something. This being true, Carlisle had a legal and moral right to the deed of trust given to secure that debt, but if he knew that White intended to delay, hinder, or defraud his creditors, and permitted White to include in the deed of trust, not only the debt which he might lawfully secure, but an amount in excess thereof, and agreed to account to White for this excess over his debt, then we say he was not only securing a lawful debt, but he went further, and participated in White's fraudulent intent to defeat his creditors. Such transactions are not only not impossible, morally or legally, but, unfortunately, are exceedingly common, in everyday life. Says Norton, J., in *Shelley v. Boothe*: "The right of a debtor to prefer one creditor over another necessarily implies the right of such creditor to accept

such preference. While the effect of such preference must, to the extent that it is made, necessarily be to hinder or to delay other creditors, the mere knowledge of the preferred creditor that such will be its effect, and the debtor intended it should have that effect, will not be sufficient to avoid the transaction, as to a creditor not preferred. But if, in such case, it further appears from the circumstances attending the transaction that the preferred creditor was not acting from an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, he will not be protected, because, in such a case, the fraud of the debtor becomes the fraud of the preferred creditor, because of his participation therein." *Shelley v. Boothe*, 78 Mo. 77. In *Van Roolte v. Harrington*, 101 Mo. loc. cit. 612, 14 S. W. Rep. 710, Black, J., says: "It makes the vendee a participant in the fraudulent purpose of the vendor," etc. In *State v. Hope*, 102 Mo. 428, 14 S. W. Rep. 985, Brace, J., arguendo, says: "If the creditor is guilty of fraud, it is because he is a participant in the fraudulent intent of the debtor." Whatever difficulty counsel may have in solving this mental proposition, it is one that seems never to have given the different members of this court trouble, nor do we think the bar generally regard it as unsolvable or impossible. Regarding this instruction as in line with the established law in this state, and there being no error in the record, the judgment is affirmed.

BARCLAY, BURGESS, and SHERWOOD, JJ., concur.

BRACE, J., (dissenting.) 1. The criticism on instruction No. 2 is that it limits the right of the interpleader Carlisle "to take and receive a note, and have it secured by deed of trust on the property of Eugene White, for any bona fide debt or liability of said White to him," (Carlisle,) thereby excluding the right of the said Carlisle to take a note and deed of trust embracing liabilities of the old firm of Carlisle & White to third parties. We do not think this a fair construction of the instruction. It was conceded that the whole consideration of the \$4,000 note, except White's original note of \$500 and interest, and the money which Carlisle had loaned him from time to time, amounting to \$160.85,—about which there was no dispute,—consisted of losses on the accounts of White & Carlisle, assigned to the latter, one-half of which White was to pay, and liabilities of that concern to third parties, which White had assumed; and, of these liabilities, there was no dispute about the item of \$2,000 due the Exchange Bank, and interest. So that the whole matter in dispute was the bona fides of the liabilities of White to Carlisle on account of the losses on

the assigned accounts and the liabilities of the old firm to third parties, which White, in his contract with Carlisle, had assumed to pay, and which, the interpleaders claim, went to make up the remainder of the consideration of the note. This was the issue to which the evidence was directed. These were the only liabilities about which there was any dispute. These were evidently the liabilities to which the instruction referred, and the jury could not well have understood the expression, "any bona fide debt or liability of White to Carlisle," or the expression, "said White owed or was liable to said Carlisle for," otherwise than as referring directly to those liabilities which were the "bone of contention."

2. The objection to instruction No. 3 is more serious, for by this instruction the jury are, in effect, told that fraud in fact on the part of Carlisle may be inferred from all the facts and circumstances of the case, provided they find that Eugene White gave the note and deed of trust with intent to hinder, delay, or defraud his creditors, and Carlisle had knowledge of such fraudulent intent, and in any manner assisted White in carrying out such intent. The settled law in this state is that a creditor is not deprived of the right to secure the payment of an honest debt by taking a security therefor that may have the effect of hindering or delaying other creditors, although he may know that the motive that prompts his debtor is not alone to give him the preference, but is coupled with an ulterior one, to hinder and delay such other creditors, or even to defeat the collection of their debts. *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. Rep. 564; *Albert v. Besel*, 88 Mo. 150; *Holmes v. Braidwood*, 82 Mo. 610; *Shelley v. Boothe*, 78 Mo. 74. His taking the security may assist his debtor in accomplishing his purpose as to such creditors, but unless he himself has the same purpose, and does some act towards its accomplishment, he is not guilty of a fraud that will vitiate his security; and the question whether he took the security with such guilty purpose on his part is a question of fact, for the jury, whose province the court invaded, in this case, when it told them that the facts and circumstances of the case were such as to warrant the inference of fraud. That was an inference that the jury should have been left at liberty to draw, or not to draw, according to their own appreciation of the facts and circumstances in the case under their consideration.

3. Instruction No. 4 was calculated to mislead the jury. Under its direction, although the jury may have found that Carlisle took the note and deed of trust for the purpose of securing an honest debt, and did no other act calculated to hinder or delay White's other creditors, yet if they found that White's purpose in executing the securities was to hin-

der, delay, or defeat his other creditors, and that Carlisle knew it, and "participated in such intent, in any manner," then his securities are void; and in the fifth instruction, repeating this hypothesis, the jury are told, in such case, to find for the attaching creditors. These instructions should not have been given. They are erroneous in themselves, and were well calculated to confuse the minds of the jurors, and distract their attention from the real issues in the case, which were fairly well presented in the first two instructions given for the respondents. They present the solecism of a man guilty of no fraudulent act, yet guilty of fraud by reason of some sort of occult participation in the fraudulent intent of another. We can understand how two minds can be said to participate in a fraudulent act, if such act be the joint product of a fraudulent purpose upon the part of each, and how each should be held responsible for the fraud. But it is impossible to conceive, except, perhaps, upon some principle of hypnotism or clairvoyance, (of which we are not well advised,) how one mind can participate in the intent of another, or how a person committing no fraudulent act can become vicariously responsible for the fraudulent act of another by some sort of undefined participation, not in the fraudulent act, but in the fraudulent intent of that other person. The law holds no man responsible for the intention of another, nor even for his own intentions, until they bear fruit in action. If Carlisle, in taking White's promissory note for \$4,000 and the deed of trust, knowingly included an amount in excess of White's actual liabilities to him, direct and contingent, either for his own benefit, or as a secret trust for White, he was guilty of a fraud upon White's other creditors that would vitiate his security as to them, and the respondents ought to have recovered. In the first two instructions for the respondents the jury were, in effect, so told by the court. After covering the real issues in the case by these instructions, the court erred in going beyond, and suggesting to the jury, in the last two, that, although they might not find that Carlisle committed this fraud, they might find for the respondents, on account of some sort of fraud that might be imputed to him through the intention of White. It is impossible to say whether the verdict was the result of the jury's conviction that Carlisle was actually guilty of the fraud defined in the first two instructions, and in issue in the case, or of some vague, supposititious fraud that seemed to be shadowed forth in the last two, or of some like fraud that they were told in the third instruction they were authorized to infer. In such case the only proper course to pursue is to reverse the judgment, and remand the cause for new trial. In these views, **BLACK, C. J., and MACFARLANE, J., concur.**

FANT et al. v. WILLIS et al.

(Court of Civil Appeals of Texas. June 1, 1898.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—EVIDENCE—OBJECTIONS—SUFFICIENCY.

1. In an action by creditors of M. to set aside conveyances of land by M. to L. and by L. to F., plaintiffs alleged that such parties, all of whom were defendants, had conspired together to defraud M.'s creditors. Plaintiffs had levied an attachment on the land, and on three mules belonging to M., and one of the mules was missing at the time of the sale, which occurred a few months after the conveyance to L. It was stated by M. that L. had borrowed such mule and ridden it off. There was evidence of fraudulent dispositions of property by M. previous to his failure. *Held*, that evidence was admissible to show that about the time the mule was missing L. had it in his possession in another county, and sold it to the witness.

2. Where such evidence was admitted in connection with inadmissible testimony by the same witness, and the objection is made to the evidence as a whole, error cannot be predicated on the action of the court in overruling such objection.

Appeal from district court, Polk county; L. B. Hightower, Judge.

Action by P. J. Willis & Bro. against J. C. McIntyre, J. W. Lindly, and N. Fant, to set aside conveyances of certain land by McIntyre to Lindly and by the latter to Fant, on the ground that they were made in fraud of the creditors of defendant McIntyre. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendants appeal. *Affirmed*.

Holshousen & Feagan and Hutcheson & Sears, for appellants. James E. Hill, for appellees.

WILLIAMS, J. During the spring of 1881 one J. C. McIntyre, of Grimes county, failed in business, owing to appellees a large sum of money. They sued out writs of attachment, and caused them to be levied upon property in different counties, among which were three mules in Grimes county, and the tract of land in controversy. In making the levy upon the land it was supposed to be situated in Trinity county, instead of Polk, as was the fact; and the levy and subsequent foreclosure and sale under the attachment were ineffectual to pass the title. McIntyre, in the fall of 1881, made a deed to J. W. Lindly, his brother-in-law, for the land, and the latter conveyed it to appellant on the 28th day of May, 1880, but the latter has in fact paid nothing for it, but bought subject to the result of the adverse claim set up by appellees. Appellees, learning the mistake which had been made in levying the attachment on the land, and having obtained judgment against McIntyre, on the 21st day of May, 1882, caused an execution to be levied upon the land, under which it was subsequently sold regularly, and bought in by them. On the 8th day of June, 1891, they

brought this suit against McIntyre, Lindly, and Fant to set aside the deeds from McIntyre to Lindly and from Lindly to Fant, alleging that defendants had conspired together to defraud the creditors of McIntyre, especially themselves, and that the deeds named were made in pursuance thereof, and for the purpose of hindering, delaying, and defrauding such creditors. The defendants pleaded a general denial and not guilty. Verdict and judgment were rendered in favor of the plaintiffs in the court below. Upon appeal it is not claimed that any error of law was committed in the instructions to the jury, nor that the evidence was not sufficient to sustain the verdict. Only two rulings of the court are presented for revision. The first ruling was the admission of certain evidence, and the second was allowing plaintiffs' counsel to comment upon it. If the evidence was admissible, there was no error in permitting the counsel to discuss it. In order to make the point understood, the connection of the evidence objected to with the other facts must be stated. It was shown that when a sale was made under a foreclosure of the attachment against McIntyre, which took place in the spring of 1882, one of the mules which had been seized—a brown mare mule—was missing, and could not be sold. McIntyre stated to plaintiffs' agent that Lindly had borrowed and had ridden it off. After this one Murphy was introduced by plaintiffs, and testified that in the spring of 1882 a man named John Lindly, who said he came from Grimes county, (where defendant John Lindly then lived,) was in Moscow, Polk county, looking after some land, and had in his possession a brown mare mule, which he sold to the witness; that Lindly was on a spree, and had pledged the mule for a debt, which witness paid. The evidence as a whole was objected to "on the ground that it was irrelevant and immaterial to any issue before the jury, and calculated to prejudice the defendants in their claim, without elucidating any issue involved in the case." In argument counsel for plaintiffs contended that the mule thus sold by Lindly was that which had been levied upon and was missing at the time of the sale. The ruling of the court in admitting the evidence and in permitting counsel to thus discuss it were both excepted to at the proper time. The state of the testimony was such as to make the ruling material. The objection taken to the admission of the evidence was general that all of it was irrelevant. A part of it at least was, we think, admissible. Lindly was charged with having engaged with McIntyre in a scheme to defraud the creditors of the latter. There was evidence tending to establish dispositions of his property by McIntyre previous to his failure in fraud of his creditors, and also that the deed to Lindly was fraudulent. It was a question for the jury to pass upon whether or not the charge of a

fraudulent conspiracy was established. If there was a purpose to defraud, common to both McIntyre and Lindly, its objects might have been restricted to the making of the deed to the land, and the conspiracy may have been accomplished and ended by that act; but it might also have assumed a broader scope, and have embraced within its purview the doing of other acts to put other property out of the reach of creditors. Evidence which tended legitimately to establish either of these theories was admissible, and its weight was for the jury to determine. Proof of an intent to defraud creditors by other acts would be admissible, as throwing light upon the purpose with which the particular act was done. Any facts tending to show concert of action between McIntyre and Lindly in effectuation of such a fraudulent design was admissible; and when there was evidence tending to show a conspiracy, any act of either of them in furtherance of its objects was admissible. The validity of the deed depended, it is true, on the facts existing at the time it was made, but what those facts were, especially what the purpose of the parties was, might appear as well from their subsequent conduct as from that which preceded or accompanied the execution of the instrument. The evidence in question tended to show that Lindly, with McIntyre's knowledge, had possession of a mule which belonged to the latter, and which creditors had attached, and converted it into money. This took place within a few months after the deed had been made. That this conduct may be explained upon other hypotheses than that of concerted action between them does not affect the admissibility of the evidence, but only its weight. The plaintiffs were entitled to have the facts weighed, and their significance determined, by the jury. We have discussed the subject upon the assumption that the man of whom Murphy spoke was the defendant Lindly, and that the mule was that which was missing at the sale. The evidence of identity was, in our opinion, sufficient to require the court to admit it for the consideration of the jury. That part of the witness' statement that Lindly was drunk, and had "soaked" the mule, was not separately objected to. Part of the evidence included in the sweeping objection was admissible and part of it was not. The objection should have been more specific. But the inadmissible part of the evidence could hardly have injured the case of the defendants. In introducing their testimony as to Lindly's ability to pay the consideration recited in the deed, plaintiffs had thoroughly shown his habits of drinking, and wasting his means, and Murphy's testimony on those points hardly added any impressions to those which the jury had already received, and properly received, as to his habits in the respects affected by the testimony.

The judgment is affirmed.

COOLEY v. GOLDEN.

(Supreme Court of Missouri. June 19, 1893.)

RIPARIAN RIGHTS — NAVIGABLE RIVERS — GRANTS FROM THE UNITED STATES — ISLANDS — ACCRETION.

1. A grant from the United States of land on a large river like the Missouri, navigable in fact, though not subject to the ebb and flow of the tide, will, even when containing no reservation or condition, pass to the grantee title only to the water's edge, but will vest in the state title to the land beneath the water, though the state has adopted the common law.

2. Where an island springs up in a navigable river, and by accretion to the shores of the island and the mainland they are united, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land.

3. Where a navigable river suddenly changes its course, the owner of the shore does not acquire title to the abandoned channel.

Brace, J., dissenting.

In banc. Appeal from circuit court, Atchison county; Cyrus A. Anthony, Judge.

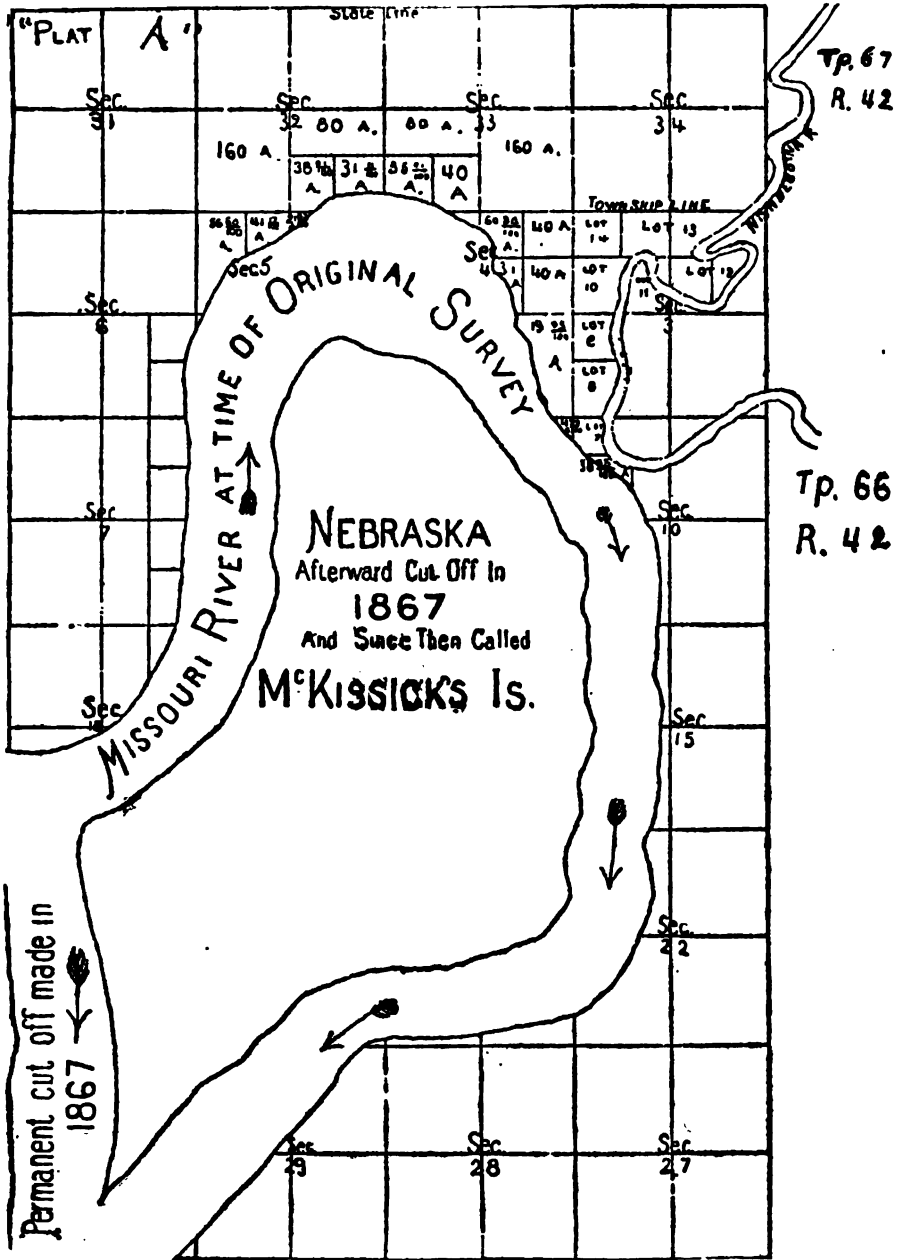
Ejectment by Millard F. Cooley against James F. Golden. Judgment for defendant. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by BRAOE, J.:

This is an action in ejectment brought by Millard F. Cooley, lessee of the Hamilton Land Company, against James F. Golden, for the recovery of a tract of about 270 acres of unsurveyed lands lying south of fractional S. E. $\frac{1}{4}$ of section 32, and fractional S. W. $\frac{1}{4}$ of section 33, in township 67, of range 42, and south and west of fractional sections 3, 4, and 10, in township 68, of range 42, all west of the fifth P. M., in Atchison county, in this state, composed partly of an island called "Pole Island," and a triangular tract of ground of about 100 acres of relict land in the old bed of the Missouri river. The answer was a general denial and a plea of statute of limitations. Title emanated from the government to the aforesaid surveyed lands at various times from 1850 to 1856. It is not disputed that the plaintiff's lessor has acquired that title through various mesne conveyances, its immediate grantors being J. P. and A. H. Allen. The lands were surveyed about the year 1846. As riparian owner of these surveyed lands, plaintiff's lessor claims the land in controversy. The location of these lands by such survey with reference to the then existing bed of the Missouri river is shown by the following plat. [See opposite page.]

As will be observed, they are on the north shore of the river. The evidence tends to show that at the time of the government survey the current of the river washed this shore; that at some time previous a bar had formed in the river opposite these surveyed lands; that, in navigating the stream, boats passed between this bar and the north shore until about the year 1854, when the current changed, and afterwards ran, and boats passed, south of it. At the time of the sur-

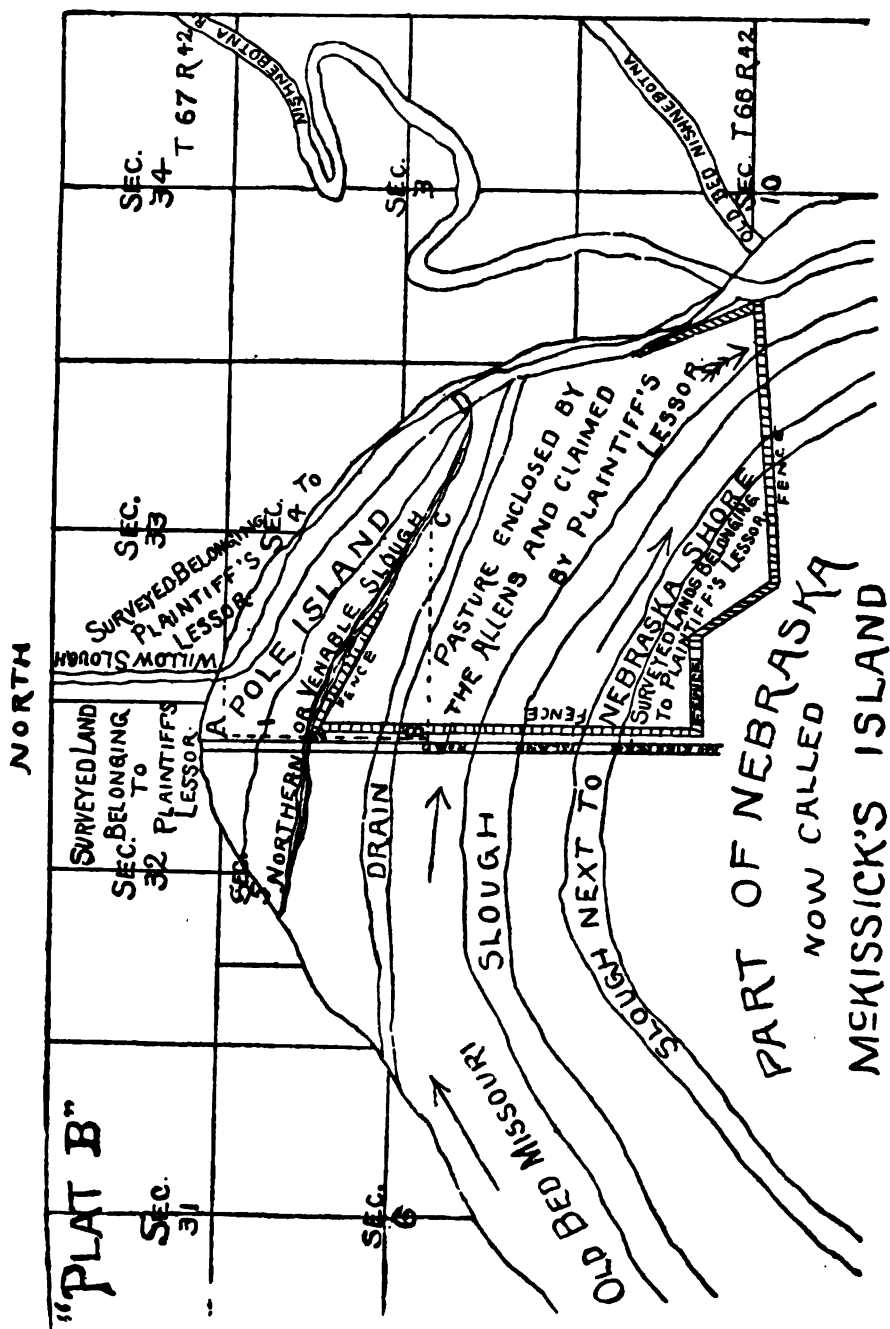
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vey this sand bar had been in existence for some years. It was a long, narrow strip, containing perhaps 100 acres or more, upon which young cottonwood and willows had grown to the height of 50 or 60 feet, and became known as "Pole Island." It was not noticed in any way in the government survey. After the current changed in 1854, the water way between it and the main shore began to fill up, and it soon became so united to the main shore, to the northwest of it, that in an ordinary stage of water persons could cross to it with teams by throwing in a little brush in the depressions between the island and the main shore. The water of an independent stream, called "Willow Slough," flowing into the old channel from the north, however, separated the principal part of the island from the mainland to the north and northeast of it. On the 5th day of July, 1867, the Missouri river, being at a very high stage of water, suddenly cut through the narrow neck of land between sections 18 and 30, township 66, range 42, and run all its water through said newly-made cut, and abandoned its old bed in the bend, fifteen miles long, and from three-fourths of a mile to one mile wide, as shown in plat A. The peninsula of land so cut off by said avulsion and thrown east of the Missouri river is called "McKissick Island," and continues to be a portion of Nebraska. This relict territory was at first and for a year or two stagnant ponds of water. Gradually, however, by drainage and evaporation, it became comparatively dry, except water standing in a few low places. Occasionally, when the Missouri river was high, it would overflow this ground, as well as the surrounding country, and deposit sediment on said low ground. In time vegetation commenced to grow on it, trees appeared, and about 1881, 1882, and 1883 much of it became fit for pasture and cultivation. It is still much lower than the surveyed lands surrounding it on the Missouri and Nebraska shores, and has in many places deep sloughs and depressions, in which water rests a good portion of the year. It is, as a general rule, higher in the center than it is next the shore, and there is a deep depression all along the main shore between this relict land and the originally surveyed lands, leaving the border of the originally surveyed shore higher than the relict lands all around. From a point on the Missouri shore 77 chains east of the northwest corner of section 5, township 66, range 42, runs a public road due south, crossing the west end of Pole Island across the aforesaid relict land to that portion of the Nebraska shore called "McKissick Island," and the land in controversy and claimed by appellant is that portion of Pole Island lying east of said road and a portion of said reliction in a triangular shape lying south of said island. The condition of the old bed of the river at the time this suit was

brought, and the situation of the land in controversy, and the respective claims of the parties, are illustrated by the following plat. [See opposite page.]

The land sued for is included within the lines A, B, C, D, A; the irregular line D, A, being the southwest shore of Willow slough until it reaches a point due east of point A; thence due west to said point. The old bed is 400 rods wide where the aforesaid public road crosses, but gradually narrows as we follow down the river, until it is only 100 rods wide some 2 miles below. Plaintiff's lessor owns all the surveyed lands on the Missouri shore opposite the Pole Island track, surveyed to the river's edge, and it and its grantors have held it for various periods from time of original entries, varying from 1850 to 1861 to the present time. Plaintiff's lessor also owns the surveyed lands along the opposite Nebraska shore, and its immediate grantors, (the Allens,) in 1886, fenced the lands on the Nebraska side into a pasture, extending their fences across the old bed onto the Missouri side, to a point about 124 rods north of the center of the old bed, along the road, where the drain or slough called the "Northern" or "Venable" slough runs through the old bed. The fence then followed in a southeasterly direction, down this slough, to a point where the water was deep enough to turn stock. The pasture was fenced with post and wire fences, except where the sloughs and streams were sufficient to prevent escape of cattle, and embraced about 700 or 800 acres of pasture, about 100 acres of which, being the triangular piece contained within the lines 2B, c2, in northwest part, is included in the lands in this suit. This 100 acres is the only part of the lands in controversy that was ever in actual possession of plaintiff or those under whom he claims. The Allens were the first to ever fence or use it in any way, and plaintiff had possession, first, as their tenant, and, afterwards, as tenant of the Hamilton Land Company, which succeeded to their interest. The remainder of the lands in controversy was never in plaintiff's actual possession. Defendant, in the year 1888, purchased the claim of a squatter named Mrs. Bird, who had lived on Pole Island several years with her children after her husband's death. She made him a deed describing in a general way Pole Island, and afterwards (after Golden had had a survey made) she executed another deed, describing a tract by metes and bounds as in plaintiff's petition. These deeds were recorded in Atchison county, and were the only ones recorded by defendant and those under whom he claims. Mrs. Bird's husband, who died in 1882, seems to have taken possession of the island in 1881, by virtue of a purchase from a man by the name of Wilcox, who had been in possession from 1868 or 1869, and who succeeded to the possession of several precedent squatters, whose



possession ran back as far, probably, as 1860 or 1861; so that the defendant and those under whom he claims had been in the continuous adverse possession of Pole island proper for more than 10 years before this suit was instituted. Mrs. Bird's fence seems to have run to Venable slough, but she claimed and deeded to the defendant the tract as described in the petition, and the defendant has inclosed and claims the tract as then deeded. The case was tried by the court, without a jury; the law declared by way of instructions. The finding and judgment was for the defendant, and the plaintiff appeals. The foregoing statement, prepared by Judge BRACE, is adopted.

Lewis & Ramsay, for appellant. M. McKillop and J. D. Campbell, for respondent.

MACFARLANE, J. That plaintiff owns under meane conveyances from the government the fractional sections of the land on the margin of the waters of the Missouri river is conceded by both parties. The most important inquiry, therefore, is whether such grant from the United States, being without reservation or condition, passed to the grantee the title to the land beneath the water to the center thread of the channel, or only to that above the water line. Under the well-recognized rule of the common law, the extent of the grant is made to depend upon whether or not the river at the particular point is or is not navigable. And, again, rivers are held not to be navigable unless the tide ebbs and flows therein. In navigable streams—that is, below tide water—the soil beneath the waters was vested in the crown, in order to the protection of commerce, fisheries, and other rights deemed public. On the other hand, the soil beneath the waters of streams which are not navigable—that is, in which the tide does not ebb and flow, or above tide water—is vested in the riparian owner to the center of the channel. Lord Blackburn says: "The property in the soil of the sea and of estuaries and of rivers in which the tide ebbs and flows, is prima facie, of common right, vested in the crown." *Bristow v. Cornican*, L. R. 3 App. Cas. 641. In discussing the question as to what will pass by a grant bounded by a stream of water, the supreme court of Illinois, in an early case, says: "At common law, this depended upon the character of the stream or water. If it were a navigable stream or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the owner extended to the center thread of the current. * * * At common law, only arms of the sea and streams where the tide ebbs and flows are deemed navigable. Streams above tide water, although navigable in fact at all times or in freshets, were not deemed navigable in law. To these riparian proprietors, bounded on or by the riv-

er, could acquire exclusive ownership in the soil, water, and fishery to the middle thread of the current, subject, however, to the public easement of navigation." *Middleton v. Pritchard*, 3 Scam. 510. See *Hardin v. Jordan*, 140 U. S. 372, 11 Sup. Ct. Rep. 808, 838.

Now, the Missouri river at the point in question is many hundreds of miles above the ebb and flow of the tide, and is, and at the time of the grant of said lands from the government was, in fact, navigable. It is contended by plaintiff that, as the common law of England has been adopted in the state of Missouri, the unqualified grant of the lands by the government should be construed according to the principles of the common law, and under such construction his title would extend to the center of the channel. The argument, being supported, as it is, by the decisions of the courts of many states, adopting the common-law rule, has great weight, and is entitled to serious consideration. Having given the matter such consideration, we have reached the conclusion that the conditions under which the rule was adopted and has been adhered to in England do not exist in respect to the great rivers of the United States; and, the reason for the rule not existing, as to the Missouri river, the rule itself should not be applied if one can be found under the changed conditions which is sounder in principle and policy. In discussing the applicability of the rule of the common law to fresh-water lakes, Chancellor Walworth says: "The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes, or inland seas, which are wholly unprovided for by the common law of England. As to these there is neither flow of the tide, nor thread of the stream, and our own local law appears to have assigned the shores down to the low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public." *Canal Com'rs v. People*, 5 Wend. 446. Probably, no river in England, in the day of Sir Matthew Hale, who first formulated the common-law rule, was navigable above tide water to more than the smallest boats. The Missouri river, at the time of this grant, was navigable for the largest of river boats for hundreds of miles. It was at the point in question, which is several hundred miles above its confluence with the Mississippi, of a width of about one mile from shore to shore. It is a tortuous stream, flowing rapidly through a valley of varying width, liable, as was shown in this case, to sudden changes of its entire bed. It is very manifest that the principle of the common law, as said by Chancellor Walworth, "is not sufficiently broad to embrace our large" western rivers. As directly bearing on the subject, the remarks of Mr. Justice Field in a recent case (*Packer v. Bird*, 137 U. S. 666, 11 Sup. Ct. Rep. 210) are pertinent and convincing. He says: "It is undoubtedly the rule of the common law

that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that, where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested in England in the crown, and in this country in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitutes the usual test of the navigability of the streams. No rivers there, at least none of any considerable extent, are navigable in fact which are not subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide water, and by vessels larger than any which sailed on the seas when the common-law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact; and, as said in the case of *The Daniel Ball*, 10 Wall. 557, 563, "they are navigable in fact when they are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common-law doctrine on this subject, prevailing in England, is held in some of the states, but in a large number has been considered as inapplicable to the navigable waters of the country, or, even if prevailing for a time, has given way, or been greatly modified, under the different conditions there." While it is true that many of the states retain the common-law rule, in others it is rejected, as being wholly inapplicable to the character of the fresh-water lakes and large rivers of the United States. For exhaustive reviews of the authorities, see *McManus v. Carmichael*, 3 Iowa, 1, and *People v. Canal*

Appraisers, 33 N. Y. 461. The latter case was distinguished in *Smith v. City of Rochester*, 92 N. Y. 473, and the common-law doctrine substantially affirmed. The rule has been declared in many of the states inapplicable to the conditions of this country, and is wholly inconsistent with the actual navigability of the rivers, the control retained by congress over the commerce and navigation of the rivers, the rules of the general land office in the survey and sale of the public lands bordering on the rivers, and the recognition by congress of the navigability of the Missouri river. See collation of authorities in *Gould, Waters*, § 56 et seq. The act of congress providing for the government of the territory of Missouri provided that the Mississippi and Missouri rivers should be common highways, and forever free to the people of the said territory and to the citizens of the United States. 2 Stat. 747, § 15. These are the very conditions upon which the right to the soil under the waters of navigable streams was retained in the crown. The rule most applicable to the condition of the Missouri river would be that applied by the common law to navigable rivers, and the riparian owner should only take title to the water's edge.

This extended consideration of the question, as an original one, has been given in part on account of its importance, and the quantity and value of the land that may be affected, and in part on account of the earnestness and ability with which the doctrine of the common law has been supported by counsel. The identical question was very fully discussed by this court in the year 1875, in the case of *Benson v. Morrow*, 61 Mo. 347, in which the conclusion was reached that the application of the common-law principle could not be transferred to our great public rivers, and that the proprietor of land on the banks of the Missouri river does not own to the middle of the stream, but only to the water's edge. This decision has been approved in two cases decided by division 2 of this court at this term. *Naylor v. Cox*, 21 S. W. Rep. 589, and *Rees v. McDaniel*, 21 S. W. Rep. 913. See cases cited in the opinion in the latter case.

Plaintiff, only taking title to the margin of the river, can claim, in addition to the original grants, only such land as may have been added thereto by the regular process of accretion or reliction. "Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belongs to the owner of the contiguous land to which the addition is made. There is no distinction in this respect between soil gained by accretion and that uncovered by reliction." *Gould, Waters*, § 155. The formation or reliction must be imperceptible, and must be made to the contiguous land so as to change the position of the water's edge or margin; hence it is

said in *Benson v. Morrow*, *supra*, that the owner of the contiguous land is not the "owner of an island that springs up in the midst of the stream, whether the island be on one side or the other of the thread of the river. He goes only to the margin of the river. It would also logically follow that if, by accretions to such island, the water margin should unite with the shore, the newly-made land would become a part of the island, and not of the mainland, and the riparian ownership would not be extended. It is so held in *Buse v. Russell*, 86 Mo. 211, and *Naylor v. Cox*, *supra*. It makes no difference in principle that the islands in these cases had been surveyed and disposed of by the United States. The riparian owner would not take the accretion, for the reason that it was not added to his own land. Pole island sprang up in the midst of the stream, far enough from the shore, which bounded plaintiff's land, to admit, at times, of the passage of boats between it and the shore. The banks of the island and that of the north shore of the river afterwards united by accretions formed by the washing of the waters, and plaintiff was only entitled to such part thereof as was formed upon his land. *Buse v. Russell*, *supra*; *Naylor v. Cox*, *supra*. If the waters of a navigable river or lake recede gradually and insensibly, the derelict land belongs to the riparian proprietors, and their boundaries change, as the waters recede. This is on the same principle as that under which they take by accretions. The recession must be gradual and imperceptible. In case the river, from storm, flood, or other cause, entirely forsakes its channel, and forms a new one, the boundary lines remain unchanged. *Ang. Water Courses*, § 59; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396; *Rees v. McDaniel*, *supra*, and cases cited. The change of the channel of the river in this case was of such a character, and plaintiff had no claim to the relict land caused thereby. The boundary of his land remained at the water line of the old channel.

The claim is now made that, inasmuch as the new channel, thus formed by avulsion, is at once subject to the public use, the relict land should of right vest in the riparian proprietors, on the principle upon which the right to the accretion is sometimes placed, —that "as every proprietor whose land is thus bounded is subject to loss by the same process which may add to his territory, and as he is without remedy for his loss in this way, he cannot be held accountable for gain." *New Orleans v. U. S.*, 10 Pet. 662, 717; *Jefferis v. Land Co.*, 134 U. S. 189, 10 Sup. Ct. Rep. 518. It is claimed that such a rule would be peculiarly applicable and just if applied to the Missouri river, which, from its tortuous course, the rapidity of its current, and the character of its soil, is so subject to such sudden changes.

Such a rule could not be justly applied, for the reason that in most cases the one who loses his land by the avulsion would gain nothing by the reliction, and the one who would gain by the reliction would lose nothing by the avulsion. Notwithstanding the character of the Missouri river and that of the soil through which it flows, it is held that the principle applying to accretions and relictions in other streams apply also to it. *Jefferis v. Land Co.*, *supra*; *Nebraska v. Iowa*, *supra*. The general rule seems to be the only one the courts can justly apply. In view of the more rapid formations of new land by accretions and relictions, caused by the peculiarity of the river and of the soil, the time in which the formations are made, if done gradually, imperceptibly, and upon the bank, should make less difference than in case of rivers less subject to changes.

Again, it is insisted that, as the river is navigable, the general government alone has the right to the soil beneath the waters in the channel; and, as the United States construes its grants of lands bounded thereby as relinquishing its title to the center of the stream, as of lands on rivers that are not navigable, such grants carry the title of the grantee to the center of the channel, subject only to the rights of the public. The fact that the United States relinquished its title to the soil beneath the water does not necessarily imply that such relinquishment was intended for the benefit of the grantee of the adjacent land. The extent of the grant depends upon the law of the state in which the land granted is situate. In the case of *Hardin v. Jordan*, *supra*, it is said by the supreme court of the United States: "In our judgment, the grants of the government for lands bounded on streams and other waters, without reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie." It is true in that case three justices dissented, but all agreed upon the foregoing proposition. Mr. Justice Brewer, who wrote the dissenting opinion, quoted approvingly from the opinion of Mr. Justice Blatchford in *St. Louis v. Rutz*, 11 Sup. Ct. Rep. 337, as follows: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local laws of Illinois." As has been seen, under the decisions of this court, the riparian owner took title only to the water's edge, and the grant of the United States carried his title no further. In the case of *Barney v. Keokuk*, 94 U. S. 324, it is said: "If the states choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objection." This declaration was cited with approval in *Packer v. Bird*, *supra*,

and *St. Louis v. Rutz*, supra. It is apparent from these decisions that, when the United States relinquished its rights to the soil under the waters of the Missouri river, it was intended that the states, in their sovereign capacity, should succeed to all the rights so relinquished. We are not aware of any legislation in this state disposing of the land under the waters of its navigable rivers or of relicted land from sudden changes in the channel. Whether those whose lands have been taken by changes of the bed of the rivers should be compensated from the relicted lands is a question for the determination of the legislative department of the state. We can only say now that the ownership of land in this state is subject to such changes as may be wrought by the natural action of the waters of the navigable rivers upon it.

Plaintiff claims that he was entitled to recover a portion of the land sued for on account of a prior possession, though neither party showed title in himself. That question was fairly submitted, under the following instruction: "(6) If the plaintiff or his lessor was in possession of any portion of the land in controversy, by having the same fenced as a pasture, and the defendant afterwards, while the same was so fenced, entered upon the same without plaintiff's consent, then plaintiff will be entitled to recover without proving any further title than prior possession; and, if the evidence in the case identifies with such degree of certainty any lands in plaintiff's petition described as were in the possession of the plaintiff or his lessor, and of which defendant took possession without plaintiff's consent, the plaintiff would be entitled to recover so much of the land as his evidence shows plaintiff or his lessor was in possession of, and that the defendant entered and held against him." The case was tried substantially according to the views herein expressed, and the judgment is affirmed. All concur, except BRACE, J., who dissents, and BARCLAY, J., who expresses no opinion.

BRACE, J., (dissenting.) 1. The Missouri river is the boundary between the states of Missouri and Nebraska. It is well settled "that where a stream which is a boundary from any cause suddenly abandons its old, and seeks a new, bed, such change of channel works no change of boundary; and that the boundary remains as it was in the center of the old channel, although no water may be flowing therein." *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. Rep. 396. The word "channel," as applied here to the Missouri river, means the bed in which the main stream of the river flowed, rather than the deep water of the stream as followed in navigation. *Black, Law Dict.* p. 193; *Dunleith & D. Bridge Co. v. County of Dubuque*, 55 Iowa, 558, 8 N. W. Rep. 443. *Beck, J.*, in delivering the opinion of the court in the case cited,

says: "The word is used in its primary meaning, above indicated, to describe the course and place of streams that have ceased to flow, and designate new beds of rivers, which owe their existence either to natural or artificial causes. The geographer speaks of the channels of ancient rivers in which no water flows. Great floods or the industry of men sometimes change the course of streams by opening new channels. When the word is thus used, it means the bed of the river from bank to bank." Some of his subsequent remarks in regard to the channel of the Mississippi river, of which he was treating, apply with more force to the Missouri. After noting that the main river is always readily distinguished, he says: "The course of navigation follows the deepest water. This is sometimes on one side of the river, and very near the shore, and sometimes on the other. Sometimes it is at right angles with the current, and not unfrequently the navigator, in descending the river, must direct his vessel against the current, in order to keep in the deepest water. Changes are continually occurring in the line of deep water followed by the vessels, caused by the shifting nature of the sand bars everywhere found in the river. The course of navigation which follows what boatmen call the 'channel' is extremely sinuous, and often changing, and is unknown except to experienced navigators. On the other hand, the bed of the main river, designated by the word 'channel,' used in its primary sense, is the great body of water flowing down the stream. * * * It cannot be possible that congress and the people of the state, in describing its boundary, used the word 'channel' to describe the sinuous, obscure, and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The center of this river-bed channel may be readily determined, while the center of the navigable channel often could not be known with certainty. The first is a fit boundary line of a state; the second cannot be." It seems to be accepted law that, when a river suddenly changes its course or deserts the original channel, "the boundary remains in the middle of the deserted bed." *Buttenuh v. Bridge Co.*, 123 Ill. 535, 17 N. E. Rep. 439; *St. Louis v. Rutz*, 138 U. S. 245, 11 Sup. Ct. Rep. 337. And in the case in hand, it cannot be doubted that the boundary line between the two states at the place in controversy is a line equidistant from the well-defined shores of the stream at the time of the cut-off; and as all the land sued for is north of that line, and next to the Missouri shore, all of it is within the boundaries and jurisdiction of the state of Missouri.

2. The next inquiry in order is, what land did plaintiff's grantors acquire from the government under their grant of the fractional section quarters, bordering on the Missouri shore of the river? These subdivisions on the side next to the river all have a common meandering line designating the river

shore. In the recent case of *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, Mr. Justice Bradley, in delivering the opinion of the court, says, in regard to such lines: "It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for lands under the bed of the stream or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held both by the federal and state courts that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that the waters themselves constitute the real boundary. *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Jeffers v. Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518; *Middleton v. Pritchard*, 3 Scam. 510; *Trustees v. Haven*, 5 Gilman, 548, 558; *Houck v. Yates*, 82 Ill. 179; *Fuller v. Dauphin*, 124 Ill. 542, 16 N. E. Rep. 917; *Boorman v. Sunnucks*, 42 Wis. 233; *Boom Co. v. Adams*, 44 Mich. 403, 6 N. W. Rep. 857; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. Rep. 614; *Ridgway v. Ludlow*, 58 Ind. 243; *Kraut v. Crawford*, 18 Iowa, 549; *Forsyth v. Smale*, 7 Biss. 201; Rev. St. U. S. §§ 2395, 2396. * * * It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees. * * * With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state, a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States. *Polar v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 471; *Webber v. Commissioners*, 18 Wall. 57. * * * This right of the states to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the crown of England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas, and also in some of the states to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all the permanent rivers of the state; but it depends on the law of each state to what waters and to

what extent this prerogative of the state shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 324, we held that it is for the several states themselves to determine this question, and, if they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. * * * The same view was taken in quite a recent case with regard to titles on the Sacramento river, under the law of California. *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210. On the east side of the Mississippi, in the states of Illinois and Mississippi, a different doctrine prevails, and in those states it is held that the title of the riparian proprietor extends to the middle of the current in conformity to the rule of the common law; that the beds of all streams above the flow of the tide, whether actually navigable or not, belong to the proprietors of the adjoining lands. *Middleton v. Pritchard*, 3 Scam. 510; *Morgan v. Reading*, 3 Smedley & M. 306; *St. Louis v. Ruts*, 138 U. S. 226, 11 Sup. Ct. Rep. 337. In the one case, that of Iowa, the government grant was held to extend only to high-water mark; in the other cases, of Illinois and Mississippi, it was held to extend to the center of the stream; being governed in both cases by the respective laws of the states affecting grants of land bordering on the river. In one case the state, by its general law, does not allow the grant to inure to the individual further than to the water's edge, reserving to itself the ownership and control of the river bed; in the other cases the states allow the full common-law effect of the grant to inure to the grantee, reserving to themselves only those rights of eminent domain over the waters and the land covered thereby which are inseparable from sovereignty. As was well said by the supreme court of Illinois in *Middleton v. Pritchard*, supra: "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass, then, by a grant bounded by a stream of water? At common law this depended upon the character of the stream or water. If it were a navigable stream or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. At common law only arms of the sea and streams where the tide ebbs and flows are deemed navigable. Streams above tide water, although navigable in fact at all times or in freshets, were not deemed navigable in law. To these, riparian proprietors, bounded on or by the river, could acquire exclusive ownership in the soil, water, and fishery to the middle thread of the current, subject, however, to

the public easement of navigation; and this latter, Chancellor Kent says, bears a perfect resemblance to public highways. The consequence of this doctrine is that all grants bounded on a river not navigable at common law entitle the grantee to all islands lying between the mainland and the center thread of the current; and we feel bound so to construe grants by the government according to the principles of the common law, unless the government has done some act to qualify or exclude the right. The United States have not repealed the common law as to their interpretation of their own grants, nor explained what interpretation or limitation should be given or imposed upon the terms of the ordinary conveyances which they use, except in special instances; but these are left to the principles of law and rules adopted by each local government where the land may lie. We have adopted the common law, and must therefore apply its principles to the interpretation of their grant.' These views are referred to with strong approval by Chancellor Kent in a note to the third volume of his Commentaries, p. 427, 6th Ed., (being the last edition under his own supervision.)" No words of ours could add to the force or lucidity of this statement of the law on this question, applicable as well to Missouri as Illinois; for we also have adopted the common law, and must apply its principles.

As was said by the supreme court of Michigan in the recent case of *Butler v. Railroad Co.*, 48 N. W. Rep. 569: "This rule applies to grants by the United States government, as well as to grants by individuals. The legal maxim must here be borne in mind that all grants must be construed most strongly against the granters. To this maxim the government forms no exception. Reservation cannot be implied. When, therefore, the government has surveyed its lands along the bank of a river, and has sold and conveyed such land by government subdivisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserves them when not surveyed." *Webber v. Boom Co.*, 62 Mich. 626, 30 N. W. Rep. 469; *Fletcher v. Boom Co.*, 51 Mich. 277, 16 N. W. Rep. 645; *Granger v. Avery*, 64 Me. 292; *Jones v. Souldard*, 24 How. 41; *Middleton v. Pritchard*, *supra*; *Chandos v. Mack*, 77 Wis. 573, 46 N. W. Rep. 803; *Railroad Co. v. Schurmair*, *supra*; *Jefferis v. Land Co.*, 124 U. S. 178, 10 Sup. Ct. Rep. 518. And "it is laid down by all the authorities that, if an island or dry land forms upon that part of the bed of the river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon." *St. Louis v. Rutz*, 138 U.

S 245, 11 Sup. Ct. Rep. 337, *loc cit.* These recent authorities render unnecessary a review of the many cases in which this question has been discussed, and clearly and satisfactorily answer the question propounded at the beginning of this paragraph,—that the plaintiff's grantors acquired, from the government, title to the middle of the thread of the Missouri river opposite their surveyed riparian lands, which, according to the evidence, covers all the land sued for, and which plaintiff ought to recover, except as to so much thereof as the defendant may have acquired title by adverse possession. The rule governing such adverse possession would, of course, be the same as to the surveyed lands.

3. It will not be necessary to notice the instructions in detail or at length. The case was evidently tried upon the theory, broadly stated in the headnote to the case of *Benson v. Morrow*, 61 Mo. 345, "that, under the acts of congress and the decisions of the United States supreme court, the ancient doctrine distinguishing navigable and nonnavigable rivers by their position above or below tide water is done away with; and the Missouri river is a navigable stream, and hence, as in other cases of navigable rivers, the proprietor of lands on its banks owns only to the water's edge." The decision in this case was rendered in 1875. It would not be profitable now to determine whether or not the deduction there drawn was warranted by the earlier decisions of the supreme court of the United States. It is evident, however, from the reading of the case, that this conclusion was reached in deference to what was then supposed by the court to be the doctrine of the United States supreme court upon the subject,—a doctrine which, if ever, is now no longer maintained by that court, as is evidenced by the most recent decisions of that tribunal hereinbefore cited. With this idea eliminated, it is impossible to see now upon what principle the rights of riparian proprietors upon the shores of the Missouri can be governed other than upon the doctrine of the common law, applicable to all fresh-water streams, made the law of this state by statute, and by which such proprietor owns to the middle of the thread of the stream, subject to the right of public navigation secured by acts of congress. This wholesome doctrine, so ably maintained by the supreme court of Illinois in *Middleton v. Pritchard*, *supra*, which commended itself so strongly to the mind of Chancellor Kent, and which has now received the sanction of the supreme court of the United States in *Hardin v. Jordan*, *supra*, ought to become the settled law of this state, as tending to the repose of the titles of its citizens to lands bordering on its streams, and to a definite and easily ascertained location of their boundaries. The Missouri river is important to the state only as a public highway, and, so long as the law is maintained

that makes it such, no public right, state or national, will be impinged in subjecting its bed to the staple and well-understood rule of the common law defining the boundaries of its riparian proprietors. The judgment, in my opinion, ought to be reversed, and the cause remanded for a new trial in accordance with these views.

COLE et al. v. WARNER et ux.

(Supreme Court of Tennessee. July 28, 1893.)

LIENS—EXECUTION OF BAIL BOND.

The execution of a bail bond creates no lien on the land of the obligors.

Appeal from chancery court, Carroll county; A. Hawkins, Chancellor.

Action by J. T. Cole and Cook & Bernhelm against W. E. Warner and wife to foreclose a mortgage, and bill by W. H. Galloway against such plaintiffs and defendants to establish title to the land described in such mortgage, and for possession. By order of the court, the two cases were consolidated, and tried together. From a decree in favor of Galloway, Cook & Bernhelm appeal. Reversed.

H. C. Towns and Caruthers & Mallory, for appellants. J. R. Hawkins and H. N. Hawkins, for appellee.

MCALISTER, J. The only question presented for decision in this case is whether the execution of a bail bond creates a lien on the land of the obligors. The question arises in a contest between the mortgagee of the land and a purchaser of the land at a judicial sale, had in pursuance of a judgment upon the forfeited bail bond. The facts presenting the question are these, to wit: Warner was the owner of a lot of ground in the town of Trezevant, in Carroll county. On the 13th April, 1886, the sheriff of Carroll county arrested one Luke Warner upon a capias issued from the circuit court of said county for the offense of malicious shooting; and upon said day the sheriff accepted from the prisoner, the said Luke Warner, a bail bond in the sum of \$500, with W. E. Warner, the owner of this land, as surety, conditioned for the appearance of said Luke Warner at the next term of the circuit court of said county to answer for said offense. The bond was duly returned by the sheriff to the next succeeding term of said court, and on the 5th May, 1886, during said first term, a forfeiture for nonappearance was taken against the said Luke Warner and his surety, the said W. E. Warner, on said bond, for the sum of \$500. At the September term of said court, in 1888, said judgment nisi was made final. On the 22d June, 1889, an execution issued on said judgment, which came to the hands of the sheriff, who on the — day of —, 1889, levied the same on this land. The land was

sold on the 5th June, 1890, for the satisfaction of said judgment, and the same was struck off to P. A. Hollingnest, who afterwards directed that the deed be made to the complainant W. H. Galloway, which was accordingly done. It was in this way that Galloway acquired his title to this land, which he now claims is superior to that of Cook & Bernhelm. The latter firm acquired their title in the manner following: It appears from the record that after the execution of the bail bond by Luke and W. E. Warner, which, it will be remembered was on the 13th April, 1886, the said W. E. Warner and wife, on April 29, 1886, executed to J. T. Cole a mortgage on said land to secure an indebtedness of \$250 due to Cole. At a subsequent date, Cole transferred said indebtedness to Cook & Bernhelm, merchants of New York. It further appears that on the 28th May, 1891, Cole and Cook & Bernhelm filed their bill to foreclose the mortgage in the chancery court at Huntingdon, against Warner and wife. At the February term of said court, 1892, the said Galloway presented a petition in said cause, in which he set forth his title to said land by virtue of the sheriff's deed made to him under the forfeiture proceedings in the circuit court of Carroll county against Luke Warner and his surety, the said W. E. Warner. The chancellor ordered that said petition be filed in the nature of an original bill, and that the same be consolidated with the case of J. T. Cole et al. v. W. E. Warner et al. On the hearing the chancellor decreed that the state, by virtue of the execution to it of the bail bond, acquired a lien upon said land, and that W. H. Galloway, by virtue of the circuit court proceedings, sale, and sheriff's deed, acquired a superior right to said land, and was entitled to the possession of it. Cook & Bernhelm appealed, and have assigned errors. The validity of the judgment pronounced by the circuit court on the forfeited bail bond is challenged upon several grounds, to wit:

First, because judgment final was taken against all the parties to said bond, without dismissing as to Luke Warner, or causing two writs of sci. fa. to be returned, as to him, "Not found." Complainant cites section 6009, Mill & V. Code, viz.: "When two sci. fas. have been returned not found by the proper officer of the county in which the undertaking was entered into, such returns are equivalent to a personal service, and judgment may be made absolute." *Wash v. State*, 3 Cold. 91; *Brewer v. State*, 6 Lea, 199.

It is next objected that the lien of the judgment, if valid, was lost by the failure to take out execution and sell the lot within 12 months from its rendition. Code, § 3694. It is unnecessary to notice the infirmities pointed out in the circuit court proceedings, since it was stated in argument by counsel for complainant Galloway that he did not rest his case upon the lien acquired by the judgment, levy, and sale of the property, but upon the

lien in favor of the state that attaches to the execution of a bail bond. No statute of this state, nor any adjudication of this court, sustaining the claim to such a lien, has been cited by counsel in argument, nor have we been able to find such authority for it. It is well settled that a recognizance entered into in a court of record creates a direct and specific lien upon the lands owned by the cognizors at the time of its acknowledgment, and situated in the county where the recognizance is taken. *State v. Miller*, 11 Lea, 620; *State v. Winn*, 3 Sneed, 393; *Pugh v. State*, 2 Head, 228. There is no room, however, for the application of the rule governing the recognizance to the case of the ordinary bail bond, for there is a marked difference between the two kinds of undertaking. The principal difference between the two forms of obligation lies in the fact that a recognizance is a matter of record, in the nature of a conditional judgment, and is proceeded upon by *scire facias*, while a bond is but an evidence of debt, for the recovery of which an action must be brought. A bail bond is taken out of court, in vacation, and a recognizance is taken in open court, in which the cognizors confess judgment to be levied on their property in case the principal makes default in his appearance. The policy of our registration laws negatives the idea that a lien could arise by the mere execution of a bail bond. Instruments conveying land, or fixing liens on land, must be recorded in the county where the land lies, unless it lies partly in two or more counties, and then they must be registered in one or the other. If the instrument embraces several tracts lying in different counties, it must be recorded in each county. *Mill & V. Code*, § 2843. Judgments and decrees of courts of record, rendered in the county of the debtor's residence, constitute a lien upon the debtor's land from date of rendition, the lien to be enforced within 12 months thereafter. *Id.* § 3694. If rendered in any other county than that of the debtor's residence, a copy of the judgment must be recorded in the county where the debtor resides, in order for the lien of the judgment to attach. *Id.* § 3695. All these provisions, says Judge Freeman in *State v. Miller*, 11 Lea, 620, "indicate the policy of our state to be that liens and charges on lands shall be evidenced by a record at the locality where they would most naturally be expected to be found," etc. It would be an anomaly in the law if a sheriff or constable could take a bail bond, and carry it around in his pocket for months, with no knowledge, or means of knowledge, on the part of the public, of its existence, and thus create an ambulatory lien which would override all subsequent conveyances. We hold that no such lien exists. It follows that complainant is entitled to a foreclosure of the mortgage on the lot in controversy, and that the decree of the chancellor must be reversed.

BURNS v. ALLEN et al.

(Supreme Court of Tennessee. July 28, 1893.)
DISINHERITANCE OF POSTHUMOUS CHILD — PAROL EVIDENCE — SETTLEMENT IN FAVOR OF CHILD — WHAT CONSTITUTES.

1. *Mill. & V. Code*, § 3033, provides that "a child born after the making of a will, either before or after the death of the testator, not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate." *Held*, that the disinheritance of a posthumous child, not provided for in the will nor by settlement in testator's lifetime, cannot be shown by parol evidence of testator's intent, but must appear on the face of the will.

2. A testator and his wife were divorced two months prior to his death and five months prior to the birth of their child. After the divorce, testator made to the wife a deed, which recited that, whereas a divorce had been granted, "this is in settlement of all demands for homestead, alimony, and support of child;" and vested in her all the powers of a feme sole to dispose of the property by will, deed, or mortgage, etc. *Held*, that such deed did not constitute such settlement in favor of the child as is contemplated in *Mill. & V. Code*, § 3033, which provides that a posthumous child, not provided for nor disinherited, but only pretermitted in the will of a parent, "and not provided for by settlement made by testator in his lifetime," shall take as if testator had died intestate.

3. The decree of divorce settled on the wife the property conveyed by such deed, with the reservation "that it should not be construed, accepted, or taken in any way to militate against the rights of the yet unborn child of complainant." *Held* that, if such deed was intended as a settlement on the child, testator had no power to make it in respect to the property described in such decree.

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Action by Barney Burns, as guardian of Mattie Eddins, a minor, against J. E. Allen and another, to recover certain real estate. From a decree for plaintiff, defendants appeal. Affirmed.

B. J. Kimbrough, J. P. Sykes, and Jas. M. Greer, for appellants. John R. Flippin and G. P. M. Turner, for appellee.

McALISTER, J. This bill was filed in the chancery court of Shelby county by the guardian of Mattie Eddins, only child of John T. Eddins, deceased, against the defendants, who are sisters of said Eddins, to recover certain real estate devised to the latter under the will of the said John T. Eddins. The said Mattie is the posthumous child of John T. Eddins, and was born in March, 1891; her father, the said John T., having died in December, 1890. It appears from the record that on the 17th October, 1890, the mother of Mattie Eddins procured a divorce from the said John T. Eddins in the circuit court of Shelby county, and in the decree certain real estate was settled upon the divorced wife. It further appears that on the 4th December, 1890, the said John

T. Eddins made and published his last will and testament, in which he devised all of his remaining property to his two sisters. As already stated, the said Eddins died on the 17th December, 1890, and the said Mattie was born in March following. The bill is filed by the guardian of the child, under section 3033, Mill & V. Code, which provides, viz.: "A child born after the making of a will, either before or after the death of the testator, not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate." This section of the Code was taken from the act of 1823, (chapter 28,) viz.: "Where any person shall hereafter by last will and testament dispose of his property, and the same shall contain no provision for any child or children, born after the making thereof, whether before or after the death of the father, and such child or children be neither provided for nor disinherited, in said will, nor any provision made for them by settlement, such child or children shall succeed to the same portion of the father's estate, as he, she, or they would have been entitled to, if the father had died intestate," etc. It is claimed by counsel for defendants that this section is only intended to make provision for a child where the parent has by oversight or forgetfulness failed to mention it in his will, and that this meaning is obvious from the language employed in the statute, to wit, "but only pretermitted in said will, and not provided for by settlement made by the testator in his lifetime." The defendants, upon this theory, offered at the hearing below to prove the declarations of the testator, alleged to have been made both before and after the execution of the will, to show that the omission to provide for the child in the will was not the result of forgetfulness, but that it was intended as a disinheritance of the child. This evidence was excluded by the chancellor and defendants assign this ruling as error. The contention of counsel for the minor child is that the act of disinheritance must affirmatively appear in the face of the will, and that parol evidence of the declarations of the testator is wholly inadmissible. This contention is based primarily upon the phraseology of the statute itself, to wit: "A child born after the making of a will, either before or after the death of the testator, not provided for nor disinherited, but only pretermitted in such will," etc. The insistence is that this section must be interpreted as if it read, viz. "neither provided for nor disinherited in such will, but only pretermitted," etc. Ordinarily the

failure of a testator to make provision for a child in his will would be equivalent to a disinheritance of that child; the testator possessing the absolute power to make any disposition of his property by last will and testament, no matter how capricious or apparently unnatural. But under the express provisions of this statute we are of opinion that a posthumous child of the testator will succeed to the same portion of his estate as in case of intestacy, unless—First, the testator had in his lifetime provided for the child by settlement; or, second, the testator has made provision for the child in his will; or, third, unless there is an affirmative act of disinheritance of the child in the will itself. We think there was no error in the action of the chancellor in excluding the evidence offered to show a parol disinheritance of the infant complainant, and that his construction of the statute was correct.

The child being neither provided for nor disinherited by the will, it remains to be seen whether she was provided for by settlement made by the testator in his lifetime. It is claimed this was done by a deed made to the testator's wife on the 18th October, 1890, which recites that, "whereas a divorce has been granted by the circuit court of Shelby Co., this is in settlement of all demands for homestead, alimony, counsel fees, and support of child," etc. The deed then vests the title of the property conveyed in his divorced wife, and clothes her with all the powers of a feme sole to dispose of the same by will, deed, or mortgage, free from the debts and control of any future husband. The divorce bill had prayed that the title to the property might be vested in the wife for life, with remainder to the child, but in this deed from the husband the wife is vested with the absolute estate, and the child takes no remainder interest or estate of inheritance. It is manifest this is not such a settlement in favor of the child as is contemplated in section 3033 of the Code. Again, if Eddins intended this as a settlement on the child, he had no power to make it in respect to this piece of property, for the reason that the same piece of property had on the 17th October,—the date prior to the date of the deed,—by final decree of the circuit court, been settled upon the wife, with the distinct reservation "that it should not be construed, accepted, or taken in any way to militate against the rights of the yet unborn child of complainant." The said Mattie Eddins, not having been provided for in the lifetime of the testator, nor provided for in his will, nor disinherited in his will, the decree of the chancellor giving her the real estate in question must be affirmed.

ALLEN et al. v. MARONNE.

(Supreme Court of Tennessee. July 28, 1893.)

DISCHARGE OF SERVANT BY FAILURE OF MASTER IN BUSINESS—MEASURE OF DAMAGES—ABANDONMENT OF CONTRACT—WHAT CONSTITUTES.

1. Where a salesman is employed for a year at a specified salary, and is discharged before the end of the term, because of the failure of his employers in business, they are liable for the year's salary, less any amount earned, or that ought by reasonable diligence to have been earned, in other employment.

2. Such salesman does not abandon the contract with such employers by accepting a new and distinct employment with one of them for the same time and salary specified in the first contract, in the absence of clear and unequivocal proof of renunciation thereof or acquiescence in his discharge.

3. Where it appears that such salesman was discharged for alleged cause by his second employer, who soon thereafter quit business, and that the former, immediately after his discharge, found other employment, where he earned more than he would have earned if he had not been discharged, his first employers are not entitled to credit for what he would have earned by the end of the year under his second contract, but for his own misconduct and consequent discharge.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by William Maronne against Thomas H. Allen & Co. on a contract of employment for a balance due plaintiff on his salary. From a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Percy, for appellants. M. B. Trezevant, for appellee.

McALISTER, J. This is a suit by an employe against his employer to recover balance due on salary. There was a verdict and judgment in the court below in favor of the plaintiff for \$1,162. The defendants appealed, and have assigned errors. It appears from the record that on the 10th November, 1890, William Maronne was employed by the firm of Thos. H. Allen & Co. as cotton salesman, for one year, at a stipulated salary of \$1,800. Maronne entered upon the discharge of his duties, and gave entire satisfaction to his employers; but on the 25th November, 1890, the firm of Thos. H. Allen & Co., failing in business, made an assignment, and Maronne was discharged. At the date of his discharge the firm was indebted to Maronne on account of salary in the sum of \$100, which they paid in full. In a few days thereafter, Harry Allen, one of the late firm, began a cotton factorage business on his own account, and immediately employed Maronne to perform the same services, and at the same salary he was to have received from Thos. H. Allen & Co. No definite time of employment was fixed. In his new employment Maronne earned \$180, and was discharged January 1, 1891, for an alleged cause. Maronne then made an effort to find employment in Memphis, but, meeting with no success, January 5, 1891, he went to New Orleans, where he secured a position with Strauss & Co., as cot-

ton salesman. Maronne remained in the employment of Strauss & Co. until August 1, 1891, (the termination of the cotton season,) and earned during his connection with that firm the sum of \$430. It appears from the record that Maronne was diligent in seeking further employment, but without success. The circuit judge properly charged the jury that plaintiff would be entitled to recover balance due on his salary for one year, less any amount earned, or that ought by reasonable diligence to have been earned, in any other employment. The verdict of the jury was for the balance due on the salary at the contract price of \$1,800, after crediting it—First, by the sum of \$100 paid by Thos. H. Allen & Co.; second, by the sum of \$180 paid by Harry Allen; and, third, by the sum of \$430 earned by Maronne while in the employment of Strauss & Co.,—with interest on balance found to be due.

It is insisted on behalf of Thos. H. Allen & Co. that Maronne abandoned his first contract; that is to say, he acquiesced in his dismissal by accepting a new and distinct employment with Harry Allen for the same time and at the same salary as under the first contract. We think this position is untenable. It is well settled that the proof of such release, renunciation, or acquiescence, when not in writing, but arising from acts or language, must be clear and unequivocal. We find no such proof in the record, and it is not true, as a matter of law, that a man who has been illegally discharged, by accepting a second employment, thereby acquiesces in his discharge, or waives his right of action for the breach of the first contract. If Maronne had not accepted the new contract of employment, he would have been precluded in this action from a recovery for a breach of the original contract to the extent of what he might have earned in his new employment. It was his imperative duty to accept the second employment. *Jones v. Jones*, 2 Swan, 608. The plaintiff's right of action accrued when the original contract was broken, without fault on his part. His subsequent conduct does not affect his right of action, but only affects the amount of recovery according as Maronne may have secured other employment, or may have been idle or diligent in seeking employment. Sedg. Dam. § 667.

It is also insisted on behalf of plaintiffs in error that Maronne was discharged by Harry Allen from the second employment for a sufficient cause, and that Thos. H. Allen & Co. are entitled to be credited with what Maronne might have earned to the end of the year. It is not shown, however, that the second employment was for any definite time, and, in point of fact, Harry Allen ceased to do business on his own account March 1, 1891. It thereby appears that if Maronne had not left Harry Allen on the 1st January, 1891, his employment would only have continued in any event until March 1, 1891. There was much proof taken and controversy

below upon the question whether Maronne had been dismissed by Harry Allen for sufficient cause, it being insisted by defendants that, Maronne having been discharged on account of his misconduct, he should be charged with the full amount of what he might have earned if he had remained in the employment of Harry Allen. We think this issue immaterial, since the fact is undisputed in the record that Maronne, immediately upon severing his connection with Harry Allen, secured employment with Strauss & Co., of New Orleans, where he earned more money than he could have earned under his contract with Harry Allen, and Thos. H. Allen & Co. are given full credit for these earnings. It is immaterial in this view of the case whether Maronne was rightfully discharged by Allen or not. We have carefully examined all the assignments of error, and do not find any of them well taken. The charge of the circuit judge was quite as favorable to the defendants as they were entitled to, under all the facts and circumstances of the case. The judgment is affirmed.

JOHNSON et al. v. JOHNSON et al.

(Supreme Court of Tennessee. May 16, 1893.)

CHARITABLE DEVISES—INDEFINITENESS—DESCRIPTION.

1. Testator devised land to trustees, to manage to the best advantage. Although expressing a preference for some educational purpose, it was left to the trustees to divert the property to any other charity, should they deem it desirable. *Held*, that effect could not be given to the devise, because too indefinite.

2. Testator gave to his son his set of books, and the proceeds of all collections he could make from accounts which were the results of testator's past oil and cotton business, with full power to continue suits, and to sue or compromise any accounts therein; the accounts against certain persons, as well as accounts of properties, rents, stocks, etc., to be treated as memoranda, only, and not included in the bequest. *Held*, that the son was entitled to all accounts in the set of books, whether the result of testator's oil and cotton business or not, except only the accounts mentioned.

Error to chancery court, Shelby county; W. D. Beard, Chancellor.

Bill by M. M. Johnson, executrix, and others, against Edwin L. Johnson and others, for construction of the will of John Cummings Johnson, deceased. Decree, from which complainants bring error. Affirmed.

Following are the eighth and twenty-fourth clauses of the will:

"Clause 8. I give and bequeath to my son, William C. Johnson, my largest Iron safe, my set of books, and the proceeds of all collections he can make from accounts which were the results of my past oil and cotton business, with full power to continue suits, to sue or compromise any accounts therein, with freedom from making any report of his action to any person or any authority, state, county, municipal, or otherwise. The accounts against or in favor of Mrs. J. C. John-

son, Mrs. M. M. Johnson, J. C. Johnson, or any of my descendants, as well as accounts of properties. Rents, stocks, bonds, and investments to be treated as memorandums only, and not to be included in the above bequeath."

"Clause 24. The income from the rentals and rental notes now in bank, and proceeds of Chapman notes, will be used by my wife, Mary Mildred Johnson, for family expenses, as now and heretofore."

Following is the construction placed upon such clauses by the lower court: "And, the court proceeding to construe same, it is therefore ordered, adjudged, and decreed as follows, to wit: First. That by the eighth item or clause of said will the testator intended to give and bequeath, and did give and bequeath, to William C. Johnson, all accounts, of every kind, nature, and description, that appeared on his set of books, whether said accounts were the result of his past oil and cotton businesses or not, save and except only the accounts appearing on said set of books against or in favor of Mrs. J. C. Johnson, Mrs. Mary Mildred Johnson, J. C. Johnson, or any of testator's descendants, as well as accounts therein of properties, rents, stock, bonds, and investments, all of which excepted accounts are to be treated simply as memoranda, and are not included in the said bequest to the said William C. Johnson. * * *

That by the twenty-fourth item or clause of said will the said testator intended to give and bequeath, and does give and bequeath, to his wife, Mary Mildred Johnson, to be used by her in the payment of family expenses in the same manner as before testator's death, such moneys in bank at the time of his death as had been derived from rentals, and such rental notes as were in bank at the time of his death, still uncollected, together with the proceeds of the Chapman notes, as aforesaid, and that outside of the rents given to Mrs. Johnson under the fourteenth and fifteenth items or clauses of said will, which last rentals are given to her absolutely, to be disposed of at her pleasure, she can appropriate no other rentals or properties of the testator's estate to the payment of the family expenses."

H. C. Warrinner, for plaintiffs in error.
Smith & Trezevant, for defendants in error.

WILKES, J. This is a bill to construe the several items of the will of John Cummings Johnson, deceased. The testator died July 25, 1892, leaving a widow, complainant Mary Mildred Johnson, and seven children by a former marriage, and possessed of quite a large estate, of both realty and personalty. The will was written by the testator, and is somewhat inartificially drawn. It consists of 28 items, and purports to convey and dispose of all the property of the testator. The several

items submitted to the chancellor were construed by him, and specific directions were entered in the decree, and a written opinion was filed by him in the court below. The cause has been brought to this court upon writ of error, and it is assigned as error that the chancellor erred in his construction of the eighth, seventeenth, and twenty-fourth items of the will. We have carefully considered these items, and the assignment, and are of opinion that there is no error in the construction placed by the chancellor upon the eighth and twenty-fourth items of the will, and his opinion and decree as to these items are adopted by this court, and need not be more specifically set out.

The main controversy is in regard to the proper construction of the seventeenth item, which is as follows: "17th. I give and bequeath to my wife, Mary Mildred Johnson, and to my daughter, Lillie W. Johnson, jointly, my home lot, of three acres, No. 11, fronting on Poplar street, east of Dunlap, to hold in trust as below cited, with power to lease and sell the same under the terms of this will, and to nominate and elect their successors and other associates in this trust from my descendants, or from their Protestant husbands or wives, not exceeding five, who may in time elect their associates and successors from my descendants. If at any time in the future there should not be as many as two of my descendants able and willing to take charge of this trust, then it shall revert to a board consisting of the elders of the several Presbyterian churches of the city of Memphis, who shall, with the assistance of the Presbyterian pastors, nominate from the bankers or business men of their body an executive committee of five, who, with my descendants, shall have full power and control to manage the trust so it will be productive of most good to the greatest number. It has been my desire to see a grand female college on this lot, and I hope it may yet be accomplished. If the way be clear to that end, the income may be appropriated in that direction; but, if not, then it is my desire and wish that the main income from this property, less the amount needed for repairs, taxes, and insurance, shall be used for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable, as they may elect. The property is never to be mortgaged, nor is the income to be pledged for more than three months in advance, and no sale of it shall be made until five years after the termination of the present lease, when it may be sold for reinvestment for some scholastic or charitable purpose."

The question presented is whether this is a valid devise to a charitable purpose, such

as can be upheld under our authorities. The complainants, who are the executors of the testator's will, are also made by this item the original trustees of this charity; and in their bill they allege that the item made a valid devise to them, as trustees, of the property, in fee; the net rents and income to be applied to charitable purposes, which are rendered sufficiently definite to be valid. The adult defendants answer that they have no desire to obstruct the benevolent and charitable intentions of their father, if they can be legally carried out, and they join in the request to the court to construe the item, and determine, as against the minor defendants and devisees, if effect can be given to the devise as a valid charity.

We are of opinion that, if the devise is valid, then the item passes the fee in the property for the purposes indicated, the net income from which is to be expended and appropriated by the trustees. While there is no specific devise of the property, yet a devise of the rents and profits and income is, in effect, a devise of the property itself. *Polk v. Faris*, 9 Yerg. 241; *Morgan v. Pope*, 7 Cold. 547; *Davis v. Williams*, 85 Tenn. 648, 4 S. W. Rep. 8; *Pilcher v. McHenry*, 14 Lea, 88; 1 Jarm. Wills, 152, note; 3 Washb. Real Prop. 529, 530; *Spofford v. College*, (Jan., 1889).¹ In the case last mentioned, Thomas Martin, of Giles county, had set apart \$30,000 in bonds of the state of Tennessee, the interest to be applied to the founding and operating a female school at Pulaski, Tenn. After the school had been founded, and successfully operated for a number of years, Mrs. O. M. Spofford, his only daughter and residuary legatee, filed a bill claiming that only the interest upon the bonds was devoted by the will of her father to the school, and that when the bonds matured, and the interest coupons had all been clipped and exhausted, then the bonds or corpus of the fund would revert to her, as residuary legatee under the will. The court below, as well as this court, held that the gift of the interest of the bonds carried the bonds themselves, and the fund could not be diverted from the charity.

But the question in this case recurs: Is the devise, as made in the seventeenth item of the will, a valid devise for charitable uses? Charitable uses are favored in courts of equity, and will be supported when the trust would fail for uncertainty, were it not for a charity. *Dickson v. Montgomery*, 1 Swan, 348; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 11 S. W. Rep. 825. This court has no disposition to abridge this rule, or recede from it, in any way. A charity will always be upheld, where it is created in favor of a person having sufficient capacity to take as donee, or, if it be not direct to such person, where it is definite in its object,

¹ No opinion filed.

lawful in its creation, and to be executed by trustees. *Franklin v. Armfield*, 2 Sneed, 305; *Gass v. Ross*, 3 Sneed, 211; *Cobb v. Denton*, 6 Baxt. 235; *Frierson v. Presbyterian Church*, 7 Helsk. 683; *Dickson v. Montgomery*, 1 Swan, 348. There is a broad distinction between a gift direct to a charity or charitable institutions already established, and a gift to a trustee, to be by him applied to a charity. In the first case the court has only to give the fund to the charitable institution, which is merely a ministerial or prerogative act; but in the latter case the court has jurisdiction of the trustee, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds, in bad faith, to purposes foreign to the charity. 2 *Perry, Trusts*, § 719. Hence, there must be either (1) a trustee capable of taking, and a definite legal purpose declared; (2) a trust so definite and well defined that it can be enforced and executed, if necessary, by a court of chancery.

The chancellor was of opinion that provisions of the will providing for trustees of this charity were sufficient, and in this we think he is well sustained by authority. An executor may be such trustee, (*Cobb v. Denton*, 6 Baxt. 236; *Gass v. Ross*, 3 Sneed, 211,) or third persons may be such trustees, (*Dickson v. Montgomery*, 1 Swan, 348; *Franklin v. Armfield*, 2 Sneed, 346; *State v. Smith*, 16 Lea, 665,) or the court may appoint a trustee, if the trusts are definite and valid, (*State v. Smith*, 16 Lea, 665; *Vidal v. Girard's Ex'rs*, 2 How. 127, 128; *Perry, Trusts*, § 722,) or a corporation to be created after the death of the testator may be such trustee, (*Inglis v. Harbor*, 3 Pet. 99; *Ould v. Hospital*, 95 U. S. 303; *Russell v. Allen*, 107 U. S. 172, 2 Sup. Ct. Rep. 327; *State ex rel. Duncan v. Martin Female College*.) The real difficulty in the devise is the uncertainty of the beneficiary, and the extreme discretion and power vested in the trustee. Unquestionably, under the English law, and the law relating to charitable trusts prevailing in many states of our Union which have adopted the doctrines of the English law, this trust would be good. The doctrines of *parens patriae* and *cy pres*, as recognized in the English law, have never obtained in Tennessee. Only those powers which in England were exercised by the chancellor by virtue of his extraordinary, as distinguished from his specially delegated, jurisdiction, exist in our chancery court. *Green v. Allen*, 5 Humph. 170; *Dickson v. Montgomery*, 1 Swan, 348. Nevertheless, the courts will sustain a charity when the plan and scheme for its management is left to the discretion of trustees, and will, if necessary, formulate a scheme for the conduct of the charity, or uphold the plan and schemes which the trustees, in their discretion, may adopt and

formulate, and prevent any interference therewith. *State v. Smith*, 16 Lea, 670; *Perry, Trusts*, §§ 744, 700; *Dickson v. Montgomery*, 1 Swan, 348; *Gass v. Ross*, 3 Sneed, 211; *State v. Smith*, 16 Lea, 665; *State ex rel. Duncan v. Martin Female College* (Tenn.; filed Jan., 1888.) In the case last named a bill was filed in the name of the state of Tennessee, on the relation of the Reverend T. J. Duncan, a presiding elder in the Methodist Episcopal Church South, against the trustees of Martin Female College, an educational charity in successful operation at Pulaski, Tenn., seeking to set aside the charter of the college, remove its trustees from office, and enjoin the operation of the school, because it had been founded by Thomas Martin, a prominent Methodist layman, and for years had been recognized and patronized by the Tennessee conference, and yet the trustees had not conducted it as a sectarian or denominational school, but had placed in charge of it principals of different tenets of faith. The court held that, in the absence of specific instructions in the will of Thomas Martin, the trustees had the power and discretion to place in charge of it such persons as they might deem best, and their discretion could not be controlled by any other persons or organizations.

In the case at bar we have a specific, definite property designated and set apart by the testator, and conveyed to trustees whose identity is fixed, and whose succession is provided for. It is apparent, also, that it was the earnest desire of the testator to devote this property to charitable purposes, and to none other, the principal or corpus to be preserved, and the income to be consumed for the purpose of the charity, and in such manner as might be productive of the greatest good to the greatest number. We think it is also evident that the testator had a primary and a secondary object, the former being to found a charity, and the latter being that, as a matter of preference, the charity should be educational. It is evident, also, that the testator had the utmost confidence in the trustees selected, to wit, his wife and daughter, and he gave to them unlimited power and discretion, not only as to the kind or character of the charity, but also as to the plan for its administration. In all cases of charities founded by wills, broad discretion and ample powers must necessarily be conferred upon the trustees, inasmuch as the testator is attempting to provide for contingencies which will arise after his own death; but at the same time this power and discretion must not go to such extent as that the objects to which the fund is to be devoted, and the kind and character of the charity, will depend, not upon the will and direction of the testator, but upon the choice and preference of the trustee. In *Read v. Williams*, 125 N. Y. 569, 26 N. E. Rep. 730, it is said: "That cannot well be said to be a

* No opinion filed.

disposition by the testator's will, with which the testator has had nothing to do, except to create an authority in another to dispose of the property according to the will of the donees of the power."

The important question which primarily arises is whether the object of the trust, and who are to be its beneficiaries, depend upon the will of the testator, or the choice of the trustee, and is there any one who could demand of the trustee the benefits of the trust, because it was made for his benefit, and others of his class, and, if refused, could compel its performance. In the case of *Tilden v. Green*, 130 N. Y. 29, 28 N. E. Rep. 880, the devise in trust under the thirty-fifth and thirty-ninth items of the will of Samuel J. Tilden was passed upon. Under these items, property was devised to trustees to be held for two lives in being, with requests that they procure an act of incorporation, to be known as the "Tilden Trust," with capacity to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects as the trustees might more particularly designate, and authorized them to convey such property to such corporation when formed, and declared that in case it was not formed, or if, from any cause or reason, they should deem it inexpedient to convey to such corporation, then they were directed to apply it to the use of such charitable, educational, or scientific purposes as in their judgment would render such property most widely and substantially beneficial to the interests of mankind. It was said in that case: "The devise does not designate any beneficiary, but, on the contrary, leaves it to the discretion of the trustees whether or not they will or will not convey to the corporation. Hence, there is not, and cannot be, any person, natural or artificial, who is, or will become, entitled to the execution of the trust in his favor." The conclusion of the court was that the bequest could not be maintained because of the complete discretion vested in the trustees,—whether they would give it, or not, to the beneficiary suggested. A charter was actually obtained, and the property was in fact conveyed by the trustees to the corporation thus created, before the suit was brought; but the court held that the invalidity of the trust could not be cured by anything done by the trustees towards its execution. It is also held in that case that a trust without a beneficiary who can claim its enforcement is void, and this objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power, and, when the beneficiary is not designated in the will, such beneficiary cannot be desig-

nated by the trustees in pursuance of a discretion vested in them by the will. It is further said: "No trust is enforceable unless there is some person or class of persons who have a right to a part or all of the designated fund, and can demand its conveyance to them, and, in case of refusal, can sue the trustees in equity, and compel compliance with the demand."

In the case at bar the power and discretion vested in the trustees are more extensive than in the *Tilden Will Case*. Here there is a mere preference expressed for an educational charity by the testator, and a hope that a grand female college may at some time be located on the lot; but absolute power is given to the trustees, at their discretion, to divert the property to any other charitable purpose, even over the preference of the testator himself, as expressed in his will. Under this power and discretion the trustees might at will devote the property to any charity, whether educational, religious, or eleemosynary, and they could at will change and alter the discretion in which the charity should flow. Under this broad discretion and power, the trustees might, instead of a female school, establish a public library or a lecture room, or a church or woman's home, or any other charity; and, if either of these should be selected by these trustees as the object of this devise, certainly it could not be said they had exceeded their powers and discretion, and, if either should be established, it would not be because of directions in the will of the testator, but from choice and preference on the part of the trustees. We are constrained to hold that such a charitable devise cannot be enforced, and is invalid. *Reeves v. Reeves*, 5 Lea, 644; *Rhodes v. Rhodes*, 88 Tenn. 637, 13 S. W. Rep. 590. The chancellor decreed that the devise must fail, and the property must pass under the nineteenth clause, which he construed to be the residuary clause of the will. As no point or contest is made upon this part of his decree, we are content to affirm his holding on this point. See, also, *Reeves v. Reeves*, 5 Lea, 650. The decree of the chancellor is in all things confirmed, and the costs will be paid by complainants out of the estate.

CAMPBELL v. CORNELIUS.

(Court of Civil Appeals of Texas. May 18, 1893.)

ASSIGNMENTS OF ERROR—PERSONAL INJURIES—EXCESSIVE DAMAGES.

1. A general assignment of error addressed to the refusal of four special instructions, containing distinct propositions of law, will not be considered on review.

2. In an action for personal injuries, where it appears that plaintiff is 74 years of age, and is not wholly disabled by the injuries, a judgment for \$7,800 is excessive.

Appeal from district court, Smith county; Felix J. McCord, Judge.

Action for personal injuries by P. O. Cornelius against T. M. Campbell, receiver of the International & Great Northern Railroad. Plaintiff had judgment for \$7,800, and defendant appeals. Reversed.

G. H. Gould, for appellant. Finley, Marsh & Butler, for appellee.

WILLIAMS, J. The first assignment of error is not framed in accordance with the rules. It attempts to present for revision the refusal of the court below to give four special charges, which are set out at length, and contain several distinct propositions of law. It is not entitled to our consideration. The brief of counsel for appellee has reproduced the portions of the general charge pertinent to the question raised, and we find that, on the subject to which the refused instructions relate, it states the law fully and as favorably to appellant as was proper. It would have been wrong for the court to have instructed a verdict for defendant, as there was sufficient evidence to entitle plaintiff to a recovery. The same may be said of the proposition that the evidence showed that plaintiff was guilty of contributory negligence. That issue was properly submitted to the jury. The rules of law concerning contributory negligence were fully given in the charge, and the instructions requested are not needed, even if true, which we need not determine.

It appears from a bill of exceptions that counsel for plaintiff, in the concluding argument, used the following language: "These railroad companies, which are created by law, and receive a part of the public domain, and are allowed by law to take people's property, and, under the law, to appropriate it to their own use, and to charge them for the carrying of freight and passengers, ought to be held to the strictest accountability and the highest degree of care." This was excepted to at the time, and was neither withdrawn nor modified by the counsel, nor corrected by the court. While the law does exact of carriers of passengers the highest degree of care, and while it is a fact that needs no proof, where it is relevant, that railroad companies are permitted to exercise the right of eminent domain, and have received grants of land from the state, the degree of care is not exacted because of those facts. It is the same whether the carrier has received lands from the state, or condemned the property of citizens, under the law, or not. The allusion to those facts was therefore wholly irrelevant. We are led to make these observations by the contention that the remarks of counsel contained a sound proposition of law. They did so, but they also contained allusion to facts which could not affect the rule of law, nor the rights of the parties in this suit. Language of a much more in-

flammatory nature has been held by the supreme court not to be, within itself, ground for reversal; and this judgment would not be reversed upon that point alone; but, after a very careful consideration of the facts and the nature of plaintiff's injuries, our deliberate judgment is that the amount recovered is excessive. Plaintiff is shown to have been 74 years of age at the time he was injured, and, while he possessed more than ordinary vigor for one of that age, he is not entitled to as much as would be one in the meridian of life. He is by no means wholly disabled, though the evidence warrants the conclusion that he has suffered much pain, and that his health and working capacity are seriously impaired. We will not comment on the facts, as the case will have to be tried again.

Reversed and remanded.

FRANCO-TEXAN LAND CO. v. MCCORMICK et al.

(Court of Civil Appeals of Texas. Oct. 11, 1892.)

CORPORATIONS—DEED OF PRESIDENT—NOTICE—RATIFICATION.

In trespass to try title against a corporation to part of the land which was included in a deed of the corporation's president, and which was purchased from the grantee therein, plaintiff is entitled to judgment, though he had notice by the deed of the president that he had exceeded his powers of sale by taking in payment for the land the note of a third person, and thereby waiving the vendor's lien, where the corporation, by cross bill, asks for a cancellation of the deed, without offering to pay plaintiff a proportionate part of the money received from the grantee of the president, as a retention of the money would be a ratification of the deed.

Error from district court, Baylor county.

Trespass to try title by Thomas McCormick against the Franco-Texan Land Company and others. From a judgment against the land company, it brings error. Affirmed.

The other facts fully appear in the following statement by **HEAD, J.**:

The Franco-Texan Land Company is a corporation organized under the general laws of the state of Texas; the purpose of its organization being, as stated in its charter, "the acquisition, by purchase or otherwise, and the location and subdivision, of lands; the management and leasing thereof, and the sale and conveyance of the same in lots and subdivisions, or otherwise; the division of the net proceeds of said lands, when sold, among the holders of the capital stock of said company; and the promotion of emigration." The record does not show whether or not there are any stipulations in the charter as to the officers or agents of the corporation that are to have control of the sale of said lands, or the terms upon which sales shall be made, but it is shown by the record that no authority is contained

in the charter, authorizing the president or other officers to sell its lands for other consideration than money, or to waive the vendor's lien for unpaid purchase money. The by-laws of said corporation, in force in 1885, provided, among other things, that the lands of said company might be sold or leased for cash, or on a credit, but no authority was contained therein, authorizing the president or other officer to sell lands of said company for other consideration than money, or to waive the vendor's lien for unpaid purchase money. Sales of the land belonging to the corporation, prior to 1885, had usually been made by the president, and the vendor's lien had uniformly been retained, to secure the deferred payments, when credit was given. It was also the general custom, in that section of the country where this transaction was had, to reserve the vendor's lien, to secure deferred payments, when land was sold on a credit. The authority of the president to make these sales was derived from the powers given him by law to execute deeds in behalf of the corporation, as such officer; from the clause of the by-laws above set forth; and from such powers as might be implied from the course of dealing and general custom above indicated. On the 20th day of February, 1885, R. W. Duke, who was then president of the Franco-Texan Land Company, executed and delivered to W. G. Martin a deed conveying 26 sections of land belonging to said company, among which was section 3, block 18, in Taylor county, Tex., it being the land in controversy in this suit. The consideration recited in said deed is as follows: "Forty-nine thousand nine hundred and twenty dollars (\$49,920.00) to be paid by W. G. Martin, of the county of Taylor, and state of Texas, as follows: One note of even date herewith, executed by the said W. G. Martin, for nine hundred and fifty dollars, (\$950.00,) due one year after date; also, nine thousand nine hundred and twenty dollars, cash in hand paid, the receipt of which is hereby acknowledged; and the further consideration of a promissory note for forty thousand dollars (\$40,000.00,) bearing ten per cent. interest from date, executed by J. H. Milliken, December 15, 1885, to W. G. Martin or bearer, and transferred and delivered by said W. G. Martin to R. W. Duke, president of the Franco-Texan Land Co., on the 18th day of February, 1885, due and payable December the 16th, 1886, the same being in full payment of the balance of the purchase price of the lands heretofore described." No express lien was reserved in said deed to secure the unpaid purchase money. In fact, as a part of the real consideration, in addition to that recited in the deed, said Martin also gave to said Duke, as president of said company, another note, for \$1,000. On the same day that said deed was so delivered by Duke to Martin, the said Martin

executed and delivered to J. H. Milliken a deed conveying to him an undivided one-half interest in said 26 sections of land. On the 23d day of July, 1885, said J. H. Milliken executed to F. R. Milliken a deed conveying an undivided one-half interest in said land. Thereafter, on the 14th day of September, 1885, the said F. R. Milliken and W. G. Martin executed to Thomas McCormick, defendant in error herein, a general warranty deed, conveying to him all of section No. 3, block No. 18, Texas & Pacific Railroad survey, containing 406½ acres, in consideration of \$1,022.50, which was then paid in cash by said McCormick, and he claimed the land in controversy under this claim of title. The \$40,000 note mentioned in the deed from Duke to Martin, above, was secured by a deed of trust on a one-half interest in a stock of horses, consisting of about 3,631 head; and it was stipulated in said note that, upon default in the payment thereof at maturity, the principal and interest might be discharged, and be collectible in horses of said stock at the rate of \$30 per head. At the time of the execution of said deed from Duke to Martin, it was expressly understood between them that the said Duke accepted said \$40,000 note, secured as aforesaid, and released the vendor's lien upon all of said land for all of the consideration except the \$950 note. After the purchase of the land in controversy in this suit by said McCormick from Martin and Milliken, said Franco-Texan Land Company filed suit in the district court of Taylor county against said Martin, Milliken, and L. H. Fitzhugh, and, while it was pending, J. B. Simpson also became a party by intervention, as purchaser of Fitzhugh's interest. The object of this suit was to rescind the trade, and cancel the deed from Duke to Martin, and the title of the several defendants claiming thereunder, upon substantially the same grounds as plaintiff in error seeks to have this done in this suit, but, in said suit, McCormick was not made a party. Upon the trial of this case, judgment was rendered in favor of said corporation, canceling said deeds, ordering the \$10,000 which had been paid as a cash consideration to be paid to the defendants Martin and Simpson, and canceling the several notes which had been given for the deferred payments, and ordering their return to the defendants Martin and Milliken. At the time that said McCormick purchased the land in controversy, he had only been in this state a few days, and the only notice he had as to the powers of said Duke in making the sale to said Martin was such as he was charged with by law, and by the recitals in the deed from Duke to Martin. On the 21st day of December, 1888, said Thomas McCormick, as plaintiff, filed his petition in trespass to try title in the district court of Taylor county, making the said Franco-Texan Land

Company, W. G. Martin, and George Clayton defendants. In this suit, plaintiff seeks to recover from said company the fractional section in controversy, and also, as an alternative remedy, seeks to recover upon a bond for \$950 given by said Martin as principal, with said Clayton as security. In answer to this petition the Franco-Texan Land Company pleads over against plaintiff, alleging the invalidity of the deed made by Duke to Martin, by reason of the alleged want of power to make the sale, accepting the note of Milliken secured by a chattel mortgage upon horses, and waiving the vendor's lien upon the land, and also charging, in general terms, fraud and collusion between Duke, Martin, and Milliken, in said trade. In its said answer there is no allegation as to the relative value of the land claimed by plaintiff, McCormick, as compared with the other 25 sections, nor as to the value of any of said lands, nor is there any offer to account to McCormick for any part of the cash consideration and notes received by said corporation in said trade. In its answer said company prays for the rescission of the trade between Duke and Martin, and for the cancellation of the several deeds under which McCormick claims; but, failing in this, it also prays for a foreclosure of what it alleges to be its vendor's lien for the payment of the \$950 and \$40,000 notes upon the land claimed by McCormick, in the proportion of its number of acres compared with the total number of acres in the 26 sections. As a matter of fact, there was no actual fraud in the transaction between Duke and Martin and Milliken, but the parties thereto acted in good faith in making the trade. Judgment was rendered in favor of defendant in error, for the land, and refusing the alternative prayer of plaintiff in error to foreclose the vendor's lien claimed by it.

G. A. Kirkland, for plaintiff in error.
Cockrell & Cockrell, for defendant in error.

HEAD, J., (after stating the facts.) By reference to the case of *Fitzhugh v. Land Co.*, 81 Tex. 306, 16 S. W. Rep. 1078, it will be seen that some of the most important questions involved in this record have already been settled by our supreme court. That suit was brought to cancel the particular deed from Duke, as president of the Franco-Texan Land Company, to W. G. Martin, involved in this controversy, and, had McCormick been made a party thereto, there would have been no necessity for this litigation. In that case it is very clearly held that the authority given the president of a corporation to execute deeds conveying its land by article 600 of our Revised Statutes does not confer upon such officer the power to make the contracts of which such deeds are the consummation, and that in making such contracts the president must derive his au-

thority from the corporation in the same manner as any other agent; but such authority may be implied from the acts of the directors in recognizing and adopting the agent's transactions, and need not be in writing. In other words, article 600 confers upon the president the power to execute the deed, and the authority to the agent to make the contract for the deed may be verbal. *Huffman v. Cartwright*, 44 Tex. 296. In passing upon the power of Duke to make this deed, the court, upon substantially the same facts as are disclosed by this record, concludes that he neither had the power to waive the vendor's lien, nor to accept in payment for his principal's land the promise of a third party to pay in money or horses, in the alternative, and that for these reasons, as between the original parties, or those claiming under them, with notice, this deed would be invalid, at the election of said corporation, and could be rescinded by it. In this case it is contended by defendant in error that he had no notice of the want of authority in Duke, other than such as is chargeable to him from the recitals in the deed, and, as he paid a valuable consideration for the land, he should be protected, even though the deed would be invalid as between the original parties to it; and the court below sustained him in this contention, both in finding as a fact that he had no other notice, and in concluding that the recitals in the deed were not sufficient to charge him with notice that the vendor's lien had been waived; and a number of the assignments of error presented by plaintiff in error are directed to challenging the correctness of this conclusion of the court. From the view we take of the law, the judgment of the court below must be sustained, as to this branch of the case, even though it should be held that the defendant in error was chargeable with full notice at the time of his purchase. From the finding of fact set forth above, it will be seen that the plaintiff in error nowhere offered to account to defendant in error for any part of the consideration it had received from this sale. That this would be necessary in a suit for rescission brought by it against its original grantee, Martin, there can be no question. *Fitzhugh v. Land Co.*, 81 Tex. 314, 16 S. W. Rep. 1078. This being a case where the deed was executed by the proper officer of the corporation, with the necessary formalities to convey the legal title, if the agent had authority to make the contract for the deed, and verbal authority in the agent being sufficient to authorize him to make such contract, for the corporation to retain the consideration received for the deed would be to ratify the transaction, and make it as binding as if the agent had originally had full authority; and this deed would therefore not be void, but only voidable, at the election of the corporation, when accompanied with the proper offer, itself, to do equity. And if McCormick, upon his pur-

chase from Martin, acquired the right, upon the rescission, to receive from plaintiff in error the part of the consideration it had received, which was represented by the land conveyed to him, there can be as little question that it was incumbent on it to make such offer to account to him in this suit. There are a number of cases in this state holding that a deed to land carries with it the certificate by virtue of which the land was located, so that, upon a failure of the title to the land described in the deed, the certificate belongs to the grantee therein. *Robertson v. Du Bose*, 78 Tex. 1, 13 S. W. Rep. 300; *Hearne v. Gillett*, 62 Tex. 23; *Hines v. Thorn*, 57 Tex. 98; *Johnson v. Newman*, 43 Tex. 628. And so we think that, where the land is conveyed by a deed, —especially a warranty deed,—it carries to the grantee the right his vendor would otherwise have had upon failure of the title, —to receive back the consideration he had paid to his vendor therefor. To hold otherwise would leave in the hands of the grantor in such deed both the consideration he had received upon the sale made by him and the consideration his vendor pays back upon the cancellation of the title, and thereby make it to his interest to defeat, instead of uphold, the title he had purported to convey. It is no answer to say that upon failure of this title the grantee can look to his covenants of warranty, especially when, as plaintiff in error in this case alleges, the warrantors are insolvent. We think that the better reason is with the holding that a deed, as its wording imports, carries to the grantee all the right, title, and interest of the grantor, of whatever kind, which includes his right to recover from previous vendors on the failure of the title. In the case of *Flaniken v. Neal*, 67 Tex. 634, 4 S. W. Rep. 212, Justice Gaines, delivering the opinion of the court, says: "The covenant of the title enters into, and forms a part or parcel of, the contract by which, and of the consideration for which, the grant of land was made; and whoever purchases the one is supposed to pay for the other, and to become substituted, in all respects, in place of the first covenantee, so far as the right of being indemnified for any failure by defect of the title. 3 Washb. Real Prop. (3d Ed.) 399." And in *Id.* (5th Ed.) 505, it is said: "As a kind of corollary to what has gone before, no one can release or discharge a covenant of warranty, except the one who then holds the title to the estate. A release by the covenantee to the covenantor, after he has parted with his estate, will have no effect upon the covenant." That this covenant is also susceptible of division into as many parts or interests as the land itself shall be divided into by subsequent conveyances, enabling each to have an action against the original warrantor, seems also to be well settled. 2 Sayles' Real-Estate Law, 857. It follows, therefore, from what we have

said, that we are of opinion that, when Martin and Milliken conveyed this section of land to McCormick, the effect of that conveyance was also to convey to the latter their right to look to the Franco-Texan Land Company for reimbursement for the loss of this part of the land previously conveyed by it, and after this conveyance they no longer had the right to receive from said company the consideration it had received from them therefor; and we therefore hold that the failure of plaintiff in error to offer to account to defendant in error for that part of the consideration represented by the land conveyed to him is fatal to its right to rescind the deed, as to him.

Plaintiff in error, also, in its answer, after repeatedly asserting that in the trade between Duke and Martin the vendor's lien was expressly waived as to the \$40,000 note, concludes with this prayer: "The premises considered, this defendant prays that it may recover from plaintiff the title and possession of the tract of land involved in this suit, and for a decree of this court canceling the deeds above described, under which he holds title to said premises, which are a cloud on the title of this defendant to said premises, namely, said deed from said R. W. Duke, as president of said company, to W. G. Martin, dated February 18, 1885, and acknowledged February 20, 1885, and that from said Martin to J. H. Milliken, and that from said Milliken to F. R. Milliken, and that from F. R. Milliken and W. G. Martin to plaintiff, and that the cloud on this defendant's title be removed. In the event the court should hold that this defendant is not entitled to said relief, this defendant alleges that it is the legal owner and holder of said notes for \$950 and \$40,000, above described, and that the same, though long since due, have never been paid, which notes were given for part of the purchase money for the tract of land in controversy in this suit, including the said 25 other sections, and in the event that, under the facts, the court should hold that this defendant cannot recover back said premises, and have said deeds and sales canceled, and in that event only, then this defendant prays for judgment against plaintiff for such part of the amount due on said notes, including interest and attorneys' fees, as the area of the tract of land involved in this suit bears to the entire area of said 25 surveys conveyed in said deed, dated February 18, 1885, from said Duke to said Martin, and for the foreclosure of the vendor's lien on the tract of land involved in this suit for the satisfaction of said proportion of said indebtedness, and for costs of suit, and for general and special relief." It is also alleged in said answer that, soon after plaintiff in error was informed of the said unwarranted and unauthorized acts of Duke, in making said sale, it instituted suit against W. G. Martin, J. H. Milliken, F. R. Milliken, and others holding under them, for the re-

covery of the said 26 sections of land, and the cancellation of said deed, and that judgment was rendered in said suit on the 17th day of October, 1888, in its favor, for the recovery of said lands, including the tract in controversy in this suit, and for the cancellation of said deed, and that said cash payment be paid to defendants J. B. Simpson and W. G. Martin, and said notes be delivered to said W. G. Martin and J. H. Milliken. But the relative value of the section claimed by defendant in error, when compared with the 25 sections recovered in this suit, is nowhere alleged, nor is the value of the 25 sections anywhere stated; so that the only data furnished by plaintiff in error to ascertain the amount for which it claims the vendor's lien should be foreclosed on the land in controversy in this suit are the respective areas contained in the different surveys.

We think it quite too clear for argument that, in this state of the pleading, the plaintiff in error, upon failing to cancel defendant in error's title, was not entitled to have the vendor's lien foreclosed under its prayer for alternative relief, above set forth. The court below, in refusing plaintiff in error this relief, proceeded upon the idea that plaintiff, having recovered back the 25 sections in the suit referred to, would be chargeable with the full value of the lands so recovered, on the theory that, where one holding a lien upon several tracts of land takes back in payment upon the debt part of the land upon which he held the lien, if the land not so taken back had been previously conveyed to other parties, the lienholder would be chargeable with the full value of the land so taken back by him, and could only foreclose upon the land which had been previously conveyed for the balance of the debt, after giving such credit. That this is correct, as applied to that kind of case, we entertain no doubt. The reasons for this are set forth at length in the case of *Burson v. Blackley*, 67 Tex. 5, 2 S. W. Rep. 668, and we do not deem it necessary to discuss the question further, but we are not prepared to say that is the case before us. In this case, plaintiff in error contends that it had never made a lawful conveyance of its land, and seeks to have canceled the conveyance attempted to be made in its name as being illegal, and not binding upon it. In such case, we believe, if a part of the land had been conveyed to a third party, under such circumstances as that the trade as to the land so conveyed could not be rescinded, a more equitable rule would be to rescind as to that part of the land as to which this relief could be granted, and to hold the land against which the rescission could not be had for its proportionate part of the purchase money, taking into consideration its relative value to the part of the land for which the rescission is granted. We believe, to hold the party securing the rescission for the full value of the land recovered might in some cases—and, so far

as we can tell, might in this case—work serious injustice. The aim, in every rescission of this kind, of course, is to place the party injured, as near as possible, in the position he occupied prior to the unauthorized conveyance. If, upon the trial of this case, it had been made to appear, as alleged by defendant in error, that the 25 sections recovered back by plaintiff in error were worth more than the total contract consideration for the unauthorized conveyance, the plaintiff in error would be compelled to receive these 25 sections in full satisfaction of its claim, and under such circumstances would be required to surrender the twenty-sixth section, without ever having received any consideration therefor. In other words, before the unauthorized conveyance, plaintiff in error had 26 sections of land, but after the rescission it would only have 25. The injustice of this is apparent at a glance, and, if this rule is to obtain in this class of cases, it might be used to defeat the very object of the rescission. We think that it will be found that almost all rescissions are sought because the party complaining thinks that he has not received full value for his property, and in such cases he could not, of course, be compelled to take back a part of the property in satisfaction of the whole, on the ground that it was worth as much as the contract price, when this very price was the gravamen of his complaint. We are also of the opinion that when an adjustment of this kind is made, as between two tracts of land, it should be upon the basis of their respective values, and not upon the basis of their areas. *Peters v. Clements*, 52 Tex. 145; *Anthony v. Carter*, 1 Posey, Unrep. Cas. 76.

From what has been said, it will be seen that the pleading of plaintiff in error wholly failed to furnish any data for foreclosure of the lien in its favor, on the basis we have indicated, and the court, therefore, did not err in refusing to grant this relief. It will also be noticed that the pleading of the plaintiff in error wholly fails to furnish a basis for the foreclosure of the lien in its favor, even though we proceed upon the idea that it should be chargeable with the full value of the 25 sections, the value of these 25 sections being nowhere alleged. Before the commencement of the trial, however, the defendant in error interposed a number of special exceptions to the pleading of plaintiff in error, based on failure to allege the value of the 25 sections, recovered by it, which exceptions were overruled by the court, and during the trial the plaintiff offered evidence, under its pleading, to show the value of this part of the land, which the court declined to receive, on the ground that the pleading would not authorize its admission. The plaintiff in error thereupon requested leave to amend its pleading so as to meet this objection, which was refused by the court, and in explanation of this refusal the court states that at the time plaintiff's de-

demurrers were ruled upon the court stated distinctly that, in the opinion of the court, the allegations of the defendant company's answer were sufficient to authorize the rescission of the deeds under which plaintiff claimed, and at the same time, and in the same connection, it was further stated that the court was of the opinion that if, in any event, plaintiff could be permitted to foreclose the vendor's lien, yet it could be legally done only by showing that the value of the land so recovered was less than the unpaid purchase money, of which plaintiff had notice at the time of his purchase, and not, as contended by counsel for defendant company, that the proper rule was that defendant would be entitled to recover in the proportion that plaintiff's tract bore to the other 25 sections. The court, however, further said he would, notwithstanding this view of the law, overrule also the demurrers calling in question defendant's right to foreclose the vendor's lien, as he was not entirely satisfied that his view of the law was correct, and a further presentation of authority might change the view of the court to that advocated in the behalf of the defendant company, and, if he did so, then such ruling would be in harmony with such changed views. Counsel for defendant company then asked, and was granted, leave to amend, the court at the time supposing the amendment was desired principally to meet the view expressed by the court; and it seems that the court did not know that this change had not been made, until called to its attention, during the progress of the trial. As a further reason for refusing the leave to amend at this time, the court states that it was asked during the day next preceding the adjournment of the court for the term, and, while plaintiff in error said it would require but little time to obtain its witnesses to show the value of this land, defendant in error stated that his witnesses upon this point had been discharged, and could not be obtained at the trial. If it be conceded that, under the present state of our statutes and decisions upon this question, the court had the discretion to permit this amendment during the progress of the trial, and after the announcement of "Ready," we think the reasons given for the refusal clearly show that the discretion of the court, in refusing it, was not abused. At any rate, no leave was asked by the plaintiff in error to make an amendment showing the relative value of the land in controversy, as compared with the other 25 sections, and under our view of the law this would have been necessary, in order to furnish a basis to estimate the part of the consideration given for the whole that should be charged against it; and even though the court should have allowed a proper amendment, under the circumstances under which the request was made by plaintiff in error, no injury resulted to it from the refusal, as the amendment it proposed to make would not

have been sufficient. We do not wish to be understood, in view of the repeated assertions of the plaintiff in error, in its answer, that in the trade between Duke and Martin the vendor's lien, as to the \$40,000 note, was expressly waived, it could, under the circumstances, claim a lien on any of the land for any part of this note, had the amendment to meet the objections above indicated been made. As to this we express no opinion, not deeming it necessary. Upon the whole case, we are of the opinion that the judgment, as rendered by the court below, should in all things be affirmed.

STEPHENS, J., did not participate in this decision.

FRANCO-TEXAN LAND CO. v. McCORMICK.

(Supreme Court of Texas. Feb. 23, 1893.)

CORPORATIONS — DEED OF PRESIDENT — NOTICE — TRESPASS TO TRY TITLE — VOID DEED — RECOVERY OF PURCHASE MONEY.

1. One who purchases part of the land conveyed to his grantor by deed of a corporation's president, reciting the taking of a third person's note in full payment of the greater part of the purchase money, has notice from such deed that the president has waived the vendor's lien of the corporation without any authority under the by-laws of the corporation, or under his power to make deeds.

2. Such purchaser, therefore, cannot have judgment against the corporation in trespass to try title, unless he shows that authority was in some way given the president, as otherwise the corporation was not divested of title.

3. Plaintiff is not entitled to judgment by reason of the fact that the corporation, by cross bill, asks for a cancellation of the deed, without offering to pay plaintiff a proportionate part of the money received from plaintiff's grantor. 23 S. W. Rep. 118, reversed.

4. To entitle plaintiff, in any case, to receive from the corporation any part of the sum paid to the president of the corporation, it must be shown that it came into the possession of the corporation, or was applied to its use. 23 S. W. Rep. 118, reversed.

Error to court of civil appeals of second supreme judicial district.

Trespass to try title by Thomas McCormick against the Franco-Texan Land Company and others. From a judgment of the court of civil appeals affirming a judgment against the land company, it brings error. Reversed.

McCall & Moseley, for plaintiff in error. Cockrell & Cockrell, John Bowyer, and H. L. Bentley, for defendant in error.

STAYTON, C. J. The leading facts involved in this case, on which the rights of the parties largely depend, are the facts stated in the case of Fitzhugh v. Land Co., 81 Tex. 306, 16 S. W. Rep. 1078. Before that action was brought, Thomas McCormick had bought one of the sections of land in controversy in that cause, but, as he was not made a party, the judgment therein rendered is not binding upon him. He brought

this action against the Franco-Texan Land Company, in form, trespass to try title, alleging title to one of the sections the president of the company attempted to convey to Martin. He attempts to deraign title through Martin, and to so much of his action a plea of not guilty was filed. He further alleged, however, that, at the time he purchased, the land company was asserting a lien on the land to secure the payment of the purchase money, and that, in addition to the indemnity furnished through the warranty in the deed under which he claimed, he required and received from Martin and Clayton—the latter being only a surety—a bond to indemnify him against the lien claimed by the land company, and against any claim the land company might make and enforce. He made Martin and Clayton parties to this action. His prayer against the land company was for the recovery of the land, and for cancellation of any claim that company might assert; and he prayed, in the event of a recovery against him by the land company, a judgment against Martin and Clayton on their indemnity bond. The land company filed a cross bill, in which it set up the invalidity of the deed made by its president to Martin, alleging the same matters as in the case before referred to, and under this prayed for a cancellation of the deeds under which plaintiff claimed. In the event, however, that the company should not be entitled to hold the land, it prayed an enforcement of its lien for the pro rata payment of the purchase money unpaid, against the section of land in controversy, but gave no basis upon which to do this, other than a statement of the purchase money still due on the 26 sections of land, and their area. To this cross bill, exceptions, general and special, were filed, and one of these exceptions questioned the right of the land company to the equitable relief sought, because there was no offer to return to plaintiff the money paid by him for the section of land. The exceptions were overruled. Plaintiff further answered the cross bill, and, among other things, alleged that he was an innocent purchaser of the land, and that he paid \$1,020.50 for it, relying upon the deed made by the president of the company to Martin; and the evidence tends to show that he had no notice of the facts which gave invalidity to the deed made by the president of the land company, other than such as appeared on the face of that deed. That he paid the purchase money for the land was proved, and the district court rendered a judgment in his favor for the land, on the ground that he was an innocent purchaser. In the decision of this case the court of civil appeals reserved a decision of the questions whether the recitals in the deed made by the president of the land company to Martin were sufficient to affect plaintiff with notice of the invalidity of the

deed, but affirmed the judgment on the ground that the land company had not offered to pay to the plaintiff such part of the money received by the company from Martin as the section of land in controversy bore to all the land the president of the company attempted to convey to Martin.

There is nothing presented in this case that would render inapplicable the rules of law announced in *Fitzhugh v. Land Co.* It was not shown in either case that power was at any time expressly conferred on the president of the corporation, but, as held in the former case, apparent power, a holding out, in former course of dealing, might justify persons, in dealing with him, to believe that he had power, not only to execute a deed, but also to make a contract for the sale of land, in the usual course of business, by which the corporation would be bound. The authority of an agent of a corporation must necessarily depend, as that of the agent of a person, on the terms of his appointment; and they differ in this respect only in that a corporation cannot empower an agent to do any act which may not lawfully be done under its charter, while a person may empower his agent to do any act not forbidden by law. This difference arises from the fact that the charter of a private corporation does not simply confer the corporate franchise, but is also an agreement between the shareholders as to the business to be conducted, and as to the powers to be exercised in reference thereto; and, for the protection of all shareholders, all business conducted, or powers exercised, when not authorized by the charter, must be held not to be binding on the corporation. Acts so done in excess of power conferred by the charter are void, in the sense that they can have no effect to divest the corporation of right in or to any property belonging to it. In this respect it matters not whether the power of the agent be expressly given, or be implied from the usual course of business, for all persons must take notice, when they attempt to contract with a corporation, of the powers conferred upon it by its charter. In the former case it was held that the charter of the land company gave to it no power to exchange for personal property the lands it was authorized to acquire. The president of the corporation having no power, under the charter, to convey to Martin, all persons claiming through the deed to him are affected with notice of every fact recited in the deed made to him. The deed to Martin recited a consideration of \$49,920, of which \$9,920 was cash, a note for \$950, and the balance thus: "And the further consideration of a certain promissory note for forty thousand dollars, bearing ten per cent. interest from date, executed by J. H. Milliken December 15, 1884, to W. G. Martin or bearer, and transferred by said W. G. Martin to R. W. Duke, president of the Franco-Texan Land Company, on the 18th day of February, 1885, due and payable on De-

ember 16, 1886, the same being in full payment of the balance of the purchase money of the lands hereinafter described." This was all that appeared in the deed as to the character of the obligation given in full payment of balance of purchase money, but when the instrument was offered in evidence it appeared that it might be paid in horses, at a price named. Of this fact, McCormick had no notice when he purchased, but he was affected with notice that a promissory note made by a person other than the vendee was taken in absolute payment of \$40,000 of the purchase money, to secure the payment of which no lien was reserved. We do not see in what respect the taking of the note of a third person in payment of so much of the purchase money would differ, in principle, from the taking of any other personal property in payment, for in either case it would be simply an exchange or barter of real estate, in so far, for personal property. If the president of the company, having power to sell and convey for cash, or, under the by-laws, on a credit, had sold and made a deed reciting that the land had been paid for in cash, then a person ignorant of the falsity of this might become an innocent purchaser, for the sale and conveyance would have been within the apparent power of the agent, and every person would be entitled to rely upon the express, or even the implied, representation that the facts existed that empowered him to convey. If a state of facts possibly might have existed, under which the president of the corporation would have been empowered to sell and convey the land as he did, their existence cannot be presumed, if they are necessarily outside of the usual course of the business of the corporation, or the leading purpose for which it has existence. "A party dealing with an agent is not entitled to assume the existence of any extraordinary state of facts in order to bring the acts of the agent within the scope of his apparent authority. Hence, if an act performed by an agent of a corporation would be in excess of the company's charter or the agent's authority, except under extraordinary circumstances, the company can be held bound by such act only provided these extraordinary circumstances did exist." *Mor. Corp.* 606. If the power to be exercised be not clearly within the express, or fairly within the implied, powers given by the charter, not within the grant of power, with its necessary incidents, found in the appointment, nor within the apparent power of the agent, however that may be exhibited, but be a power which, for its existence, must invoke some extraordinary state of facts, not of a nature to be known to the agent only, and clearly out of the usual course of business, then it would seem to be the duty of a person seeking to acquire right through the exercise of the power to inquire as to its existence, and as to the facts which bring it into being. In the usual course of business, it is

shown that sales were made for cash, or, if on credit, with lien to secure the purchase money unpaid, while, under the contract the president and Martin assumed to make, the paper of a third person was taken in absolute payment of the greater part of the purchase money; and thus, in so far, the lien the law would have given, had the purchaser executed his own notes, was destroyed, for to its existence the nonpayment of the purchase money was an essential fact. Under the facts, we are of opinion the plaintiff was not an innocent purchaser, the agent having no real power to make the sale and conveyance made. The president having, at most, only an apparent power to sell and convey, in every case, in due and ordinary course of business, we are of the opinion that the recitals in the deed to Martin affect all persons claiming through it, with notice that he exceeded his power in making the sale. This being true, the plaintiff, on that branch of his case which asserted his title to the land, failed to show right in himself simply because the land company had not been divested of title by the unauthorized conveyance made by its president.

This is not a case, in so far, in which a person seeking equitable relief must do equity before such relief will be granted, but is a case in which the plaintiff shows no title to the land, either legal or equitable, while the defendant shows a legal title. In such a case the holder of the legal title is clearly entitled to a judgment; and that it may have asked, by way of cross bill, relief of an equitable nature, in the event it was not entitled to the land, cannot affect this question. If the plaintiff be entitled to have defendant repay all or any part of the sum he paid for the land, upon showing the facts that entitle to such relief, the court has full power to give it; but it has no legal power, under the facts of this case, to deny to defendant the right which results from legal title to the land simply because it may not have offered to do equity. If it be conceded that, under the facts of this case, plaintiff, through the conveyance to him, on failure of title to the land, would have the same right as would Martin, had he not conveyed, we do not think that a case was made by the pleadings or proof which would even have authorized a judgment against the defendant for any sum of money upon the conveyance to Martin being held void. It was the right of the land company to repudiate the transaction its agent attempted to consummate, simply because he had no power to make the contract, and the company was therefore not bound by it, but, under the general rules of equity, it could not have the land, and the money paid by Martin also; but the mere fact that the money was paid by Martin to the president of the company, when assuming to act for the company, would not furnish ground for recovery against the company, and still less for refusing to

give full protection to defendant's legal right because some part of the money had not been paid or offered to plaintiff by the company. Before any such right can exist, it must be shown that the money was appropriated to the use of the company, through some corporate agency acting within the scope of its express or implied authority. *Tayl. Priv. Corp.* 310-312; *Mor. Priv. Corp.* 714, 715. If the money was actually received by the corporation, it should account for it to the proper person, if it had used it. If it had it on hand, or had property received under such circumstances, it should restore it, and ought to pay the value of anything received by it, and used for a legitimate corporate purpose. In this case there is nothing to show that any sum paid by Martin ever came into the possession of the corporation, or that it was applied to a corporate purpose, and under such facts no judgment could have been rendered in favor of the plaintiff on account of any sum that may have been paid to Duke. A payment to Duke, the president, was not a payment or delivery to the corporation, sufficient in itself to fix liability on it. It may be that the rule invoked in the court of civil appeals could not be given effect, even in so far as to require the return of any of the money paid by Martin, in view of the fact that, if ever received by the corporation, it may, as is indicated in the pleadings, have been returned to Martin, in the cause before referred to, without notice from any source that plaintiffs had bought the section of land. If, through his negligence in failing to give notice of his claim, all the purchase money had been returned to Martin, a court of equity might possibly refuse any relief at all, as against the defendant, but it is not necessary to decide these questions. In view of the uncertainty as to the sum which should be returned for the purchase money of the section of land in controversy, if defendant be under obligation to do this at all, and of the fact that on demurrer the trial court held this not to be necessary, we do not think the judgment could be legally affirmed, even if the case was one in which the maxim that "he that seeks equity must do equity" had application to the case. The judgment of the court of civil appeals and the judgment of the district court will be reversed, and the cause remanded, that the parties may so amend their pleadings as to have adjusted any equities that may exist between them. It is so ordered.

SPENCER et al. v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 27, 1893.)

TAKING PRIVATE PROPERTY FOR PUBLIC USE—
RIGHTS OF ABUTTING OWNERS IN STREET.

The construction of a viaduct in a street by a street-railway company, which prevents

the use of the street by the abutting lot owner, is a taking of private property for public use, for which Const. 1875, art. 2, § 21, requires just compensation to be made.

Case certified from Kansas City court of appeals.

Action by Catharine Spencer and Paul Spencer against the Metropolitan Street-Railway Company. From a judgment for plaintiffs, defendant appealed to the Kansas City court of appeals, and by that court the cause was certified to the supreme court. Affirmed.

Pratt, Ferry & Hagerman, for appellant.
K. M. DeWeese and R. O. Boggess, for respondents.

BURGESS, J. This was an action for damages to an abutting lot owner for building the Twelfth Street Viaduct & Cable Railway Line. There was a trial by jury, and a verdict in favor of plaintiffs for \$800. After an unsuccessful motion for new trial, the case was appealed to the Kansas City court of appeals, and from that court certified to this court upon the ground that a constitutional question is involved.

Catharine Spencer was the owner of lots 5 and 6, in block 57, Turner & Co.'s addition to Kansas City. The lots were in what were known as "short blocks," being bounded on the north by Eleventh street, and on the south by Twelfth street. The lots are each 24 feet in width and 35 feet in depth. The defendant was authorized by the city to build a viaduct, and lay its street-car line along Twelfth street. This viaduct was the approach to the Twelfth street incline, by which the cable line runs from the low ground in the bottom to the bluff. The contention of plaintiffs is that this structure was a change of grade, within the meaning of article 2, § 21, Const. 1875, which provides that private property shall not be taken or damaged for public use without just compensation. The claim of plaintiffs is that, in the construction of that part of the Twelfth Street Cable Railway, that part of said street on which plaintiffs' property abuts southward was totally destroyed, so that it could not be used by plaintiffs in connection with said lots. Some of the witnesses testified as to the value of the lots before the construction of the viaduct, and also afterwards; and some of them, who were introduced on the part of plaintiffs, testified, over the objections and exceptions of defendant, as to the amount of damages plaintiffs sustained, how they were damaged, and what caused such damage. To allow a witness to give his opinion as to the amount of damages sustained in any given case is, as a general rule, usurping the province of the jury, and determining for them a question of which they are peculiarly the judges, and for which purpose they are selected in all cases sounding in damages, and where there is a trial by jury. This is the rule

announced by this court in the case of *Hurt v. Railroad Co.*, 94 Mo. 255, 7 S. W. Rep. 1; *Belch v. Railroad Co.*, 18 Mo. App. 80; *White v. Stoner*, Id. 540. And especially is this true when the inquiry is in reference to future damages. *Hurt v. Railroad Co.*, supra, and authorities cited. In the cases of *Railroad Co. v. Calkins*, 90 Mo. 538, 3 S. W. Rep. 82, and *Railroad Co. v. DeLissa*, 103 Mo. 125, 15 S. W. Rep. 366, witnesses were allowed to give their opinions as to values, after having stated their knowledge of the property, and it was held not to be error. The better rule seems to be that they should only state facts, and to leave entirely to the jury the question of damages. This however, was not reversible error in this case, as the measure of damages was fixed by instruction No. 4, given on behalf of defendant, which states the damages to be the difference in the value of the lots before the construction of the viaduct, and immediately afterwards. The same may be said with reference to the evidence of the witnesses as to what caused the damage, or whether or not the property was benefited. It was not reversible error, under the facts in this case. This is not a proceeding to condemn private property for public use by the exercise of the power of the right of eminent domain, but is simply an action ex delicto, and is not like the laying of a railroad track on the surface of a street, thereby imposing an additional servitude, or making a new and improved public use thereof. It amounts to a total destruction of the street. The street, having been dedicated to public use for ordinary purposes, could not be lawfully appropriated to another, distinct and inconsistent, public use. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121, and authorities cited. While contrary opinions have been maintained with great ability in courts of other states, and by elementary writers of much distinction, the rule in this state is well established that in cases of this kind, in estimating benefits, the jury should be restricted, in estimating such benefits, to peculiar and direct benefits, or increase of value, as result to the lots in controversy, in which other lots in the same locality do not participate. The advantages to be considered by the jury are such as particularly affect the lots of plaintiffs, and are not advantages of a general nature, which the plaintiffs, in common with their neighbors, whose lots are not damaged, derive from the construction of the viaduct. *Lee v. Railroad Co.*, 53 Mo. 178; *Hosher v. Railroad Co.*, 60 Mo. 303; *Combs v. Smith*, 78 Mo. 32; *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. Rep. 931, and authorities cited. The right of the plaintiffs to the use of the street adjoining their lots is as much property as the lots themselves. *Lackland v. Railroad Co.*, 31 Mo. 180; *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Railway Co.*, 94 Mo. 574, 7 S. W. Rep.

579; *Chicago v. Taylor*, 125 U. S. 165, 8 Sup. Ct. Rep. 820; *Tate v. Railway Co.*, 64 Mo. 149. We are unable to see even a plausible reason for complaint by defendant of the instructions of the court in this case, as the only instructions given as to the measure of damages were given at its request, and by the court of its own motion, which were in harmony with each other, and with the views herein expressed. There was no error in refusing instructions asked by defendant, as those given presented the case to the jury manifestly fair, and remarkably favorable to defendant, and the plaintiffs are not complaining. The judgment is affirmed. All concur.

IN re WYANDOTTE AND CENTRAL STS.
Appeal of MORTON.

(Supreme Court of Missouri, Division No. 1.
July 3, 1893.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT
—DAMAGES—BENEFITS.

1. The charter of Kansas City, § 8, art. 9, provides that an ordinance for the grading of a street or alley shall determine the limits within which private property is benefited thereby. Section 13, relating to the ascertainment of damages, provides that should the court or judge, on evidence, find the benefit district unreasonable, he shall so declare, and the proceedings shall be void. *Held*, that the court cannot find, without evidence, that any property in the district was not specially benefited.

2. The charter of Kansas City provides that, in ascertaining damages from grading, allowance shall be made for all benefits, and that if property is damaged the commissioners shall first assess against the city the amount of the benefit the city at large will receive, and against the property in the district benefited the balance, not assessing any lot where the damages exceed the benefits. *Held*, that the allowance to be made for all benefits means such benefits as are not borne by the city at large, and the rule applies whether the whole of a lot is taken, or whether it is damaged, only.

3. Where buildings on the line of the improvements are threatened with injury thereby, greatly in excess of the cost of protecting them, the owner is bound to use reasonable exertion and necessary expense in protecting them, and his damages should be measured by such exertion and expense.

Appeal from circuit court, Jackson county; R. H. Field, Judge.

In the matter of proceedings to assess damages for grading alley between Wyandotte and Central streets, from Ninth to Tenth streets. From a judgment in her favor for \$1,100, Annie Morton appeals. Reversed.

The other facts fully appear in the following statement by MACFARLANE, J.:

This is a proceeding under the charter of Kansas City for the assessment of damages and benefits to private property for the proposed grading of an alley lying between Wyandotte and Central streets, and extending through the block from Ninth street to Tenth street, the length being 247 feet. The passage of an appropriate ordinance was

effected, and all preliminary steps were taken for the assessment of damages. Annie Morton owned lot No. 6 in said block, which was 24 feet wide, lying on the west side of the alley, fronting south on Tenth street, and extending along the alley 140 feet to an alley running east and west through the block. The heirs of James Morton owned lot 7, lying along the east side of the alley, fronting south, and also running back to the east and west alley. These heirs also owned lot 8, lying east of said lot 7, its entire length. These owners duly filed their claim for damages, as did also some of the other owners abutting on the alley. Some made no claim for damages. Upon these claims for damages, and for the assessment of benefits, the cause was tried by a jury. The benefit district, as declared by the ordinance, included some lots which did not abut on the alley. The court excluded all evidence of benefits to these lots, holding that they could not be assessed, thereby cutting out from assessment a portion of the property within the established district. The claimants for damages insisted that this ruling rendered the whole proceedings void. Annie Morton, who is the only appellant, offered evidence showing "that at the southwest corner of the alley, upon her lot, there stood a two-story brick residence, costing about nine thousand dollars; that the east wall of the house, which is seventy feet long, built of brick, and with a stone foundation, stood exactly on a line with the alley; that her lot was twenty-four feet wide, and the house covered almost the entire width of the lot; that the alley had already been graded out some few feet, and that in the front and rear of her house were stone retaining walls, running along the line of the alley; that on the rear of the lot, and very close to the line of the alley, were situated cisterns and vaults; that the walls of the house and the retaining walls now are built down below the present surface of the ground four or five feet; and that the cut proposed to be made in the alley was six feet at the front of the house, and fourteen feet at the rear. She then offered evidence showing the expense that would be necessary in securing and protecting her property, and the improvements thereon. This evidence tended to prove that such expense would be from \$2,300 to \$4,000. There was other evidence offered and admitted, tending to show that the property of the various other claimants was damaged, and that various lots abutting upon the alley in question in the benefit district were benefited by the proposed improvement in various sums, and other evidence tending to show that the lots not abutting on the alley would not be benefited in any way nor in any sum by the proposed improvement; and there was no evidence that tended in any way to show that these lots not abutting upon the alley in question would be in the

least benefited by the proposed improvement." Upon the evidence and instructions of the court, the jury assessed the damages of Annie Morton at \$1,100, and from the judgment thereon she appealed.

Brumback & Brumback, for appellant.
Ashley & Gilbert, F. F. Rozzelle, F. H. Dexter, and F. W. Randolph, for respondent.

MAUFARLANE, J., (after stating the facts.)
1. The charter of the city (section 2, art. 8) requires that the ordinance that shall order grading or regrading of any street or alley shall also prescribe and determine the limits within which private property is benefited by the proposed grading and regrading. Section 13 of the same article, in providing for the proceedings for ascertaining the damages before the court or judge, makes this provision in regard to the benefit district: "Provided, however, that should the court, or judge, upon evidence find that the benefit district prescribed by the common council is unreasonable, it or he can so declare and cause an entry of such finding to be placed on record in the cause; and such finding shall cause all the proceedings had under such ordinance to be null and void; and an appeal from such finding of the court or judge may be taken in the same manner as in any ordinary civil case. The inquiry as to the reasonableness or unreasonableness of the ordinance in the matter mentioned may be heard and determined by the court or judge before the submission of any other testimony in the case, or it may be submitted and disposed of by the court at any time before the verdict or report of the commissioners." At the conclusion of the evidence the court gave the following instruction: "The court instructs the jury that they must not assess with benefits any property in block 7, upon the map read in evidence, east of lot 8, nor west of lot 6. Nor must the jury assess with any benefits the west forty feet of lots 20, 21, and 22, in block 3, upon such map. Nor must the jury assess benefits against any lot abutting upon the alley in question that will be damaged in its market value by the proposed grading, whether damages thereto be claimed herein or not." This instruction excludes from assessment property lying inside the district established by the ordinance. The legislature, in which the taxing power is vested, has delegated to the common council of the city of Kansas exclusive power to prescribe and establish the districts in which the property may be benefited by grading streets and alleys, and the courts have no power to enlarge or contract them. No such power is given by the charter, and none exists independent of it. The discretion is intrusted to the council alone. *Keith v. Birmingham*, 100 Mo. 300, 13 S. W. Rep. 683; *Grading Co. v. Holden*, 107 Mo. 308, 17 S. W. Rep. 798; *Johnson v. Duer*, (Mo. Sup.) 21 S. W. Rep. 802. The only supervising control over

the action of the council given to the courts, under the foregoing proviso, is to declare the district unreasonable, and to nullify the whole proceedings. This power the court doubtless had, under its general jurisdiction, and in a direct proceeding for that purpose. This charter provision grants the power and jurisdiction in connection with the proceedings for the assessment of damages, but the jurisdiction is limited to declaring the district unreasonable, and it has no power to establish another, either directly or indirectly. It does not follow that every piece of property within a district, as established by ordinance, is conclusively bound for even nominal benefits. The charter provides that "no piece of private property shall be assessed with benefits in any amount in excess of the actual benefits which the same will receive by reason of the proposed improvement." The question whether any piece of such property receives benefits is one to be determined by the jury, under proper instructions from the court. The duty of the court in instructing the jury, under the proceedings, is the same as in other jury trials; and if it appears conclusively, from the evidence, that any property is not benefited, the jury should be instructed to assess no benefits against it. The district will not necessarily be unreasonable simply for the reason that certain property may not be benefited by the improvement. Its unreasonableness is a matter for the direct and special finding and determination of the court. We think the court committed error in refusing to hear evidence as to whether or not any particular piece of property was benefited. The court had no right to assume, without evidence, that any property in the district was not specially benefited. The presumption, on the contrary, was in favor of the action of the council in prescribing the district. If the evidence had been admitted, and had shown conclusively, and without conflict, that the property excluded by the court from assessment was not in fact benefited, there would have been no substantial objection to the instruction.

2. The rule for the assessment of damages and benefits must be governed by the constitution of the state, and the provisions of the charter of the city. The former declares that "private property shall not be taken or damaged for public use without just compensation." Section 21, art. 2, Const. Mo. 1875. The rule provided by the charter for ascertaining the damage and benefits provides that: "First. The amount of actual damage to each piece of private property that will be damaged by reason of the proposed grading or regrading, making just allowance for all benefits to such piece of property from such grading or regrading, and when the damages to any piece of property do not exceed the benefits thereto from the proposed improvement, the commission-

ers shall not report any allowance or damages to such piece. Second. If the commissioners shall find that private property is actually damaged by reason of the proposed improvement, to pay the total amount of such damages allowed, they shall first assess against the city such sum as is equal to the amount of benefits the city at large will receive from the proposed improvement, and the balance of the sum so awarded as damages and not assessed against the city the commissioners shall assess against the private property within the benefit limits prescribed in the ordinance, but excluding from such assessment any piece of private property to which damages are awarded on account of the proposed improvement; when the damages allowed exceed the benefits assessed against such piece of private property; and no piece of private property shall be assessed with benefits in any amount in excess of the actual benefits which the same will receive by reason of the proposed improvement; and in determining such actual benefits to any piece of private property, the damages which it may have sustained, but for which no claim was made, shall be taken into consideration by the commissioners." Section 7, art. 8, Charter Kansas City. Until the adoption of the constitution of 1875 the city was not liable to the owner of property abutting upon a public street for general damages caused by grading or regrading the same, nor for special damages, if the work was done in a careful manner, and under corporate authority. *City of St. Louis v. Gurno*, 12 Mo. 418; *Hoffman v. City of St. Louis*, 15 Mo. 631; *Rude v. City of St. Louis*, 93 Mo. 415, 6 S. W. Rep. 257. The foregoing charter provisions, as the same may be limited by the constitution, provided the rule for the assessment of damages and benefits in this matter. It will be observed that the charter requires that, in case a piece of property is damaged by the grading, just allowance shall be made "for all benefits" accruing thereto, and if the damages do not exceed the benefits no damage shall be allowed. In order to pay the damages, if any, the commissioners are required to assess against the city all benefits that the city at large will receive, and the balance they shall assess as benefits against the property in the district not damaged. None but actual benefits shall be assessed against property benefited; that is, unless the benefits exceed the damages, no benefits shall be assessed. The question is whether the benefits to be assessed are to be confined to such as are special to the property to be charged, or whether they include, also, such as are general to property outside the district. The construction the court gave to these provisions of the charter is clearly indicated by the following instruction given: "In determining whether any particular piece of property is benefited by the proposed grading or not, and, if bene-

fited, how much, the jury should disregard all benefits accruing to said property which accrue to other lots and parcels of land in Kansas City outside of the benefit district; but this instruction only applies to the lots, if any, that are assessed with benefits for the proposed grading, in the estimate of such benefits, and does not refer in any way to the lots, if any, that the jury deem damaged in their market value by reason of the proposed grading." It will be seen that the court adopts one rule for estimating benefits in case the property is damaged, and another in case it is benefited, charging the former, but not the latter, with general benefits. This does not seem to us to be the true construction of the charter. That "all benefits" the city at large will receive from the proposed improvements are to be assessed against the city is very clearly expressed. These are paid by the city from revenues raised by general taxation, to which the damaged property contributes its proportion. The general purpose of the legislature, as declared under this charter, is manifestly to place the property owner who suffers loss by the improvement upon the same footing as one who receives only benefits. If the property of the community generally, outside the district, is enhanced in value by reason of the work or improvement, and the owners thereby receive advantages in common with those whose property is damaged, common justice requires that they should contribute their just proportion of the cost of securing such advantages. This cost the charter justly requires to be borne by the city at large. "Just compensation, thus estimated, is a sum of money which makes the owner whole, and, in respect to general benefits or damages resulting from the improvement, leaves him in as good a situation as his neighbor," whose property is not damaged. *Lewis, Em. Dom.* § 471. The requirement of the charter, that, in case a piece of property shall be damaged, allowance for all benefits shall be made, can only mean all such benefits as are not required to be charged against the city at large. Any other construction would not only be repugnant to the expressed intent of the charter, but would impose a burden upon one citizen which his neighbor, receiving equal benefits, would not be called upon to bear. Such construction would also require the payment for such general benefits by the landowner, and also by the city at large, which could not have been intended. It would require the owner of the damaged property to assume and pay the obligation imposed upon the city by the charter, and it would unjustly discriminate in favor of the one whose property was benefited, and against one whose property was damaged. This construction is also, we think, repugnant to the spirit of the constitution, requiring the payment of just compensation for property "taken or damaged,"

in such cases. The rule for the measure of damages to the remaining land, where a part, only, of a tract is taken for public uses, as construed by many decisions of this court in condemnation proceedings, allows the reduction of the damages by the amount of the benefits accruing to the land from such use, which are special to the property damaged, and excludes all such as are general, and common to other property, not directly affected. *Daugherty v. Brown*, 91 Mo. 31, 3 S. W. Rep. 210; *McReynolds v. Railway Co.*, (Mo. Sup.) 19 S. W. Rep. 824; *Spencer v. Railway Co.*, (Mo. Sup.) 23 S. W. Rep. 126, and cases cited by each. It is insisted that a distinction should be observed between a case in which a part of a tract is taken, and one in which the tract is damaged, only; that in the latter case the damage would only be the diminution in the actual pecuniary or market value of the land affected, to obtain which all benefits, whether of a general or special nature, would necessarily enter into the calculation. While the rule has been thus declared in some of the states, under constitutional and charter provisions similar to ours, we do not think it consistent with our decisions. Our constitution secures to the property owner the right to compensation when his property is damaged, in the same terms as when it is actually invaded and taken. No reason is seen why the rule for assessing the benefits should be different. The proper construction of the charter requires that only special benefits be charged, whether the property is damaged or benefited.

3. Appellant requested, and the court refused to give, the following instruction: "The defendants, Morton and Morton's heirs, are entitled to have charged in favor of their property such damages, if any there be, as may result to their property from changing the present surface of the ground; and in estimating such damages the jury may take into consideration the present situation of the buildings and walls on their land, their situation after the proposed cut, the cost of altering and supporting same to make them conform to proposed cut, and the value of their property after the cut is made, including such benefits as may result to their property from making the proposed cut." "It is the duty of one sustaining damages by reason of the act of another to use all reasonable exertion to protect himself, and avert, as far as practicable, the injurious consequences of such act." *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. Rep. 931, and cases cited; *Hartshorn v. Worcester*, 113 Mass. 111. Under this rule it would be the plain duty of the property owner to use all reasonable care to avoid or lessen the damage to his property. This would be the case though proper protection of the property required the expenditure of money. The principle is thus expressed by the court of appeals of New York in a recent case,

(Hartshorn v. Chaddock, 31 N. E. Rep. 997:)"There are many cases of injury to real estate, where the cost of repairing the injury may be the proper measure of damages. The owner is not, in every case of injury to the soil, the trees, or the fixtures, driven to proof of the diminution of value of the estate by reason of the injury, in order to establish his damages. The rule seems to be that when the reasonable cost of repairing the injury, or, in this case, the cost of restoring the land to its former condition, is less than what is shown to be the diminution in the market value of the whole property by reason of the injury, such cost of restoration is the proper measure of damages. On the other hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages, the rule of avoidable consequences requiring that in such a case the plaintiff shall diminish the loss as far as possible." It is evident that the buildings and improvements on appellant's lots were threatened with injury greatly in excess of the cost of protecting them. The owner was bound to use reasonable exertion, and incur necessary expense, in protecting them, and the damage, under such circumstances, should be measured by such expense and exertion; and the instruction should have been given under the evidence in this case. If it had appeared that the expense of protecting the buildings would exceed the damage that would result to them from grading the alley, the instruction would have been improper. The landowner would have no right to increase his damage, and at the same time improve his property, and increase its value. If the evidence was conflicting, then the jury should decide whether the expense of protecting the property would or would not exceed the damage to it without securing it. For the errors pointed out, the judgment is reversed, and cause remanded. All concur, except BARCLAY, J., not sitting.

CONTINENTAL NAT. BANK OF MEMPHIS v. BOWDRE et al.

(Supreme Court of Tennessee. Aug. 7, 1893.)

LIBEL—PLEADING JUSTIFICATION—WHAT ACTIONABLE—EVIDENCE.

1. In an action for libel, whether or not the libelous matter is actionable *per se*, by pleading the general issue only, defendants admit that the language used by them is untrue.

2. Defendants may plead the truth of the language used by them, without regard to any innuendo that may have been employed in the declaration, and may join with such plea a denial of the meaning ascribed by the innuendo.

3. A postal card sent by a bank to a correspondent, from whom it had received a draft on B. Bros. & Co., a mercantile firm, for collection, and reading, "B. in hands of notary," while in fact the draft had been paid to the bank, is libelous *per se*.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by Bowdre Bros. & Co. against the Continental National Bank of Memphis. From a judgment for plaintiffs, defendant appeals. Reversed.

Morgan & McFarland and Estes & Fentress, for appellant. M. B. Trezevant, Metcalf & Walker, and Turley & Wright, for appellees.

MOALISTER, J. This is an action of libel, brought by the firm of Bowdre Bros. & Co., in the circuit court of Shelby county, against the Continental National Bank of Memphis and C. F. M. Niles, its cashier. It appears from the record that on the 16th October, 1890, Messrs. R. L. Bliss & Co., of Florence, Ala., drew a sight draft on Bowdre Bros. for the sum of \$659.95. This draft was sent for collection, through the First National Bank of Florence, Ala., to the Continental National Bank at Memphis. It appears that R. L. Bliss & Co. were customers of Bowdre Bros. & Co., and shipped them large consignments of cotton. At the time this draft was drawn, Bowdre Bros. & Co. had funds in their hands belonging to Bliss & Co., and it was their duty to pay the draft. The Continental National Bank, on the morning of October 16th, by its collector, presented the draft at the office of Bowdre Bros. & Co. It appears that neither member of the firm was in the office when the draft was presented. The bookkeeper of the firm requested that the draft might be left for a short time, but this request was declined, in accordance with the established usage of this bank. About 3 o'clock of the same day the bank asked Bowdre Bros. & Co., over the telephone, what they intended to do about the draft. W. T. Bowdre replied that the money was in his office to meet the draft, and he would pay it when presented. The bank then turned the draft over to a notary, who presented it at the office of Bowdre Bros. & Co., and received payment in full, returning with the money to the bank. It further appears that soon after the draft was handed the notary by the bank, for collection, and after Bowdre Bros. & Co. had notified the bank, over the telephone, of their readiness to pay the draft on presentation, the corresponding clerk of the Continental National Bank addressed a postal card to the First National Bank of Florence, Ala., stating that "Bowdre [was] in the hands of a notary." This postal card, it reasonably appears from the record, was not mailed until 6 o'clock that evening. In the mean time, and about 5 o'clock, the money had been paid into the bank by the notary. It thus appears that Bowdre Bros. & Co. were not protested for the nonpayment of this draft, nor was said firm in the hands of a notary for protest, but, on the contrary, it must have been understood that the draft would be paid on presentation. The evidence is indisputable that at the

time the postal card was mailed, stating that Bowdre was in the hands of a notary, the draft had been paid, and its proceeds were in the vaults of the Continental National Bank. There was proof on the trial below tending to show that a report became prevalent among the merchants of Memphis, having its origin in the publication of the postal card, that the Continental National Bank had protested the Bowdres, and that said firm had become involved. There was also proof tending to show that the commercial agencies subjected the Bowdres to an investigation. It is shown, also, that the rumor reached the customers of Bowdre Bros., and caused a withdrawal of large deposits. The trial resulted in a verdict and judgment against the bank for the sum of \$20,000, but in favor of C. F. M. Niles, cashier. Motions for a new trial and in arrest of judgment having been overruled, the bank appealed, and has assigned errors.

The first assignment of error arises upon the charge of the court with respect to the pleadings. The declaration avers that "plaintiffs are merchants and traders in the city of Memphis, and in the exercise of that calling, on the 16th October, 1890, in which calling a good financial credit and standing is and was on said day, and at all times, of great importance and value to them, and that on said 16th October, 1890, the defendants, wickedly intending to injure the plaintiffs, did maliciously compose and publish of and concerning the plaintiffs a certain false, scandalous, and defamatory libel; that is to say, it, through its officers, wrote and directed a certain United States postal card on said 16th October, 1890, and addressed the same to the First National Bank in the State of Alabama, and deposited the same in the United States post office at Memphis, Tenn., with legal postage prepaid, as follows: 'Continental Bank, Memphis, Tenn. Oct. 16, 1890. Yours of ——— received. We credit Bowdre in hands of notary. Entered for collection. Respectfully, C. F. M. Niles, Cashier,'—meaning thereby that the plaintiffs had suffered their financial credit and standing as merchants to become dishonored by a protest for nonpayment of their commercial paper at the hands of a notary, which said postal card was carried through the United States mail, and by due course was received by said First National Bank of Florence, and by it was publicly shown and exhibited to divers persons then and there, by means whereof the plaintiffs have been brought into public scandal and commercial disgrace, and greatly injured in their good name, and otherwise injured, to their damage fifty thousand dollars," etc. To this declaration the defendants pleaded the general issue. In this state of the pleadings, the circuit judge opened his charge to the jury, viz.: "The defendants, the Continental Bank and C. F. M. Niles, had the right to make any legitimate pleading

that would defeat this suit. They did plead not guilty. They could have pleaded, further, if they had so desired, viz.: First. Justification generally,—that is, that the language written on the postal card, and the meaning or innuendo, as set out in the declaration, was true. Second. They might have pleaded specially,—that is, that the language written on the postal card was true,—and would have been compelled to prove it; and they might, also, have pleaded that the innuendo or meaning attributed to the language written on the postal card, as set out in the declaration, was not a legitimate construction of such language. If either of the foregoing pleas had been interposed and established, it would have defeated this action. Third. Defendants might have pleaded the general issue, and under it insist that the communication in the language written on the postal card was one which, in law, he had a right to make, and therefore it was privileged, or that he or it was protected in making it." The first assignment of error is that the circuit judge erred in charging the jury as follows: "If the last method of pleading, [viz. the general issue] is adopted, defendant thereby admits that the language used on the postal card is not true. In this case the court has to tell you that the course of pleading, as set out in the third item [viz. the plea of the general issue] is the one adopted by these defendants, and under it they admit that the language used in the postal card is not true." It is insisted that this charge is erroneous. It is admitted by counsel that in actions for libelous publications imputing crime or moral turpitude, and perhaps in cases clearly imputing commercial insolvency, the truth of the publication cannot be given in evidence under the general issue. But counsel insist that this is an action for libel "only in respect to special damages to commercial credit, and that the rule invoked by the court has no application. In the investigation of this question, we will first inquire what is admitted, as a matter of pleading, under the general issue, in an action of libel, and whether there is any difference in the application of the rule when the libelous matter is actionable per se, and when it is only actionable upon averment and proof of special damages.

The general principle that the defendant in an action of libel or slander cannot, under the general issue, prove the truth of the defamatory matter, is well settled in this state. *McC Campbell v. Thornburgh*, 3 Head, 109; *Shirley v. Keathy*, 4 Cold. 29; *West v. Walker*, 2 Swan, 32; *Hackett v. Brown*, 2 Helsk. 264. In *Hackett v. Brown* this court quotes with approval the following language from section 324, 1 Greenl. Ev., viz.: "It is perfectly well settled that under the general issue the defendant cannot be admitted to prove the truth of the words, either in bar of the action, or in mitigation of dam-

ages." The plea of the general issue, in an action of oral or written slander, operates as a denial of the speaking of the words, or the publication of the libel, and a denial, also, of the damages, in cases where the averment of special damages is necessary to maintain the action. Where the defense is that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue. Newell, *Defam.* p. 648. But it is well settled that under the plea of the general issue the defendant cannot be permitted to give in evidence any matters tending to establish the truth of the defamatory matter, either in bar of the action, or in mitigation of damages. The truth of the words charged to have been spoken or published is a conclusive defense to the action, but, in order to be available, must be relied on by a formal plea of justification. It is insisted, however, on behalf of the bank, that it was precluded from interposing a plea of justification as a defense for the reason that plaintiff employed an innuendo in the declaration which ascribed an unwarranted meaning to the words written on the postal card, and that defendant could not justify the use of the words without at the same time justifying the meaning set forth in the innuendo. The defendant, says Mr. Newell, (page 628,) is in no way embarrassed by the presence of the innuendo in the statement of the claim. In fact, it is to him an advantage. He can either deny that he spoke the words, or he can admit that he spoke them, but deny that they conveyed that meaning. He can also plead that the words were true, either with or without the alleged meaning. It will then be a question for the jury to say, from the proof, whether the plaintiff's innuendo is sustained. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable in themselves, without the alleged meaning, and that, therefore, his unproved innuendo may be rejected as surplusage. The plaintiff, however, will not be allowed, in the midst of the trial, to start a fresh innuendo, not in the pleadings. He must abide by the construction put on the words in his statement, or else rely on their natural and obvious import. It is true, Mr. Townsend, in his work on *Slander & Libel*, states that a justification on the ground or truth must justify in the sense imputed by the innuendo, for the reason that the plea admits the innuendo. Section 215. But it is evident the author refers here to a plea that justifies the libel or slander generally, and he does not mean to say that there can be no special justification, under the American practice. It would violate every canon of common sense and good pleading to hold

that a defendant cannot justify the speaking of the words, or the publication of the libel, without at the same time admitting the truth of some far-fetched and extravagant meaning started in the imagination of the pleader, or evolved from the morbid brain of his client, and introduced into the declaration in the form of an innuendo. It was perfectly admissible, we think, under the authorities, for the defendant bank to have pleaded a justification of the words written on the postal, and in the same plea to have denied that the words were susceptible of the meaning ascribed to them in the innuendo; and we fail to perceive in what way the defendant was embarrassed or hampered, or precluded from the interposition of the plea of justification, by the presence of the innuendo.

Again, it is contended by counsel for the bank that while it may be true that in an action for libelous publications imputing crime or moral turpitude, and perhaps in cases clearly, *per se*, imputing commercial insolvency, the truth of the publication cannot be given in evidence under the general issue. Yet this principle does not apply in cases where the language is only actionable upon averment and proof of special damages. In the opinion of the court, this position is untenable. A plea of justification, supported by proof of the truth of the charge, is a conclusive defense, whether the words are libelous *per se*, or are only actionable upon proof of special damages. The true distinction between the two classes of cases is not to be found in the contention of counsel for the bank, that when the words are actionable *per se* the justification of their truth must be specially pleaded, while, in cases which are only actionable upon averment and proof of special damages, the truth of the words may be shown under the plea of not guilty. But the marked feature that distinguishes the two classes of cases is to be found in the quantum of evidence to be introduced by the plaintiff on the question of damages. If the words are libelous *per se*, the plaintiff may recover damages without the necessity of showing by evidence that he has sustained any pecuniary loss. If, on the other hand, the words are not actionable in themselves, the plaintiff must not only show the publication of the words, but that it has resulted in special damages to him. In the former the plea of not guilty does not put in issue the question of damages, because damages are presumed, while in the latter no damages are recoverable, unless averred and proved. As already stated, this is the distinguishing feature of the two classes of cases, and we apprehend that, if the defendant wishes to avail himself of the defense that the words are true, a formal plea of justification is as necessary in the one case as in the other, and in neither case can the truth of the words be proved under the general issue. In the case of *Sheahan v. Collins*, 20 Ill. 325, which was an action of libel, it

was urged that the court below erred in instructing the jury that the defendant, by pleading the general issue, admitted that plaintiff was innocent of the charge. The supreme court said: "While this is not the language of the plea, it is undoubtedly the effect of such a plea," citing *Regnier v. Cabot*, 2 Gilman, 39. That plea denies the act charged in the declaration only, and the truth or falsehood of the charge cannot be inquired into under that issue. Its falsehood stands admitted by the parties. See, also, *Townsh. Sland. & L.* § 403, where it is stated that the plea of the general issue admits the falsity of the charge. While we are of opinion the charge of the circuit judge, laying down the rule on this subject, was technically correct, we think it is objectionable, and ordinarily would have been misleading, in that it omitted to state in the same connection that the failure to plead a justification was not an admission of the writing and publication of the words, but that the plea of the general issue was a denial both of the writing and publication. We can see, however, from the record, that this omission could not have been prejudicial to the defendant, since the writing and publication were not disputed on the trial.

We next proceed to inquire whether the words laid in the declaration are libelous per se, or are actionable only upon averment and proof of special damages. Says Mr. Newell, in his work on Defamation, Slander, and Libel, (page 181:) "When language is used concerning a person or his affairs, which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication, prima facie, constitutes a cause of action, and prima facie constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term 'actionable per se.' Therefore, the real, practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation, is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken." Defamatory words, falsely spoken of a party, which prejudice such party in his profession or trade or business, are actionable in themselves, without proof of special damages. Of merchants, tradesmen, and others in occupations where credit is essential to successful prosecution, any language is actionable, without proof of special damages, which imputes a want of credit or responsibility, or suggests a charge of insolvency. *Newell, Defam.* §§ 168-193; *Townsh. Sland. & L.* § 191. Next to imputations which tend to deprive a man of his life or liberty, or to exclude him from the comforts of society, may be ranked those which affect

him in his office, profession, or means of livelihood. *Newell, Defam.* 168. It by no means follows, says the same author, that all words spoken to the disparagement of an officer, professional man, or trader will be actionable in themselves. Words, to be actionable on this ground, must touch the party in his office, profession, or trade; that is, they must be shown to have been spoken of them in relation thereto, and to be such as would prejudice him therein. *Newell, Defam.* p. 174. Says Mr. Townshend: "That the language must touch the person whom it concerns, in his special character, means only that it must concern him in such special character, and affect him therein." Section 190. The rule is thus stated by Judge Andrews in *Sanderson v. Caldwell*, 45 N. Y. 405, viz.: "There is some confusion in the cases upon the point whether the words used must, in terms, be applied by the speaker to the office, business, or profession of the person who claims to recover by reason of them, and whether, if not so expressly applied, they can be said to touch him in the special character named. The rule derived from the authorities, and with which most of the cases can be reconciled, seems to be this: When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made."

Tested by these principles, is the language of the postal card, "Bowdre in the hands of a notary," libelous per se; that is, actionable without averment and proof of special damages? The argument against such a construction is that the words used on the postal do not, in their obvious meaning, convey to the mind an imputation of a protest of Bowdre Bros. & Co.'s commercial paper; that the name of the mercantile firm of Bowdre Bros. & Co. is not mentioned; and that the words, "in the hands of a notary," do not obviously impute a protest or insolvency, but mean a demand for payment, and a protest if payment is refused. The position assumed by counsel for plaintiff in error is that the words are ambiguous in their meaning, and do not, in their obvious sense, necessarily impute a protest, and are also ambiguous in their application, and are not libelous on the plaintiffs, per se, without extraneous facts, explanation, or innuendo. We do not think the character of the libel is changed by the fact that an innuendo showing the meaning and application of the words is employed in the

declaration. The full name of the party need not appear in the libel. All that is necessary is that the words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. Newell, Defam. pp. 256, 257. "Whether a man is called by one name, or whether he is called by another, * * * if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name, and Christian name, were ten times repeated." Odgers, Sland. & L. 130. If the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, or of any statement or declaration made by the defendant as to the person referred to. Newell, Defam. § 259. "Nor is the character of the libel affected by the fact that its full meaning is set forth in an innuendo. The office of the innuendo is to aver the meaning of the language published. Therefore, if the meaning of the language is plain, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense. If the common understanding of men takes hold of the published words, and at once applies, without difficulty or doubt, a libelous meaning thereto, an innuendo is not needed, and would be but useless surplusage in pleading." Newell, Defam. 610. Again, it is a familiar rule that words are to be understood in their ordinary signification, unless reason appears for assigning a different sense. Says Mr. Newell: "The courts no longer strain to find an innocent meaning for words *prima facie* defamatory. Neither will they place a forced construction on words which may fairly be deemed harmless. The rule which once prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now to be construed by courts as they always should have been,—in the plain and popular sense in which the rest of the world naturally understand them. In all cases of ambiguity, it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence." Newell, Defam. p. 304; Watson v. Nicholas, 6 Humph. 174. Where the language published is unambiguous, it is the exclusive province of the court to determine its construction, and to determine whether or not, upon its face, it is actionable *per se*, etc. Townsh. Sland. & L. § 286; Banner Pub. Co. v. State, 16 Lea, 179. But on a plea of not guilty, whether the defamatory matter was published concerning any particular individual, or whether that individual was intended, is a question of fact for the jury. *Id.*

This court is of opinion that the words,

"Bowdre in hands of a notary," found by the jury to have been written of and concerning the mercantile firm of Bowdre Bros. & Co. were libelous *per se*. We think these words would be universally understood by merchants and business men to mean that some commercial paper, for which Bowdre Bros. & Co. were primarily bound, had not been paid during business hours, and had gone into the hands of a notary for protest. The obvious meaning of the words is that Bowdre's own paper was in the hands of a notary, not that paper drawn on him had been placed in the hands of a notary. It is admitted that the nonpayment of an unaccepted draft by the drawers, and a protest for such nonpayment, does not dishonor the drawee, but the objectionable words used in this postal contains no such explanation. The language employed conveys the idea that there had been a failure on the part of Bowdre Bros. & Co. to meet, within business hours, some mercantile paper, for which they were primarily bound, and that it had become necessary to place the same in the hands of a notary for protest. Such language contains a clear imputation that touched the credit, standing, and solvency of a mercantile firm, and the language is actionable *per se*. To say or publish of a merchant anything that imputes insolvency, inability to pay his debts, want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, is slanderous or libelous *per se*, if without justification, and general damages may be recovered. *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38.

The nineteenth assignment of error is that the circuit court erred in not granting a new trial on the ground that the verdict is excessive. This court is satisfied, upon a careful examination of the record, that this assignment should be sustained. We are of opinion, in view of the facts disclosed by this record, that the damages assessed (\$20,000) are so excessive and extravagant as to indicate passion and prejudice on the part of the jury. As the case must be retried, we refrain from reviewing the case, further than to say that we find many facts and circumstances in proof which, in our opinion, should have mitigated the damages assessed by the jury. *Reversed.*

THEUS v. DUGGER et al.

(Supreme Court of Tennessee. June 15, 1893.)

MARRIED WOMAN—SEPARATE ESTATE—LIABILITY FOR DEBTS.

Where a married woman invests her separate estate in a mercantile partnership, her interest in the stock of goods, in the absence of an express agreement by her to the contrary, is not liable for the payment of a note executed by the firm for general partnership purposes. *Snodgrass, J.*, dissenting.

Appeal from chancery court, Madison county: A. G. Hawkins, Chancellor.

Action by John W. Theus, trustee, against W. A. Dugger and others. From a decree for complainant, defendants appeal. Reversed.

Haynes & Hays, for appellants. McCorry & Bond and Caruthers & Mallory, for appellee.

WILKES, J. The bill is filed by John W. Theus, trustee of the Bank of Madison, which failed September 27, 1890, to collect a note of \$2,230.25 executed by the late firm of W. A. Dugger & Co.—a firm lately theretofore composed of W. A. Dugger and Sallie T. Dugger, wife of A. D. Dugger—to the Bank of Madison, and also against Jesse A. Thompson, to set aside, as fraudulent, an alleged sale of the interest of W. A. Dugger in said late firm to Jesse A. Thompson, as being made to hinder, delay, defraud, and defeat complainant and the other creditors of the firm of W. A. Dugger & Co. in the collection of their debts. The note sued on is an ordinary promissory note, providing for the payment of reasonable attorneys' fees in case of suit, and is signed, "W. A. Dugger & Co." An attachment was issued, commanding the sheriff "to attach as much of the estate and interest of the said S. T. Dugger in said partnership property, consisting of a stock of groceries," etc., as would satisfy complainant's debt and costs; and the attachment was accordingly issued, and levied upon the "entire undivided interest of the defendant S. T. Dugger in the stock of goods in possession of J. A. Thompson & Co. A replevy bond was executed. The firm of W. A. Dugger & Co. was dissolved October 8, 1892; the said W. A. Dugger selling his entire interest to his codefendant and partner, Sallie T. Dugger, notice of the dissolution being published in the Jackson papers; and thereupon Sallie T. Dugger formed a partnership with Jesse A. Thompson, under the style of J. A. Thompson & Co.; the said Thompson buying an undivided half interest in the stock of goods, but no interest in the notes, accounts, and choses in action of the late firm of W. A. Dugger & Co. The trade thus made had been in negotiation for six months before the bank failure, and the president of the Bank of Madison had been advised with concerning the same. A motion to quash the attachment was made on the hearing upon the following grounds, to wit: (1) Because there is no valid or legal ground for the issuance of the same stated or set forth in the bill. (2) Because there is no allegation in the bill of any legal or valid or subsisting lien, in complainant's favor, upon the stock of goods of said J. A. Thompson & Co., or the interest of S. T. Dugger therein. (3) Because no valid or sufficient grounds for an attachment are stated, set forth, or shown

in the bill,—which motion was overruled. A demurrer was interposed by defendants Sallie T. Dugger and husband, A. D. Dugger, upon the following grounds: (1) The bill does not make or state a case that entitles complainant to the relief prayed. (2) The defendant S. T. Dugger, as shown by the will, is a married woman, under the disability of coverture, and as such is not liable on the promissory note sued on, and she pleads her said coverture as a complete defense against liability on said note. (3) To the part of the bill which seeks a personal recovery against defendant S. T. Dugger, she demurs on the following grounds: First, she is, as shown by the bill, a married woman, under the disability of coverture, and is not liable on the said note, as the same is stated and alleged in the bill, because the same is not shown to have been executed by her with express reference to her separate estate, or that in fact she has any separate estate. (4) To so much and such parts of the bill as allege her ownership in the stock of goods sought to be attached by the bill, and seeks to reach the same for the satisfaction of the debt sued on, she, the said S. T. Dugger, demurs on the following grounds: First, she, as shown by the bill, is a married woman, not shown to have any separate estate in the goods, nor to have contracted the alleged indebtedness with express reference thereto. Wherefore, her interest in the same cannot, in the manner sought by the bill, be sold, or made liable for the said indebtedness.

The first ground of demurrer was overruled, and the second and third grounds, to the effect that S. T. Dugger was shown by the bill to be a married woman, under disability of coverture, and as such not liable on the promissory note sued on, were allowed, so as to prevent any decree on said note against said S. T. Dugger, personally.

Answers were filed by defendants, denying all fraud in the sale and purchase of the stock of goods, and alleging that while W. A. Dugger sold out his entire interest in the stock, notes, accounts, choses in action, fixtures, and delivery wagon and horse, to his codefendant S. T. Dugger, that codefendant J. A. Thompson only bought an interest in the stock and fixtures. Proof was taken, and decree rendered, in which it was adjudged that there was no fraud in the sale of the goods to J. A. Thompson, and adjudging that no personal decree could be entered against her on said note, but adjudging that "the interest of said S. T. Dugger, acquired by the investment of her separate estate in said firm, is liable to complainant on account of said indebtedness, and should be subjected to its payment;" and thereupon the court proceeds to render a personal decree against her, and her sureties upon the replevin bond, for the sum of \$4,460.50, being double the penalty thereof, but to be discharged by the pay-

ment of the sum of \$1,815.83, the balance due on the note sued on.

The question of the alleged fraudulent sale of the stock of goods, and its purchase by J. A. Thompson, and which was the ground laid in the bill for the issuance of the attachment, was abandoned when complainant had the attachment issued; it being only issued against the "undivided interest of the defendant S. T. Dugger in the stock of goods;" and the chancellor having found as a fact, and so adjudged in the decree, that the allegations of fraud in purchasing the stock of goods, on the part of J. A. Thompson, and the sale thereof by the said S. T. Dugger, had not been proven, but disproved, and there being no appeal by complainant from this portion of the decree.

Several errors are assigned, only one of which we deem it necessary to notice, as it disposes of the entire matters in controversy. The question raised by this assignment is, in substance, this: Is a married woman, owning a separate estate, which she has put into a mercantile business, as a partner with another person, bound by a note executed for partnership purposes, in the name of the firm, so that a personal judgment can be rendered against her on such note, or so that the stock of goods belonging to the firm in which she is interested as a partner can be subjected to the payment of such firm note, in the absence of an express agreement on the part of the married woman that the stock of goods in which her separate estate is invested shall be bound for the same?

It has been held that when a married woman engages in business, if she fails to pay a debt incurred by her in that business, the creditor may seize and reclaim such goods as he has sold to her as may remain in her possession, provided the same can be identified. *Federlicht v. Glass*, 13 Lea, 487, 488. It also has been held that land purchased by a married woman, in which her separate estate has been invested, leaving a portion of the purchase money unpaid, may be sold to enforce collection of that portion of the purchase money remaining unpaid. *Jackson v. Rutledge*, 3 Lea, 628-629, 631. But in each of these cases no personal judgment was rendered against the married woman, and the only relief given was against the identical property in the purchase of which the debt was created. The law is well settled in Tennessee that, in order to bind the separate estate of a married woman, there must be an express agreement or contract binding the same. It cannot be charged by implication. *Jordan v. Keeble*, 85 Tenn. 412, 3 S. W. Rep. 511; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Ragsdale v. Gossitt*, 2 Lea, 720; *Litton v. Baldwin*, 8 Humph. 209; *Cherry v. Clements*, 10 Humph. 552; *Kirby v. Miller*, 4 Cold. 3; *Shacklett v. Polk*, 4 Heisk. 115.

It is earnestly insisted, however, that when

a married woman engages in mercantile business on her own account, or as a partner, and uses her separate estate therefor, she thereby expressly binds her stock of goods and mercantile assets, as fully as if she should by express words stipulate with each creditor with whom she deals that such stock and assets shall be so bound, and that such ruling does not conflict with our previous holdings that there must be an express agreement on the part of the married woman in order to make a charge upon her separate estate. It is earnestly insisted that this must be so, more especially in cases when the married woman enters into a partnership, because a legal entity is thereby created, which has assets primarily liable for its own debts. It is also urged that to allow a married woman, under such circumstances, to escape liability, both personally and as to her estate, would be a fraud upon her creditors, on the one hand, and, on the other, prevent her from obtaining and enjoying that credit necessary to the successful operation of a mercantile business. We feel the force and weight of these suggestions, but we are of opinion that if we hold a married woman bound by contracts made by her in her business or mercantile ventures simply because she is so engaged, and has a separate estate invested in them, we must do so on the ground that she is bound by implication of law, rather than upon any express agreement or contract. It would be to lay down a rule for married women, engaged in merchandizing upon their separate estates, different from that laid down in cases where their separate estates are invested or employed in other business or property, and we can see no sound basis for such distinction. As the law has heretofore been held, and is now laid down, if a married woman, having a separate estate, employ it in mercantile business, any creditor, in order to bind her separate estate engaged in such business, need only stipulate with her to that effect. With this simple precaution, the creditor may deal safely with the married woman, and at the same time her credit will not only not be impaired, but may be strengthened, by the consideration that an express charge has made the creditor feel more secure in extending credit to her. This is the rule applied in all other cases involving the separate estates of married women, and we think it safer to leave the rule uniform in its application, rather than create distinctions which we cannot rest on any satisfactory basis. This holding is strictly in accord with the previous rulings of this court upon this subject. *Federlicht v. Glass*, 13 Lea, 481; *Frank v. Anderson*, Id. 695; *Chatterton v. Young*, 2 Tenn. Ch. 768.

In the case at bar, the note sued on was signed W. A. Dugger & Co., but did not purport to charge the separate estate of Sallie T. Dugger, nor was there any parol evidence that this separate estate or stock of goods

was agreed to be bound for its payment. The note was given, not for the purchase of goods, but in the general conduct of the business of the firm. The goods sought to be subjected to the payment were not the goods of W. A. Dugger & Co., (fraud in the transfer being eliminated,) but it was the interest of Sallie T. Dugger in the new firm that was sought to be reached. The chancellor declined to give any personal judgment against Sallie T. Dugger, the married woman, and in this he was correct. It was error, however, to give any decree against the interest of Sallie T. Dugger in the firm assets of J. A. Thompson & Co., or against the goods as the property of W. A. Dugger & Co., or against the parties upon the bond given to replevy the same; and the decree of the court below, in these particulars, is reversed, with costs.

SNODGRASS, J., (dissenting.) I do not agree with the majority in the conclusion reached, but am of opinion that a married woman engaging in a mercantile business on a separate estate, or in partnership in which she is using such estate, and thus holding herself out to all as so trading, expressly binds that separate estate to every creditor who deals with her in that business. The condition of the business is an advertisement and holding out to the public, and therefore an invitation to each member of the public to deal with her upon the faith of such separate estate, and consequently each contract she makes in that business binds her separate estate as an express contract to do so. The contrary rule results from considering only the words used in each separate contract with each creditor, and ignoring the conditions under which the words were used. The conditions, the business, the dealing in and only with a separate estate, and the holding out to each creditor, as to all, that such was the business in which he was invited to enter and deal, are all to be considered in connection with, and as essential parts of, each contract, and, thus considered, they supplement the words used, and make out an express contract, or rather make what would not, in the absence of these conditions and propositions to the public, (and therefore to each member of it,) have been a contract to bind a separate estate, in fact, as in legal effect, such a contract, just as, in the case of a partnership holding itself out as such, the contract of each member, in the legal scope of, and for, that business, binds the firm, though no express words are used proposing to do so. We have held that a married woman may carry on a mercantile business as a separate estate, and that such business is protected from her husband's creditors. We ought, therefore, not to hold, it seems to me, that it is also protected from her own. Both in her interest, and that of the public dealing with her, I think the property invested in

such business should be bound. The 13 Lea case, I believe, applied the correct rule of law to facts not calling for the application. The facts of that case have therefore made a precedent which I think should be overruled, and the doctrine established that a married woman doing a business with the public on the faith and credit of investment of her separate estate, and holding herself out as so dealing, binds her separate estate, expressly, in every contract made in the scope and for the objects of that business, though she does not then and there, in making each business contract, repeat such terms as expressly bind the separate estate.

BLASS v. HELMS et al.

(Supreme Court of Tennessee. July 23, 1893.)

WILL—CONSTRUCTION—DESCRIPTION OF DEVISEES.

Testator devised a lot and houses to his wife for life, "and at her death" to E., and, if E. die without issue "living at the death of my wife, or if he should die after the death of my wife without leaving any child or children, I devise the above-described lot and houses to the living children of my daughter, B., and the child or children of any of her children that may be dead." E. died before the death of testator's wife, without issue, and children of B. were living at the death of such life tenant. *Held*, that children of B. born after the death of the life tenant took nothing by the devise.

Appeal from chancery court, Shelby county; H. D. Beard, Chancellor.

Action by Gus Blass against Margaret Helms and others for the specific performance of a contract. From a judgment for plaintiff, defendants appeal. Affirmed.

Frazer & Heath and H. F. Walsh, for appellants. B. W. Hersh, Randolph & Son, and J. P. Edmondson, for appellee.

McALISTER, J. The only question arising in this case is in respect to the proper construction of the second item of the will of William English, which is as follows: "Item Second. I give, devise, and bequeath to my wife, Joanna English, for and during her natural life, my lot and the two brick houses thereon, situated on the northwest corner of Shelby and Beale streets, fronting on Shelby street forty seven (47.03) feet and three inches, and running back on Beale street eighty feet; and at her death I give and devise the said lot and houses above described to Michael English, the son of myself and present wife, Joanna; * * * and if my son, Michael English, die without any child or children living at the death of my wife, or if he should die after the death of my wife without leaving any child or children, I devise the above-described lot and houses to the living children of my daughter, Mrs. Margaret Briscoe, and the child or children of any of her children that may be dead," etc. It appears from the record that the testator, William English, died in 1866, and that his widow, the said Joanna,

mentioned in the will, died in 1870. Michael English, the son of the testator, died in 1867, unmarried, and without issue. Margaret Briscoe, the daughter of the testator, referred to in the will, had three children by her first husband, to wit, Anderson, Paul F., and Mary F. Briscoe. Anderson Briscoe was born before the death of the testator, and is still alive. Mary F. Briscoe was born February 1, 1869, and died in October, 1875. Paul F. Briscoe was born after the death of Joanna English, and is still alive. The husband of Margaret Briscoe having died, she intermarried with one Helms, and by him had a son, Maurice E. Helms, who was born July 11, 1881, and is still surviving.

The question presented for adjudication, therefore, is whether, under the will of William English, Paul F. Briscoe and Maurice E. Helms, children of Margaret Briscoe, who were born after the death of Joanna English, the life tenant, take any interest in the property. They were excluded from any interest therein by the decree of the chancellor. The chancellor held that, under the second clause of the will, Joanna English took the property therein described for life, with a vested remainder in Michael English, determinable upon his dying during said life tenancy without children, or survivor or survivors of any dead child, living at the date of the death of the life tenant, or upon his death after the death of said life tenant without any child or children him surviving, with an executory devise over upon the happening of either contingency to the then living children of Margaret Briscoe, who, under the terms of said clause, were to take as a class. The result of the decree of the chancellor is that Anderson Briscoe and Mary F. Briscoe, children of Margaret Briscoe, who were born before the death of Joanna English, the life tenant, were entitled to the whole property, and that the after-born children of Margaret Briscoe took no interest. He further held that Anderson Briscoe, having survived his sister, Mary F. Briscoe, as her heir, took the whole fee.

It is assigned as error that the court erred in its construction of the will of William English, and that Anderson Briscoe and Mary F. Briscoe are not the only persons interested in the devise; that the devise was to a class; that it was flexible, and let in after-born children. It is claimed that the word "living," used in this item of the will, is simply used in contradistinction to the word "dead" in the same phrase. The contention is that the phrase simply means that living children and the children of dead children are placed on the same footing, and that there is nothing in the will to indicate that the word "living" means living at the death of Joanna English, the life tenant.

We think the decree of the chancellor is correct. The law is well settled that where a particular estate is carved out, and the re-

mainder is devised to a class of persons, and a future period of distribution is fixed, such persons only are meant as come within the class at the time of distribution, and children born after that period are excluded. It is perfectly apparent from a consideration of this will that the devise was to the children of Margaret Briscoe as a class, and the death of Joanna English, the life tenant, was fixed upon as the period for distribution. The second clause provides that if Michael English dies without issue before the death of Joanna, then this property, on the death of Joanna, is to go to the living children of Margaret Briscoe; that is to say, to those children that may be living at the death of Joanna English. As already stated, Michael English died in 1867, unmarried, and without issue, while his mother, the said Joanna English, lived until 1870. In *Satterfield v. Mayes*, 11 Humph. 58, this court said, viz.: "Where a bequest is made to a class of persons, subject to fluctuations by increase or diminution of its numbers in consequence of future births or deaths, and the time of payment or distribution is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons only as at that time fall within the description of persons constituting such class." In 2 Jarm. Wills, (2d Amer. Ed.) p. 76, and also *Id.* (5th Amer. Ed.) p. 704, the rule is stated as follows: "Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Thus in the case of a devise or bequest to A. for life, and after his decease to the children of B., those living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are entitled, but not those who come into existence after the death of A." It was manifestly the intention of the testator, under the second clause of this will, to fix the death of his wife and the termination of her life estate as the period of distribution. This construction is obvious for several reasons, to wit: First, a life estate is carved out for the said Joanna English. The will then provides that at her death "I give and devise the said lot to Michael English;" clearly indicating that Michael English was not to take absolutely until after his mother's death. The estate of Michael English was a vested remainder, but this remainder was determinable upon two contingencies, to wit—First, the death of the said Michael without issue before the death of Joanna; and, second, the death of Michael without issue after the death of Joanna. It is manifest that it was clearly the intention of the testator to fix the death of his wife as the time for

distribution. The will next provides, viz.: "I devise the above-described lots to the living children of my daughter, Margaret Briscoe, and the child or children of any of her children that may be dead." The term "living" children restricts the devise to such children as may be living at the death of said Joanna English, and such children who answer the general description when the distribution is to be made are entitled to take in exclusion of those coming in esse after the death of the said Joanna. The only children of Margaret Briscoe living at the death of Joanna were Anderson Briscoe and Mary F. Briscoe, who took the property absolutely, to the exclusion of Paul F. Briscoe and Maurice E. Helms, who were born long after the death of the said Joanna. Mary F. Briscoe having died in infancy, her brother, the said Anderson Briscoe, as her heir at law, became vested with the title to the whole property. The decree of the chancellor is affirmed.

LONDON & L. FIRE INS. CO. v. CRUNK.
(Supreme Court of Tennessee. March 19, 1892.)

FIRE INSURANCE POLICY—CONDITIONS—CONSTRUCTION—FALLING WALLS PREVIOUS TO FIRE—ACTION FOR LOSS—INSTRUCTIONS—PETITION—SUFFICIENCY.

1. A fire insurance policy provided that if the building, "or any part thereof," fall, except as the result of fire, all insurance shall immediately cease. *Held*, that the falling of a minute portion of the material in the insured building would not avoid the policy, where no functional portion of the structure fell before the fire, so that its distinctive character as such was destroyed.

2. The court charged that if the roof was blown from a part of the building, and one of the upper rooms was uncovered, and the walls thereof partially blown away, but leaving more than three-fourths of the building intact and suitable for a dwelling, and that in this condition it was burned, defendant is not exempt from liability, and that, if the fire was scattered over the floor in one of the rooms by the wind, and ignited the furniture, and a strong wind blew the roof and a portion of the building upon it, and, after smouldering a time, it broke out and consumed the building, and that the fire, and not the falling of the building, was the proximate and direct cause of the loss, the jury should find for plaintiff. *Held*, that such instruction was not objectionable, as an invasion of the right of the jury to determine as a fact what part of the building falling might be within such clause of the policy.

3. Defendant had no cause for complaint because in such charge the court referred to only one room as having been uncovered, whereas the roof was blown from two rooms, since the error in that respect was in defendant's favor.

4. In an action on an insurance policy the petition need not negative conditions which avoid the policy, nor aver the performance or nonperformance of conditions subsequent.

Error from circuit court, Lincoln county; M. D. Smallman, Judge.

Action by Crunk against the London & Lancashire Fire Insurance Company on a fire insurance policy. From a judgment for

plaintiff, defendant appeals in error. Affirmed.

W. B. Lamb and J. D. Tillman, for plaintiff in error. J. H. Holman & Carter, for defendant in error.

SNODGRASS, J. The defendant in error brought this suit against the London & Lancashire Fire Insurance Company to recover for loss sustained by fire, which destroyed his buildings, insured by said company. The policy contained a clause providing that, "if the building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." There was no averment in the declaration that the building insured, and no part thereof, fell, except as the result of fire, and the defendant demurred because of the failure of plaintiff to make such averment. The demurrer was overruled. Pleas were filed denying liability, and the case was tried on the merits, resulting in a verdict and judgment in favor of plaintiff for \$1,828.75, and defendant appealed, and assigned errors of fact and law. Before proceeding to consider such of these as are deemed material for consideration, we notice an objection of defendant in error that plaintiff cannot avail himself of objections assigned, because there were no proper motions made below for a new trial and in arrest of judgment, the entry of record on that subject being that "the defendant moved the court for a new trial and in arrest of judgment, which motion was by the court overruled," and the point made on it here that this was but one motion, and that a motion for a new trial could not have been entertained at the same time with a motion in arrest, and that a motion in arrest, thus made, waives a motion for a new trial; citing *Snapp v. Moore*, 2 Overt. 236, where this position was taken arguendo, but doubtless correctly, by Judge Overton, delivering the opinion of the court. But, in the view we take of it, this is immaterial. It would only affect the right of defendant to object here, as plaintiff in error, that the evidence did not sustain the verdict, because, as to errors of law, he needed no motion for a new trial to authorize a correction of errors on appeal. *Wells v. Moseley*, 4 Cold. 405; *Mumford v. Railroad Co.*, 2 Lea, 397; *Morgan v. Bank*, 13 Lea, 239. And as there was evidence before the jury to sustain the verdict, it does not matter whether plaintiff in error could not make the question, because, if he could, it would be ineffectual, as the verdict would not be disturbed upon the facts. Passing this, therefore, we proceed to questions made and deemed essential to be noticed.

The first alleged error is the action of the circuit judge on the demurrer. The declaration was not defective for want of averment omitted. It is not necessary that it should

have averred the performance or nonperformance of conditions subsequent, nor to have negative prohibited acts or excepted risks. May, Ins. § 590.

The second and last error we notice here (though all others assigned have been considered and disposed of in consultation of the court) is as to the charge of the court upon construction and effect of this provision of the policy. Before the fire destroyed the insured building, it had been visited by a cyclone. It was a two-story building, with a portico in front, and what is designated as an "ell" addition in the rear. This was one story. The roof of the two front upper rooms had been blown away, the rafters, ceiling, and parts of walls remaining. But there was evidence tending to show that before this some fire had been blown out on the floor by a current of air passing through a room, which was the probable cause of the burning of the building subsequently consumed, after the roof, etc., had been blown away or fallen in upon the fire. This was evidence sufficient to justify the verdict that the fire commenced before the fall of any part of the building. Of course, if it commenced before the fall, though the entire building fell subsequently, the insurance company would be liable. May, Ins. § 401. The defendant company insisted, however, that the evidence showed that the fire commenced after the roof, etc., were blown away, and there was evidence tending to show this. It also insisted that a window or a window light was first blown out, and through this the air current had been admitted, which blew fire out into the room, if any was so blown, and hence a part of the building had fallen before the fire, and the policy ceased, by its terms, before the fire started. The question thus presented, upon facts and proper construction of the policy, is made in objection to the charge of the court, which, on this point, was as follows: "The exclusion clause in question is not to be literally understood, so as to avoid the policy if an atom or some minute portion of the material in the insured building should fall. It means some functional portion of the structure, the falling of which would destroy its distinctive character as such. So that, if the proof in this case shows that the roof was blown from a part of one of the buildings mentioned in the policy sued on, (there being two buildings in the policy,) and one of the upper rooms was uncovered, and the walls thereof partially blown away, but leaving more than three-fourths of the building intact, and suitable for a dwelling house, and that in this condition it was burned, the clause in the policy as to the falling of the building, or any part thereof, would not exempt defendant from liability, if otherwise liable, as before explained, unless you should believe from the proof that the falling was the direct cause of the fire. If the proof shows

that the fire was scattered over the floor in one of the rooms of one of the insured houses by the wind; that some of it ignited the carpet or some of the furniture in the room, and a strong wind blew the roof, and a portion of the building, upon it, and, after smoldering a time, it broke out and consumed the building; that the wind, and not the falling building, or a part thereof, caused the fire; that the fire, and not the falling of the building, was the proximate and direct cause of the loss,—you should find for the plaintiff, if defendant is otherwise liable, as before explained." Defendant in error objects to this upon several grounds: First. That it is law only in case of a contract where the condition is as to the "falling of the building" entire. This is an erroneous view. The circuit judge drew the correct distinction. The falling of "any part" of a building in such a contract manifestly could not apply to any minute or fragmentary portion, as it might literally import. If so, the clause would be void as unreasonable, and defeating, without merit, the contract for indemnity. It cannot have such a technical or literal construction. Literalism being disregarded, the clause must have a fair and reasonable interpretation and construction, and that which is most favorable to indemnity,—the object of the contract. Not having a literal meaning, and not definitely designating what material part of the building must fall before the fire to exempt the insurer from liability, it must, like all ambiguous clauses, be construed most favorably to indemnity, and against the insurer. It should therefore not have been construed as meaning any fragment or portion of a part of the building, but an integral part of the entire building, as was done by the circuit judge. Second. It is next objected to this that, after construing this clause, the circuit judge told the jury that if the roof was blown from "one of the rooms," etc., this would not be a falling of any part, within the meaning of the policy, and that this was erroneous, because, first, it limited the facts to the blowing off of the roof of one room, whereas the roof of two was blown off, etc. This was error in defendant's favor. It left the jury to infer that if the roof was blown from two rooms, or more damage was done, it might be such a falling as the contract contemplated, whereas, in fact, it would not have been, under the proper construction he had already given. Again, it is said this was an invasion of the right of the jury to determine as a fact what part of the building falling might be within the clause. This objection is not well taken. The judge tells the jury what construction the contract must have, and illustrates by stating such a condition as would not be within his meaning or definition or construction. If his construction was right, he was right in eliminating, by statement, such a blowing off of the build-

ing as would or would not be within it. It is not telling the jury on a controverted question what the facts were, or how to find them; it is a statement to them that certain facts, being true or proven, will not bring the case thus proven or assumed within the construction the court gives the contract. On the whole case, we are satisfied with the judgment, and it is affirmed, with costs.

GULF, C. & S. F. RY. CO. v. GILL et al.
(Court of Civil Appeals of Texas. June 27, 1893.)

SALE OF LAND—BONA FIDE PURCHASER—WHAT CONSTITUTES.

1. A purchaser with notice of outstanding equities is not affected thereby, if his vendor was an innocent purchaser.

2. The construction of a railway track does not affect purchasers of land 132 feet from the track with notice of a claim of title to such land by the railroad company.

3. Where land sold to plaintiff was described in the deed, which was duly registered, as a certain block in a certain addition, without any statement of the dimensions thereof, a subsequent purchaser of part of such land, under a different description, will be treated as having notice of plaintiff's title, unless he can show that he was unable, by the exercise of reasonable diligence, to ascertain that such land was included in the block conveyed to plaintiff.

Appeal from district court, Tarrant county; N. A. Stedman, Judge.

Trespass to try title by the Gulf, Colorado & Santa Fe Railway Company against L. B. Gill and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Terry and Leake, Shepard & Miller, for appellant. J. F. Cooper, for appellees.

TARLTON, O. J. Appellant brought this suit, in the form of an action of trespass to try title, in the district court of Tarrant county, to recover certain real property, described as a part of block No. 55, in Tucker's addition to the city of Ft. Worth. The defendants, who prevailed in the trial court, are L. B. Gill, W. H. and Sallie Holt, B. L. Spencer, and G. B. Brown. The appellant claims that the property in controversy is a part of block No. 55, in Tucker's addition to the city of Ft. Worth. The appellees claim that it is no part of block No. 55, but that it consists of certain lots lying between block 55 and Jones street, in Tucker's addition. They further claim that, if this property be a portion of block 55, they are nevertheless entitled to it, as bona fide purchasers for value, and without notice.

Conclusions of Fact.

W. B. Tucker and his wife, M. A. Tucker, were formerly the owners of all the property involved, together with other real property, known as "Tucker's Addition to the City of Ft. Worth," and they are the common source of title. June 25, 1881, they conveyed, in

consideration of \$500 cash, by general warranty deed, to the Gulf, Colorado & Santa Fe Railway Company, certain real property, described as "Blocks Nos. 50 and 55, in Tucker's Addition to the City of Fort Worth." This deed was duly filed for record in Tarrant county February 25, 1882. The title of the defendants W. H. Holt and Sallie Holt is as follows: (1) A deed from W. B. Tucker and his wife to Edward Isham, dated October 6, 1881, and acknowledged December 6, 1881. This deed conveys one lot, 51x78 feet, without reference to number or block, but described by metes and bounds, as beginning 50 feet east, 51 south, of the southeast corner of a lot deeded by Tucker and wife to M. S. Coppage. (2) A deed conveying the same property, by Edward Isham and wife, to S. M. Evans, dated April 19, 1882. (3) A deed from S. M. Evans, conveying the same property to W. H. and Sallie Holt, dated January 29, 1883. The title of the appellee Spencer, (in which the appellee W. H. Holt is jointly interested,) is as follows: (1) A deed from W. B. Tucker and his wife to W. D. Davis, dated June 7, 1883, to "lot No. 2, block 58, Tucker's addition, according to the plan of said Tucker's addition, containing 51x78 feet." (2) A deed from W. D. Davis and his wife, conveying to W. H. Holt and B. L. Spencer, October 15, 1883, the same property. The title of the appellee G. B. Brown is as follows: (1) Deed dated May 28, 1883, by Tucker and wife to Milton F. McConnell, conveying lot No. 5, block No. 58, 51x78 feet, in Tucker's addition to the city of Ft. Worth, according to the plan of said addition. (2) A deed from Milton F. McConnell, dated November 25, 1884, and conveying the same property. (3) A deed from S. M. McConnell to G. B. Brown, dated November 28, 1884, conveying the same property. The title of the appellee L. B. Gill is as follows: A deed from Tucker and wife, dated August 25, 1882, conveying lot No. 1, block No. 59, in Tucker's addition. Two witnesses for the plaintiff testify, in effect, that they were representing the company in the year 1881, and negotiated the purchase of block 55, in question; that in buying from W. B. Tucker they used a map known as the "Cetti Map," and including Tucker's addition to the city of Ft. Worth; that they purchased with reference to this map, which was recognized as genuine by W. B. Tucker; that this map showed that block 55, in question, abutted on Jones street, as its west boundary line; and consequently that the lots now claimed by the appellees were a part of block 55. On the other hand, W. B. Tucker testifies that he had no knowledge of such a map as that described by the witnesses for the plaintiff; that he did not sell the property with reference to such a map; that at the time of the sale to the plaintiff no surveys had been made of his land east of Jones street; that in conveying to the plaintiffs he intended to convey a block of land only 200 feet wide;

that, however, at the time he did convey he supposed that block 55, mentioned in the deed to the company, while only 200 feet wide, would extend on the west to Jones street; that after the execution of the deed he caused one Findley to survey this block 55, and adjoining lands, when he discovered that there was a strip of land 78 feet wide intervening between the west boundary line of block 55, as he understood it, and Jones street; that he thereupon caused Findley to divide this strip into lots, which he afterwards conveyed to the defendants. The plat or map thus made by Findley was subsequently, with reference to block 55, and the lots here involved, carried into a map of Tucker's addition, and so into the official map of the city of Ft. Worth made by one King. This Findley map was used by Tucker in selling his property in this addition. It indicates, as does the King map, the strip of land in question, divided into lots, though in neither of these maps is any mention made of a block 58 or 59.

It is undisputed that, when Tucker sold and conveyed to the several defendants, they purchased with reference to the Findley map; that they paid value for their land; that, when they purchased and paid for the lots, they were ignorant of the Cetti map, relied upon by the plaintiff, and that they had never heard of any claim by the plaintiff to the lots in question; that they had attorneys to investigate their title, which was reported to them as being good. It appears, also, that Edward Isham, the remote vendor of the Holts, paid the valuable consideration stated in his deed for the lot which he purchased; and, while there is no direct evidence that he was ignorant of the deed executed to the company, circumstances justify this conclusion, the correctness of which seems, indeed, to be admitted by appellant. At the time of purchase by the several defendants, no map of Tucker's addition was on record. The company, in the summer or fall of 1881, constructed its roadbed across a strip of the land purchased by it from Tucker. The distance from the rear line of the lots in controversy to the center of the roadbed is 182 feet.

Conclusions of Law.

The record presents two issues: (1) Are the lots in controversy included in block 55, as purchased by the company from Tucker? (2) If so, are the defendants and appellees bona fide purchasers? The several assignments of error relied upon are addressed exclusively to the second issue. We have therefore no concern about the former, save in so far as the facts incident thereto may bear upon the proper solution of the latter.

It will be noted that the appellees Holt, with reference to their claim from Edward Isham, occupy an attitude, to some extent, different from that of the remaining defendants, and this for the reason that at the

time of Isham's purchase the deed to the company was not of record. If Isham was an innocent purchaser, the title which he conveyed to the Holts would pass to them unaffected by any notice which they themselves might have had. The title of the second purchaser, with notice, is protected by the good faith of the first purchaser, without notice, 2 Pom. Eq. Jur. § 754. The trial court, accordingly, in a separate clause, instructed the jury, with reference to the defense of the appellees Holt, in the following language: "You are further instructed, if you believe from the evidence that the defendants W. H. Holt and Sallie Holt bought and paid in good faith for the land that Tucker and wife conveyed to Edward Isham, October 6, 1881, without notice that said Tucker and wife had previously conveyed same to plaintiff,—if it was conveyed to plaintiff,—you will find for them as to that lot, unless you believe from the evidence that, when it was conveyed to said Isham, plaintiff had graded the ground, preparatory to the construction of its railway, through said land it had purchased from said Tucker and wife, and further believe from the evidence that block 55 of Tucker's addition, as it was then designated,—if it was then designated,—embraced said land conveyed to said Isham, and that said land, as then defined, with reference to said designation, had been conveyed by said Tucker and wife to said plaintiff. But, in order for the notice afforded by plaintiff's grading said land to prevent said W. H. Holt and Sallie Holt from claiming as innocent purchasers, you must believe that, if said W. H. Holt and Sallie Holt had exercised reasonable diligence, they would have discovered that said land was conveyed by said Tucker and wife to plaintiff prior to said Isham conveyance." The appellant complains of this charge because it "does not define the law as to an innocent purchaser, and is not applicable to the facts in evidence, and also because, in connection with a subsequent clause of the court's charge, it fails to accurately define what would be reasonable diligence on the part of all the defendants." We think that, if the charge was erroneous, it operated to the undue advantage, and not to the prejudice, of appellant, provided the court was correct in assuming, under the evidence, the fact which appellant evidently admits, viz. that Isham had purchased in ignorance of the deed to the company. Such being the case, as he was a purchaser in good faith, without notice, his vendees, W. H. and Sallie Holt, should not have been required by the charge to show that they "bought and paid, in good faith, for the land that Tucker and wife conveyed to Edward Isham," etc. For the reasons already stated, proof of the good faith of their vendors would suffice for their protection.

With reference to the proposition of appellant to the effect that the grading of ap-

pellant's road was sufficient notice to the defendants of the adverse claim of the company, we deem it proper to say, in connection with the foregoing clause of the court's charge, as well as the clause hereinafter set out, that we attach little importance to the fact thus relied upon. We do not think that the construction of the company's roadbed along a line 132 feet distant from the lots in controversy should—here at least—affect the question of notice. If the deed to the company, as recorded, was sufficient to charge the defendants with conclusive notice of appellant's claim, the possession indicated by the roadbed could add no strengthening element thereto. If the deed was not thus sufficient, the adverse possession indicated by the company's track would, on its face, be confined to that amount of land which the company could acquire as a right of way by condemnation proceedings, which would be "reasonably necessary for the convenient use and maintenance of the railway in the customary mode," and which would not, therefore, include the lots in question. *Day v. Railroad Co.*, 41 Ohio St. 392.

With reference to the title of defendants other than W. H. and Sallie Holt claiming under Edward Isham, the court instructed the jury as follows: "You are further instructed that the record of the deed from said Tucker and wife to plaintiff was notice to all persons of plaintiff's title to said land, to the extent that the limits of the said land could, by reasonable diligence, be ascertained. Now, if you believe from the evidence that, when Tucker and wife conveyed block 55 to plaintiff, said block, as then designated, included the land in controversy, and that it was sold to plaintiff with reference thereto, and further believe from the evidence that defendants could, by the use of reasonable diligence, have ascertained that said block, as then defined, comprised the land in dispute,—if such was the fact,—you will find for plaintiff, except as to the southern portion of the land claimed by Brown, in respect to which you will be instructed below, and except as to the Isham land, if you find same for defendants W. H. and Sallie Holt under the above instructions. On the other hand, if you believe from the evidence that, by the exercise of reasonable diligence, defendants could not have learned that the land in controversy was included in said block No. 55, as same was conveyed to plaintiff, if the same was embraced therein, you will find for the defendants. Reasonable diligence is that which a man of ordinary prudence would exercise under the circumstances." The appellant complains of the foregoing instruction, in connection with the refusal of the court to grant the requested instruction, urging the proposition that "as in the claims of all the defendants, except that of Holt, to the first lot, under the Isham deed, the record of appellant's deed

was direct notice, and the court should so have instructed the jury." Such registration, if notice, was constructive notice. Mr. Pomerooy (see 2 Pom. Eq. Jur. §§ 604, 606) treats of constructive notice "as of two classes: (1) That wherein the law conclusively presumes that a person is possessed of information of a certain fact; (2) that wherein the law indulges in a prima facie presumption that a person is so possessed, and casts upon him the burden of rebutting the presumption." In this case the court below seems to have considered the deed from Tucker to the company, as recorded, as coming within the second kind of constructive notice. It held the defendants whose claims originated subsequently to the registration chargeable with notice of the recitals of the registered deed, but allowed them to rebut the inference to be thence drawn by showing that they were unable, by the prosecution of due inquiry, and by the exercise of reasonable diligence, to ascertain that the land in controversy was included in block 55, as it was conveyed to plaintiff. In this, we are not prepared to say that the court erred. The registration of the deed to the company should operate as constructive notice of what appears on the face of the deed, as registered, but of no more than that. *McLouth v. Hurt*, 51 Tex. 115. The deed thus registered did not notify an inspector thereof of the dimensions of block 55. Was it sufficient to affect such an inspector with conclusive notice that this block was 278 feet in width, instead of 200 feet? We think not. The description given in the deed was hence imperfect and uncertain; and, where this is the case, we understand the rule to be that, while the notice effected by the registration is such as to beget the duty of inquiry on the part of a purchaser of property which might be affected by the description given in the deed, yet this inference of notice is rebuttable by proof of the due and diligent pursuit of such inquiry, and of the existence of good faith on the part of the purchaser after the inquiry has been exhausted. Such a rule we understand to be intimated in the case of *Carter v. Hawkins*, 62 Tex. 396. If the purchaser discharge the duty of inquiry until doubt is removed, he will not be deprived of the benefit of the defense of a bona fide purchase. Whether, in the present case, the defendants discharged this duty, was a question of fact submitted to the jury, and in the appellant's assignments of error we find no complaint to the effect that the appellees failed in the exercise of proper diligence in the inquiry suggested by the record. The views here expressed dispose, in effect, of all the assignments of error. While we are free to confess that the question last considered is not without embarrassment, we have nevertheless, with some hesitancy, concluded that the action of the trial court with reference to it was correct. The judgment is therefore affirmed.

GULF, C. & S. F. RY. CO. v. JACOBS et al.
(Court of Civil Appeals of Texas. June 15,
1893.)

**AUTHORITY OF AGENT—CLERK IN RAILROAD
OFFICE.**

In an action against a railroad company for failure to deliver goods, an instruction that defendant was bound by a promise made by a clerk in the office of defendant's auditor that defendant would pay for the goods is erroneous, in the absence of evidence that the clerk had authority to make such promise.

Error from Galveston county court; S. S. Hanscom, Judge.

Action by S. Jacobs, Bernheim & Co. against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiffs, defendant brings error. Reversed.

J. W. Terry, for plaintiff in error.

PLEASANTS, J. The suit was instituted by appellees against appellant to recover the value of a box of clothing, shipped by appellees to J. M. Womack, over defendant's road, on the 23d day of August, 1890, appellant executing on the day last named its bill of lading. The package was consigned to Womack, care of railroad agent at Belden, Tex., and should have reached its destination in from three to five days. The petition alleged that, by reason of the negligence of appellant, the goods did not reach McGregor, the most distant point of transit on its line, until about the 28th day of September; that the goods were again delayed in their transit over the Cotton Belt Railway, and the purchaser, Womack, advised plaintiffs that, on account of the delay, he could not receive the goods, and he was by plaintiffs released from his purchase; that, about the 10th of October, the defendant acknowledged that the goods were lost, and requested plaintiffs to present their bill for payment to the defendant company, and plaintiffs accordingly did on said day present their bill to the defendant for the sum of \$419, and defendant then promised to pay the same between the 10th and 15th of November, 1890. Defendant answered by general denial. Trial by the judge, without a jury, and judgment for the plaintiffs for the price of the goods, to wit, \$419, and interest on that sum added, making the judgment, principal and interest, \$448.90. Motion for new trial being overruled, defendant filed petition in error, and plaintiffs accepted service.

The plaintiffs proved by N. Reddich, who is one of the plaintiffs, that the goods were shipped, as alleged, to Womack, and that they were delayed in transit, and did not reach Belden till the 18th of October, 1890, and that, prior to this date, Womack had been released from his purchase on account of the great delay in the transmission of the goods; and that the defendant company, through W. W. Rhodes, whom witness found in the office of the auditor of the defendant, promised to pay for the goods

within the time alleged in the petition. Rhodes testified that he was the auditor's clerk; that he never promised that the company would pay plaintiffs the value of the goods, but that he requested the plaintiffs to make out their claim showing the value of the goods, that he might forward the same to the Cotton Belt Company, and show them the importance of finding the goods, and forwarding them to their destination; that he had no authority to bind the company to pay for the goods, and that he did not on the 10th day of October, 1890, nor at any other time, promise for the company to pay plaintiffs for the goods; that the goods went astray on the Cotton Belt Railway from some cause, but that they were afterwards recovered, and on the 18th of October, 1890, tendered to the consignee, who refused to accept the same, and plaintiffs were duly notified of the refusal of Womack to receive the goods. Plaintiff Reddich testified that he did not know that the witness Rhodes was not the defendant's auditor; that Rhodes was the only person he saw in the office; and that he promised that the company would pay for the goods. It was admitted by both the plaintiffs and defendant that the goods were finally recovered, and were tendered on the 18th of October, 1890, to the consignee, and that he refused to receive them, and that plaintiffs were notified of the fact, and that the consignee had never received the goods, and that they were still in the custody of the St. Louis, Arkansas & Texas Railway Company.

The appellant has made several assignments of error, but we deem it unnecessary to notice any other than the second, which is: "The court erred in its conclusions of law, as follows: 'The agreement of the company to pay plaintiffs for the goods on the 10th the same sued for, was binding on both parties. Thereafter the goods belonged to the defendant company, and the plaintiffs become entitled to demand payment.'" This conclusion of law is based upon a conclusion of fact, which is without evidence to support it. There is the testimony of one of the plaintiffs that the witness Rhodes did promise that the defendant company would pay for the goods; but where is the evidence that Rhodes, if he made such a promise, the making of which he positively denies, was authorized by the defendant to make the promise for it? The record furnishes no such evidence. We cannot say that the auditor of the defendant company, by virtue of his office, would be authorized to bind the company by an agreement such as that upon which the plaintiff rests his suit; and a fortiori we cannot conclude that such an agreement made by the auditor's clerk would bind the defendant company. For this error the judgment of the lower court is reversed, and the cause remanded for another trial.

INTERNATIONAL & G. N. RY. CO. v.
TURNER et al.

(Court of Civil Appeals of Texas. Nov. 16, 1892.)

DANGEROUS EMPLOYMENT—ASSUMPTION OF RISK—
REBUTTAL—PROMISE OF MASTER.

A yard master, on being complained to by the train master for slowness in making up trains, explained that it could not be done faster with only an engineer on the engine, to which the train master replied that he would see to getting a fireman at once. *Held* that, the yard master not having complained of the danger of working about the trains without a fireman, and the promise not having been made on account of such danger, there was nothing to rebut the yard master's assumption of the risk.

Appeal from district court, Leon county; G. M. Smither, Judge.

Action by Katie Turner and others against the International & Great Northern Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Cate & Teagarden, for appellant. F. M. Etheridge, for appellees.

WILLIAMS, J. This is an action by the widow and children of Lee Turner to recover damages resulting from his death, alleged to have been caused by negligence of defendant, while said Turner was in its service. The negligence charged against the defendant consisted in a failure to furnish a fireman upon a switch engine in the yard at Willis, where Turner was killed, and to keep in proper repair the frog of a switch in which Turner's foot was caught while attempting to uncouple cars. Turner was master of defendant's yard at Willis, and had been for about two years prior to his death. On October 5, 1888, during the night, Turner entered between two cars of a freight train, to uncouple them while they were slowly moving, and, finding difficulty in drawing out the pin, he walked along with the running cars until he reached the switch, when his foot was caught between the two rails, and held fast until he was thrown down and run over. When he realized that his foot was fastened, he gave the alarm, and a servant of the defendant signaled to the engineer to stop. The engineer was at his station on the side of the engine opposite to that on which stood the servant who gave the signal, and did not, therefore, see it. Had there been a fireman on the engine, his station would have been on the right of the engine, from which the signal came; and the plaintiffs' contention is that he would have received the warning, and the train could have been stopped before it passed over Turner's body. Turner knew that there was no fireman upon the engine. It had been operated by an engineer alone during the whole of the time of Turner's service at that place. To meet the objection that he assumed the risk resulting from the absence of a fireman, plaintiffs alleged,

and sought to prove, that shortly before his death he protested against the use of the engine without a fireman, and received from his employer an assurance that one would be supplied in a reasonable time, and a request to continue in the service, and that, upon faith in such assurance and promise, he had continued in the discharge of his duties not longer than was reasonable, at the time he was killed. The only evidence upon this point is in the statement of the witness May, as follows: "I heard Mr. Turner complain to Mr. Mulvey, the train master, about the want of a fireman on said engine. I cannot say the fireman and engineer were under Mr. Mulvey's control or charge. I do not suppose they were. But at the same time we had a channel of business to go through. We had to make an application to Mr. Mulvey, and him to the officer over him. The yard force at Willis was under his (Mulvey's) charge, in his division. As nearly as I recollect, the conversation between Turner and Mulvey with reference to a fireman, was about this: There came up a little dispute about the delay of trains. Mr. Mulvey came up to settle the matter one night during my service, and Mr. Turner explained to Mr. Mulvey that we could not possibly do the work with one man to handle the engine, without any fireman or assistant. Mr. Mulvey says, 'I will see to getting you a fireman at once.'"

The charge of the court submitted to the jury the question whether or not Turner had complained of the want of a fireman, and received a promise that the deficiency would be supplied, and instructed them, if such complaint was made, and such promise given, that Turner had the right to rely on it, and continue in the work for a reasonable time, if he had reasonable expectation that such promise would be carried out, unless the danger of the attempt to do the work was so patent and obvious that a prudent and cautious railroad man would not have attempted it. The general rule is that the servant assumes, not only the ordinary risks of the employment, but also of those super-added by negligent omission of the master to perform a duty to the servant, which are known to the servant. A modification of the rule exists where, upon discovery of defective machinery or appliances, or other dangerous condition arising from an omission of duty on the part of the master, the servant complains to the master, and receives such promises or assurances as to make it reasonable for him to assume the deficiency will be supplied before he is exposed to injury from it. In such a case the presumption of an assumption of the risk arising from a continuance in the service is said to be rebutted. This doctrine is recognized in this state, though its precise limits, and the principle upon which it rests, may not be entirely settled. We do not think the facts of this case make it

applicable here. There was no complaint by Turner of a deficiency in the force of employes, exposing him to danger. There was no promise on the part of the master to remedy any such condition for the protection of the servants. The subject of discussion was delay in moving trains, and the complaint came from the master. The deficiency in the force was referred to as an excuse for that, and what the master said was not an assurance given to the servant to induce him to remain in the service, but was addressed to the advancement of his own business. When the servant knows of defective appliances or dangerous conditions surrounding the service, he has the option of taking upon himself the risks of continuing in the employment, or of quitting. He may relieve himself of the risk, if he brings the facts to the knowledge of the master, and receives such promises or assurances as either to show an express assumption of the risk by the master, or to afford the servant reasonable guaranty that the danger will be removed in time to prevent injury to him. To have either of these effects, it would seem that what has passed between them should appear to have had in view either a transfer of the risk from the servant to the master, or the removal of the dangerous condition as a protection to the servant. In other words, the master should have induced the servant to waive his right to leave the dangerous employment, either by taking upon himself the responsibility for injuries which might result, or by leading the servant to believe that the duty to repair the appliances or supply the deficiency would be performed within reasonable time. The facts here do not show that either of these things was done. Turner neither complained of his own risks, nor asked for protection. He said nothing calling in question the master's duty to himself. While a promise was made to furnish a fireman, it was to be done in order to forward the master's business, and not as a discharge of a duty, or measure of protection to the employes. The master, having made the statement expressly for his own benefit, could change his mind about furnishing the fireman without violating any obligation assumed to Turner. It may be true that the defendant was originally under obligations to furnish a fireman, in order to make the operation of the engine safe. If so, it had never performed it, but, with Turner's knowledge, had disregarded it for at least two years. The risk resulting from the absence of the fireman was the same during the whole of Turner's service, and he had never complained of it. Nothing transpired in his conversation with Mulvey showing that he was induced to continue his work by anything then said. The decision in the case of *Railroad Co. v. Donnelly*, 70 Tex. 371, 8 S. W. Rep. 52, does not, as we understand it, conflict with these views.

The liability in that case is not rested by the decision upon the doctrine under discussion, though it was applied in the lower court, and was referred to in the opinion. The right of Donnelly to recover was held not to be defeated by the fact that he had known the track to be dangerous for the passage of trains, because it was not dangerous to him when passing over it on a hand car. In short, it was held that he was not chargeable with notice of the defect which caused the injury. The charge submitting this phase of the case to the jury was erroneous, and for this the judgment must be reversed, and the cause remanded.

OVERTURF v. STATE.

(Court of Criminal Appeals of Texas. April 20, 1892.)

LARCENY—SUFFICIENCY OF EVIDENCE.

Where, on a trial for larceny of coal, there is no evidence that defendant took the coal from the person alleged to be the owner, but took it from along the right of way of a railroad, which was in the possession of a person other than such alleged owner, a judgment of conviction is not supported by the evidence.

Appeal from Grayson county court; E. P. Gregg, Judge.

Jerry Overturf was convicted of larceny, and appeals. Reversed.

R. H. Harrison, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was tried for and convicted of theft of coal, alleged to be the property of La Bryer. The evidence fails to show that any coal was ever taken by appellant from La Bryer. The only coal taken by appellant was taken from along the right of way of the Missouri, Kansas & Texas Railway Company, and this was not in the possession of La Bryer, but, if in the possession of anyone, it was in the possession of one Kelley, who gave appellant his authority and consent to take same. Because the evidence does not support the conviction, the judgment is reversed, and the cause remanded. Judges all present and concurring.

BAUM et al. v. SAUER et al.

(Supreme Court of Missouri, Division No. 1. July 8, 1893.)

FRAUDULENT CONVEYANCES—SUFFICIENCY OF PROOF.

1. Plaintiffs, judgment creditors of the firm of S. & R., sued to set aside a deed from S. and his wife to her granddaughter, R.'s daughter. S. & R., merchants, had been closed up on attachments in 1882, having bought largely on credit and sold for cash, of which some deal was unaccounted for. The same year these lots had been bought in the name of Mrs. S., and S. & R. had built on them a dwelling, which they occupied with their families. Just before judgment in the attachment suits Mrs. S. and

S. gave a deed of trust on the lots to R.'s sister G., who admitted that she took it to protect the house from the creditors. The dwelling and S. & R.'s storehouse were sold under the judgments, and bid in in G.'s name by one acting under instructions from S., who told him where to get the money. S. had deposited this money himself. Thereafter S. & R. occupied the house without rent, rented out the storehouse, and controlled it. In 1883, G., without actual consideration, conveyed the house to Mrs. S. The deed was recorded in 1887, when G., for like value, released the trust deed. Soon after, the S.'s, without consideration, made the deed in suit. It appeared that since their failure, both S. and R. had done business requiring capital, in other people's names; that all the transactions with G. were arranged by them, G. signing, as she said, without asking questions. *Held*, that a finding for plaintiffs was supported by the evidence.

2. Rev. St. 1889, § 4861, provides that when a deed is lost, or not in the power of the party, a certified copy of the record may be received in evidence. *Held*, that one not a party to the deed, and unable to produce it, may put in evidence such a copy.

Appeal from Hannibal court of common pleas; Thomas H. Bacon, Judge.

Action by Joseph Baum and Joseph Levi, trading as Joseph Baum & Co., and Abram, August, Louis, and Joseph Frank, trading as A. Frank & Son, against Ruth S. Sauer, John A., her husband, and others, to set aside a certain conveyance as in fraud of plaintiffs, judgment creditors of the firm of Sauer & Rueter. Judgment for plaintiffs. Defendants appeal. Affirmed.

This case is connected with and follows *Frank v. Rueter*, (Mo. Sup.) 22 S. W. Rep. 812.

A. M. Hough and J. C. Fisher, for appellants. Ohas. Martin, for respondents.

BRACE, J. The plaintiffs are judgment creditors of Sauer & Rueter, a firm composed of defendants John A. Sauer and Herman H. Rueter. The object of this suit is to set aside certain deeds vesting the legal title to certain lots in the town of Elsberry, in Lincoln county, in defendants Otis N. and Ada A. Baldwin, and to vest the same in the said Sauer & Rueter, and to subject them to sale under plaintiffs' judgment against them, on the ground that such deeds were made for the purpose of defrauding the creditors of the said Sauer & Rueter. The court below found for the plaintiffs, and from its decree granting the prayer of the petition, the defendants appeal.

The defendants are related to each other in the following manner: Ruth S. Sauer and John A. Sauer are husband and wife; Herman H. Rueter is a son-in-law of Ruth S. Sauer; Ada Baldwin and Otis N. Baldwin are husband and wife; Ada Baldwin is a daughter of H. H. Rueter, granddaughter of Ruth S. Sauer, and niece of Mary Gerber; Mary Gerber is a sister of Herman H. Rueter. The defendants Sauer & Rueter were for some years in mercantile business in New Hope, Lincoln county. In 1880 they

removed their business to Elsberry, on the line of the St. Louis, Keokuk & Northwestern Railroad, purchased a lot, built a storehouse thereon, and sold goods until they were closed up by attachment, in January, 1882. In August, 1881, they had on hand goods amounting to \$5,000 at cost price. From that time until after their suspension of business in January, 1882, they purchased goods on credit of various wholesale merchants in St. Louis, Chicago, Quincy, and Cincinnati, amounting to between \$18,000 and \$19,000; and from the time between August and their failure, in January, 1882, sold a great quantity of goods, almost exclusively for cash. During this time they had paid only \$3,000 on their indebtedness. When an inventory was taken of the assets attached it was found that the goods on hand and accounts amounted to only about \$10,500; the accounts being about \$500, and all contracted before they moved to Elsberry. About the 1st of January, 1882, they executed a chattel mortgage on their entire stock to Keeling, Kemper, and Norton to secure debts to Keeling and Kemper of about \$1,000, and Norton's attorney's fee of \$250. Upon the filing of this mortgage most of the creditors attached, on the ground that they had fraudulently conveyed their property. Sauer & Rueter defended none of these attachment suits, but consented that the attachments should be sustained, and judgments were so rendered. In February, 1882, the lots in controversy in this suit were conveyed by McIntosh, Carroll & Roberts to Ruth S. Sauer for the express consideration of \$300. This deed was not filed for record until September 1, 1882. During the spring and summer of 1882, Sauer & Rueter had built upon these lots a dwelling house at a cost of \$1,500 or \$1,600. They made the contract with the workmen, and did a considerable part of the work themselves. After the completion of the dwelling house both families occupied it until they removed to Baxter Springs, Kan., in 1888 or 1889. The term of the circuit court of Lincoln county at which the judgments were rendered in favor of the creditors against Sauer & Rueter was held on the third Monday of September, 1882. On the 13th day of September,—preceding the rendition of these judgments a few days,—Ruth S. Sauer and John A. Sauer executed a deed of trust to the defendant Mary Gerber on these lots for \$1,000, for the purpose, as Mrs. Gerber says in her deposition, "If I didn't take a deed of trust, they [the creditors] take the house away, just like they did the storehouse." In November, 1882, at an adjourned term of the circuit court, this property and the storehouse owned by Sauer & Rueter were sold and bid in by John Singleton, who got his instructions from John A. Sauer as to how he should bid, and where he could get the money to pay for the land. Sauer had previously placed the money in the hands of

William Colbert, and instructed Singleton to bid the property off for Mary Gerber, and go to Colbert and get the money. After the sales, Sauer & Rueter continued to occupy the dwelling house without rent, rented out the storehouse, and had absolute control and management of the same. On August 13, 1883, Mary Gerber and her husband conveyed the property in dispute in this case to Ruth S. Sauer for the consideration expressed of \$150, being the same amount for which the property was bid off by Singleton for her, but in fact without a cent of consideration. This deed was kept off the records until February 16, 1887. Two days after this deed was made, to wit, August 15, 1883, Mary Gerber and her husband conveyed by warranty deed the storehouse property which Singleton had bought for her to Rebecca Rueter, wife of the defendant H. H. Rueter, for an express consideration the same as amount bid by Singleton at sheriff's sale, but in fact without any consideration at all. On the same day of the filing of the warranty deed from Mary Gerber to Ruth S. Sauer, to wit, February 16, 1887, Mary Gerber and husband executed a deed of release of the deed of trust given her by Ruth S. Sauer and John A. Sauer. This release recites the full payment of the \$1,000 by Ruth S. Sauer and John A. Sauer, but in fact no sum was ever paid for said release or on said pretended debt. On May 8, 1887, Ruth S. Sauer and John A. Sauer executed warranty deed to these lots to the defendants Otis and Ada Baldwin, without a cent of consideration being paid, although the deed expresses a consideration of \$1,500. Soon after their failure in 1882, Sauer & Rueter engaged in other business, requiring considerable sums of money, but had their business conducted in the name of some third person. Sauer traded in stock to a considerable extent with R. T. Elsberry and T. S. Elsberry, furnishing all the money, and had the business carried on in the name of the defendant Otis Baldwin. Rueter conducted for several years at Elsberry a boot and shoe store, which was run in the name of Mary Gerber, but which he had absolute control and management of, and which he finally closed out, receiving the entire proceeds, with Mrs. Gerber's consent. All the deeds and other transactions with Mary Gerber were prepared and attended to by Sauer & Rueter; "they had everything fixed up for me;" and "she signed without asking any questions."

For reversal of the judgment of the circuit court it is urged that the court erred in admitting in evidence the certified copy of the deed of trust mentioned in the statement, and that the finding of the trial court is not supported by the evidence. These are the same grounds upon which a reversal was asked in the case of *Frank v. Reuter*, 22 S. W. Rep. 812, in which an opinion was delivered in division No. 2, June 13, 1893,

affirming the judgment of the circuit court,—a case standing on all fours with the case in hand, being in fact a branch of the same transaction, and resting upon substantially the same evidence. There can be little doubt upon the evidence in this case that the lots in question were purchased in the first instance from McIntosh et al. with the money of Sauer & Rueter. In other respects this case presents the same features as the *Frank Case*. We have again gone over the evidence in both cases, and reach the same conclusion as in division No. 2, viz. that there was no error in admitting in evidence the certified copy of the deed of trust; and that there is evidence to support the finding of the chancellor, who was in a better position to judge of the credibility of the witnesses and to weigh the evidence than we are. The judgment is therefore affirmed. All concur.

SULLIVAN v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. June 27, 1893.)

ACCIDENT AT RAILROAD CROSSING—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RATE OF SPEED—REGULATION BY ORDINANCE—INSTRUCTIONS.

1. In an action for the death of plaintiff's mother from injuries received at a railroad crossing in a city which had an ordinance prohibiting the running of trains faster than six miles an hour, the court instructed that it was decedent's duty to look and listen before stepping on the track, but, if the jury found that she saw the train, she had a right to presume, unless she knew to the contrary, that the person in charge of the train would not run faster than six miles an hour, and to act on that presumption. *Held*, that the instruction was proper, as advising the jury what, under the law, were decedent's rights and duties, and that it did not direct them to presume a fact concerning which there was evidence. Barclay and Gantt, JJ., dissenting.

2. An instruction that, though decedent was negligent in stepping on the track, yet if, after such negligence, defendant's employes in charge of the engine discovered, or could have discovered by the use of ordinary care, her condition, and its danger, and could have avoided injuring her by the use of ordinary care, and failed to do so, her negligence was no defense to the action, was proper.

3. An instruction that though decedent was guilty of negligence in stepping on the track, and defendant's employes in charge of the engine, after seeing her danger, could not have avoided injuring her, yet if their inability to avoid the injury was caused by running at an illegal speed, and they could have avoided it if they had been running at a lawful speed, the negligence of decedent was no defense to the action, was erroneous. Barclay and Burgess, JJ., dissenting.

In banc. Appeal from circuit court, Jackson county.

Action by Thomas L. Sullivan against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

The following is the opinion of the court in division No. 1, (BRACE, J.):

"On the 3d of August, 1889, at the crossing of Lydia avenue and Front street, in the city

of Kansas, an old lady, Mrs. Ellen Sullivan, was run over and killed by a train of defendant's freight cars, being propelled by a switch engine along said Front street and over said crossing. In this action, afterwards instituted by the plaintiff, her only minor child, he obtained judgment in the circuit court of Jackson county for \$5,000, under the statute, for her death. The defendant appeals.

"By the ordinance of the city of Kansas, the running of a locomotive and cars within the city limits at a greater rate of speed than six miles an hour is prohibited. The evidence of the plaintiff tended to prove that, when Mrs. Sullivan was struck by defendant's cars, the train was running at the rate of about 20 miles an hour, and that no bell was ringing nor whistle blowing. That it consisted of a switch engine and two box cars in front of it. That Mrs. Sullivan and six or seven other ladies had been visiting a lady residing on the north side of the railroad track and Front street, and near the point where she was killed. That, leaving her house, they approached the crossing, and all started to cross over, four or five of the ladies in advance, followed by a Mrs. McKeever and Mrs. Sullivan, a few steps in their rear, Mrs. McKeever leading and Mrs. Sullivan following. The ladies in advance crossed the track, and, just as Mrs. McKeever stepped upon it, some one exclaimed, 'The switch engine is coming.' Mrs. McKeever answered, 'We will make it,' and stepped across the track. As she was stepping off the track, Mrs. Sullivan looked up and down the track, stepped on it, and, as she did so, either tripped against the rail, or caught her foot in her dress, and fell. She was a large woman. She got partly up, fell again, struggled towards or onto the south rail, and was struck before she could get over it, and died within a minute. That the train ran on, after passing over her, about a block before it stopped. That at the time Mrs. Sullivan stepped on the track the train was distant from the crossing from two to four hundred feet. That the track was straight, and in plain view of the operatives. That such a train, running at the rate of 6 miles an hour, could be stopped in about 10 feet; at 8 miles an hour, in 15 or 16 feet; at 10 miles an hour, in 18 or 20 feet; at 15 miles an hour, in 40 or 50 feet; and at 20 miles an hour, in 150 feet; at 25 miles an hour, in about 225 or 250 feet. The evidence for the defendant tended to prove that the train consisted of a switch engine and four freight cars, two loaded and two empty, the engine in the middle of the train; that it was running from eight to ten miles an hour; that the bell was ringing and the whistle blowing; that the operatives discovered the ladies approaching the track when the train was about a block from the crossing; that they did not check the speed of the train; that four of the ladies crossed

the track; that the deceased came up near the track, stopped, looked in the direction of the coming train, and when it had approached within the distance of six or eight feet, as one witness says, or within the distance of a car length of the crossing, as other witnesses say, she stepped on the track, fell, and was killed; and that nothing could have been done that was not done after she stepped upon the track that could have prevented the train from striking her. The evidence of the defendant further tended to prove that such a train, running at the rate of 6 miles an hour, could not be stopped inside of 35 or 40 feet. At the rate of 8 miles an hour, it would take 55 or 60 feet to stop; at 10 miles an hour, between 70 and 80 feet; at 12 miles an hour, about 100 feet; at 15 miles an hour, about 115 or 120 feet; and at 20 miles an hour about 150 feet.

"1. The errors complained of as ground for reversal are the refusal of the court to direct a verdict for the defendant on the evidence, and the giving of the following instructions for the plaintiff: '(4) You are instructed that while it was the duty of Ellen Sullivan to look and listen before stepping upon the track, yet, if you find from the evidence that she did see the train, then she had the right to presume, unless she knew to the contrary, that the person in charge of said train would run the train at a rate of speed, not exceeding six miles per hour, and to act upon said presumption. (5) Although you may believe from the evidence that Ellen Sullivan was guilty of negligence in stepping upon the track, yet if you further find from the evidence that, after said Ellen Sullivan was guilty of negligence, the agents, servants, and employes of defendant in charge of the locomotive and cars discovered, or could have discovered by the use of ordinary care, her condition, and the danger of the same, if it was dangerous, and could have avoided injuring her by the use of ordinary care, and failed to do so, then such negligence of said Ellen Sullivan is no defense to this action; [and in this regard the court further instructs you that although you believe from the evidence that Ellen Sullivan was guilty of negligence in stepping upon the track, and although you may believe from the evidence that the servants, agents, and employes of defendant in charge of said train, after seeing her on the track, and discovering the danger of her position, if it was dangerous, could not have avoided injuring her by the use of ordinary care, yet if you further find and believe from the evidence that their inability to avoid such injury after discovering her condition was caused by their running at an illegal rate of speed, and if they had then and there been running at a legal rate of speed they could have avoided injuring her, by the use of ordinary care, then such negligence of said Ellen Sullivan is no defense to this action.]' There was no error in the refusal of the court to direct a

verdict for the defendant on the evidence. To have done so would have been to have totally ignored the evidence for the plaintiff. It is clear from the evidence that the defendant's servants were running this train along and across the public streets of the city at a rate of speed in excess of that prescribed by the city ordinances; and there was evidence upon which the jury might well have found that the deceased, in attempting to cross the defendant's track (laid and operated in one of those streets) was in the exercise of ordinary care and prudence. To have declared, as a matter of law, that she was not, in this case, would have been to declare that a citizen lawfully pursuing his way across a public highway, who comes to a railroad track laid along it, and, before he enters upon it, looks (as a careful and prudent person should do) up and down the track for danger, and sees an approaching train distant two to four hundred feet, (as plaintiff's evidence tended to show,) whose rate of speed he cannot determine, for the reason that it is coming directly towards him, but who, relying upon the assurance that the law gives him that the train is being run at no greater rate of speed than six miles an hour, then undertakes to make the next three or four steps in his pathway that will safely land him across the track, is, by so doing, guilty of negligence, and forfeits all right to protection against the negligence of the railroad company; it is against reason and the law. *Eswin v. Railway Co.*, 96 Mo. 290, 9 S. W. Rep. 577; *Kelley v. Railway Co.*, 101 Mo. 67, 13 S. W. Rep. 806. A reasonably prudent person might well suppose that he could safely cross the track under such circumstances. It was for the jury to determine, under all the circumstances, as detailed in the evidence, whether the deceased acted as a reasonably prudent person would have acted in her situation in attempting to do so. The shouting upon which so much stress is laid in the argument of counsel upon this point, except the exclamation that 'the switch engine is coming,' which she evidently heard and acted upon, was after the unfortunate woman had stepped upon the track and fallen, or was about to fall, and when monitions could no longer do her any good in the struggle she was making to extricate herself from the terrible situation in which she was. Even if the jury had found as a matter of fact that the deceased, under the circumstances, was guilty of negligence in entering upon the track, it did not follow that she could not recover. We do not know, and it is not for us to determine, neither was it for the judge who tried the case below to determine, how far this train was from the crossing, or at what rate of speed it was running at the time deceased stepped upon the track. There is no question in this case about negligence of the defendant's servants in failing to discover the perilous situation of the de-

ceased in time to prevent the accident. They saw her from the beginning to the end of the tragedy, and there is evidence upon which the jury might have found that if the defendant's servants had been at their posts, and on the watch for persons likely to be on the track at the crossing of two public streets in a populous city, as this was, and as was their duty, they could, by the prompt use of the proper means, have stopped or checked the train so as to have avoided the accident; for it is to be remembered that the evidence of the distance of the train from her at the time the deceased stepped on the track ranged all the way from six to four or five hundred feet, and the speed of the train all the way from six to twenty miles an hour, and, whichever standard furnished by the evidence be adopted to measure the distance within which the train could have been stopped, it is manifest that there was evidence upon which the jury could have found that the train was at such a distance, and going at such a rate of speed, when the deceased stepped on the track, that it might have been stopped or checked in time to have prevented the accident.

"2. The court committed no error in giving the fourth instruction. The criticism upon it is not well founded, and the authorities cited in support thereof are not in point. The jury, in this instruction, are not directed to presume a fact concerning which there is evidence, but are simply told, on the one hand, what, under the law, was the duty of the deceased, and, on the other, what was her right. Every one is presumed to know the law, and their rights and duties under the law, and to act in accordance with them, and it is the peculiar province of the court to advise the jury what those rights and duties are in a given case.

"3. Instruction No. 5 given by the court for the plaintiff is unobjectionable down to the qualifying clause contained within brackets. With this clause omitted, the instruction is in harmony with instruction No. 4 given for defendant, and with every ruling of this court upon the subject since the case of *Harlan v. Railway Co.*, 65 Mo. 22, in which, it may be said, the doctrine recognized and applied in earlier cases was distinctly formulated, by which a plaintiff was permitted to recover, notwithstanding the fact that his own negligence contributed to produce the injury of which he complains. This doctrine is so well understood in this state, and the cases are so numerous in which it has been reiterated, as to be unnecessary of citation or review. In the ruling of no one of them will be found support for the qualifying clause introduced into this instruction. After going through them all, the only color of support for it that we can find among our authorities is a redundant remark of the learned judge made *arguendo* in *Maier v. Railroad Co.*, 64 Mo. 276, and paraphrased in *Dunkman v. Railway Co.*, 95 Mo. 232,

4 S. W. Rep. 870, in both of which cases the remark was foreign to the ruling made, purely obiter, and in which at the same time the well-recognized rule on the subject was stated. The first time the doctrine contained in this qualifying clause came before this court in such a tangible shape as to warrant a ruling upon it was in the case of *Guenther v. Railway Co.*, 95 Mo. 286, 8 S. W. Rep. 371, in which it was disapproved. The next was in *Kelny v. Railway Co.*, 101 Mo. 67, 13 S. W. Rep. 806, and the last in *Dlauhl v. Railway Co.*, 105 Mo. 645, 16 S. W. Rep. 281, in both of which it was also disapproved. The reasoning in these cases shows that to adopt it would be, in this class of cases, to practically abrogate the doctrine of contributory negligence; for, while the principle which lay at the root of the accepted doctrine was that, although the plaintiff was guilty of negligence, contributing with that of the defendant to the production of the injury, yet if the defendant could, by the exercise of due care, after the situation became or might have become apparent to him, have prevented the injury, he was held responsible. The principle of this new doctrine is that he is to be responsible, whether he could have prevented the injury or not, after the situation became or might have become apparent to him. In applying this new doctrine to the facts in this case, the jury may well have concluded from this instruction that, although they might find that the deceased was guilty of gross negligence in entering upon the track in front of the approaching train, yet, if they further found that the train was being run at a greater rate of speed than six miles an hour, they ought to find for the plaintiff, though the death of his mother was the result of these two concurring acts of negligence, provided they further found the fact to be that she went upon the track at any distance from the train within which it could have been stopped before it struck her, if the train had been going at no greater rate of speed than six miles an hour. Thus, the power to prevent the injury is practically eliminated by the instruction from the law of contributory negligence as a basis of recovery; and the right to recover is predicated upon concurrent negligence of both parties, and the finding of a fact tending only to prove that the deceased was not negligent. It is to be regretted that in so close a case as this, otherwise so well tried, an error such as this should have been committed; but, the error being of such a character as that it may have affected the result, the judgment must be reversed, and the cause remanded for new trial. All concur, except *BARCLAY, J.*, who dissents."

Elijah Robinson, for appellant. Teasdale, Ingraham & Cowherd, for respondent.

BRACE, J. On rehearing by the court in banc, all the judges agree in reversing

and remanding the cause for new trial; *SHERWOOD* and *MACFARLANE, JJ.*, concurring in the foregoing opinion; *GANTT, J.*, also, except in paragraph 4; *BLACK, C. J.*, and *BURGESS* and *BARCLAY, JJ.*, expressing their views in separate opinions.

MACFARLANE, J. In concurring in the foregoing opinion of Judge *BRACE*, I do not wish to be understood as holding, nor do I think the opinion holds, any view contrary to what I conceive to be the settled doctrine in this state: First. That running an engine within an incorporated town or city at a rate of speed prohibited by a valid ordinance is of itself negligence, and, if one is injured on a public crossing by an engine being run in violation of such ordinance, the corporation is prima facie liable for all damage resulting therefrom. Second. That a traveler has the right to assume, not being advised to the contrary, that a railroad company is obeying the law; and an attempt to cross a track in a city in front of an approaching engine running in violation of such an ordinance, if, by the exercise of due care, such crossing could have been safely made but for the excessive rate of speed, will not be such negligence as will bar a recovery, though the engine could not have been stopped or checked in time to have avoided the collision after the danger became apparent.

BURGESS, J. I concur in the opinion of the court, with the exception of what is said therein in regard to instruction numbered 5, given on the part of plaintiff, and the instructions given on behalf of defendant to the effect that, although defendant was guilty of negligence per se in running its train which caused the accident at a rate of speed prohibited by city ordinance, yet if, after those in charge of the train exercised reasonable care and diligence to avoid the collision after they saw the perilous position of deceased, the defendant is not liable. But for the ordinance limiting the rate of speed in the city, the rule thus announced in the opinion would be the correct one, but that it is not with the ordinance in force is, I contend, well-settled law. The rule is well established in this state that moving a train in a city in excess of the rate of speed fixed by ordinance is negligence per se. *Schlereth v. Railway Co.*, 96 Mo. 509, 10 S. W. Rep. 66; *Flynn v. Railroad Co.*, 78 Mo. 201; *Holmes v. Railroad Co.*, 69 Mo. 536; *Ellott v. Railroad Co.*, 67 Mo. 272; *Kelm v. Transit Co.*, 90 Mo. 314, 2 S. W. Rep. 427; *Eswin v. Railway Co.*, 96 Mo. 290, 9 S. W. Rep. 577. The case of *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369, seems to be one of the leading cases in this country on the subject in hand, and in this case it is held that, "if a railroad company which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate

limits, for the purpose of protecting against injury to persons, fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company, and recover, if he establishes that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence." *Railroad Co. v. Becker*, 84 Ill. 483. So it was held in the case of *Railroad Co. v. Stebbing*, 19 Amer. & Eng. R. Cas. 36, which was an action for personal injuries sustained by reason of the violation by defendant of an ordinance limiting the rate of speed at not exceeding 10 miles per hour, that it must appear that the negligent breach of the duty imposed by the ordinance was the direct and proximate cause of the injury complained of, and that such injury would not have occurred but for the violation of that duty. See, also, *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Railroad Co. v. Notzki*, 66 Ill. 455. In the case of *Correll v. Railroad Co.*, 38 Iowa, 120, the defendant requested the court to instruct the jury as follows: "(2) That the defendant's train was run within the city limits of the city of Vinton at a rate of speed prohibited by the ordinance of said city is not evidence of negligence in fact, and of itself, and involves no consequences except liability for the penalty to the city. (3) It is not sufficient to charge the defendant to simply show that the train was run at a rate of speed greater than that prescribed by ordinance. The plaintiff must show that, after discovering the peril of the animals, the engineer could have so conducted as to have prevented the injury, and for this purpose the burden of proof is on the plaintiff." The court refused to give these instructions, and gave the following: "As to the alleged negligence in running the train, it is conceded that the accident occurred within the corporate limits of the city of Vinton, and that, at the time of the accident, an ordinance of the city prohibited trains from running at a greater rate of speed than six miles an hour within the city limits. If you find from the evidence that the defendant's servants or employees were running the train at a much greater rate of speed than six miles an hour, and that, while so running, the train ran against the horse and mule in question, this is evidence of negligence, and the defendant is liable, unless excused by reason of the alleged negligence of the plaintiff's servant. If the rate of speed was not to exceed six miles per hour, and the employees on the train, when the horses and mules came upon the track, used all proper means to avoid the collision, the defendant is not liable." There was judgment for plaintiff in the court below, and, on appeal, the judgment was affirmed, and the action of the trial court, after a review of the authorities at consid-

erable length, approved. See, also, *Railroad Co. v. Dunn*, 78 Ill. 197. In the case of *Railway Co. v. McDonnell*, 43 Md. 534, where the plaintiff was injured by the defendant's street car, which at the time was running at a greater rate of speed than was allowable by city ordinance, it was held that the defendant was guilty of negligence if the accident could have been avoided had the car not been running at a prohibited rate of speed. *Railroad Co. v. McGowan*, 62 Miss. 682; *Haas v. Railroad Co.*, 41 Wis. 49; *Pierce, R. R. 534*; *Siemens v. Eisen*, 54 Cal. 418; *Johnson v. Railroad Co.*, 31 Minn. 283, 17 N. W. Rep. 622; *Bott v. Pratt*, 38 Minn. 323, 23 N. W. Rep. 237; *Devlin v. Gallagher*, 6 Daly, 494. The opinion of the court in this case is not in harmony with the case of *Brannock v. Elmore*, 21 S. W. Rep. 451, (decided by division No. 1 of this court,) wherein it is held that it is actionable negligence to violate an ordinance which forbids blasting without first covering the rock with timber.

Plaintiff's fifth instruction is wrong, for the reason that it commingles the moving of the train in violation of the ordinance, which is negligence per se, and which is alleged to have been one of the direct causes of the injury, with the failure of defendant's servants in charge of the train to check it up after they discovered the perilous position of the deceased, by the exercise of ordinary care and diligence, in time to have avoided the accident, but for the fact of the excessive rate of speed at which the train was running. This rule only applies to cases where the movement of trains is not in violation of some law or ordinance. Suppose Mrs. Sullivan had been an infant child, so young as, under the law, to be incapable of contributory negligence, would it be contended that defendant, under the facts in this case, would not be liable? If so liable, why not liable in the case in hand, unless Mrs. Sullivan was guilty of negligence contributing directly to the accident? Whether she was or was not guilty of such negligence was properly and fairly submitted to the jury. Or if A., in riding or driving along a street in a city at a rate of speed prohibited by ordinance, should, without fault or negligence on the part of B., run over him and injure him, could A. claim immunity from liability for the injury if it would not have occurred but for the fact that he was in violation of the ordinance, on the ground that he did everything that he could to avoid the accident after he discovered the perilous position of B.? No lawyer would hesitate to answer that he could not. Notwithstanding the defendant was guilty of negligence per se, and that Mrs. Sullivan had the right to assume that the train was not being run at a rate of speed prohibited by the city ordinance, yet, if she knew that it was so running, and undertook to cross the track in

front of it, when a reasonably prudent and cautious person similarly situated would not have done so, then she was guilty of such negligence as to bar her recovery. All persons are presumed to know the law, and citizens of cities and towns are presumed to be familiar with their city or town ordinances. Black, J., in speaking for the court in the case of *Rine v. Railroad Co.*, 88 Mo. 392, says "that there is no analogy between the case at bar, as respects the question under consideration, and those cases where the servants fail to observe some municipal or statutory regulation, and the injury is attributed in whole or in part to that, or where they are not found at their proper places when passing a public crossing, or going through a populous city or district, or fail to heed due warning of danger." Mrs. Sullivan was not guilty of the violation of any law or ordinance in attempting to cross the railroad track, while the defendant was in running its train at a rate of speed exceeding six miles per hour. If, then, defendant's servants in charge of the train were running it at an excessive rate of speed, and that was the direct cause of the injury, and, if they had not been so running, the injury would not have occurred, then defendant is liable, unless deceased was guilty of contributory negligence. Mr. Thompson, in his work on Negligence, (page 1232, § 5,) says: "If a duty is enjoined upon A. by express statute, and B. is, without fault on his part, aggrieved by reason of the fact that A. has failed to perform it, B. makes out a case for damages against A. by merely showing that A.'s neglect to comply with the statute was a proximate cause of the injury which he sustained." *Worster v. Proprietors, etc.*, 16 Pick. 541. "The violation of any statutory or valid municipal regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of a statute or an ordinance regulating the speed of vehicles, horses, or trains * * * may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby." *Shear. & R. Neg.* § 13. And, although one who knows that a train of cars is moving at a greater rate of speed than is lawful is not authorized to go upon the track or attempt to cross merely because he might do so with entire safety if the cars were moving at only a lawful speed, still he has a right to assume that the train is moving at a lawful rate until the contrary is made apparent.

It must be presumed that plaintiff knew the law, and, knowing it, she might properly assume that defendant's servants and employees were acting in conformity with its provisions. *Langhoff v. Railway Co.*, 19

Wis. 489; *Gratlot v. Railway Co.*, (Mo. Sup.) 21 S. W. Rep. 1008. Plaintiff's fourth instruction was authorized by these adjudications, and the court committed no error in giving it. This position is not in conflict with the decision of this court in the case of *Lynch v. Railway Co.*, 20 S. W. Rep. 642, so much relied on by defendant in its motion for rehearing, as the failure to have bells on the mules in that case had no more to do with the accident than the failure to ring the bell or sound the whistle had in this; and for that reason the instruction given in that case was not warranted by the facts in the case, and should not have been given. The same may be said in regard to the other authorities cited by defendant on this proposition. "All the authorities agree that the plaintiff cannot recover upon the mere proof of his injury and of the defendant's breach of a statute or ordinance of the kind mentioned." Section 13, *Shear. & R. Neg.* "The plaintiff must prove that the breach of regulations was the proximate cause of his damage; and therefore noncompliance with a statutory requirement, however stringent, affords no ground of action if compliance therewith would not have prevented the injury." *Id.* § 27.

Had the train been running at a rate of speed not prohibited by the city ordinance, there would have been no negligence on the part of those in charge thereof; and the company would not have been liable for the injury unless, after having discovered the deceased in her perilous position, they failed to exercise proper care and diligence in order to have averted the calamity; and deceased was not guilty of such negligence as to bar a recovery in attempting to cross the track in front of the train under such circumstances. Running the train at a rate of speed in excess of that fixed by ordinance of the city was a positive act of negligence. If, then, the rate of speed of the train was negligence per se, and was the cause of the accident, why inject into the instruction a condition or qualifying clause which abrogates or ignores the legal force and effect of the ordinance? The ordinance was intended for the protection of life and property, and those who cause injury by violating its provisions cannot claim immunity therefrom by showing, however rapidly the train may have been running, that, after the danger was discovered, it did all it could to check the train and to avoid the injury. To so hold would be offering reward for violations of the ordinance; as, the greater the speed, the less the liability. If this be not the law, ordinances of cities regulating the speed of trains are of no consequence. In the country, or localities that are sparsely inhabited, the speed of railroad trains is not limited, and in such case the company is not liable for injuries unless they fail to exercise ordinary care and diligence to prevent them after those in charge of the train become aware of

the danger. In the case of *Zimmerman v. Railroad Co.*, 71 Mo. 491, there was no question as to the violation of a city ordinance in the movement of defendant's train, but the case was bottomed upon failure to ring the bell or sound the whistle; so was the case of *Moody v. Railroad Co.*, 68 Mo. 470; nor was there in the cases of *Purl v. Railway Co.*, 72 Mo. 168; *Turner v. Railroad Co.*, 74 Mo. 602; *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. Rep. 909. The principle announced in these cases we think correct, but they are not authority on the question now under consideration, for the reason that the failure to comply with the statutory provisions in this regard has nothing to do with the movement of trains. In the case of *Bowman v. Railroad Co.*, 85 Mo. 533, the following instruction was approved by this court: "The court instructs the jury that if they believe from the evidence that there was an ordinance in force in the city of Louisiana prohibiting railroads from running their engines and trains of cars at a greater rate of speed than six miles per hour in the city limits, and that defendant, by the agents and employes, did, on the — day of June, 1882, negligently run its engine and cars on the hog of plaintiff by running said engine and cars at a greater rate of speed than six miles per hour, and that, by reason of said running, said hog was killed, then defendant is liable, and the verdict should be for plaintiff." The court, in speaking of this instruction, says: "The first instruction given on the part of plaintiff is in accord with the doctrine laid down in *Karle v. Railroad Co.*, 55 Mo. 476, and in *Kelley v. Railroad Co.*, 75 Mo. 138, where it is held that where a municipality, having the power, passes an ordinance fixing the rate of speed beyond which locomotives shall not run within the corporate limits, a violation of such ordinance is negligence per se; and when the evidence shows, further, that an injury occurs, which is caused by the prohibited rate of speed, then the railroad company is liable. But, unless it is shown that the injury was caused by the speed exceeding that prohibited by the ordinance, there is no liability. The first instruction squarely presented these questions, and was not objectionable." In the case of *Kelley v. Railroad Co.*, supra, Henry, J., in delivering the opinion of the court, says: "Defendant complains of the first instruction the court gave for plaintiff, which declared 'that it was negligence for defendant to run its locomotive engine in the city of Kansas at a rate of speed exceeding six miles per hour.' Abstractly this was correct. There was an ordinance of the city, which it was authorized to pass, prohibiting a greater rate of speed; but, unless there was evidence to connect with the accident the violation of the ordinance as a cause, it was no ground for recovery." In the case of *Bergman v. Railway Co.*, 88 Mo. 678, 1 S. W. Rep. 384, it was held by this court that,

notwithstanding the negligence of plaintiff, the company was liable for the death caused by backing its train if it could have avoided the accident by having observed the provisions of an ordinance of the city in which the accident occurred. See, also, *Kelly v. Transit Co.*, 95 Mo. 279, 8 S. W. Rep. 420. When defendant was running its train at an unlawful rate of speed, it was not in the exercise of ordinary care. The case should be reversed and remanded, to be tried on the theory of negligence per se on the part of defendant, if contributing directly to the injury, and whether or not there was contributory negligence on the part of the deceased.

BLACK, C. J., (concurring.) 1. It is the duty of persons operating a train of cars along or across a highway to use ordinary care to avoid injuring persons traveling thereon, and this duty requires such operatives to be vigilant and watchful, whether there is or is not an ordinance or law regulating the rate of speed. A negligent failure to perform this duty, causing injury to another, is actionable.

2. The running of cars at a rate of speed prohibited by a municipal ordinance is negligence per se. The defendant is liable for injuries caused by running its cars at a prohibited rate of speed, though the operatives did all in their power to avoid the injury after the peril of the injured party was discovered by them; for inability to stop the train in time to avoid the injury is no excuse if the inability to stop in time to avert the calamity was due to the prohibited rate of speed at which the train was running. In other words, the defendant is liable if the accident could have been avoided by the use of ordinary care had the cars been running at a rate of speed not prohibited by ordinance.

3. The foregoing propositions relate to the negligence of the defendant. The following rules relate to contributory negligence: There can be no recovery where the injured party and the defendant are both at fault, and the negligence of each contributed proximately and directly to the injury; but where the negligence of the defendant is the proximate cause of the injury, while the negligence of the injured party is only a remote cause or a mere condition, the plaintiff may recover. Such negligence of the injured person is no defense. Again: "The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard to use ordinary care for the purpose of avoiding such injury." *Shear. & R. Neg.* (4th Ed.) § 90.

4. The court, at the request of the defendant, told the jury that if the deceased was negligent at the time and place she

was killed, and that such negligence directly contributed to her death, then the plaintiff could not recover, although the defendant was also negligent. The same principle is recognized in the first instruction given at the request of the plaintiff. It follows from the principles of law before stated that these instructions were proper. The difficulty in the case arises out of the fifth instruction, given at the request of the plaintiff, which contains these propositions: First, though the deceased was guilty of negligence in stepping upon the track, yet if thereafter the servants in charge of the train discovered, or by the exercise of ordinary care could have discovered, her peril, and, by the use of ordinary care, could have avoided the injury, then such negligence on her part constitutes no defense; second, if the inability of the persons in charge of the train to stop it in time to avoid the injury, after they saw the deceased in a dangerous position, was due to the fact that they were running the train at a prohibited rate of speed, then the negligence of the deceased in stepping upon the track in front of the train is no defense. It was held in *Scoville v. Railroad Co.*, 81 Mo. 434, citing prior cases in this court, that, to make the defendant liable where both parties were negligent, the negligence of the defendant must occur after the defendant knew, or by the exercise of ordinary care might have known, of the danger of the deceased; and it was said in *Hilz v. Railway Co.*, 101 Mo. 36, 13 S. W. Rep. 946: "If the failure to so discover him was the result of the omission of that measure of duty which the law requires, in view of the locality, circumstances, and dangers to be anticipated, and the due observance thereof would have enabled the persons in control of dangerous agencies of this sort to have avoided the injury by the use of reasonable care, then, and in such case, such omission and want of reasonable care are, under the law, held the proximate cause of the injury, and liability for the resulting damage may then exist, notwithstanding the negligence of the person injured." It was certainly the duty of the defendant here to obey the ordinance regulating the rate of speed. The principle of these cases applied to this one is this: If after the defendant knew, or by obeying the command of the ordinance regulating the rate of speed might have known, of the danger of the deceased in time to have avoided the injury, then the defendant is liable, notwithstanding the negligence of the deceased. It seems to me the instruction, in both of its branches, conforms to the rule stated in the above cases, as well as that stated in *Shearman & Redfield*. The second branch of the instruction is but a specific application of the "might have seen" doctrine set out in the first. While the instruction states facts amounting to negligence on the part of

the defendant, which was an immediate and proximate cause of the injury, and while it is unobjectionable so far as it defines negligence of the defendant, and while it would be a correct statement of the law in some cases, still I think it is inapplicable to the case in hand. It was designed to and does take the question of contributory negligence away from the jury. It is a conceded fact that the deceased actually saw the approaching cars just before she stepped upon the track. She voluntarily and knowingly placed herself in this position. It was a position of obvious and manifest danger, unless the cars were so far from her that she had time to cross the track in safety had the train been running at a lawful rate of speed. In view of the fact that the deceased knowingly placed herself on the track in front of an approaching train, I think the question of contributory negligence should have been left to the jury to be determined in view of all the circumstances. To sustain the instruction, we must pronounce the conclusion from the facts therein recited that the injury was willfully inflicted by the servants of the defendant, or that the negligence of the deceased was a mere remote contributing cause of the injury. If all the facts stated in the instruction be found for the plaintiff, it would not necessarily follow that the injury was willfully inflicted; nor do I see how it can be said, as a conclusion of law from the facts recited in the instruction, that her negligence was remote in the chain of causation, when we attach to those facts the further conceded fact that she knowingly stepped upon the track in front of a train which she knew was approaching her. Surely, she ought to be required to take that care of herself which others are required to take of her. The circumstances of this case are such that, in my opinion, the questions whether deceased was negligent, and whether her negligence was an immediate and proximate contributing cause, should be submitted to the jury, on all the circumstances of the case. The questions are: Did she act as a prudent person would have acted under the same circumstances? And did her want of such care contribute directly and proximately to the injury? I regard the case of *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, as an authority for, not against, the proposition that the question of contributory negligence here is one for the jury to determine, on all, not a part, of the circumstances in evidence. To avoid any misunderstanding, I repeat there is no objection to this fifth instruction, given at the request of the plaintiff, so far as it defines negligence on the part of the defendant. The error in it is that it cuts out the defense of contributory negligence,—a defense which, in my opinion, should, under the facts of this case, have been submitted to the jury.

for them to determine upon all the evidence. The court, I agree, did not err in giving the plaintiff's fourth instruction.

BARCLAY, J. Finding myself unable to agree to some of the propositions asserted in the opinion of my learned Brother BRACE, it seems appropriate to indicate distinctly the points of difference.

1. What force should be given to reasonable municipal regulations of the speed of railway trains, and to similar local enactments for the protection of life and property, is the question of first consideration. Its importance is obvious. The facts of the case have been already stated, and need not be repeated. The judgment against the railway company is to be set aside because the circuit judge gave the instruction numbered 5, quoted. It deals with the liability of defendant on the assumption that plaintiff was negligent in stepping on the track before she fell. The majority of my brethren concede that the first half of the instruction is entirely correct. That concession is satisfactory as far as it goes. The doctrine it recognizes was announced in Missouri more than 30 years ago, following the leading English case of *Davies v. Mann*, (1842,) 10 Mees. & W. 546. It has since been often applied, though there are, nevertheless, instances in the reports (some of which are referred to, with approval, in the leading opinion here) in which it has been wholly ignored. That doctrine bears so directly on the merits of this case that its full meaning should be appreciated. It has been formulated by the highest court in England thus: "The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident; but there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him, [the defendant.]" *Radley v. Railway Co.*, (1876,) L. R. 1 App. Cas. 759. The supreme court of the United States in recent cases has approved and followed the same rule. *Coasting Co. v. Tolson*, (1891,) 139 U. S. 551, 11 Sup. Ct. Rep. 653; *Railway Co. v. Ives*, (1892,) 144 U. S. 408, 12 Sup. Ct. Rep. 679. It is universally recognized wherever the principles of the modern common law prevail, though it is not necessary here to mention more than a few more precedents applying it, outside of this state. *Scott v. Railway Co.*, (1861,) 11 Ir. Com. L. 377; *Silliman v. Lewis*, (1872,) 49 N. Y. 379; *Reis v. Wendel*, (1884,) 5 Hawaii, 140; *Beck-*

ett v. Railway Co., (1885,) 8 Ont. 601; *Pierce v. Steamship Co.*, (1891,) 153 Mass. 87, 26 N. H. Rep. 415; *Valin v. Railroad Co.*, (1892,) 82 Wis. 1, 51 N. W. Rep. 1084. It is a serious error to suppose that the proper application of that rule would "practically abrogate the doctrine of contributory negligence." As was pointed out with great clearness by Judge Scott in *Adams v. Ferry Co.*, (1858,) 27 Mo. 95, the negligence of plaintiff which will defeat his recovery must be such as "actively" (or, as some other judges say, "directly") contributes to the injury "at the time of its commission;" and, "where there is a mere passive fault or negligence on the part of the plaintiff, the defendant is bound to the observance of ordinary care and prudence in order to avoid doing him a wrong." This distinction has been well expressed in a distant quarter of the globe by Sir George Innes, in *Brown v. Commissioners*, (1887,) 9 New South Wales, 92, thus: "The two rules * * * perhaps may appear to conflict, but are really not in any way inconsistent when it is borne in mind that the negligence on the part of the plaintiff which is to preclude him from recovering must be negligence immediately and proximately conducing to the injury." So that the negligence of the injured party is a defense, in a case like this, only when it enters into the result as a direct or efficient cause thereof; but where that negligence distinctly precedes the final act which produces the injury, and that act might have been avoided by defendant's exercise of reasonable care, the prior negligence is not to be regarded, juridically, as the proximate or direct cause of the damage. *Fitch v. Railroad Co.*, (1870,) 45 Mo. 322; *Brown v. Railroad Co.*, (1872,) 50 Mo. 461; *Werner v. Railway Co.*, (1884,) 81 Mo. 388. This rule does not nullify the other proposition, that, where negligence of the injured party directly contributes to the result, there can be no recovery, under the principles of the common law.

Sometimes it is a question of fact whether the negligence, just mentioned, directly contributed to the injury, or whether it was so remote as to be a mere condition, and not a proximate cause. *Meyer v. Railroad Co.*, (1867,) 40 Mo. 151; *Morrissey v. Ferry Co.*, (1869,) 43 Mo. 380; *Karle v. Railroad Co.*, (1874,) 55 Mo. 476. While, on the other hand, the admitted facts may at times tend so plainly to an inference of negligence, directly contributing to the result, as to exclude any other reasonable conclusion; and in such case the court may so declare by virtue of its right to determine the evidential force of facts submitted for its action. That these principles are frequently difficult of practical application goes without saying; but that furnishes no sufficient reason to discard the valuable rule of *Davies v. Mann*, 10 Mees. & W. 546, (of which *Adams v. Ferry Co.*, 27 Mo. 95, is the counterpart in Missouri.)

in order to save the doctrine of contributory negligence from its supposed peril. Each has its proper, useful, and just place in our jurisprudence; and the efforts of those who strive to apply the law with a due regard to its vital principles will, no doubt, in time, secure a more general understanding of the proper part that each of those rules should play in the administration of justice. Some of my associates (acknowledging in a measure the force of the doctrine of *Davies v. Mann*) admit, in the leading opinion, that the circumstances of the present case are such that, notwithstanding *Mrs. Sullivan* may have been negligent in going on the track, yet defendant would be liable if it failed to exercise ordinary care to discover and to avert her peril when there, as stated in the first part of instruction 5. This rule is conceded to be established law. Why? Because the principles of general jurisprudence, deduced by the judges from the precepts of the common law, are held to impose on defendant a duty to use reasonable care to avoid the consequences of *Mrs. Sullivan's* prior negligence. Now, just at this point, my view of the case, with due deference to the judgment of my associates, differs from that expressed in the opinion of my learned Brother BRACE. If, in such circumstances, defendant is liable for negligence resulting from the breach of a duty imposed upon it by the general principles of law, (as construed by the courts,) why should not defendant be held liable, on the same facts, for breach of a duty imposed upon it by positive law, namely, the ordinance regulating the speed of trains in Kansas City? It has heretofore been often held in this state that the failure to observe such municipal regulations is of itself negligence, (*Liddy v. Railroad Co.*, [1867,] 40 Mo. 506; *Dahlstrom v. Railway Co.*, [1892,] 108 Mo. 525, 18 S. W. Rep. 919;) yet in the leading opinion now delivered the position is taken that, for negligence of that kind, defendant is not liable, if prior negligence of *Mrs. Sullivan* existed, though the negligence of the latter might be sufficiently remote to warrant a recovery if defendant had been guilty of negligence of a different sort, namely, failing to observe the duty of using reasonable care to discover her peril and avert it. This distinction between different sorts of negligent acts of the defendant seems to be entirely artificial, and untenable on principle. Worse than that, its application has the effect to excuse the defendant from performing one duty (said to rest upon it by reason of common-law principles) because of its failure to observe another duty enjoined on it by the ordinance. These ordinances contemplate that persons are likely to be upon the public streets where defendant has its tracks, and their design is to protect the lives, limbs, and property of citizens lawfully using the highway, concurrently with the railway company. If a

train is moving slowly, that care which its managers are bound to use to avoid running people down will be far more effective than if the train is going at a great speed. It appears in evidence that, if the train had been running at the ordinance rate, it could have been stopped within about 10 feet; but in point of fact it was stopped "about a block" after passing the place of accident. All the evidence establishes that it was running at a higher rate of speed than the ordinance permitted. To hold that defendant was bound only by the duty to use ordinary care to discover and avert injury to *Mrs. Sullivan*, however fast the speed of the train might be, is, in my opinion, to take the life out of the ordinance, and to put a premium on its violation. Such a ruling practically gives defendant a great advantage from its own wrong, and seems to me to be out of harmony with the reason and spirit of the law of negligence. Under it, the greater the speed, the less the capacity to use care to avoid danger to persons on the street, and hence the less the liability. To such a conclusion, my dissent is respectfully, but earnestly, interposed. In my judgment, the duty to obey the ordinance was as imperative as that of using care to discover and avert peril to *Mrs. Sullivan*. The violation of either was negligence; and, if the breach of the ordinance prevented the defendant from performing its further duty to use reasonable care to avoid injury to her, then it should be held liable for that breach. That proposition was distinctly laid down in *Maher v. Railroad Co.*, (1876,) 64 Mo. 267. It was repeated with emphasis in *Dunkman v. Railway Co.*, (1887,) 95 Mo. 232, 4 S. W. Rep. 670, a case which has since been often cited as authority; and, upon a careful reading of the opinion and of the instructions in *Kelly v. Transit Co.*, (1888,) 95 Mo. 279, 8 S. W. Rep. 420, it will be seen that this precise question was involved in that case, and was decided, without dissent, in the same way. Those decisions appear to me to be sound in principle, and should not be overruled. In *Prewitt v. Eddy*, (Mo.; 1893,) 21 S. W. Rep. 742, it was declared by the second division that, "after a careful review of the doctrine of contributory negligence, we find no warrant in authority or in reason for making any distinction in the character of defendant's negligence, whether it is the violation of some statutory provision or municipal ordinance or is such by virtue of the common law." It is neither here nor there now whether that theory was correctly applied to the facts of that litigation. The principle, at least, was plainly laid down, and it is applicable to the case here in hand.

Along with the instruction numbered 5, the court (in plaintiff's first instruction) required the jury to find, as essential to a verdict against defendant, "that said *Ellen Sullivan* was not, at the said time and place, guilty of negligence directly contributing to the in-

jury." The same idea was repeated in the seventh instruction given for the defendant, as follows: "(7) The court instructs the jury that if they shall believe from the evidence in the case that the deceased was herself negligent at the time and place she was killed, and that such negligence directly contributed to her death, then the plaintiff cannot recover, although you may believe that the defendant was also negligent." It is the settled rule in Missouri that all the instructions should be considered together and read as an entirety. *Dougherty v. Railroad Co.*, (1889,) 97 Mo. 647, 11 S. W. Rep. 251; *Owens v. Railroad Co.*, (1888,) 95 Mo. 169, 8 S. W. Rep. 350. The fifth instruction authorizes a finding in plaintiff's favor on the facts stated, notwithstanding Mrs. Sullivan was negligent "in stepping upon the track;" but, under the other instructions, it was necessary to the verdict that the jury should further find that her negligence did not directly contribute to her death. Taking these statements together, the legal effect of the verdict is to decide that her negligence in "stepping on the track" was negligence that did not directly contribute to her injury, but was sufficiently remote to justify the submission of the issue whether or not the defendant, by the exercise of ordinary care, (including therein the observance of the duties imposed by ordinance,) could have avoided injuring her. Furthermore, it will be seen that the language in respect of her negligence is precisely the same in the first half of the fifth instruction as that used in the latter half; yet the former is held (in the principal opinion, delivered by Judge BRACE) to be a correct declaration, while the latter half is condemned as failing to properly state the law of contributory negligence. In my opinion, the fifth instruction, when read along with the others of the series, was right on principle, and the judgment should not be reversed because of it.

2. But a careful examination of the plaintiff's fourth instruction, already quoted, leads me to consider it faulty. No doubt, it correctly states a general rule in respect of Mrs. Sullivan's right, at the outset, to presume (if she knew no better) that the train was running at a speed not exceeding that allowed by law; but the statement of that rule is of doubtful utility and correctness as part of the instructions in a case of this sort, where the evidence is such as to warrant an inference and finding either way on the question whether the injured party was guilty of negligence directly contributing to her own misfortune. This was held in *Myers v. City of Kansas*, (1892,) 108 Mo. 480, 18 S. W. Rep. 914, and it seems to me that that opinion should not be abandoned. But the instruction went further, and proceeded to comment on the evidence on the point to which it referred. Mrs. Sullivan was certainly bound to use ordinary care. With the facts in proof when the

cause was submitted, it was not proper to tell the jury that she had the right to act on the presumption that the train was not running at an unlawful rate of speed, when there was room for the inference that ordinary vigilance would have informed her to the contrary. It is true that, by the other instructions, already noted, the issue whether or not her negligence directly contributed to her death was submitted, and the jury found in plaintiff's favor on that issue; but it is impossible to reasonably say that that result may not have been influenced by the fiat of the court that she had the right to "act on the presumption" that the train was going at a lawful rate of speed. In the shape the case finally assumed upon the evidence, that instruction amounted to an announcement that her act in stepping on the track was rightful, as a matter of law, if she did not know the speed of the train, irrespective of the question whether or not that act may have directly contributed to her death. That declaration was, in our judgment, erroneous. It was a question of fact whether she used ordinary care to observe its speed, and whether, in going forward, her act was that of a reasonably prudent person in the circumstances. To announce that she had the right to act on the presumption mentioned was for the court to declare, in effect, as a rule of law, that that act of hers was not negligence, and to exclude any inference of negligence based on that act. Viewing the case broadly on its merits, it cannot fairly be said that this error was harmless. For that reason a new trial should be granted.

GANTT, J., concurs in the second paragraph of this opinion.

BOGGESS v. METROPOLITAN ST. RY. CO.¹

(Supreme Court of Missouri, Division No. 1.
July 3, 1893.)

ACTION FOR PERSONAL INJURIES — HARMLESS ERROR — EVIDENCE — INSTRUCTIONS — DAMAGES.

1. In an action for personal injuries, though the court may have erred in instructing the jury as to plaintiff's right to recover at all, where that issue was found for plaintiff, and substantial damages awarded, the error is not reversible on appeal by plaintiff.

2. In an action for personal injuries, defendant may show, under the general issue, that the injury was enhanced by plaintiff's continued use of intoxicating liquors.

3. Rev. St. 1889, § 2188, providing that the court may instruct the jury "when the evidence is concluded, and before the case is argued," does not prevent the giving of instructions after the argument of the case by counsel.

4. In an action for an injury to plaintiff's ankle, alleged to have resulted from defendant's negligence, where the evidence as to the extent of the injury is conflicting, a judgment of \$1,000 will not be reversed, because so in-

¹ Rehearing pending.

adequate as to indicate that it was the result of passion or prejudice. Barclay, J., dissenting.

Error to circuit court, Jackson county; R. H. Field, Judge.

Action by Richard O. Boggess against the Metropolitan Street-Railway Company for personal injuries. From a judgment for plaintiff for \$1,000 only, he brings error. Affirmed.

L. H. Waters and Eugene Pearson, for plaintiff in error. Pratt, Ferry & Hagerman, for defendant in error.

BRACE, J. This is an action for damages for personal injuries, in which the plaintiff obtained a verdict and judgment for \$1,000, to reverse which he brings the case here by writ of error. The substantial averments of the petition are that the defendant is a corporation operating a cable street railway on and along Main and other streets in the city of Kansas; that on the 23d day of January, 1890, while the plaintiff was passing over the defendant's track on Main street, he stepped upon the covering of a pit or manhole maintained by the defendant between its tracks for the purposes of its railway, which covering "slipped and turned, and he was thereby thrown down, and caused to fall into said opening, and was thereby bruised, wounded, and injured in his right foot and ankle," by reason of which injuries he was confined to his room and bed for two months, expended large sums of money for care and medical treatment, and underwent great pain and suffering in mind and body, to his damage in the sum of \$20,000. The specific negligence charged was that said cover was constructed to rest upon a rabbet inside of a frame, and that the defendant, at the time of the accident, had failed to have the same properly inspected, and had permitted dirt and other material to collect around the inside of the upper part of said frame, and along and upon said rabbet, by reason of which the said covering would not and did not rest upon said rabbet, but was then and there loose and insecure, and liable to slip and turn when stepped upon by any person passing over the same. The answer was a general denial and a plea of contributory negligence, upon which issue was joined by reply. The evidence for the plaintiff tended to prove that the plaintiff was injured in the manner charged in the petition, and the negligence of defendant as therein charged; that the defendant, by reason of his injuries, was confined to his room over 50 days, suffered sharp pain in his ankle and foot at the time and ever since, took medicine to alleviate the pain and to induce sleep for four or five weeks; that some of the ligaments were torn, and blood vessels injured, some ruptured; no bones were broken, the most serious trouble being in the ankle joint; that the

injury was permanent, and he would always have to use a crutch or cane. The evidence for the defendant tended to prove that the defendant was not guilty of negligence; that the track was properly inspected; that there was no accumulation of dirt or other material, as alleged; that the cover was displaced by a heavy team passing over the same immediately before the accident; and that the injury was not serious. There was no evidence tending to prove contributory negligence, nor expense for medicine or medical attendance, nor of the value of time lost; and there was evidence tending to prove that the plaintiff attended regularly to his business as a lawyer after April, 1890.

1. Upon the question of the plaintiff's right to recover, the court gave many instructions and refused several asked for the plaintiff. The action of the court in giving and refusing these instructions is assigned as error, and a large part of plaintiff's brief is devoted to the demonstration of these errors. Conceding, for the sake of the argument, that the court did commit such error in respect of these instructions as would require a reversal of the case if the verdict had been against the plaintiff, ought they to so operate when the verdict, despite such errors, was in his favor and for substantial damages? The instructions now under consideration did not go to the question of damages at all, but were confined to the issues involving plaintiff's right to recover. Those issues were all found for the plaintiff. The verdict established his right to recover. How, then, is he prejudiced by those errors? The plaintiff has no right to complain that the verdict was in his favor. He does not in fact so complain. The whole burden of his complaint is, and can only be, that, having been so found, the jury gave him inadequate damages for his injuries, and of any error tending to produce this result he has a right to complain, but not of errors prejudicial only to his right to recover, when in fact he does recover. The appellate courts of this state are prohibited by statute from reversing the judgment of any court except for error committed by such court materially affecting the merits of the action, (Rev. St. 1889, § 2303;) and this court has uniformly disregarded such errors as produce no injury, (Gregory v. Chambers, 78 Mo. 294; Pritchard v. Hewitt, 91 Mo. 547, 4 S. W. Rep. 437; City of St. Louis v. Langan, 97 Mo. 175, 10 S. W. Rep. 475; Stanley v. Railway Co., 100 Mo. 435, 13 S. W. Rep. 709; McGuire v. Nugent, 103 Mo. 161, 15 S. W. Rep. 551; Green v. City of St. Louis, 106 Mo. 454, 17 S. W. Rep. 496.) In Pritchard v. Hewitt, supra, we said: "The refused instructions numbered seven and eight, asked for by the plaintiff, and the instruction given by the court for the defendant, were all upon the issue joined upon defendant's plea,—that plaintiff first assaulted him, and that, in resisting that assault,

he used no more force than was necessary to resist such assault and protect himself from great personal injury; and, as that issue was found for the plaintiff by the jury, no harm resulted to him from the action of the court in that behalf, even though it be conceded that plaintiff's refused instructions were correct, and that the one given for the defendant is obnoxious to the criticism placed upon it. The action of the court in giving the one and refusing the others would therefore be no ground for reversal." And such seems to be the rule elsewhere independent of statute. *Donovan v. Railroad Co.*, 79 Ala. 429; *Carrington v. Railroad Co.*, (Ala.) 6 South. Rep. 910. The following remarks of Somerville, J., in the latter case, are apposite to the case in hand: "It is perfectly apparent upon the whole record that this finding of the jury necessarily determined every issue raised in favor of the plaintiff, excepting alone the issues affecting the amount of recovery. They manifestly decided that the defendant was guilty of culpable negligence, for which it was liable in damages to the plaintiff. They decided, likewise, that the deceased was not guilty of contributory negligence in any particular which would bar a recovery by his personal representative. The only matter as to which the plaintiff in the court below (who is the appellant here) can or does complain is, as we have said, the amount of the recovery. He maintains that the jury should have found a verdict for a larger sum than \$500. In this aspect of the record, we have a direct authority in the case of *Donovan v. Railroad Co.*, 79 Ala. 429, for the proposition that we will not consider as reversible error any ruling of the primary court bearing merely on the naked question of the defendant's liability, and not affecting the amount of damages recovered, however erroneous it may be in fact, because, if error, such ruling is error without injury to the plaintiff." Such being the law, we will pass to the consideration of the only substantial ground of complaint,—the amount of the damages.

2. The court gave only two instructions directly upon the question of damages, as follows: "(12) If the plaintiff conducted himself imprudently by imprudently drinking, thereby increasing his trouble and difficulty of being cured, he must take the consequences of such action, and cannot charge the defendant therewith." "(14) If the jury find the issues submitted in the instructions for plaintiff, they will assess his damages at such sum, not exceeding \$20,000, as they believe from the evidence will be a fair compensation to him for the pain and suffering of mind and body that he has already endured on account of the alleged injury, and such as he is reasonably likely to suffer therefrom in the future, and for any permanent physical disability of the right foot, ankle, or leg, if any, which the jury may be-

lieve from the evidence the plaintiff has sustained by reason of such injuries; but inasmuch as no amount of medical bill has been shown by the evidence to have been incurred by plaintiff, and no specific value for his alleged loss of time, if the jury allow plaintiff for these items, they can only give him a nominal amount for each of them." Two objections are urged to the first of these instructions: First, that there was no evidence upon which to base it; and, second, that it was not within the issue of the pleadings. The plaintiff himself testified that he was a habitual drinker of intoxicants, and that he continued the practice after he was injured, and that once or twice he was slightly intoxicated; and two physicians testified that the drinking of liquor was "detrimental to the condition of healing;" "detrimental to the restoration of the tissues;" while there was evidence on the other side tending to prove that the continuance of the practice by one who was in the habit thereof was not so detrimental. This was a question for the jury, and there was evidence upon which to instruct upon the subject; and we think this evidence was admissible under the general denial. In a recent work on Damages, it is said: "The acts and negligences of the plaintiff which have enhanced the injury resulting from the defendant's act or neglect may be shown in mitigation of damage. The defendant is liable for the natural and proximate consequences of his wrongful acts; but if the plaintiff has rendered these consequences more severe to himself by some voluntary act which it was his duty to refrain from, or if by his neglect to exert himself reasonably to limit the injury, and prevent damage, in the cases in which the law imposes that duty, and he thereby suffers additional injury from the defendant's act, evidence is admissible in mitigation to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff." *Suth. Dam. (2d Ed.)* p. 299, § 155. *Sedgwick* reaches the same result by a somewhat different mode of reasoning. He says in his work on Damages, (8th Ed. § 201:) "The same principle which refuses to take into consideration any but the direct consequences of the illegal act is applied to limit the damages where the plaintiff, by reasonable precaution, could have reduced them." Section 202: "It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that, by consequences which the plaintiff, acting as prudent men ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequences of the defendant's wrong. * * * Ad hoc he is not damaged by the defendant's act, but by his own negligence or indifference to consequences." Section 203: "The observance of the rule by the plaintiff will not always have the effect of reducing the damages; it may

even enhance them." Section 204: "The application of the doctrine of contributory negligence and of that of avoidable consequences often produces results that closely resemble each other, but there is a distinction between the two. Contributory negligence defeats the action itself. The rule of avoidable consequences can never produce this result, as it cannot be applied until a cause of action which in any event will entitle the party injured to nominal damages has arisen. The rule therefore is really a rule of limitation upon the plaintiff's recovery. Nor is it properly to be regarded as a species of mitigation of damages." Whichever line of reasoning be adopted, the result is the same. The acts of the plaintiff tending to enhance the injury are admissible in evidence to reduce the amount of the damages under the general issue, whether considered as in mitigation or as a rule of limitation of damages, (see, also, *Bless*, Code Pl. [1st Ed.] § 329; *Cousins v. Railroad Co.*, 66 Mo. 572; *Young v. City of Kansas*, 27 Mo. App. 101;) and so counsel seemed to think when the evidence was offered, as no objection was then made to its admission, and, it would seem, ought now to be precluded from objecting to an instruction upon it for that reason, (*Mellor v. Railroad Co.*, 105 Mo. 456, 16 S. W. Rep. 849.) It follows that there was no error in giving said instruction No. 12.

3. Instruction 14 was a modification of instruction No. 4, asked by the plaintiff, made by merely eliminating from that instruction the right to allow damages for time lost and medical expenses. Before making the modification the court inquired of counsel for the plaintiff whether there was any evidence of expenditures for medical services, or of the value of time lost; and he replied there was not, and thereupon the instruction was modified in the manner stated. There was no such evidence, as the record here shows, and there was no error in this action of the court.

4. During the argument of counsel for plaintiff to the jury, he stated to them that the witnesses of the defendant who had testified as to the cause of the removal of the cover of the manhole in question were of bad repute. To this statement, counsel for defendant objected, and his objection was sustained by the court; and thereupon counsel for plaintiff, continuing his argument, stated to the jury that he had a right to comment upon the conduct and the manner of the witnesses while giving their evidence, and that the jury had the right to take that into consideration. The court thereupon, of its own motion, gave the following instruction: "The court instructs the jury that, in determining the credibility of any witness, the jury have the right to take into consideration the conduct and manner of the witness while on the witness stand, and all the credible evidence in the case, as as-

serted by counsel for plaintiff; but there is no evidence that any witness in the case is of bad repute. The jury will therefore disregard the assertion of such attorney that any witness is of bad repute." The assertion in this instruction that there was no evidence that any witness in the case was of bad repute is borne out by the record, and the only point made against the instruction is that it was given after the argument to the jury had begun. *Rev. St. 1889, § 2188.* The statute does not prohibit the giving instructions after the argument has been commenced, or even after the jury has retired; and we have repeatedly held that the court may do so in a proper case when the demands of justice require it. *Dowzelot v. Rawlings*, 58 Mo. 75; *State v. Williams*, 69 Mo. 110; *State v. Miller*, 100 Mo. 606, 13 S. W. Rep. 832, 1051; *Wilkinson v. Dock Co.*, 102 Mo. 130, 14 S. W. Rep. 177; *Willmott v. Railway Co.*, 106 Mo. 535, 17 S. W. Rep. 490.

5. The last ground urged for reversal is that damages awarded by the jury are so inadequate as to shock the sense of justice of the judicial mind, and indicate that the verdict must have been the result of passion, prejudice, or partiality. If such were the case, the judgment ought to be reversed, and the cause remanded for new trial; the rule in this respect being the same when the damages allowed in actions in tort are so grossly inadequate as when they are so grossly excessive. 3 *Sedg. Dam.* (8th Ed.) § 1326; 1 *Graham & W. New Trials*, (2d Ed.) side p. 452; *Gregory v. Chambers*, 78 Mo. 294; *Whitsett v. Ransom*, 79 Mo. 258; *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. Rep. 437; *Welch v. McAllister*, 13 Mo. App. 89; *Fairgrieve v. City of Moberly*, 29 Mo. App. 141. The evidence as to the extent of the defendant's injuries was conflicting. The damages are substantial. It was the peculiar province of the jury to assess the amount, and their judgment upon the matter is not such as to shock our sense of justice, or to force on our minds the conviction that their verdict was the result of passion, partiality, or prejudice, and it must stand. The judgment is therefore affirmed. All concur, except *BARCLAY, J.*, who dissents to the fifth paragraph only, for reasons which he will state in a separate opinion.

* The section provides: "When the evidence is concluded, and before the case is argued or submitted to the jury, or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing, and shall be given or refused. The court may of its own motion give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict, according to the law and evidence, which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk, and kept as a part of the record in such case."

DUNN et al. v. EATON et al.

(Supreme Court of Tennessee. Sept. 11, 1893.)

EJECTMENT—EVIDENCE—ADMISSIONS—PRESUMPTION OF DEED.

1. The self-dissevering admissions of a predecessor in title are as a rule admissible against those who follow and claim under him, when such admissions are made at the time such predecessor was in possession.

2. Declarations of this character are to be received, not only in disparagement and diminution of the property which the declarant enjoyed, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it.

3. The rule admits, as against succeeding holders of a title, maps, recitals in deeds, monuments, and boundaries of which an owner during his ownership was author.

4. Deeds, although not links in deraignment of title from original owners, are admissible in evidence when connected with possession of present owners, and of those under whom they claim, for the purpose of showing the boundaries of such possession, as well as the nature, extent, and description of their claim. Such conveyances are also admissible in aid of the presumption of a deed from one of the original grantors, arising from long possession of defendants and of those under whom they claim.

5. When possession and use of land are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its nonexecution.

(Syllabus by the Court.)

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Ejectment bill by H. N. Dunn and others against L. B. Eaton and others. From a decree dismissing the bill, complainants appeal. Affirmed.

M. R. Patterson and Randolph & Son, for appellants. L. B. Eaton, F. P. Poston, Geo. Gant, Geo. Newhardt, W. B. Glisson, Metcalf & Walker, and Smith & Collier, for appellees.

MCALISTER, J. This is an ejectment bill to recover an undivided one-third interest in six acres of land lying along the south side of Vance street, in the city of Memphis. The land in controversy is part of a tract of 243 acres originally owned by Dr. Dudley Dunn. By a codicil to his will, dated January 3, 1847, Dr. Dunn devised all the residue of his estate, embracing this 243-acre tract, to his three children, Camilla F. Dubase, William D. Dunn, and David L. Dunn, to have and to hold the same during their natural lives, and, from and after their deaths, he devised the shares of each to such child or children as each may have living at his or her death. Dr. Dunn, the testator, died in February, 1848, and on the 18th March, 1848, his devisees filed their petition in the commercial and criminal court of Memphis for a partition of this land as

life tenants under the will. The commissioners appointed by the court made a report of a partition dated April 26, 1848, which was confirmed by the court, and title vested and divested. The property in controversy was not embraced in the report of the commissioners, and was entirely excluded from the partition.

The complainants in the present suit are the children of William Dudley Dunn, who, as already stated, was a son of Dr. Dunn, and these children claim an undivided one-third interest in the six acres as remaindermen, devisees under the will. William Dudley Dunn died in May, 1881, and this bill was filed on the 14th March, 1888, within seven years after his death. The contention of complainants is that their father had a life estate in this land, and that upon his death, in May, 1881, their rights accrued as remaindermen under the will of Dr. Dunn, and that they then answered the description in his will of children of William Dudley Dunn living at the time of his death.

Defendants are the persons in possession of different parts of the six acres, and those claiming title to different portions of it. Defendants claim under connected conveyances from Judge William T. Brown, who conveyed to Walker in 1855, and describes the land as lot No. 5 of a town laid off by Dr. Dunn. Defendants have all answered, but none of them set up any conveyance from Dr. Dunn, nor any contract in writing purporting to have been executed by him and passing title to this land. They rest their defense on the presumption of a conveyance from Dr. Dunn, which they claim arises as a matter of law or fact from the long lapse of time since Dunn's death, the various conveyances which have since been made of the land, the possession of those under whom they claim, and their own possession under said conveyances, together with other facts and circumstances set forth in the record.

The chancellor held that Dr. Dunn, the ancestor of complainants, although at one time owner of this lot, was not seised and possessed of the same at the date of his death. He held that the entire proof, taken together, justifies the conclusion that Dr. Dunn had sold this lot to Judge William T. Brown, and that said Brown was in the actual possession thereof, under visible inclosures, for several years prior to the death of said Dunn, under circumstances showing that said Dunn knew of the possession and claim of ownership on the part of said Brown; that, while no deed appears of record, or is exhibited in the proof, of Dunn to Brown, yet the facts and circumstances are of a character to authorize the conclusion that a deed might have been made by said Dunn to said Brown, and justifies the presumption of its existence. The chancellor further held that this presumption accords with equity and justice, and is in har-

mony with the conduct of said Dunn and his descendants, by whom no claim to said lot was made from about the year 1845 until the year 1888, when this bill was filed, a period of over 43 years, during all which time said Brown and those claiming under him were openly exercising acts of ownership over said lot, making improvements thereon, paying taxes, enjoying the use, and appropriating the rents and profits, thereof. The chancellor adjudged, therefore, that complainants had no interest in said land, and dismissed their bill. Complainants appealed, and have assigned errors.

The first error assigned is that the court erred in admitting in evidence the record of the partition suit from the commercial and criminal court of Memphis, purporting to show a partition between the children of Dr. Dudley Dunn of certain portions of the original tract of 243 acres. The ground of the exception is that the complainants in this suit were not parties to the partition suit, and that what transpired or was adjudged in that suit is not evidence against these complainants. It is also insisted that the property involved in the present suit was not embraced in the partition suit. The plan attached to the report of the commissioners in the partition suit was particularly objected to by complainants, on the ground that it did not purport to be a conveyance of the property, and could not legally affect the title. The question, then, presented for the consideration and determination of the court, is whether the record of the partition suit was admissible in evidence. The cardinal inquiry in this suit is whether lot No. 5, which is the property in controversy, was a part of Dr. Dudley Dunn's estate at the date of his death. The object of introducing the record of the partition proceedings was to show that the life tenants under the will of Dr. Dunn did not claim at the time of the partition that this lot No. 5 in the Wherry plan was a part of Dr. Dunn's estate, and that it was intentionally excluded from said partition. It appears from the record that the basis of this partition was a plan made by one John Wherry, a surveyor, some years prior to the partition, and during the lifetime of Dr. Dunn. The said John Wherry was one of the commissioners who made this plan, and the allotments were made in accordance with the numbers laid down on the Wherry plan. The commissioners made no change in the streets and alleys laid out on this plan, but adopted them as they found them on this plan. The evidence in the record indicates very clearly that this plan was made by John Wherry for Dr. Dunn. In May, 1845, Dr. Dunn sold and conveyed lot 18 of said division to James H. Stewart, and in the deed he refers to the plan as a survey recently made by John Wherry. In September, 1845, Dr. Dunn sold another lot on said plan to one Price, giving him bond

for title, and referring in express terms to this plan. It further appears that in January, 1848, Dr. Dunn sold another lot on said plan by the lot number and description given on said plan, the deed expressly reciting that this plan was made for him. Again, in the second codicil to his will, Dr. Dunn refers to this plan, and specifically devises three of the lots on this plan by lot numbers. This plan is exhibited in evidence, and is shown to have been found among the old files of the partition proceedings, in the right place and in proper official custody. As already stated, the commissioners made this plan the basis of the partition, and they refer to it as the large plan of the division. Now, the most important fact connected with this plan is that it recites on its face that lot No. 5, which is the subject of this controversy, was sold to Judge W. T. Brown. There were three other lots on this plan marked "Sold," to wit: Lot 18, to Stewart; lot 34, to Price; and lot 33, to Dickinson. All of these four lots were excluded by the commissioners in making their allotments.

The complainants objected, as already stated, to the introduction in evidence of the record of the partition among the life tenants; also to the plan which is shown to have been made by John Wherry, surveyor for Dr. Dunn; also to the recitals in the deeds from Dr. Dunn to various purchasers of lots in this plan. We are of opinion that this evidence was properly admitted by the court, as it all tended to show that neither Dr. Dunn, at the date of his death, nor the life tenant, devisees under his will, when they came to partition his estate, claimed any right, title, or interest in lot No. 5, which is the subject-matter of this controversy. Says Mr. Wharton, in his work on Evidence, (volume 2, § 1156,) viz: "The self-disserving admissions of a predecessor in title are as a rule admissible against those who follow and claim under him, when such admissions are made at the time such predecessor was in possession. Declarations of this character are to be received, not only in disparagement and diminution of the property which the declarant enjoyed, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it. Thus, the declarations of the ancestor that he held the land as the tenant of a third person are admissible in evidence to show the seisin of that person in an action brought by him against the heir for the land, and declarations of a former owner as to boundaries are in like manner admissible. * * * Thus, the rule admits, as against succeeding holders of a title, maps, recitals in deeds, monuments, and boundaries of which an owner during his ownership was author." See, also, 1 Whart. Ev. §§ 194, 663-670.

Complainants also objected to the several deeds offered in evidence on the part of de-

defendants under which they claim title, because those deeds were not connected with Dr. Dudley Dunn, in whom the title to this lot was originally vested, but depend on conveyances made since Dr. Dunn's death. The objection is that the deeds do not show a proper deraignment of title. It is clear, however, that those deeds were admissible in evidence on behalf of defendants when connected with their respective possessions, and the possessions of those under whom they claim, for the purpose of showing the boundaries of such possession, as well as the nature, extent, and description of their claim. These deeds were also admissible in aid of the presumption of a deed from Dr. Dunn to Judge Brown, arising from long possession of this land by the defendants and those under whom they claim.

Complainants also assign as error the action of the chancellor in admitting as evidence the deposition of Richard Norris. This witness is an old citizen of Memphis, and testified that Judge Brown was in the actual possession of this lot as early as 1845, which was during the life of Dr. Dunn. He also testified that Brown built a double cabin, and sunk a well, on this lot in 1845, and that his servants occupied the cabin and used the well. Brown and Norris (the latter testified) built a plank fence on the line between their lots, displacing a rail fence that Brown had previously built on the line of his lot. This evidence of Richard Norris was objected to by complainants, on the ground that it is an attempt to prove title to the property in controversy by hearsay and in parol, and upon the further ground that the witness did not state his knowledge or recollection of existing facts, but only what he thought or supposed or concluded must have been facts.

We are of opinion, upon an examination of the deposition, that the objections are not well taken, and the evidence is clearly competent as showing the possession of Judge Brown by visible inclosures during the life of Dr. Dunn, and the former's acts of dominion and ownership over this property. It is also insisted on behalf of complainants that their title as remainder-men vested on the death of their father, William Dudley Dunn, which occurred in May, 1881, and that, as their cause of action accrued at that time, no statute of limitations began to run against them until that date, and that they are not prejudiced or in any way affected by anything done or omitted during the life of their father, the life tenant. It is true that the statutes of limitations do not begin to run against the remainder-men until the termination of the life estate; but, as stated by counsel for defendants in his brief, the object of the evidence introduced by defendants is not to set the statutes of limitations or the presumption of a deed in operation against remainder-men during the existence of the particular estate, but to

show that there is neither particular estate nor remainder; that, in fact, the will of Dr. Dunn did not embrace this property, because it was not the testator's at his death. If, then, Judge Brown was in possession of this property by visible inclosures in the lifetime of Dr. Dunn, and his possession was adverse, as shown by Dr. Dunn's plan, which declares that this lot had been sold to Judge Brown, then there was not a particular estate which would defeat the presumption of a deed arising from this long, continuous, and adverse possession of Brown, and those claiming under him. As stated by Justice Field in *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. Rep. 667: "The owners of property, especially if be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. * * * The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction had become dimmed and imperfect. * * * It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-execution." To the same effect is *Williams v. Donell*, 2 Head, 695. We are of opinion that the presumption of a deed from Dr. Dunn to Judge Brown is well warranted both as a matter of law and fact, upon the evidence presented in this record. The decree of the chancellor is affirmed.

C. F. SIMMONS MEDICINE CO. v. MANSFIELD DRUG CO. et al.

(Supreme Court of Tennessee. June 30, 1893.)

TRADE-MARKS AND TRADE NAMES—INFRINGEMENT—
—DECEPTION BY OWNER—EVIDENCE.

1. A trade-mark will not be protected if the owner has knowingly misrepresented the article to the public, and it is immaterial that the adverse party fails to allege such misrepresentations.

2. The fact that in one year, eight years before bringing suit, and forty years after the business was established, complainant issued a circular misrepresenting the character of the article sold by him, will not prevent his obtaining relief against infringement of the trade-mark or trade name borne by such article.

3. The fact that complainant falsely stated on his packages that the trade-mark was registered November 11, 1843, will not deprive him of his right to protection from infringement, when he in fact on that date filed the name of the article as a book title under the copyright law, and since the public could not have been deceived by such statement, there being no provision for registering trade-marks at that early date.

4. Innocent misrepresentations are not ground for refusing complainant relief.

5. The words "Liver Medicine," being purely descriptive, cannot be appropriated as a trade-mark.

6. The name "Simmons" cannot be appropriated as a trade-mark, when it has become merely descriptive of medicine prepared under the formula of a Dr. Simmons, and is used by many people in connection with such medicines.

7. Where it appears that defendant put on the market packages of medicine, labeled "Dr. M. A. Simmons' Liver Medicine," in packages so substantially similar to those in which complainant's "Simmons' Liver Medicine" had been previously sold as to deceive the public, and that this was done with the purpose of selling it in place of complainant's medicine, the latter is entitled to an injunction to restrain the use of such labels and packages by defendant.

8. The fact that defendant put his packages on the market a year before complainant filed his bill to restrain such competition does not deprive complainant of his right to an accounting.

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Bill by the C. F. Simmons Medicine Company against J. H. Zellin & Co., I. L. Corse, T. F. Cheek & Co., and the Mansfield Drug Company, to restrain the use by defendants of a certain package for the sale of medicine, for an accounting, and other relief. From a decree for complainant, defendants appeal. Affirmed.

Gantt & Patterson and Turley & Wright, for appellants. Phillips, Stuart, Cunningham & Elliott, Lee & Ellis, and Taylor & Carroll, for appellee.

NEIL, Special Judge. Prior to the year 1840, one A. Q. Simmons, a farmer in Walker county, Ga., having come into possession, in some manner not clearly disclosed by the proof, of a secret formula for the making of a valuable liver medicine, was accustomed to prepare it in small quantities for use in his own family and in the families of his neighbors. It does not satisfactorily appear that he made any for sale. In 1840, or about that time, one M. A. Simmons, a young physician, and son of A. Q. Simmons, being at his father's house, they conceived the idea of preparing the medicine together for market. The two together made up the first lot of it for sale, M. A. Simmons, with his father's assistance, writing the first prescription or directions. This first lot was

made in liquid form, and put in a five-gallon keg, and carried through the country in a buggy, and retailed in quantities to suit the purchaser, by M. A. Simmons and his father. After making a few trips like this through the country, M. A. Simmons decided to return to his home in Dade county, Ga., where he had previously begun the practice of medicine, and it was agreed between him and his father that they would make and sell the medicine separately, the father operating from his home and the son from his. The father continued to manufacture and sell this medicine from Walker county, Ga., until the year 1856, when he moved to the state of Texas, and there died in the year 1862. About the year 1842 the son, Dr. M. A. Simmons, moved to the state of Mississippi, and there continued the manufacture and sale of the medicine. He advertised the medicine considerably both in newspapers and almanacs, calling attention to his own and his father's make. It does not appear that A. Q. Simmons ever advertised to any extent, if at all, separately from the advertisements prepared and put forth by Dr. M. A. Simmons. At this early date the medicine put forth by Dr. A. Q. Simmons (he having acquired the title in the manufacture of the medicine) was labeled thus: "Liver Medicine, by A. Q. Simmons;" all in print. That put forth by Dr. M. A. Simmons was labeled thus: "Liver Medicine, by M. A. Simmons;" the name being written in script. On the 11th day of November, 1843, Dr. M. A. Simmons deposited in the clerk's office of the district court of the United States for the district of West Tennessee the title to a book as follows: "Dr. Simmons' Vegetable Liver Medicine, Prepared Solely by A. Q. Simmons and Son, Walker County, Geo.;" and obtained a certificate in his own name of this fact. In the year 1850 he began to use a label consisting of his picture and autograph, and the name "Dr. Simmons' Vegetable Liver Medicine," and a statement of the ailments for which it would be found useful. On the 17th day of October, 1856, Dr. A. Q. Simmons gave his son C. A. Simmons a paper writing authorizing him to "make all my medicines, and to use my name in preparing, selling, and advertising all of my medicines," etc., A. Q. Simmons having been the manufacturer of other medicines also besides the "Liver Medicine." Immediately after this authority was given him, he began to manufacture under it, and manufactured and sold under it continuously, except for a short period during the Civil War, when he could not get the material, down to 1868. From 1856 down to 1865 he called his preparation "Dr. C. A. Simmons' Liver Medicine," but in 1865 he gave it the name "Dr. Simmons' Liver Regulator," and sold it in that name until 1868. On the 30th of September, 1868, C. A. Simmons sold his certificate, together with a knowledge of the

formula for the making of the liver remedy, to defendants J. H. Zellin & Co. After their purchase, and during the year 1868, they added to the name of the preparation the words "or medicine," and on the 10th day of December, 1868, in the district court of the United States for the southern district of Georgia, "deposited the title of an engraving," consisting of a label containing the words "Dr. Simmons' Liver Regulator or Medicine," with a statement of the diseases for which the remedy was thought to be useful, and the words "A Strictly Vegetable, Faultless Family Medicine, Prepared Only by J. H. Zellin & Co., Macon, Ga." In 1868 or 1869, after Zellin & Co.'s purchase, Dr. M. A. Simmons changed his label so as to read "Dr. M. A. Simmons' Vegetable Liver Medicine;" the change consisting in the insertion of the initials "M. A." to distinguish his preparation of the remedy from that of Zellin & Co. On November 1, 1870, Zellin & Co. registered in the patent office at Washington "a wrapper or label or a trade-mark for said medicine," being an exact copy of that previously filed in the United States district court for the southern district of Georgia. It should be noted, however,—a fact not previously mentioned,—that both of said wrappers also contained the following: "Caution: Owing to the imitations and counterfeits of this valuable medicine, we are compelled at a great expense to change to this style of wrapper. None genuine without it and the signature of A. Q. Simmons,"—the name of J. H. Zellin & Co. being written in red ink across the face of this "Caution," and below it their monogram in red ink. Each label also contained at the top a triangular-shaped space inclosed in black lines, to be folded over the top of the package, and in this space the words: "Directions inside for preparation and use;" and a similar triangular space at the bottom, to be folded over the bottom of the package, and in which were printed the words: "Entered according to act of congress in the year 1868, by J. H. Zellin & Co., in the clerk's office of the district court of the United States for the Dist. of Ga." On March 10, 1874, Dr. M. A. Simmons registered his trade-mark in the patent office at Washington, with the following specification: "My trade-mark consists of the words 'Dr. Simmons' Vegetable Liver Medicine' placed on a label above a portrait of myself, and a facsimile of the signature of 'M. A. Simmons, M. D.' on the lower part of the label at the right hand, as represented in the accompanying drawing,"—said drawing being a duplicate of the label upon his tin-can packages in use in 1850. He continued, however, in actual use the variation of this form introduced by the insertion of the initials "M. A.," the actual name appearing on all the packages being "Dr. M. A. Simmons' Vegetable Liver Medicine;" and it has also been most generally

advertised by this name, both by him and his successors in title, but very often by the name of "Dr. M. A. Simmons' Liver Medicine." On the 17th day of May, 1881, J. H. Zellin & Co. registered in the patent office at Washington an addition to the "trade-mark," consisting of a device representing a mortar and pestle, crossed by a scroll or ribbon in the form of the letter Z, one end of which embraces a spatula, and the other end a graduate. On the several limbs of this symbol are arranged the words "A. Q. Simmons' Liver Regulator." And on the 24th day of May, 1881, they registered also in the patent office at Washington a claim to the exclusive use of the word "Simmons" as a "word symbol," claiming that it had "lost its original signification, and become a purely arbitrary term, indicating origin and ownership by pointing to us as the manufacturers of the genuine preparations." They have continued this form of label down to this time, the Z being a large, red letter on the front face of the label, and the words "A. Q. Simmons' Liver Regulator" being in white letters on the limbs of said red letter Z. Up to 1878, Dr. M. A. Simmons manufactured his medicine principally at Inka, Miss., but in that year moved to St. Louis, Mo., where he prosecuted the business until 1879, when he sold to Simmons and Hayden his business, including his trade-mark, cuts, dies, and labels; and thence the said business, trade-mark, cuts, dies, etc., passed by proper transfers to the complainant, C. F. Simmons Medicine Company, which has been conducting the business in St. Louis ever since. J. H. Zellin & Co. began the business of manufacturing their regulator or medicine in Macon, Ga., but in 1872 removed to Philadelphia, Pa., and after that time did business continuously at Philadelphia, until they transferred their business to "J. H. Zellin & Co., Incorporated," a corporation chartered under the laws of the state of Pennsylvania, which corporation has since been carrying on the business at the same place, and has been brought into this case by supplemental bill and answers assuming all responsibilities connected with this litigation.

Within a few months after J. H. Zellin & Co.'s purchase from C. A. Simmons, a fierce rivalry sprang up between that concern and Dr. M. A. Simmons, and has been continued by them and their successors down to this time. This warfare has been waged in newspapers and circulars, and has been very bitter and mutually abusive. It would serve no good purpose to go into this matter more particularly. Suffice it to say that neither has secured much advantage over the other in the use of hard names and injurious epithets. The culmination of this rivalry and bitterness was the present litigation. On the 23d day of January, 1891, the complainant filed its original bill against J. H. Zellin & Co., I. L. Corse, T. F. Cheek & Co., and the

Mansfield Drug Company, in which bill, among other things disposed of by the chancellor and not appealed from, and hence not necessary to notice here, they sought to restrain the defendants from vending a certain package known in this record as the "Cheek Package," and for a destruction of the labels, packages, devices, etc., connected therewith, and for an account of profits. To this bill the defendants filed their answer and cross bill, and in said cross bill defendants asked that complainant in the original bill be restrained from using a carton of like form and size to that used by complainants in the cross bill; that complainant in the original bill be restrained from using red or reddish-gold borders within slight black lines on its package; that it be restrained from using red tablets or reddish-gold tablets across its packages; that it be restrained from using triangular-shaped flaps on the ends of its packages, bounded by broad red or reddish-gold lines, inclosed in slight black lines; that it be restrained from using the words "Full directions inside" within the triangular-shaped flap at the bottom of its packages; that it be restrained from putting any matter within the triangular-shaped flap on the top of its packages; that it be restrained from putting up its medicine in liquid form; and for an order of reference to ascertain the amount of damages which complainants in the cross bill may have sustained by reason of the infringement of their trade-mark rights.

But before proceeding to a consideration of these matters, it is necessary to first dispose of a preliminary question made by the defendants. It is said that the complainant does not come into court with clean hands, and should be therefore repelled at the threshold of a court of equity, because the proof shows that complainant had put out a circular entitled "Humor and Facts," and sent it broadcast to the trade, in which circular the claim was made that Dr. M. A. Simmons was the discoverer of the remedy; also because the triangle on top of complainant's packages contains the following: "Trade-mark registered, consisting of name, picture, and autograph, November 11th, 1843;" and also because each package issued by the complainant contains the following statement, viz.: "This is the only original and genuine Simmons' Liver Medicine." The principle is general, and is one of the maxims of the court, that he who comes into a court of equity, asking its interposition in his behalf, must come with clean hands; and if it appears from the case made by him or by his adversary that he has himself been guilty of unconscionable, inequitable, or immoral conduct in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of or depends upon or is inseparably connected with his own prior fraud, he will be repelled at the threshold of the court. Some application of this principle

to the special class of cases we have under consideration will be seen in the following extract taken from Browne on Trade-Marks: "Where a complainant had in his advertisements made a number of false representations to the public with respect to the origin, composition, and value of the tea bearing his trade-mark, an injunction was refused until he had established his right at law; Vice Chancellor Shadwell saying: 'It is a clear rule laid down by courts of equity not to extend their protection to persons whose case is not founded in truth.' The rule applies when one has made misrepresentations in show cards; or made false statements as to the qualities and properties of his merchandise, as in selling a medicine misnamed 'Balsam of Wild Cherry;' or a toilet compound, the labels of which contained untrue statements and exaggerations; or a cosmetic called 'The Balm of Thousand Flowers,' though the compound was not derived from flowers; or 'Laird's Bloom of Youth, or Liquid Pearl,' when the so-called article contained carbonate of lead or other noxious ingredients, although the manufacturers described it as being free from all mineral and poisonous substances; or improperly represented that 'schnapps' is not merely a spirit, but also a medicinal preparation; or sold a so-called 'hop essence' for the purpose of enabling brewers to supply to the public a liquid which they might represent as being made from pure hops, which was not the truth; or made false representations of the origin and value of the plasters, the word 'caprine' being shown to be quite unknown, and not to imply any such qualities as were described by the plaintiffs; or falsely representing the place of manufacture, as where the manufacturer of a skin powder, which he called 'Meen Fun,' falsely represented his American compound to have been made in England, and patronized by the queen; or misrepresented his cigars as having been made in Havana; or falsely denoted or indicated to the public, in the title to his merchandise, that the formula for his medicine was prepared in the East Indies; or untruly represented the place of origin as well as manufacturer; or continued the name of a predecessor after he had ceased to be connected with the business. But it must be remembered that in all the above cases fraud was a predicate. Where no actual or constructive fraud is shown, and no intention to harmfully mislead purchasers manifested by the use of instrumentalities that would naturally tend to that result, the rule does not apply." Browne, Trade-Marks, § 71. And see *Pidding v. How*, 8 Sim. 477, Cox, Amer. Trade-Mark Cas. 640; *Partridge v. Menck*, 2 Sandf. Ch. 622, Cox, Amer. Trade-Mark Cas. 72; *Hobbs v. Francois*, 19 How. Pr. 567, Cox, Amer. Trade-Mark Cas. 287; *Phalon v. Wright*, 5 Phila. 464, Cox, Amer. Trade-Mark Cas. 307; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. Rep. 436. So, where

the question arose as to the untruthful use of the word "patent" or "patented," it is said: "In all the foregoing cases, a fraudulent intention, or tendency to mislead, was the ground of decision. But the untrue use of the word 'patent' or an equivalent expression does not necessarily disentitle to relief. Intent, or a tendency to mislead, is, after all, a question of fact to be determined by the circumstances of each individual case." *Browne, Trade-Marks*, 87. And again: "In the supreme court of Louisiana it was held that the use of the word 'patented' must be with the purpose of deceiving the public, to be a valid objection; and if a fraudulent intention does not exist, and the use of the word may be explained in any reasonable sense consistent with truth and honesty, the party will not be prejudiced." *Id.* 88; *Oil-Tank Co. v. Scott*, 33 La. Ann. 946, *Price & S. Amer. Trade-Mark Cas.* 477. So, where the words adopted in the label as a trade-mark are substantially true, and contain nothing calculated to deceive the public, although not literally true, this was held to be a distinction without a difference, and not sufficient to repel the plaintiff. *Conrad v. Brewing Co.*, 8 Mo. App. 277. The words complained of were "Budweiser Lager Beer." "It is contended that the law can afford no protection to plaintiff because his so-called 'trade-mark' or 'label' was in itself a misrepresentation. This beer, it is said, was not Budweiser beer. That it was not Budweiser beer in the sense that it was not made in Budweis is true. Neither was it imported beer. But it does not appear that it was held out to the public either as actually made in Budweis or as a foreign article. The statement on the label explains that it was not made at Budweis, but by the Budweiser process. Whether there was anything peculiar to Budweis about this process or not, it seems that this beer was really made as beer made in Budweis,—of the best barley and hops, and with the same preparation of mash. The label states that it was made of the best Saazar hops and imported barley. If this was not literally true, the testimony is that it was a distinction without a difference. Imported hops exclusively were used. There were frequently other hops, but they were always of the same excellent quality as Saazar hops, and of the same peculiar properties, and were always imported hops. The barley was not imported; but a select quality of American barley, equal to imported barley, was always used. There was no testimony tending to show any imposition upon the public by plaintiff. The testimony is that the public was furnished by him with an excellent quality of beer, made of imported hops and of barley equal to any to be found in Europe or America." *Id.*, *Price & S. Amer. Trade-Mark Cas.* 322.

It is true, as insisted by complainant, that this objection is not set up in defendant's answer in the case at bar; nor was that nec-

essary. In the case of *Fetridge v. Wells*, 13 How. Pr. 385, *Cox, Amer. Trade-Mark Cas.* 188, where this question arose in a similar case, said Duer, J.: "The remarks that I have now made would suffice for the decision of this motion were the only question that of the similarity of the trade-marks, but there is another and a grave and important question, to which the counsel for the defendants have earnestly directed my attention. That question is whether, even upon the supposition that all the material allegations in the complaint are true, the conduct and proceedings of the plaintiff and his firm have not been such as justly to preclude them from any claim to relief in a court of equity. This question, it is true, is not raised in the answer of the defendants, but it is raised by the facts which the affidavits and other papers before me have disclosed, and, in my opinion, it is emphatically a question that, as a judge in equity, I am bound to consider and determine." And in *Connell v. Reed*, 128 Mass. 477, the fraud was first disclosed in the report of the master upon the subject whether there had ever been a former use of the trade-mark in controversy, and when this report came in, containing the information that the plaintiff had adopted and used the words "East Indian" to denote and to indicate to the public that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which was the fact, the court declined to entertain the proceeding further, saying: "Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public." *Id.*, *Price & S. Amer. Trade-Mark Cas.* 347. It is not, strictly speaking, a defense at all, but rather an interposition by the court in behalf of the public, to discourage fraud and wrong upon the public.

Applying the rule above illustrated to the facts of this case, we think that there is no doubt that the statement made in "Humor and Facts" that M. A. Simmons was the discoverer of the medicine or formula, being false, and being known to be false, and material, would disentitle complainants to any relief, if otherwise entitled, but for the fact that this statement was not made after the year 1883. It is certainly true that where a business has been built upon the publication of a particular falsehood for a considerable time, as in *Seabury v. Grosvenor*, 14 Blatchf. 262, *Price & S. Trade-Mark Cas.* 29, the omission of such fraudulent and untrue language from circulars before bringing suit will not relieve the plaintiff of the consequences of the previous wrong; but we do not think this rule should be applied to a single circular issued in one particular year, eight years before suit brought, although a very large number of copies of that circular were issued in that year, especially in view of the fact that this publication occurred simply as one incident in a

long career of previously established business, reaching back more than 40 years.

As to the statement on complainant's packages, "Trade-Mark registered, consisting of name, picture, and autograph, November 11th, 1843." While this was not and could not be true, we do not think that it was intended thereby to mislead the public as to any material matter, or that it did so mislead the public. This statement must be understood in the light of the controversies that have been waged between the complainant and defendants for many years past. As soon as Zellin & Co. got possession of the formula from C. A. Simmons, and began the manufacture of their Dr. Simmons' Liver Regulator or Medicine, a controversy sprung up as to who had the right to make the medicine. Zellin & Co. claimed that, as assignee of C. A. Simmons, the only person, as they insisted, who had received authority from Dr. A. Q. Simmons, they had the sole right. M. A. Simmons insisted that he was one of the original proprietors. In this state of the case, M. A. Simmons thought it necessary to hold up before the public the fact of his early connection with the making of the medicine; that, as far back as 1843, he had publicly asserted a proprietorship in the medicine. This he had in fact done by the filing of the book title, before referred to, November 11, 1843, under the copyright law in the office of the clerk of the district court of the United States for the district of west Tennessee, and receiving from the clerk a certificate in his own name, showing that he had so filed, the title so filed being "Dr. Simmons' Vegetable Liver Medicine, Prepared Solely by A. Q. Simmons and Son, Walker County, Geo." The statement on the package is intended to call attention to this cardinal fact: the early connection of Dr. M. A. Simmons with the medicine as a proprietor; and, so understood, states the truth. The statement in other respects is wholly immaterial and unmeaning, because in 1843 there was no provision for registry of trade-marks, and the statement in this respect was merely the statement of an absurdity, and innocuous. The copyright law under which the so-called "registration" of 1843 was made had no application to trade-marks, and gave them no protection. *Browne, Trade-Marks*, §§ 109-112. The first attempt by congress to regulate the right in trade-marks is to be found in the act of July 8th, 1870. *Id.* § 280. Under this act, Dr. M. A. Simmons did register his trade-mark, "consisting of name, picture, and autograph," in 1874, as before stated; and, at the time said statement on his package was first put forth, the registration allowed by that act had been made. That act was declared unconstitutional in 1879 by the federal supreme court. *Trade-Mark Cases*, 100 U. S. 82, 99. We do not think that the complainants should be repelled on account of said statement, for the reason that, so far as

it contains any suggestion of untruth, it is immaterial, absurd, and innocuous.

As to the next statement upon complainant's package animadverted upon by the defendants, that "this is the original and only genuine Simmons' Liver Medicine, the first that was ever advertised of that or any similar name. Dr. M. A. Simmons advertised it extensively, peacefully, and alone for 25 years, before any of the others who are now making the different grades of imitations of it commenced. No other Simmons ever did so," etc. This is substantially correct in its statement as to advertisement, and the maintenance of the reputation of the medicine, and as to its being original, in the sense of being made from the original formula and by one of the original proprietors; but it is not correct as to complainant's preparation being the only genuine preparation made from the original formula, because the proof makes it clear that the preparation made and sold by Zellin & Co. is equally genuine with complainant's, in the sense of being made from the same original formula. Was this misstatement made fraudulently? We think not. However mistaken M. A. Simmons was in his opinion, the record shows that he honestly believed that, as one of the original proprietors, he was entitled to the secret of the preparation, and he alone after the death of his father, in 1862. He always passionately denied the right of Zellin & Co. to use the word "Medicine," making no objection to the use of the word "Regulator." He seemed never to be convinced of the fact that his father had communicated the formula to C. A. Simmons. He dwelt upon the fact that C. A. Simmons had sold what purported to be the original formula to one Gulce, and that the medicine made up by Gulce according to this formula had proven inert and worthless, and he argued from that that Zellin & Co., having purchased from C. A. Simmons, had gotten the same imperfect formula that he supposed C. A. Simmons to have. He even went so far as to offer in a letter to J. H. Zellin himself, dated October 8, 1877, to teach him how to prepare the medicine correctly, when he and Zellin were having some correspondence about a sale of M. A. Simmons' business to him. The letter runs thus: "Your favor of the 3d instant is here. Knowing your ignorance of the party addressed, I overlook the part which seems designed to intimidate, and come at once to the question, what is best for us to do? I have been for several years in hopes of getting into court with you,—would when you first commenced, but had no idea that you could so completely undermine and get my business until it was done. Then you were in Philadelphia, too far for me to go so often annually, and probably so long to attend court. Now, as proof that I am pursuing the proper course, it is successful. My business has been constantly

increasing for several years, and I am satisfied that it will continue to increase. My prospects are better now than ever since your monopoly of newspapers. Yet I prefer quiet and peace, and would like to rest from exciting business in my old age. Therefore would sell to you; learn you how to make it right; quit it entirely, and run other preparations," etc. He and his successors also attached the greatest importance to the word "Medicine" in the title to their preparation, because it bore that designation as prepared under the original formula by M. A. and A. Q. Simmons, when they made it up and sold it themselves, and the word "Medicine" in that connection had acquired in the minds of the people supplied by M. A. Simmons a meaning peculiar, and appertaining to the old medicine as originally prepared, and connecting it back with the old formula. So that, when M. A. Simmons and his successors used the expression "original and only genuine Simmons' Liver Medicine," it bore in their minds and was intended to convey two ideas,—direct descent, so to speak, in formula and in name, from the ancient original; and this was honestly believed by them to be true. We cannot impute fraud on such a state of facts. We cannot hold this to be a deliberate purpose to deceive the public. This statement is not true in the sense of being the only genuine preparation from the original formula; it is true in the sense of being the only preparation, so far as the proof shows, that continues the ancient name with the ancient formula.

Recurring now to a consideration of the substantial rights of the parties in litigation in this case, we are brought to a discussion of the "Cheek Package" and the rights predicated thereon. The antecedents of this package are as follows: T. F. Cheek, being a son-in-law of old Dr. A. Q. Simmons, and having gone with him to Texas, and there resided part of the time with his family and part of the time a few miles distant, claimed to have received in 1857 authority from Dr. A. Q. Simmons to make all of his medicines, and to use his picture as a protection against frauds and imitations. After the close of the Civil War, and about the year 1870 or 1871, Cheek decided to leave Texas and remove to Alabama or Mississippi. Before leaving Texas, he endeavored to purchase from A. Q. Simmons, Jr., the right to use his name in connection with the manufacture of the liver medicine. A. Q. Simmons, Jr., refused to comply with this request. Cheek then approached A. W. Simmons, another son of Dr. A. Q. Simmons, and, for a consideration of \$50, secured from him permission to use his name in connection with the manufacture of said medicine. Thus armed, Cheek went to Iuka, Miss., where Dr. M. A. Simmons was engaged in manufacturing and selling the medicine. He suggested to Dr. M. A. Simmons that there

should be a combination of all the heirs of Dr. A. Q. Simmons in the manufacture of the medicine. This was declined. He, however, manufactured a small quantity of the medicine on his own account, Dr. M. A. Simmons ordering the materials for him, and he (said Cheek) sold it in an inconsiderable quantity around the neighboring towns and country for a short time. About this time he registered his trade-mark in the office of the librarian of congress at Washington, a photograph of Dr. A. Q. Simmons; and on the 31st of December, 1872, having in the mean time removed to Birmingham, Ala., he deposited in the same office a print entitled "Simmons' Improved Liver Medicine," and on December 4, 1877, he received a certificate from A. R. Spofford, librarian of congress, to the effect that he had deposited in that office a photograph of Dr. A. Q. Simmons, accompanying the certificate, with the title "Simmons' Improved Liver Medicine. By T. F. Cheek, of Birmingham, Alabama." After he went to Birmingham, Ala., he there manufactured liver medicine, and sold it in a small way, using a wrapper for his packages on one face of which appeared a picture of Dr. A. Q. Simmons,—that is, a bust of him,—with the words "Trade-Mark," one of these words appearing on each side of the picture. Above this picture was a notice of the entry in the office of the librarian of congress before referred to, and under it the following: "The celebrity of Simmons' Liver Medicine and the constantly increasing demand has induced sundry persons to counterfeit it. Hence it becomes the duty and privilege of the heirs of Dr. Simmons to sustain and increase its usefulness by such improvements as are demanded by medical progress, and to secure accuracy in purchasing. Therefore information is given that Simmons' Liver Medicine has been greatly improved, and hereafter every package will have the engraving of Dr. Simmons and signature of T. F. Cheek, to whom all orders and communications must be addressed at Birmingham, Alabama." On another face of said wrapper was the following: "Simmons' Improved Liver Medicine, a safe and effectual remedy for all diseases arising from a diseased state of the liver, such as chronic and acute inflammation of the liver, dyspepsia, bilious affection, dropsy, sick headache, costiveness, impure blood, jaundice, colic, loss of appetite, low spirits, despondency, flatulence, female weakness, and general debility; warranted purely vegetable by A. W. Simmons & Co., heirs of Dr. A. Q. Simmons. Send all orders to T. F. Cheek, Birmingham, Alabama." Another face of the wrapper contained a further list of ailments for which the medicine was said to be efficacious, and the fourth face contained the advertisement of Simmons' blood purifying pills.

In May, 1878, T. F. Cheek entered into an arrangement with E. G. Eaton and F. H.

Eaton under which the firm of T. F. Cheek & Co. was organized to manufacture the liver medicine at Memphis, Tenn., with the reservation in his favor that he was to be allowed to carry on his own manufacture at Birmingham. This concern used a wrapper upon one face of which appeared the following: "Dr. A. Q. Simmons, the Original and Genuine Vegetable Liver Medicine;" just under this the picture of Dr. A. Q. Simmons, on each side of which was printed the word "Trade-Mark," and under the picture a facsimile of the signature of Dr. A. Q. Simmons; then a notation of the entry in the office of the librarian of congress; and then these words: "A cure for all diseases of the liver, biliousness, dyspepsia, sick headache, loss of appetite, costiveness, etc. T. F. Cheek & Co., Proprietors and Manufacturers, Memphis, Tennessee." The other three faces contained certificates, one of which purported to be made by A. Q. Simmons, setting forth the fact that he had given T. F. Cheek the right to use his picture. This concern continued in business until some time in the year 1881 or 1882, and in June, 1882, T. F. Cheek and his wife, Mary J. Cheek, transferred to one Thomas A. White all their interest in T. F. Cheek & Co. and all their individual interest in the formula for making the liver medicine, together with the trade-mark, cuts, dies, wrappers, etc.; and the same month the Eatons likewise sold all their interest in the said property to White, who soon thereafter transferred all these rights and properties, such as they were, to J. H. Zellin & Co., defendants hereto, and the business of T. F. Cheek & Co. wholly ceased; that is, said T. F. Cheek & Co. ceased doing business when the sale was made to White. Matters remained in this condition until January, 1890, or about that time. About the date last named, J. H. Zellin & Co. opened a business at Memphis, in the name of T. F. Cheek & Co., the defendant I. L. Corse being manager. This business consisted of a wareroom wherein were stored boxes of liver medicine of the manufacture of defendants Zellin & Co., done up in packages as follows: Contained in wrappers very closely resembling those used by T. F. Cheek in his business at Birmingham, but with the following differences: Immediately under the picture of Dr. A. Q. Simmons is the name of Dr. A. Q. Simmons in printed letters, and on the lower part of the face of the package the sentence in the original Cheek package beginning with the word "Therefore" is changed so as to read as follows: "Therefore information is given that Simmons' Liver Medicine will have on every package an engraving of Dr. A. Q. Simmons and name of T. F. Cheek & Co." On the back of the package in controversy the following changes are made from the original Cheek package: The word "Improved" is left out, so as to make the top of that side of the label read "Simmons' Liver Medicine," and upon the

lower part of that side of the package the words "T. F. Cheek & Co., Memphis, Tennessee," are substituted for the corresponding words "T. F. Cheek, Birmingham, Alabama," on the original Cheek wrapper. On the third side of the package in controversy, there are substituted in place of the advertisement of Simmons' Blood Purifying Pills on the original Cheek wrapper the following words: "Liver Medicine, by A. Q. Simmons. The original, as made by old Dr. A. Q. Simmons in his lifetime, a cure for all diseases of the liver, biliousness, dyspepsia, sick headache, loss of appetite, costiveness, colic, heartburn, fever and ague," etc. The fourth side is exactly like the original wrapper used by T. F. Cheek. There is but little resemblance to the wrapper used by T. F. Cheek & Co., the old firm composed of Cheek and the Eatons, the only substantial similarity being the picture of Dr. A. Q. Simmons. With regard to this package, complainant charges that it was manufactured and put up in its present form to sell to the customers of complainant and to the trade known by defendants to be the territory in which complainant's medicines were sold; that it is a spurious, fraudulent, and sham preparation of a liver medicine, purporting upon the label and wrapper containing said medicine to be the genuine Dr. Simmons' Liver Medicine, and further showing by the printed matter upon said label and wrapper that the same was warranted as purely vegetable by "A. W. Simmons & Co., heirs of Dr. A. Q. Simmons," and stating that the same was made and sold at and from the city of Memphis, Tenn., by the firm of T. F. Cheek & Co., when in fact it is not so made or sold by said T. F. Cheek & Co., but it is manufactured and labeled and sold by and for the account of J. H. Zellin & Co. and their agents, for the purpose of injuring the trade and damaging the business of complainant, and of deceiving the public, and that the pretended warranty by A. W. Simmons & Co. is fraudulent and fictitious, there being no such firm as A. W. Simmons & Co. or T. F. Cheek & Co. in the city of Memphis or elsewhere; that the object of this plan and device was to palm off said package as complainant's goods; that there is neither upon said label or wrapper of said package anything to indicate to or inform the public that defendants are in any manner identified with the manufacture or sale of said package, and that the said defendants Zellin & Co. have studiously avoided any identification or apparent connection with the said preparation, both for the purpose of not interfering with their own medicine, known as "Dr. Simmons' Liver Regulator or Medicine," and in order that they might more effectually injure complainant's business; that from a date long prior to 1868, and down to the present time, the liver medicine manufactured and sold by Zellin & Co., and labeled as "Dr. Simmons' Liver Regulator or Medicine," has been known to the

trade and consumers as "Liver Regulator" or "Simmons' Liver Regulator," the word "Medicine" being rarely used in connection with said preparation when speaking thereof or ordering the same, and that complainant's medicine, since 1840, has been generally known to the trade and consumers as "Simmons' Liver Medicine," or "Dr. Simmons' Liver Medicine," or "Simmons' Medicine," and that the words "Medicine" and "Regulator" have respectively been used and are used by the trade and by consumers to indicate which of the two preparations was and is wanted when called for, the word "Medicine" being used to identify complainant's liver medicine, and the word "Regulator" being used to designate defendants' medicine; and that defendants Zellin & Co., well knowing these facts, had put upon the market said Cheek package in such a manner as would not injure the sale or detract from the price of their regulator, but that would come in direct competition with, and could be sold under calls or orders for, complainant's "Simmons' Liver Medicine," and that said package had been put upon the market in that portion of the country where complainant's principal trade was at about one-half the price charged by Zellin & Co. for their "Liver Regulator," and by complainant for its "Liver Medicine," and this reduction in price was made solely for the purpose of damaging the trade and business of complainant, and to drive it out of the market; that all the packages of medicine manufactured by complainant and its predecessors in ownership contained, as one distinguishing feature of the wrapper thereof, an engraved portrait in black of Dr. M. A. Simmons, and that none of the packages of "Liver Regulator" manufactured and sold by defendants at any time contained on the wrapper thereof any picture of any person, but that they were characterized and designated by the name "Regulator" and by the large red Z on the front of each package thereof, but that on said Cheek package complained of there is a picture of Dr. A. Q. Simmons in black, placed upon the face of the label, of about the same size and of the same general appearance and in the same position relatively on the package or wrapper as the picture of Dr. M. A. Simmons on the packages made and sold by complainant, and that said picture was put upon said Cheek package by defendants Zellin & Co. to enable them the more easily to deceive the public and the consumers of complainant's medicine; that said Cheek packages are well calculated to deceive and do deceive and entrap the unwary who call for "Simmons' Liver Medicine," manufactured and sold by complainant, the name, picture, and general appearance of the package deceiving them; and that defendants, well knowing this fact, have repeatedly filled orders calling for "Simmons' Liver Medicine," or "Dr. Simmons' Liver Medicine," made by complainant; and that said defendants are now sell-

ing large quantities of said medicine put up in said Cheek packages to complainant's customers, and to the trade in the territory where complainant is most largely engaged in selling its said Simmons' Liver Medicine; and that, by reason thereof, complainant has been greatly injured.

Respondents Zellin & Co. deny all charge of fraudulent purpose in putting out said Cheek package, and deny that it is a spurious or sham preparation; admit that said medicine is not in point of fact manufactured in the city of Memphis, and say that it is manufactured in the laboratory of respondents in the city of Philadelphia, and that J. H. Zellin is sole proprietor of both J. H. Zellin & Co. and of T. F. Cheek & Co.; deny that said medicine is sold in said packages at Memphis for the purpose of injuring and damaging the business of complainant, and of deceiving the public; deny that the warranty of A. W. Simmons & Co. is pretended, fraudulent, or fictitious, and state that they have the right to use the firm name of A. W. Simmons & Co. or T. F. Cheek & Co. in the city of Memphis or elsewhere; set forth the facts of their purchase from T. F. Cheek and wife and the Eatons substantially as hereinbefore stated, and say: "Having acquired the trade-marks of T. F. Cheek & Co., respondents concluded to put up their medicine in the wrappers and labels used by T. F. Cheek & Co. at Birmingham, the only difference being the substitution of 'Memphis, Tennessee,' for 'Birmingham, Alabama,' and sell their medicine through the Mississippi valley, making Memphis the point from which the shipments were made. Accordingly, respondents, under the firm name of T. F. Cheek & Co., established a depot at Memphis, and have since conducted the business under the name of T. F. Cheek & Co. Respondents deny that the labels and wrappers in which said medicine is inclosed are any infringement whatever of the trade-mark rights of complainant. There is no resemblance whatever between the portraits of M. A. Simmons and A. Q. Simmons. The packages are not the same color, and they bear no resemblance in color; and there is no probability of consumers being deceived in taking one for the other." That T. F. Cheek & Co. only sell said medicine in the form of powder, and in 25-cent packages, and that respondents were induced to put up the medicine in this form because they could do so more cheaply than it could be put up in the form in which J. H. Zellin & Co. sell their medicine,—that is, their "Regulator,"—and that the business of T. F. Cheek & Co. was intended to meet the demands of the trade in the Mississippi bottom, where the people are not accustomed to buying medicine in large packages. That the 25-cent package sold by T. F. Cheek & Co. was intended to meet the requirements of the negro trade in the Mississippi valley, and

that, while the medicine is intrinsically as valuable as that of J. H. Zeilin & Co., it is put up in a cheaper package, and is therefore sold for less money, without interfering with the business of J. H. Zeilin & Co. at Philadelphia. They state that T. F. Cheek put said medicine up in a package in all respects similar to the one now in controversy as far back as 1871, and prior to the time when the predecessors of complainant adopted the square package, and before they had abandoned the use of a tin can for their medicines; and there is no resemblance whatever between the labels and wrappers in use by complainant and his predecessors at the time T. F. Cheek began business and the labels and wrappers then adopted by T. F. Cheek, and now used by T. F. Cheek & Co. They deny that the use of said firm name of T. F. Cheek & Co. is a fraud upon the complainant, or that it was intended to palm off spurious goods put up by respondents, and sold by said firm to the injury of complainant; deny that the medicine so put up is spurious, but say that it is pure and of the best quality; admit that there is nothing on the packages containing the medicine of T. F. Cheek & Co. indicating that respondents are in any manner connected therewith, and insist that they have a right to do business in Philadelphia under the firm name of J. H. Zeilin & Co., and in Memphis under the firm name of T. F. Cheek & Co.; deny that they have avoided any identification with T. F. Cheek & Co., but say that, on the contrary, they have openly shipped the medicine from their laboratory in Philadelphia to their storehouse in the city of Memphis, and that the defendant Corse, who is a member of the family of J. H. Zeilin, has charge of his business; deny that the medicine is generally known by any particular appellation to all customers, but say that it depends a great deal upon the locality as to what the public calls it; that, among the more ignorant, it is sometimes called "Simmons," without the use of any other word, and that generally it is called "Liver Regulator," and by some it is called "Liver Medicine;" that, at various times since defendants began business, various persons have used the words "Liver Medicine" in connection with the word "Simmons" in one form or another; and that for years they have been in litigation with first one and another member of the family; and that a man by the name of Simmons, and not a member of the family, is selling a liver medicine in Texas, and used the word "Simmons" as a part of his trade-mark; and that a man named Thedford is the manufacturer and vendor of "Simmons' Liver Medicine" at Judson, Ga.; and that all this has been brought about by means of the extensive advertising of respondents' medicine; and that consequently, to protect themselves, they have bought out T. F. Cheek & Co. as aforesaid, concluded to

manufacture and put up in a cheaper package the medicine, and sell it in Memphis under the firm name of T. F. Cheek & Co., and under the trade-marks acquired as aforesaid from T. F. Cheek and Eaton. They deny they have sold and are now selling large quantities of the medicine of T. F. Cheek & Co. to the customers of complainant, or that they ever damaged complainant in any respect, but say they are selling the medicine to their own customers, and are doing what they can to build up a fair and legitimate business.

The complainant is not entitled to any relief on the ground of infringement of its trade-mark, as such, technically considered. The right to acquire property in a trade-mark by use upon vendible commodities of some mark, symbol, sign, or word, susceptible of being used as such, is a common-law right, and the property so acquired is always protected by courts of equity in a proper case. The object and purpose of a trade-mark is to indicate by its meaning or association the origin or ownership of the article to which it is applied, so that the manufacture or product of the owner of same may be readily recognized in the market. "This may, in many cases, be done by a name, a mark, or device well known, but not previously applied to the same article. But though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. * * * No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those made or produced by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a general name or names merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection." *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396; *Canal Co. v. Clark*, 13 Wall. 311. The words "Liver Medicine" are purely descriptive, and could not be appropriated by the complainant to indicate its preparation alone, nor could the word "Simmons," in connection with the words "Liver Medicine," be appropriated by the complainants to its preparation alone; that, name, under the proof, having become merely descriptive of medicine prepared under the formula of old Dr. Simmons, and used by many people in connection with medicines prepared under that formula. *Marshall v. Pinkham*, 52 Wis. 572, 9 N. W. Rep. 615.

But the complainant contends that, at all events, it is entitled to relief against this Cheek package on the ground of what is styled, in some authorities, "unfair compe-

tion" in business. In relation to the class of subjects we now have under consideration, this may be defined, in general terms, as consisting of any device or trick whereby one manufacturer's or dealer's goods are palmed off in the market as and for the goods of another, in fraud of the public and of the persons whose goods are so displaced; the most usual of such devices being the simulation of labels, the imitation of another's style of putting up goods, and the reproduction of the form, color, and general appearance of his packages. An attempt to enumerate all such devices would be as futile as an effort to catalogue all the expedients that fraud can employ. It is only within recent years that a distinction has been taken in the authorities between this class of controversies and technical trade-mark cases. In the earlier reported decisions, infringements of trade-marks and simulations of labels and packages are all intermingled under the general designation of "trade-marks," or treated as, in substance, the same thing, if not the same in exact definition. Latterly, however, especially in this country, the tendency has been to a narrowing of the use of the term "trade-mark" to its proper signification, as an arbitrary symbol affixed by a manufacturer or merchant to a vendible commodity, and to exclude from use, as such symbol, words merely descriptive or generic, or merely expressive of quality, and also to exclude from designation, as such, labels, advertisements, signs, and the form, size, and general appearance of packages of merchandise. *Browne, Trade-Marks*, §§ 20, 39, 43, 79, 81, 83, 87, 89, 89a-89d, 90, 91, 130, 131-134, 137, 544. The new classification, while useful, seems to lack something of logical accuracy, inasmuch as the imitation of another's trade-mark, if intentional, and done with the purpose of pirating his trade thereby, is as truly an instance of unfair competition in business as any other fraudulent device adopted for that purpose; so that the effect is, in the main, only the attainment of a more correct and accurate use of the term "trade-mark," while the cases falling under the new classification are subject to most of the principles that govern technical trade-marks, but not to all. Moreover, the principles that are common to trade-mark law as thus narrowed, and to the subject of unfair competition in business, are also applicable to competition in other kinds of business besides the sale of articles of merchandise; leaving, however, a residuum of peculiar rules applicable only to technical trade-marks. The correspondences between the two classes of cases are more numerous than their differences. As in cases of trade-marks, so in cases of unfair competition in business, imposition upon the public is a necessary constituent of the plaintiff's title to sue, but only in the fact that it is the test of the invasion of the

plaintiff's rights by the defendant. As in one, so in the other, the object and purpose of the law is, first, to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill, and, secondly, to protect the community from imposition. As in one, so in the other, the underlying principle is that one man is not to sell his own goods under pretense that they are the goods of another; and as in one, so in the other, the violator of another's rights pirates upon the good will of that other's friends and customers, or the patrons of his trade and business, by sailing under his flag without his authority or consent. There is this difference, however: The law of trade-mark is designed to protect primarily a property right, (*Browne, Trade-Marks*, §§ 45-47,) and, as incidental thereto, gives redress for the injuries resulting from invasions of the right, a distinct technical trade-mark being in itself evidence, when wrongfully used, of an illegal act; while the jurisdiction exercised over cases of unfair competition in business is grounded in the prevention of fraud. Fraudulent intention is not a necessary ingredient of a pure trade-mark case, as an invasion of another's trade-mark rights may be the result of accident or of a misunderstanding, although it may be and probably is true that in the majority of cases fraud is an element in trade-mark cases in awarding damages and costs, (*Id.* §§ 386-468;) while, in a case of unfair competition in business, fraud is of its essence, (*Id.* [2d Ed.] pp. 417-423, §§ 418-420; *Apolinaris Co. v. Brumler*, [decided by the supreme court of New York,]¹ *Cox, Manual Trade-Mark Cas.* [2d Ed.] pp. 429, 430, note; *Carson v. Ury*, 39 Fed. Rep. 777.) In the last-named case, the true distinction is thus accurately expressed by Thayer, J.: "The court cannot interfere in this instance, as in ordinary trade-mark cases, on the ground that one person is intentionally or unintentionally appropriating a mark, symbol, design, or word which has become the exclusive property of another when used by him to distinguish goods of a certain class. In short, this is not a trade-mark case. As I view it, it is a bill filed to restrain the defendants from perpetrating a fraud which injures the complainant's business, and occasions him a pecuniary loss. Even where no trade-mark was infringed or involved, courts of equity have granted injunctions on more than one occasion against the use upon goods of certain marks, labels, wrappers, etc., when the evident design of such use was to deceive the public by concealing the true origin of the goods, and making it appear that they were the product of some other manufacturer of established reputation, thereby depriving the latter of a portion of the patronage that would otherwise

¹ See note at end of case.

come to him, or injuring the reputation of his goods."

A short reference to some of these cases may be useful. In *Knott v. Morgan*, 2 Keen, 213, Cox, Manual Trade-Mark Cas. No. 57, it appeared that the omnibuses of the London Conveyance Company were painted, and their servants clothed, in a special and distinctive manner, and that the defendants began to run omnibuses similarly painted, with servants similarly clothed. On motion by plaintiffs, injunction was granted to restrain the defendants from imitating the plaintiff's line of omnibuses. Lord Langdale, in delivering his judgment in the case, expressly stated that the plaintiffs had no exclusive right to the words "Conveyance Company" or "London Conveyance Company," or any other words, but held that they had the right to call upon the court to restrain the defendants from fraudulently using precisely the same words and devices which plaintiffs had taken for distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendants', belonged to or were under the management of the plaintiffs.

In *Williams v. Johnson*, 2 Bosw. 1, decided by the supreme court of New York in 1857, and reported as No. 150 of Cox's Manual of Trade-Mark Cases, it appeared that plaintiffs were manufacturers of soap which they sold under the name of "Genuine Yankee Soap," using a particular style of wrapper, form of cake, handbill, etc., and that the defendant put up his soap in a similar manner with slight variations. It also appeared that there was sufficient doubt about the exclusive right of the plaintiffs to use the words "Genuine Yankee" to prevent their being protected. An injunction was granted restraining the defendant from using the simulated wrapper, etc., complained of. Woodruff, J., in his judgment, referred particularly to the form and size of cake, particular mode of covering and packing, a combination of three labels on each cake, and an exterior handbill upon the box, and the arrangement of the whole, and to the fact that the defendant had copied the form, appearance, color, style, and substantial characteristics which distinguished the plaintiffs' goods.

In *Lee v. Haley*, an English case, decided in 1869, and reported as No. 325 of Cox's Manual of Trade-Mark Cases, it appeared that the plaintiffs were coal merchants, and carried on business at 32 Pall Mall, as "The Guinea Coal Company," and that the defendant, who was their former manager, set up for himself at Beaufort Buildings, Strand, as the "Pall Mall Guinea Coal Company," and afterwards removed to 46 Pall Mall. An injunction was granted to restrain the defendant from trading under that name in Pall Mall. It was said, per Giffard, L. J.: "I quite agree that the plain-

tiffs had no property in the name, [Guinea Coal Company,] but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given reputation to the name."

In *Frese v. Bachof*, (decided by Wheeler, J., U. S. Cir. Ct. S. D. N. Y., 1878,) Cox, Manual Trade-Mark Cas. No. 603, it appeared that plaintiffs were a firm of tea merchants, who sold "Hamburg Tea," in a peculiar form of package, the tea being inclosed in long, cylindrical parcels, with pink wrappers, and with crimson papers of directions and yellow ones of warning tied in, and having a white label with the firm name within a circle pasted across the ends of the string, and another white label, with the same and the words "Hamburg Hopfensack 6" embossed thereon, pasted on the package. The defendant at first put up his tea in a precisely similar manner, but, after the commencement of the suit, discontinued the firm name, and inserted his own. An injunction was granted restraining him from using packages similar to those of the plaintiff.

In *Sawyer v. Horn*, (decided in 1880, U. S. Cir. Ct. D. Md.,) 21 Fed. Rep. 24, Cox, Manual Trade-Mark Cas. No. 667, complainant alleged that, to individualize and identify his bluing, he adopted a peculiar and original style of package, "consisting of a blue cylinder, having a red top," and that his goods had long been known and identified by consumers by the peculiar appearance of the package. It was also set forth that his method of packing, including the size, shape, and color of his large packages, was original with him, and had never been varied. It was shown that the defendant had knowingly made and sold bluing put up in boxes and packages imitating complainant's article in all these particulars, except that he used his own name and made changes in the wording of his label. Defendant was restrained from putting up his goods in the manner stated, "or in any other manner so simulating the form, color, labels, and appearance given by the complainant to his goods as to mislead purchasers into imitating one for the other," and this "whether the plaintiff has a trade-mark or not."

In *Avery v. Meikle*, (decided in 1883,) 81 Ky. 75, it appeared that the defendants had not imitated plaintiffs' trade-mark; yet that, by the exact simulation of plaintiffs' plow in every perceivable point, exposed to an ordinary observer and purchaser, and the use of the same coloring and staining, the same relative position of the letters and figures as employed and used by the plain-

tiffs, avoiding the literal appropriation of any part of the trade-mark, they had obscured their own and appellants' trade-mark, but at the same time sought to avoid detection and responsibility in doing so, and to cause their plows to be taken for and purchased as those of plaintiffs; that, laying aside their own letters and numerals which they commonly used to indicate the size, series, and quality of their plows, they took up those of plaintiffs; that they quit lettering cast and figuring steel plows, and reversed that order, adopting the order used by plaintiff; that they consulted and deliberated before adopting the letters and numerals or imitating the construction of plaintiffs' plows; and that, after this deliberation, they so imitated the numerals and lettering of appellants' plows that nothing but the reading of their trade-mark and close inspection could distinguish the difference; that they made large quantities of plows leaving off their own trade mark and name, and substituting therefor the name of jobbers who were well known in the market to be vendors and not makers of plows, making it in their hands therefore impossible, without the aid of expert knowledge, to tell the difference between a Meikle and an Avery plow, as they both had the same indicia, and were constructed alike, the maker's name being altogether suppressed; and that they employed small salesmen to sell their plows, who placed them on the market one-half dollar cheaper than the Avery plow, and so advertised them as to be taken for those of plaintiffs. It was held that plaintiffs were entitled to injunction and relief; and, in setting forth the grounds of the judgment, the court say: "The confusion which prevails in the argument against the jurisdiction in this case results from assuming that in all cases the complainant must make out a legal title to an exclusive trade-mark by means of which, or some part of which, the defendant has done the wrong and injury to his rights. The authorities do not sustain this assumption, but, on the contrary, are numerous and strong that the wrong consists in one person fraudulently selling his goods as and for those of another, either by the use of the other's trade-mark, or indicia, or by any means whatever, if such fraudulent practices result, or are likely to result, in damage to the complainant. * * * As the object of the courts of equity is to prevent one man injuring another's rights by selling his goods as those of the other, why not prevent all fraudulent misrepresentations, whether oral, by sign, symbols, trade-marks, labels, words, or figures, by which that wrong is accomplished? The injury is the same, no matter how or by what means it may be done, and the responsibility should attach when that injury is deliberately and fraudulently committed."

In *Leclanche Battery Co. v. Western Electric Co.*, (decided in 1885,) 23 Fed. Rep. 279, v.23s.w.no.6—12

It appeared that there was no trade-mark in the case, but say the court: "The defendants have imitated the label of the complainant to the minutest details, except the signature at the bottom. The complainant is entitled to protection against the unlawful competition in trade thus engendered by the simulation of its label, and upon this ground a decree is ordered in its favor."

In the case of *Association v. Clarke*, (decided in 1886,) 26 Fed. Rep. 410, it appeared that "the complainant was the first to use for bottled beer a label with a diagonal red band, with the name of the kind of beer appearing in white letters on the red band, and that he has been habitually using this label for two years." It appeared to the court from an inspection of the labels that defendant's labels or bottles of beer would be likely to deceive purchasers desiring complainant's beer, and an injunction was ordered. There was no question of trade-mark in the case. To same effect, see *Association v. Piza*, 24 Fed. Rep. 149. And *Browne*, in his work on Trade-Marks, at section 43, under the heading of "Unfair Competition in Business," writes thus: "In examining cases classified in digests and books of reports as those of trade-marks, the reader is sometimes puzzled. In the absence of the slightest evidence that technical trade-marks have been infringed, courts of equity have granted full and complete redress for an improper use of labels, wrappers, billheads, signs, or other things that are essentially publici juris. The difficulty is that wrong names are used. French speaking nations have a standard name for this kind of wrong. The term used is 'concurrency deloyale.' This term may be fairly Anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German imperial court of Colmar, in 1873, the court said that current jurisprudence understands by 'concurrency deloyale' all maneuvers that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business. The euphemism employed as a head to this section will answer the present purpose. It implies a fraudulent intention, while, on the contrary, an enjoined infringement of a technical trade-mark may be the result of accident or misunderstanding, without actual fraud being an element. At law, special damage, unless damage is necessarily presumed, deceit, or fraudulent intent, must be proved in all cases to warrant a recovery. This is not always so in equity, but it is common both in law and equity where the infringement is perpetuated by other modes and means than the use of any part of a trade-mark itself; and whether a trade-mark is shown to be imitated or not, if the goods of one have been intentionally and fraudulently sold as the goods of another, and the latter has sustained damage, or the former threatens to continue acts tending to that end, a court

of equity will restrain the further commission of them. This subject belongs properly to the class of good-will cases; but, nevertheless, it is necessarily an ingredient in a great majority of trade-mark cases. As an illustration, take *Croft v. Day*, (in 1843,) 7 Beav. 84, which is not a technical trade-mark case. In that, Lord Langdale, M. R., granted an injunction to restrain the defendant from using labels or show cards calculated to mislead the public, saying that the right which any person may have to the protection of the court does not depend upon any exclusive right to a particular name of a man or to a particular form of words. His right, said he, is to be protected against fraud, and fraud may be practiced by means of a name, though the person using it have a perfect right to use that name, provided he do not accompany the use of it with other circumstances to effect fraud."

In *Croft v. Day*, 7 Beav. 84, (above referred to,) the following apt language upon this subject also occurs, in addition to that above quoted: "The accusation which has been made against this defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator, in this cause. It has been very correctly said that the principle in these cases is this: that no man has the right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors or adopt the bare symbols to which he had no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

And in *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396, it is said: "It seems, however, to be contended that plaintiff was entitled, at least, to an injunction, upon the principle applicable to cases analogous to trade-marks; that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly, an unfair and fraudulent competition against the business of the plaintiff—conduct with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff, to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief." Then the court further proceeds: "In *Nail Co. v. Bennett*, 43 Fed. Rep. 800, where the bill alleged that the defendants had imitated

plaintiff's method of bronzing horseshoe nails, which plaintiff used as a trade-mark, with the intention of deceiving the public into buying their goods instead of plaintiff's, and the question came up on demurrer, Mr. Justice Bradley, after stating certain averments of the bill, said orally: "There is here a substantial fact stated,—that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nails for the complainant's. That averment is amplified in paragraph four of the bill. Now, a trade-mark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is the style of goods adopted by the complainant which the defendants have imitated for the purpose of deceiving, and have deceived, the public thereby, and induced them to buy their goods as the goods of the complainant. This is fraud." The court quotes with approval the case of *Wotherspoon v. Currie*, L. R. 5 H. L. 508, known as the "Glenfield Starch Case," and *Thompson v. Montgomery*, 41 Ch. Div. 35, 50, known as the "Stone Ale Case."

"In this important case," says the learned compiler of *Cox's Manual of Trade-Mark Cases*, in a note to same, (2d Ed., p. 495,) "the supreme court of the United States for the first time in its history recognizes and explains the fundamental differences between the piracy of a trade-mark and unfair competition in business. In *Goodyear India-Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. Rep. 196, allusion was made to the existence of a rule whereby 'unfair trade' is restrained, but no attempt was made to define it, or to interpret the adjudications which illustrate its application and purpose. The lucid and accurate opinion of Chief Justice Fuller in the case before us establishes a classification which is obviously logical, and obviously useful and of value to the public; and his conclusions are at variance with, perhaps, not a single well-considered case to be found in the books. The doctrines affecting the protection of technical trade-marks are easily understood, but the subject of what has come to be known as 'unfair competition in business' is much broader and more important. * * * We have here a recognition of the two kinds of cases: (1) Those dependent upon the right of property, and (2) those dependent upon fraud, whereby the earlier cases and the thought and learning of the past are harmonized and made to run hand in hand." And, as the learned author further remarks: "Courts of equity will direct the manner in which words that are public juris shall be used, and will prohibit their use in an inequitable manner for the purpose of misleading the public and displacing

an existing business. Beyond this none of the cases go, nor can they be made to go without endangering the doctrine which supports them. Thus, in *Wotherspoon v. Currie*, the wrongdoing consisted, not in the use of the word 'Glenfield' in the abstract, but in the use of the word in a particular way. It was printed by the defendant in conspicuous type, whereby his starch was offered and sold as 'Glenfield Starch.' He did not use the word 'Glenfield' to indicate where his article was made, but, in the words of the court of appeals of New York, as 'a short phrase between buyer and seller,' or, in the words of the supreme court of the United States, 'the phrase which indicated the wish to buy and the power to sell from that origin.' He used it in that 'secondary sense' which had come to mean the starch of the complainant. * * * It has happened in many instances in which descriptive words have been invoked that, by reason of the character of the pleadings, or because there was no attempt to apply the doctrine of unfair competition, the plaintiff has failed. But the effect of these cases is to establish only that descriptive words are publici juris; they do not decide that the manner in which such words are used will not be regulated according to the maxims of equity. There are decisions, perhaps, which justify deliberate fraud; but they are based, in almost every instance, upon an illogical view of the common-law rights of the defendant, and the assumption that the plaintiff was assailing those rights. But there is no real conflict between the authorities. There has been merely an evolution of thought whereby we reason with better results, and are enabled to understand the old doctrine, and more intelligently to apply it. Perhaps the larger expression is due to looking at the old doctrine under a stronger light, and with the aid of the influences of an increasing civilization." These comments of the learned author meet with our approval.

The supreme court of the United States, in a very recent case, (*Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625,) made the following additional observation upon this subject: "The theory of a trade-mark proper, then, being untenable, this case resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparation, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors, endeavored to palm off their goods as those of the plaintiff. The law upon this subject is considered in the recent case of *Lawrence Manufg Co. v. Tennessee Manufg Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396. The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is

likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market."

As to the quantum and character of evidence in this kind of a case, some useful observations occur in the reports. In *Croft v. Day*, supra, it is said: "It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated: First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and, in the next place, to secure a benefit to the party practicing the deception by preserving his own individuality."

In *McCann v. Anthony*, 21 Mo. App. 83, the St. Louis court of appeals say: "The governing principle is that one manufacturer shall not be allowed to impose his goods upon the public as the goods of another manufacturer, and to derive a profit from the reputation of that order. It is not necessary that the trade-mark, trade name, sign, label, or other device which is employed by one merchant for that purpose shall be an exact imitation or counterfeit of the trade-mark, trade name, sign, label, or other device employed by the other manufacturer. Nor is it required that the imitation be so close as to deceive cautious and prudent persons; it is sufficient if it be so close as to deceive the incautious and unwary, and thereby work substantial injury to the other manufacturer. Nor is it necessary to prove that actual fraud was intended by the manufacturer employing the simulated trade name, sign, label, or other device, in order to entitle the other manufacturer to relief in equity, or for an action for damages at law. Here, as in most other civil actions, the law does not attempt to penetrate the secret motives or intent with which the act is done; contents itself with the conclusion that the party intended the natural and probable consequence of the act; and gives its judgment accordingly."

In *Hostetter v. Adams*, 10 Fed. Rep. 838, the criterion is stated to be: "If the general effect is to deceive an ordinary observer having no cause to use more than ordinary caution." In speaking of the packages in

controversy in that case, Judge Blatchford says: "But the general effect to the eye of an ordinary person acquainted with plaintiff's bottle and label, and never having seen the defendants' label, and not expecting to see it, must be, on seeing the defendant's, to be misled into thinking it is what he has known as the plaintiff's."

And, by analogy to trade-mark cases: "It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led from the mark impressed on it to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of the device." *Seixo v. Provezende*, Cox, Manual Trade-Mark Cas. No. 256.

And, continuing the analogy of trade-mark cases: "All that can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution. To constitute an infringement of a trade-mark, exact similitude is not required, but an infringement is committed when ordinary purchasers, buying with ordinary caution, are likely to be misled; it being enough to show that the representations bear such a resemblance to the plaintiff's mark as to be calculated to mislead the public generally who are the purchasers of the article bearing it. That means persons of ordinary intelligence, who adopt ordinary precaution against imposition and fraud, and use such reasonable care and observation as the public generally are capable of using and may be expected to exercise. It is sometimes the case that the names of articles are of a character to mislead and deceive, they being *idem sonans* in the usual pronunciation; or the form of the package, general appearance of the wrapper, color of label, wax impressions on the top of the box containing the goods, are well suited to divert the attention of the unsuspecting buyer from any critical examination, and the courts do not require a critical examination. It was well said by Wood, V. C., in 1854, that in every case the court must ascertain whether the differences are made *bona fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally

arise from the necessity of the case, or whether, on the other hand, the differences are merely colorable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance of primary importance for the court to consider, because if the court finds, as it almost invariably does find in such cases, that there is no reason for the resemblance except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading. *Taylor v. Taylor*, 2 Eq. Rep. 290. Such is the reasoning of all the courts. Probably Vice Chancellor Shadwell did not go too far, in 1847, when he said that 'if a thing contains twenty-five parts, and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud.' *Guinness v. Ullmer*, 10 Law T. 127." *Browne, Trade-Marks*, § 33, and cases cited.

And in the case of *Read v. Richardson*, appearing as No. 698 of Cox's Manual of Trade-Mark Cases, the following facts appeared: The plaintiffs were bottlers of beer for export. Plaintiffs' label consisted of a representation of the head of a bull dog, on a black ground, surrounded by a blue circular band, on which were the words "Read Brothers, London. The Bull Dog Bottling." Defendants' label consisted of the representation of the head of a terrier, on a black ground, surrounded by a red circular band on which were the words "Celebrated Terrier Bottling;" one considerably larger than the other, as appears from the cuts attached to the report of the case. It was made to appear that plaintiffs' beer was well known in the colonies as "Dog's Head Beer," and it was alleged that the defendants, by exporting their beer to the colonies, where plaintiffs' beer was in demand, enabled the substitution of defendants' beer for plaintiffs' beer as Dog's Head Beer, to plaintiffs' injury. A motion for a preliminary injunction was heard by Jessel, M. R., who denied the motion, chiefly on the ground that plaintiffs had failed to make out a case of infringement. On appeal, held, that the use of the defendants' label was an infringement of plaintiffs' rights, especially because it enabled the sale of defendants' beer as Dog's Head Beer, which name had come to be known as indicating the beer of the plaintiffs. And see *Montgomery v. Thompson*, Cox, Manual Trade-Mark Cas. No. 722.

Concerning the Cheek package under consideration, we find the facts to be that there is now in existence no such firm as T. F. Cheek & Co., the old name of T. F. Cheek & Co. being used by the defendants Zellin & Co., and Zellin & Co., Incorporated, in floating said package on the market; the goods being really put up in Philadelphia by Zellin & Co., as a part of the operations of that business, and sent to

Memphis, and stored in a wareroom there, under charge of one of Zellin & Co.'s agents, to be thence distributed to the trade. We also find that there is not, and never was, any such firm as A. W. Simmons & Co., represented upon said package, and that A. W. Simmons never authorized defendants to use his name, and that name, together with the representation "Warranted purely vegetable by A. W. Simmons & Co., heirs of Dr. A. Q. Simmons," is a misrepresentation, and calculated to deceive the public. We also find the representation on the face of said package as to the improvement of the medicine is also a misrepresentation; and, as to whether defendants acquired any substantial rights by the transfer from T. F. Cheek, the proof does not satisfy our minds. We are far from being satisfied by the proof that T. F. Cheek ever acquired any rights from A. Q. Simmons, such as he undertook to transfer to White; and certainly the transfer by him and the Eatons of a bare name, unconnected with any existing business, and when that business was bought only to be extinguished, as we think the proof shows, could not confer the right to revive the old name and insignia of this business eight years afterwards, to the prejudice of a rival in trade, and for the purpose of foisting upon the public packages of goods that might, by the use of said old insignia, be substituted for the goods of such rival, and lend to the device the semblance of a prior right. We also find that the trade of the complainant is confined principally to the southwest, and that in that territory its preparation is generally known and called for under the name of "Simmons' Liver Medicine," and that those are the prominent words on the face of its packages, the word "Simmons" being preceded by the letters "M. A.," and the word "Vegetable" being printed in small letters between the word "Simmons" and the word "Liver;" so that, at the distance of a few feet, the title appears to be "Dr. M. A. Simmons' Liver Medicine;" also on the front of said package is the picture in black of Dr. M. A. Simmons, on a white ground, slightly shaded. On the front of the Cheek package is also a picture in black, and under it the name of Dr. A. Q. Simmons printed; and just under that, in letters nearly the same size, the words "Simmons' Liver Medicine." On the back of the Cheek package, near the top, are the words, again, "Simmons' Liver Medicine;" and near the bottom, on the same side, the words "Warranted purely vegetable." On the back of complainant's package, in the same position, are the words "Dr. M. A. Simmons' Vegetable Liver Medicine." In color the packages are not very similar; the color of the Cheek package being pale straw, with the printing all in black ink; and complainant's package being white, with the printing in black and bronze border, and a bronze shading over the word "Vegetable," and the words "C. F. Simmons & Co." being printed in bronze ink, and on

the back the word "Vegetable," and the words "Dyspepsia," "Indigestion," and "Original" being printed in bronze ink. As to size, it comes nearest complainant's dollar package, the Cheek package being about one-half inch shorter, and being a 25-cent package. Placed side by side, and compared, the differences between these packages are soon discovered; but, as ruled in the authorities which we have cited, that is not the true criterion. If the general effect is such as to deceive an ordinary observer, having no cause to use more than ordinary caution, being acquainted with complainant's package and label, and never having seen the defendants' package and label, and not expecting to see it, so that he must be, on seeing the defendants', misled into thinking it is what he has known as the plaintiff's, that is sufficient. We think, when we take into consideration the large black picture on each package,—the most prominent feature on each,—together with the words "Simmons' Liver Medicine," which had come to be associated in the minds of the people with complainant's preparation, and the arrangement and collocation of words before referred to, that an ordinary person, calling for complainant's preparation, and exercising only ordinary caution, and having the Cheek package handed to him, would mistake one for the other; and the proof shows that, since this package has been upon the market, it has in numerous instances been received by customers calling for complainant's medicine without question or objection. The proof also shows that this package was put upon the market only in that section of the country where complainant's trade existed. We also think that this package was put upon the market by the defendants for the purpose of having it take the place of complainant's medicine, and to be sold as and for that medicine. We think the charge of unfair competition in business has been clearly made out against the defendants with regard to this Cheek package.

The complainant is entitled to an injunction restraining J. H. Zellin & Co. and J. H. Zellin & Co., Incorporated, from putting on the market their medicine put up in packages with the Cheek labels on them, and from disposing of the packages so labeled that are now in existence, and from issuing packages of their medicine with the imprint upon their label or packages of the words "Simmons' Liver Medicine," or "Dr. Simmons' Liver Medicine," or "Liver Medicine, by A. Q. Simmons," in conjunction with the picture of A. Q. Simmons, or in such other combinations as will cause them to be mistaken for complainant's packages by one exercising ordinary care; and complainant is entitled to an injunction to restrain the defendants from using the Cheek package or label or wrapper in any manner or form, and the complainant is entitled to have the cuts, dies, labels, or wrappers pertaining to said

Cheek package delivered up to be destroyed.

Defendants insist that the chancellor erred in ordering an account to ascertain the damages of complainant in respect of the Cheek medicine, made and sold by defendants. It is customary in this class of cases to order such an account. *Manufacturing Co. v. Gato*, (Fla.) 7 South. Rep. 23; *Milling Co. v. Rowland*, 27 Fed. Rep. 24; *Milling Co. v. Robinson*, 20 Fed. Rep. 217. But it is said that the complainant has been guilty of such laches as would deny it the right to an account. This is a good defense to an accounting where there has been real neglect. *Browne, Trade-Marks*, § 497; *McLean v. Fleming*, 96 U. S. 245; *Holt v. Menendez*, *Price & S. Amer. Trade-Mark Cas.* 986, 989. But we do not think there has been any such delay in this case as to deny complainant the right to an accounting. The Cheek package was put on the market in January, 1890, and the bill in this case was filed in January, 1891. A party is not compelled to file his bill at once, but may lie by until sufficient time shall elapse to enable him to gather the requisite proof. Besides, it appears from a letter in the record written by Mr. I. L. Corse, defendants' agent, in January, 1890, that defendants had full information that their putting the Cheek package on the market had been promptly complained of by the complainant and was bitterly objected to by complainant.

Defendants also insist that complainant should be denied the account, because T. F. Cheek, at Birmingham, and T. F. Cheek & Co., at Memphis, were making and selling the medicine from 1871 to 1882, and complainant's predecessor did not object. Without going into the question as to whether the conduct of T. F. Cheek and of the old firm of T. F. Cheek & Co., 10 to 20 years ago, amounted to a violation of the rights of complainant's predecessor, it is sufficient to say that, even if it was, it could not justify the defendants' conduct at this time.

We do not consider the questions raised by defendants' cross bill. We think the defendants' conduct with regard to the Cheek package is such as to disentitle them to any relief in a court of equity. The cross bill will therefore be dismissed. A decree will be entered in accordance with this opinion, and the cause remanded for the execution of the order of reference, and for the delivery and cancellation of said cuts, dies, labels, and wrappers. The costs below will be paid as adjudged by the chancellor. The costs of this court will be paid by defendants, and subsequently accruing costs as the chancellor may direct.

NOTE.

Apollinaris Co., Limited, v. Brumler was decided at chambers, (supreme court, New York county,) by Mr. Justice Patterson, who filed the following memorandum of decision on February 3, 1890:

"It is not necessary on this motion to decide whether or not the plaintiff has an exclusive

technical trade-mark right in the labels, or the combination and arrangement of color, form, or style of such labels, used upon its bottles in this market. It may be doubted whether a manufacturer, producer, or dealer can acquire a multitude of different trade-marks, and claim an exclusive right to any one of them, because he uses that one only in a restricted territory or a particular place or market, and the remainder in other places; but here it is fully established, as I think, that the purpose of the defendant, or the company for which he acts as sole resident agent, was to adopt this arrangement (position on the bottle, shape, and color combined) of orange or yellow body and neck labels in order to sell in the American market goods under a general resemblance to bottles of Apollinaris water. That bottles of the Victoria water, as put up with these orange-colored labels, may well be mistaken for Apollinaris at a short distance, and without close inspection, was quite apparent on the exhibition of such bottles on the argument, and that they have been so mistaken is incontestably shown in the moving papers. The conduct of the defendant or his principals in thus imitating the plaintiff's packages or bottles is such as justifies and requires the interposition of a court of equity. The exercise of the power of the court does not depend upon the plaintiff having an exclusive trade-mark right, but on the general jurisdiction of a court of equity to prevent fraud. This has been so often decided as to names which do not constitute trade-marks in a technical sense, and as to labels and symbols which are not regarded as exclusive trade-marks, that the law would appear to be well settled but for some cases in this state which seem to have been misunderstood or misapplied. The case, generally, and I may say always, now cited against the view here expressed, is what is known as the *Sapolio Case*, (*Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292;) but it is evident that, as that case came before the court of appeals, it was regarded and disposed of simply as a technical trade-mark case, and that Judge Rapallo and the court did not intend the remarks in the closing paragraph of the opinion to state a rule of law that unlawful competition in trade would not be enjoined unless the plaintiff showed property in a trade-mark, for the case did not call for such a ruling, and no authority is cited, while the books—American and English—are filled with decisions to the contrary. *Croft v. Day*, 7 Beav. 84; *McLean v. Fleming*, 96 U. S. 245; *Thomson v. Winchester*, 19 Pick. 214; *Perry v. Truefitt*, 6 Beav. 66; *Newman v. Alvord*, 51 N. Y. 189; *Lever v. Goodwin*, 57 Law T. (N. S.) 583; *Sawyer v. Horn*, 4 Hughes, 239, 1 Fed. Rep. 24; *Robertson v. Berry*, 50 Md. 591; *Carson v. Ury*, 39 Fed. Rep. 777; and other cases. There was no laches in the case now before the court, such as to deprive the plaintiff of its right to an injunction. An order may be entered as applied for."

CITY OF SPARTA v. LEWIS.

(Supreme Court of Tennessee. March 17, 1892.)

APPEAL—REVIEW OF EVIDENCE—CITY ORDINANCE—VIOLATION—ACTION FOR PENALTY—EVIDENCE.

1. A verdict will not be disturbed on appeal where there was any evidence to sustain it.

2. A proceeding by a city to recover a penalty for the violation of one of its ordinances by the commission of an assault, commenced by a warrant sued out in favor of the city, charging such assault, is a civil action, and a preponderance of evidence only is necessary to authorize a recovery.

Error from circuit court, White county; John Fite, Judge.

Action by the city of Sparta against Pate Lewis for a penalty for violating an ordinance by committing an assault and battery. From a judgment for defendant, plaintiff appeals in error. Reversed.

E. Jarvis, for plaintiff in error. Hill & Mitchell, M. A. Cummings, and W. J. Ferris, for defendant in error.

SNODGRASS, J. On a warrant sued out in favor of the corporation of Sparta, the defendant, Pate Lewis, was brought before the recorder of that municipality on a charge of assault and battery, which, among other offenses, was one specially punishable by city ordinance, under which he was sued. He was found guilty, judgment rendered against him in favor of the corporation for \$10 and costs, and he appealed to the circuit court. There, after trial before a jury, judgment was rendered in his favor, and the corporation appeals to this court.

Two objections are made here to the judgment and action of the circuit court,—one that there is great preponderance of evidence against the verdict, and the other that the court erred in charging the jury that, before it could find against defendant, it must be satisfied beyond a reasonable doubt of the guilt of defendant, or acquit. The language in which the first proposition—that there is “a great preponderance of evidence against the verdict”—is couched is quoted from *England v. Burt*, 4 *Humph.* 399. There, in affirming a judgment, the court did use the language quoted, that, under a line of cases already settling it, this court would not disturb a verdict approved by a circuit judge, unless there was a great preponderance of evidence against it. The court did not attempt then to make a rule, or to state more than the effect of it. What the “great preponderance” must be it did not suggest in that case, but it referred to a rule already established. That rule was that the verdict would not be disturbed if there was any evidence to sustain it. *Dodge v. Brittain*, *Meigs*, 84; *Car. Hist. “Lawsuit,”* § 411; *Tate v. Gray*, 4 *Sneed*, 592. Afterwards, when the term “preponderance” was used in this connection, it was put in the form of saying, unless the evidence so overwhelmingly preponderates against the verdict that the court can see it is clearly wrong, and in some cases other terms have been used; but all these expressions refer to the same rule, and mean the same thing, in legal effect and intent, and the rule remains now as it always has been in this court, that a verdict will not be disturbed if there is any evidence to sustain it. *Railway Co. v. Mahoney*, 89 *Tenn.* 332, 15 *S. W. Rep.* 652. In some recent cases, to the term “any evidence” of the rule has been prefixed the words “material” or “legitimate,”

“substantial” or “competent;” but these add nothing to it not already implied in its use without them. *Trott v. West*, *Meigs*, 168. They tend rather to weaken the strength of the term, by addition of unnecessary epithets. It was never decided or thought that any immaterial or illegitimate, unsubstantial or incompetent, evidence was sufficient, nor that “any evidence” alone was sufficient, but “any evidence to sustain the verdict.” This always meant any competent, material, substantial, connected evidence, legitimately establishing the proposition decided, though there might be much or little evidence to the contrary. It did not mean that, if there were any evidence of facts tending to establish one element of a proposition proven, the whole proposition of several elements might be regarded as proven, but only that where the evidence made out, as an entirety, a *prima facie* right to a verdict, and the jury so found, it was evidence sufficient to sustain the finding. For the same reason, it never meant that where one or more facts material to be established were established out of several necessary to be proven to sustain a verdict, the establishment of that one or more by competent evidence, substantial, material, and legitimate, should justify or sustain a verdict, although both these supposed are cases where there is evidence, and material, competent, substantial, and legitimate evidence. But they are not cases where there is evidence “to sustain the verdict,” and there must always be this, in any case, if it is sustained in this court. When it is sustained, it is not upon the ground that there is “any evidence” in the case, or any material, substantial, competent, legitimate evidence in the case, but upon the ground that there is “evidence which sustains the verdict.”

The real question in this case is involved in the second objection,—that is, whether this case is within the rule as to preponderance of evidence, or must the evidence exclude reasonable doubt. It is argued that the offense is criminal, and that, before the corporation can recover, it must show defendant guilty by the same evidence as if it were a prosecution by the state on presentment or indictment. This view is erroneous. The action is not a criminal prosecution. It is not a trial between the state and defendant, nor on presentment or indictment by and before a jury. If it were, the evidence would have to be entirely satisfactory. But this is in the nature of a suit for debt. It is not a prosecution, but a suing in court to recover a penalty for the violation of a city ordinance. The case was triable before a recorder. On appeal it was in fact tried by a jury, it is true, but only as all civil cases are or may be, but not on presentment or indictment. In criminal trials proper the jury must be satisfied beyond a reasonable doubt of defendant's guilt.

There are, too, civil issues as to resulting trusts, etc., and on pleas of justification in slander and libel, and other cases, in which positive statute or settled rules of construction, in view of a wise policy, require a given kind or amount of evidence; but this case falls within no exception of the classes indicated. Cases merely involving civil redress for criminal offenses need only to be made out by a preponderance of evidence. Of course, the evidence must preponderate after due allowance in defendant's favor of the legal presumption of innocence of crime and proof of good character, when proven; but, after all, it must be, against all other evidence and presumptions, but a preponderance. *Hills v. Goodyear*, 4 Lea, 233; *McBee v. Bowman*, 89 Tenn. 132, 14 S. W. Rep. 481. The judgment must be reversed, and the case remanded for a new trial.

BRANSHAW v. TINSLEY.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

ATTACHMENT—WHEN ALLOWED—PARTIAL SECURITY—BOND—SECOND ATTACHMENT—AFFIDAVITS.

1. Where a debt is alleged against only one defendant, and an attachment sought against his property, the attachment bond is properly made payable to him alone.

2. Plaintiff's right to attachment is not impaired by the fact that he has collateral security for part of his debt.

3. Under Sayles' Civil St. art. 161, providing that several writs of attachment may be issued at the same time, or in succession, and sent to different counties, a second attachment may be issued two months after the filing of the petition and affidavits, without the filing of a new petition and affidavits.

Appeal from district court, McLennan county; A. C. Prendergast, Special Judge.

Action by Thomas Tinsley against Albert Branshaw and Nelson Swain. On plaintiff's motion, the action was dismissed as to Swain. There was judgment against defendant Branshaw, and he appeals. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

This is a suit, brought July 13, 1889, by Thomas Tinsley, in the district court of McLennan county, Tex., against Albert Branshaw, of Dallas county, and Nelson Swain, of Taylor county, Tex., on the following promissory note: "\$7,110.00. Waco, Texas, Jan. 1st, 1885. On or before the first day of January, 1890, we, or either of us, promise to pay to the order of Thomas Tinsley at Waco, Texas, the sum of seven thousand one hundred and ten dollars, together with interest at ten per cent. per annum after maturity until paid, in payment of sheep this day sold to us by Thomas Tinsley; and, to secure the payment of this note, (the purchase money,) a deed of trust is to be executed of sheep by both of us. A. Branshaw. Mrs. Sadie Branshaw, By A. Branshaw. Sadie Branshaw." The petition alleges that Sadie

Branshaw is the wife of A. Branshaw. It is also alleged that a lien on the sheep was retained by Tinsley to secure the payment of the note; that the sheep had greatly depreciated in value, and were at the time of suit worth \$2,500, and not exceeding that amount; that Branshaw had removed the sheep out of Shackelford county, where they were at the time of sale, and placed them in the possession of defendant Swain, "who is now claiming some interest in them." Allegations are made as a basis for writ of sequestration. It is also alleged in the petition that the sheep are wholly inadequate to secure the payment of the note, and from the sale thereof not exceeding \$2,500 can be realized; that "defendant A. Branshaw is about to dispose of his property with intent to defraud his creditors," and that "the attachment now prayed for against defendant A. Branshaw is not sued out for the purpose of injuring or harassing the defendant A. Branshaw, and that petitioner will probably lose his debt unless such attachment is issued." Prayer for citation, writ of sequestration against both defendants, and for writ of attachment against A. Branshaw, for judgment against Branshaw for said sum of \$7,110; costs, decree of foreclosure of petitioner's lien, and order of sale. At the same time plaintiff filed affidavit that A. Branshaw was justly indebted to him in the sum of \$7,110 on the note, describing it; that A. Branshaw, defendant, is about to dispose of his property with intent to defraud his creditors; that the writ of attachment applied for is not sued out for the purpose of injuring or harassing the defendant; and that "I, Thomas Tinsley, the plaintiff, will probably lose my said debt unless such attachment is issued." By supplemental petition plaintiff alleged that since suit was brought the sheep had been removed from the county where they were alleged to be, and delivered by Swain to defendant A. Branshaw, and are now in his possession in Shackelford county, to which he prays for writ of sequestration. March 10, 1890, plaintiff amended his original petition, alleging his residence to be in England, declaring on the note as before, showing that Sadie was the wife of A. Branshaw, and was not sued; that the note was past due and unpaid, etc. Prayer for his debt, interest, and costs, "and such other relief, both special and general, to which he may show himself entitled," etc.

The court on trial overruled motions of defendant Albert Branshaw to quash attachment, and, at the instance of plaintiff, dismissed the suit as to defendant Nelson Swain, and, a jury being waived, gave judgment for plaintiff against A. Branshaw for his debt, interest, etc., for \$5,740.74. The judgment then proceeds: "And, it appearing to the court that the writs of attachment issued in this cause on the 13th of July, 1889, were on July 1st, 1890, by the sheriff of Shackelford county, Texas, levied upon the

following described property of the defendant Albert Branshaw, situated in said Shackelford county, to wit, south half of section 25, block 14, 320 acres, surveyed in the name of T. & P. R. R. Co., deeded to Branshaw by Christian Klock by deed of date Dec. 30, 1885; north half section 28, block 13, 320 acres school land, surveyed by the T. & P. R. R. Co.; south half section 28, block 14, 320 acres school land, surveyed by T. & P. R. R. Co.; section 28, block 14, 320 acres school land, surveyed by T. & P. R. R. Co.,"—the attachment lien is foreclosed, and sale ordered. The judgment proceeds: "And it appearing to the court that a writ of attachment issued in this cause on 16th September, 1889, was on the 21st day of September, 1889, by the sheriff of Taylor county, levied upon the following described property of the defendant Albert Branshaw, to wit, sixteen hundred and ninety-nine pounds of wool in sacks, and, by virtue of the same writ, was on 24th September, 1889, further executed by levying on three bags of wool, containing six hundred and seventeen pounds of wool in bags, all of said sacks and bags being marked 'T. W. Scallord,' and valued by said sheriff at \$347.40, and that the same was delivered to Thos. W. Scallord, who, on 4th October, 1889, filed with said officer his affidavit and bond, with T. C. Henry and O. W. Henry as sureties, for the trial of the right of property, and that, should claimant fail to establish his right thereto, the clerk of this court shall issue an order of sale, directed to the proper officer, commanding him to sell the above-described property, or so much thereof as may be sufficient for the satisfaction of the judgment rendered in this cause." No sequestration was issued, and the only information furnished by the record as to the attachments is that contained in the judgment. The only evidence adduced on the trial was the note sued on, as described in the petitions. Defendant A. Branshaw has appealed from the judgment upon a cost bond for the sum of \$200. Appellant's assignments of error state truly the grounds relied on in the motion to quash the attachments.

Clark, Dyer & Ballinger, for appellant.
Jones, Kendall & Sleeper, for appellee.

COLLARD, J., (after stating the facts.) The assignments of error are as follows: (1) The court erred in overruling this defendant's motion to quash and hold for naught the several writs of attachments in this cause, for the following reasons, as set forth in said motion, viz.: First, because there are two defendants in this cause, to wit, defendant Albert Branshaw and Nelson Swain, and the bond is only made payable to Albert Branshaw, one of the defendants; second, because it is shown in plaintiff's petition that plaintiff has a mortgage with power of sale on 1,529 head of sheep belonging to the defendant Albert Branshaw, and

which mortgage was given by said Branshaw to plaintiff to secure the indebtedness sued on in this cause, all of which is shown by the allegations in plaintiff's petition, and which petition admits the value of the sheep and the security aforesaid to be of, to wit, the value and sum of twenty-five hundred dollars, and, notwithstanding such security and lien upon said sheep, the writs of attachment were issued for the whole sum sued on in this case, to wit, the sum of seventy-one hundred and ten dollars; third, because the attachments could not be legally issued unless it was shown by the plaintiff in his affidavit and petition that he, plaintiff, would probably lose his debt unless such attachment was issued, which fact could not exist where he had a mortgage and security for \$2,500; fourth, because a writ of attachment cannot issue for the purpose of enforcing a part of a payment, where the other portion of the same debt is secured by a lien on property, as in this case, of the alleged value of \$2,500; fifth, because the writ of attachment was issued in this case on the 13th day of July, 1889, and another on the 16th day of September, 1889, which attachments were issued too remotely from the date of the filing of the petition, and making oath therefor, and so remotely that the statement of facts sworn to, to entitle the plaintiff to a writ of attachment, may not have existed when the writs of the 13th of July and 16th of September, 1889, issued.

Plaintiff had no debt against defendant Swain, sought no attachment against him on his property, and none could have been issued against him. The bond should not have been made payable to him.

Plaintiff's right to attachment was not impaired by the fact that he had collateral security for his debt, or a part of it. It was proper for plaintiff, under the law, to provide for the collection of his entire debt by attachment, and, in so doing, to comply with the terms of the statute. The petition did not admit the value of the sheep as a credit on his note. It was not paid, and was collectible by attachment. A creditor may abandon his security by mortgage, and attach other property of the debtor, if he sees proper, as it seems was done in this case. The record does not show that the attachments were issued for the whole amount alleged to be due, but they should have been for such amount. *Beckwith v. Sibley*, 11 Pick. 482; *Whitwell v. Brigham*, 19 Pick. 117; *Porter v. Brooks*, 35 Cal. 199; *Homer v. Falconer*, 60 N. H. 206; *Buck v. Ingersoll*, 11 Mete. (Mass.) 226.

The question of excessive levy is not raised by the facts, and could not be raised on a motion to quash. The attachment proceedings were in form, and, whether false or injurious to defendant, could only be inquired of under plea.

Appellant's assignment that the writs of

attachment—one of the 13th of July, 1889, and the other of the 16th of September, 1889—were issued too remotely from the date of filing of the petition and affidavit, and so remotely that the facts sworn to may not have existed when the writs issued, cannot be sustained. The attachment of the 13th of July, 1889, was issued on the day the petition and affidavit were filed; the other was issued some two months later. The statute provides that "several writs of attachment may, at the option of the plaintiff, be issued at the same time, or in succession, and sent to different counties, until sufficient property shall be attached to satisfy the writ." Sayles' Civil St. art. 161. There is no intimation in the statute that the attachment pleadings must be renewed, and in truth they should not be.

There is no error in the judgment of the court below as assigned, and it is therefore affirmed.

JONES v. GULF, C. & S. F. RY. CO.¹

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

COURT OF CIVIL APPEALS—EFFECT OF SUPREME COURT DECISIONS.

To overturn decisions of the supreme court, that court itself must overrule them, and, until then, they must be regarded as authority by the court of civil appeals. Fisher, C. J., dissenting.

Appeal from district court, Milan county; John M. Henderson, Judge.

Action by P. W. Jones against the Gulf, Colorado & Santa Fe Railway Company. A demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

J. W. Terry, for appellant. E. L. Antony, for appellee.

KEY, J. This action was brought by appellant to recover from appellee the statutory penalties for a failure to construct and keep in repair a "farm crossing" over its right of way and roadbed within appellant's inclosure. The suit is brought, and sought to be maintained, under the act of March 23, 1887, (Gen. Laws 20th Leg. pp. 39, 40.) The district court sustained a general demurrer to appellant's petition, and it is virtually conceded in his brief that this ruling was correct, unless the doctrine announced in the cases of Railway Co. v. Rowland, 70 Tex. 298, 7 S. W. Rep. 718, and Railway Co. v. Ellis, 70 Tex. 307, 7 S. W. Rep. 722, is to be held erroneous, and those cases overruled. In a brief of more than ordinary strength, counsel for appellant combats the doctrine promulgated in the cases referred to, and insists that they should be overruled. To effectually overturn those cases, the supreme court itself must overrule them. Until that is done, this court will regard them as authority. It follows, therefore, that the judg-

ment of the court below must be affirmed, and it is so ordered.

FISHER, C. J., (dissenting.) Some time during the term I may prepare an opinion, stating my reasons for dissenting.

MEADE et al. v. BARTLETT et al.

(Court of Civil Appeals of Texas. Nov. 15, 1892.)

EXECUTION SALE—VALIDITY—TITLE CONVEYED—JUDGMENT—COLLATERAL ATTACK.

1. Where defendant's title to the land in controversy was acquired by mesne conveyance from a purchaser at an execution sale under a judgment against O., the owner of the land, the judgment and sale being valid, such conveyance vests in defendant a good title, as against a subsequent conveyance from O. to plaintiffs. 21 S. W. Rep. 52, followed.

2. A judgment entered by default against a nonresident will not be subject to attack in a collateral proceeding on the ground that the record does not show an affirmative compliance with the provisions of the statute providing for the publication of a citation to defendant, the presumption being that there has been a full compliance. 21 S. W. Rep. 52, followed.

Error from district court, Wichita county; P. M. Stine, Judge.

Trespass to try title by Mahlon Bartlett and others against Meade & Bomar. Judgment for plaintiffs. Defendants bring error. Reversed.

Bomar & Bomar and Hunter, Stewart & Dunklin, for plaintiffs in error. Barrett & Eustis, for defendants in error.

STEPHENS, J. This writ of error is a companion case to Buse v. Bartlett, (No. 16, this day decided by us.) 21 S. W. Rep. 52. The other section of land mentioned in the conclusions of fact in that case is the subject of controversy in this suit. In this case the possession of the land in controversy was continued in plaintiffs in error up to the institution of the suit and the trial in the court below. In other respects the facts disclosed by the record in this, so far as they are important to the issues determined, are identical with those in said cause No. 16, and the conclusions of law and fact filed in that case are here referred to and adopted as our conclusions of law and fact in this case. The judgment of the court below will therefore be reversed, and judgment will be here rendered for plaintiffs in error.

A motion for rehearing was overruled.

GULF, C. & S. F. RY. CO. v. ALLCORN.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

CARRIERS—CONNECTING LINES—INJURIES TO FREIGHT.

Under a contract stipulating that after defendant's delivery of the goods to a connect-

¹ Rehearing pending.

ing line it should not be liable for injuries, the evidence showing that a large part of the damages were sustained after such delivery, the court should have instructed that defendant was not liable therefor.

Appeal from Brown county court; R. P. Conner, Judge.

Action by J. C. Allcorn against the Gulf, Colorado & Santa Fe Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

J. W. Terry, for appellant.

KEY, J. This case is appealed from the county court of Brown county. It is a damage suit for injuries sustained by a car load of horses shipped by appellee from Brownwood, Tex., to Yazoo, Miss. Verdict and judgment were rendered against appellant for the sum of \$225. The contract of shipment clearly stipulates that after its delivery of the horses at Houston, Tex., to a connecting carrier, it should not be liable for any injury to them, and the testimony shows that a large part of the damage was sustained on a line of road other than appellant's. The court below refused to give the following instruction asked by appellant: "You are instructed that defendant, if liable at all in this case, is only liable for damages for such injuries as the stock in question may have received whilst on defendant's own road, and that it is not liable in damages for any injury resulting from any cause after said stock arrived at Houston, and were delivered to the connecting line of road on the route to Yazoo, Miss." This ruling of the trial court was in harmony with decisions of the court of criminal appeals, then having jurisdiction over civil cases appealed from county courts, but was at variance with repeated decisions of our supreme court, which are so well known that it is not deemed necessary to cite them here. The rule established by the latter tribunal has been followed by this court. The judgment of the trial court is reversed, and the cause remanded.

CONNELLE et al. v. ROBERTS.

(Court of Civil Appeals of Texas. Nov. 22, 1892.)

EXECUTORS—QUALIFICATION—INVENTORY—EXECUTION SALE—APPEAL.

1. Pasch. Dig. art. 5574, provides that, where not otherwise provided, a bond shall be given by executors and administrators, and an oath taken. Article 5626 allows a will to direct that no action be had in the district court in administering the estate, except to prove the will and return an inventory, and that the executor be not required to give bond. Article 5628 provides that, where a will contains such directions, no other provision of the act shall apply to the estate, but it shall become like any other property to be administered under a power, chargeable in the hands of a trustee, and liable to execution in any court having jurisdiction. *Held* that, where a will contains such directions, the executor's qualification is

complete on probate of the will, and his acceptance, with the return of an inventory where required by law, and it is not essential that he take an oath. *Roberts v. Connelle*, 8 S. W. Rep. 626, 71 Tex. 14, explained.

2. A sale under execution on a judgment against an executor of land which was properly included in his inventory cannot be collaterally attacked because the inventory was not complete as to other property. *Roberts v. Connelle*, 8 S. W. Rep. 626, 71 Tex. 14, explained.

3. Where a case is before the appellate court on a full statement of facts, as well as the conclusions of the trial judge, the rule requiring exceptions to have been taken to the findings does not apply.

Appeal from district court, Eastland county; J. E. Cockrell, Special Judge.

Action by John C. Roberts against C. W. Connelle and others. From a judgment for plaintiff, defendants appeal. Reversed.

For former report, see 8 S. W. Rep. 626.

J. R. Fleming and R. B. Truly, for appellants. J. M. Moore and J. C. Walker, for appellee.

HEAD, J. On June 7, 1871, the will of M. J. Hall, Sr., was admitted to probate in the district court of Harrison county, Tex. By this will it was provided that no action should be had in the courts in regard to the testator's estate, except the probate and registration of his will, and the return of an inventory, and also that the executors should not be required to give bond. M. J. Hall, Jr., and Samuel S. Mosely were named as executors. The petition to probate this will was in the name of M. J. Hall, Jr., only, but the order admitting the will to probate directed that letters issue to both executors. There is no evidence that either of the executors ever took an oath as such. M. J. Hall, Jr., however, filed a paper consisting of several pages, which upon its face would appear to have been a very full and complete inventory were it not for the affidavit attached thereto, which is in the following language: "The state of Texas, Harrison county. Before me, C. E. Bolles, clerk of the district court of Harrison county, appears M. J. Hall, Jr., who makes oath and says that the within inventory contains all the property and effects of the estate of M. J. Hall, Sr., which up to this time has come into his hands, but this inventory is not complete. M. J. Hall, Jr. Sworn to and subscribed before me this July 13, 1871. C. E. Bolles, Clerk." This paper was recorded as the inventory of said estate, and upon such record the said M. J. Hall, Jr., proceeded with the administration in all respects as the duly-authorized independent executor of said will; and, while so acting, judgment was rendered against him as such executor in favor of Joseph Mason, on the 12th day of July, 1875, before J. K. Williams, a justice of the peace for Harrison county, and the land in controversy was regularly sold under an execution issued upon this judgment, and appellants claim under this sale. Appellee claims under quitclaim deeds made by the heirs of M. J. Hall, Sr., subsequent to the ex-

ecution sale aforesaid. The land in controversy appeared regularly upon the inventory filed by the executor as above set forth.

The court below construed the opinion rendered upon a former appeal of this case to hold that, to sustain the execution sale against the executor of M. J. Hall, Sr., it was necessary for the defendants claiming thereunder to prove that the executor qualified by taking the oath required of administrators and executors, and also returned a full and complete inventory of all property belonging to the estate. By an examination of this opinion, reported in 71 Tex. 14, 8 S. W. Rep. 626, it will be seen that the principal question presented upon that appeal was as to whether or not the taking of the oath and filing of an inventory by the executor could be proved by parol evidence, or should this be done by certified copies from the records; and it was held that such copies would be the best evidence, and the court below erred in permitting parol evidence without showing that such copies could not be had. We do not find anything in this opinion which goes to the extent of holding that the taking of an oath by an independent executor would be essential to the validity of a sale made against him while acting as such; nor do we construe the opinion as holding that the return by him of a full inventory, or even any inventory, would be absolutely essential under all circumstances to the validity of such a sale, although there are expressions therein which might be given this construction. By the law in force at the time this will was admitted to probate, it was provided that "a testator may direct by his will that no action be had in the district court in the administration of his estate, except, first, to prove and record the will; second, to prove and record the will and return an inventory and appraisement of the estate; third, he may direct that the person named as his executor shall not be required to give bond." Pasch. Dig. art. 5623. Also: "When a will contains directions that no action be had in the district court in the administration of the estate, except to prove and record the same, or to prove and record it and return an inventory and appraisement, no other provision of this act, except as disclosed in subdivision 4 of section 158, shall apply to such estate; but the same shall become like any other property to be administered under a power chargeable in the hands of a trustee, and liable to execution in any court having jurisdiction." Id. art. 5628. The provision in this act with reference to giving bonds and taking oaths by executors and administrators is found in Paschal's Digest, art. 5574, as follows: "Where it is not otherwise provided, a bond shall be required to be given and an oath to be taken at a time specified in the order within twenty days." We think that a fair construction of the different portions of this act leads to the conclusion that it was not essential to the qualifi-

cation of an independent executor that any oath as such should be taken by him, and that his qualification would be complete upon the probate of the will and acceptance of the trust by him, with the return of an inventory and appraisement of the estate when this was required by the law. We are aware that most of the cases, in speaking of the acts of an independent executor, mention the executor as having qualified as such, but we are not aware of any case which prescribes the requisites of such qualification to include the taking of an oath. In *Mayes v. Blanton*, 67 Tex. 247, 3 S. W. Rep. 40, it is said: "It appears that T. Schlutter died, testate, in the year 1877, and, by his will, named three persons executors, two of whom renounced the executorship, and the other probated the will, and in accordance with its terms received letters testamentary which empowered him to administer the estate without the control of the probate court. The executor seems to have returned an inventory and appraisement." It will be noticed that no allusion was made to the executor having taken an oath in this case, although his qualification was treated as complete. We are therefore of the opinion that the court below erred in treating the taking of an oath by an independent executor as essential to his legal qualification as such. We do not wish, however, to be understood as intimating that, even if the law required such executors to qualify by taking an oath, a failure to comply with such provision would be fatal to his acts when called in question collaterally, as in this case.

We are further of opinion that the court below laid too much stress upon the use of the word "full" in the opinion rendered upon the former appeal. The question before the court upon that appeal was not so much the necessity of an inventory to the validity of the sale in question as it was the kind of evidence necessary to prove the return of such inventory. No intimation was made in that opinion of a desire or intention to overrule or call in question the previous cases of *Cooper v. Horner*, 62 Tex. 356, and *Willis v. Ferguson*, 46 Tex. 496, to the effect that the return of an inventory would not be essential to the validity of a sale made by an independent executor in all cases. In this case, as will be seen from the conclusions of fact, the inventory to all appearances would have been full and complete but for the statement in the affidavit that it was not complete. As to the particular land in controversy, however, it was full and complete in every particular, and we are clearly of the opinion that this addition to the affidavit made by the executor should not affect this sale. We apprehend that few inventories are returned in any estate that embrace every item of property owned by the deceased at the time of his death; and we cannot see how the addition to an affidavit of a statement of a fact which must almost of necessity exist in ev-

ery case would, on a collateral attack, invalidate a sale of the property in the administration of such estate. It would hardly be contended that, if this addition had not been made to the affidavit, the mere fact that some item of property had been omitted from the inventory would have invalidated this sale, and we cannot see how the statement that this fact did exist should have any greater weight than the existence of the fact without stating it in the affidavit. We are therefore of the opinion that, where an inventory has been returned by an executor which includes all the property in controversy, a sale thereof cannot be collaterally attacked, even though the inventory might not be complete as to other property, and that the court erred in holding differently upon the trial below.

No question was made in the trial below as to the sufficiency of the evidence to show that the executor Mosely had refused to act, so as to authorize his coexecutor Hall to proceed alone, (*Eskridge v. Patterson*, 78 Tex. 417, 14 S. W. Rep. 1000; *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. Rep. 220; nor was any question made as to the failure of appellee to offer to refund the money for which the land was sold at the execution sale, (*Smithwick v. Kelly*, 79 Tex. 576, 15 S. W. Rep. 486.)

Appellee, in his brief, contends that appellants are not entitled to have considered their assignments presenting the questions above discussed, because the findings of the court below were not excepted to. We do not find this sustained by the record. In the judgment rendered by the court, it was duly noted that defendants excepted thereto. *Voight v. Mackie*, 71 Tex. 78, 8 S. W. Rep. 623. Besides, this case is brought before us upon a full statement of facts, as well as conclusions of the trial judge, and in such cases the rule laid down by the appellee does not apply. *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. Rep. 443. Upon the whole case, we are of the opinion that the judgment of the court below should be reversed, and here rendered in favor of appellants for the land in controversy; and it is so ordered.

MILLS et al. v. PAUL et al.

(Court of Civil Appeals of Texas. Nov. 2, 1892.)

APPEAL—TRANSCRIPT—STRIKING FROM FILES.

1. Where the record shows an order consolidating nine causes, directing that they be tried as one cause under the file number of one of the causes, and that thereafter four only of the causes were tried, and separate verdicts returned, and separate judgments entered in each, the transcript will be stricken from the files, and the appeal dismissed, on the ground that no final judgment is shown to have been rendered in the consolidated cause.

2. Appellees, by consenting to the filing of a transcript after time allowed by rules, are not precluded from moving to have the transcript

stricken from the files on the ground that it does not show a final judgment.

Appeal from district court, El Paso county.

Action by Anson Mills and others against George Paul and others. Judgment for plaintiffs. Defendants appeal. Plaintiffs move to strike the transcript from the files. Motion granted, and appeal dismissed.

M. W. Stanton, for appellants. Patterson & Buckler, for appellees.

KEY, J. The appellees in this case have filed a motion seeking to strike from the files and have this court refuse to consider the transcript filed by the appellants, upon the grounds (1) that the record shows four separate and distinct judgments of four separate and distinct cases; (2) because the caption does not refer to or name either one of the causes the record of which is presented and transcript filed; (3) because the certificate of the clerk only refers to three of the causes tried, and does not embrace the principal case disclosed by the record; (4) because the clerk's indorsement upon said transcript does not show for whom the transcript was applied and for whom it was delivered. The appellants resist this motion upon the grounds (1) that the motion is too late, because the supreme court granted leave to file the transcript; (2) because it is claimed that the appellees, in signing the waiver of time for filing the transcript, have waived their right to object to the transcript that is filed; (3) they claim that there is no merit in the motion, as the record shows that all of said causes have been consolidated.

The record shows that on the 23d day of June, 1890, the district court of El Paso county made an order consolidating nine several causes, and ordered that they be tried as one cause, to wit, *Charles E. Fruin v. George Paul et al.*, file No. 1,319; *Mosseson and Thera v. George Paul et al.*, file No. 1,320; *William Cameron & Co. v. George Paul et al.*, file No. 1,322; *G. T. Bassett v. Charles E. Fruin et al.*, file No. 1,323; *Barton, Lingo & Co. v. George Paul et al.*, file No. 1,324; *T. M. Cooney & Co. v. George Paul et al.*, file No. 1,325; *Davis and Rogers v. Anson Mills et al.*, file No. 1,327; *Berla & Co. v. Anson Mills et al.*, file No. 1,340; *George Paul v. Anson Mills et al.*, file No. 1,326; and that all of said parties in said several suits file their pleadings in this cause under file No. 1,319, and that all the rights of said secondary parties be adjusted in this said cause. This order was made in cause No. 1,319,—*Charles E. Fruin v. George Paul et al.*,—and was made upon the application of the appellants in this cause, and embraces the four causes shown by the record to have been tried in said court. At the February term, 1892, four of the cases embraced in the foregoing order of consolidation, to wit, *William Cameron & Co. v. George Paul et al.*, file No.

1,322; *O. T. Bassett v. Charles E. Fruin et al.*, file No. 1,323; *T. M. Cooney & Co. v. George Paul et al.*, file No. 1,325; *George Paul et al. v. Anson Mills, J. F. Crosby, and Josephine Crosby*, file No. 1,327,—were tried, and separate verdicts returned, and separate judgments entered, in each of said causes. The trial (or trials) was had upon separate petitions of each set of plaintiffs, but on one answer, so prepared as to constitute an answer to each petition. The court gave separate charges applicable to each case. Thereafter a motion for a new trial was filed in the cause of *Charles E. Fruin v. George Paul et al.*, stating that the defendants, *Anson Mills, J. E. Crosby, and Josephine Crosby*, moved the court to set aside the verdicts and judgments rendered in the following causes, consolidated and tried with this cause, viz.: *George Paul v. Anson Mills et al.*, No. 1,326; *O. T. Bassett v. Charles E. Fruin et al.*, No. 1,323; *William Cameron & Co. v. George Paul et al.*, No. 1,322, and *T. M. Cooney & Co. v. George Paul et al.*, No. 1,325. This motion being overruled, defendants gave notice of appeal.

The statement of facts was prepared and filed by the district judge in cause of *Charles E. Fruin v. George Paul et al.*, No. 1,319, and certain causes consolidated therewith. The appellants' assignment of errors is filed in the same cause, and assigns errors committed in the trial of the foregoing four cases, giving their styles and numbers as consolidated and tried together. The appellants filed four supersedeas and appeal bonds in cause No. 1,319, of *Charles E. Fruin v. George Paul et al.*, each reciting that, "whereas, in the above styled and numbered cause, and causes consolidated therewith, pending in said district court of El Paso county, Texas, the plaintiff [giving the name of the plaintiff] had recovered judgment against defendants in said cause," etc. The clerk's certificate at the end of the transcript reads as follows: "State of Texas, county of El Paso. I, J. A. Escajeda, clerk of the district court in and for El Paso county, Texas, do hereby certify that the foregoing pages are a true and correct transcript of all papers, orders, decrees, and proceedings had in the district court of El Paso county, Texas, in causes No. 1,322, 1,323, 1,324, and 1,326, wherein *William Cameron & Co.*, plaintiffs, *v. George Paul et al.*, defendants; *O. T. Bassett*, plaintiff, *v. Charles E. Fruin et al.*, defendants; *T. M. Cooney & Co.*, plaintiffs, *v. George Paul et al.*, defendants,—as the same, with other causes, were consolidated as one cause, under No. 1,319, where *Charles E. Fruin*, plaintiff, *v. George Paul et al.*, defendants, together with a correct and true bill of costs herein." This certificate is properly signed, and has the seal attached.

While the judgments themselves do not show it, it is admitted in appellees' motion that the four cases were tried at the same

time, and before the same jury; but, inasmuch as the record shows separate charges, verdicts, and judgments, we believe that, for the purposes of an appeal, they must be treated as separate and distinct trials. If this is not true, then, treating the order of consolidation as in force at the time of the trials, it appears that there is no final judgment in the case, because the judgments rendered in the court below do not dispose of the other five cases, and the rights of the parties therein, with which these four were consolidated. *Martin v. Crow*, 28 Tex. 614; *Simpson v. Bennett*, 42 Tex. 241; *Linn v. Arambould*, 55 Tex. 611; *Mignon v. Brinson*, 74 Tex. 18, 11 S. W. Rep. 903. However our attention may be called to the fact, if the record discloses that no final judgment has been rendered in a cause, then this court is compelled to dismiss the appeal for want of jurisdiction; and sustaining the motion before us has the same effect. If it be true that the order of consolidation was in force at the time of the trial, and the other parties to the consolidated suit had not withdrawn or been dismissed from the case, or otherwise disposed of, then the proceedings of the court below—from which this appeal is sought to be prosecuted—did not constitute a final judgment; and while, without acquiring jurisdiction of the case, we have no authority to direct how the district court should proceed, yet if it be a fact that there has been no final judgment rendered, then, in the law, the consolidated case should be proceeded with and tried in the district court as though there had never been any trial therein. It follows, therefore, that the first ground of the motion is well taken; and, inasmuch as the certificate of the clerk undertakes to enumerate the several causes tried, and omits the case of *George Paul v. Anson Mills, Josiah F. Crosby, and Josephine Crosby*, except by giving its file number, it must also be held that the third ground of the motion is well taken. *Sup. Ct. Rules*, 90, 96.

We do not think that appellees are precluded from making this motion by their action, as stated in the appellants' answer to the motion. All that they did was to sign a paper admitting that the facts stated in the appellants' motion to be allowed to file transcript after the time required by law, excusing themselves for not filing the same, were true, and consenting that appellants might file a transcript and their briefs at a later day than that permitted by the rules. They did not consent to the filing of any particular transcript. Nor did the supreme court in granting appellants permission to file transcript at a later day than that required by law, give permission to file this particular transcript. For the reasons above stated the motion to strike out the transcript filed by appellants on the 25th day of June, 1892, will be granted, and the appeal herein dismissed.

KENYON v. STATE.

(Court of Criminal Appeals of Texas. April 23, 1892.)

USURY — CRIMINAL PROSECUTION — CONVICTION — APPEAL — REPEAL OF STATUTE.

Pen. Code, art. 16, provides that the repeal of a penal law, without substitution of other penalty, will exempt from punishment all offenders against the repealed law, unless otherwise declared in the repealing statute. *Held*, that where, pending an appeal from a conviction for violating the usury law, it is repealed without substitution of penalty, the judgment will be reversed.

Appeal from Taylor county court; D. G. Hill, County Judge.

B. B. Kenyon was convicted of violating the usury law, and appeals. Reversed.

Bledsoe & Legett, for appellant. R. H. Harrison, Asst. Atty. Gen., for the State.

DAVIDSON, J. This prosecution is based upon an alleged violation of the act of the twenty-second legislature defining and punishing usury. Acts 1891, p. 20.

There are several questions raised upon the record and urged as grounds for reversal of the judgment of conviction. Subsequent to the conviction of appellant, and pending this appeal, the special session of the twenty-second legislature, which has just adjourned, repealed the statute upon which this case is predicated, and, in doing so, failed to substitute any penalty in lieu of that prescribed by the act of 1891. By the Penal Code (article 16) it is provided that "the repeal of a penal law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute." The repealing statute was passed, with the emergency clause attached, and took effect from and after its passage. There is at present no law in this state punishing usury as an offense. All of the remedies prescribed are civil in their nature, and such penalties and damages as are recoverable against parties lending money upon usurious contracts are recoverable only in civil actions. The repeal of the act of 1891 by the recent legislature annuls the conviction in this case. *Whisenhunt v. State*, 18 Tex. App. 491; *Sheppard v. State*, 1 Tex. App. 522; *The Irresistible*, 7 Wheat. 552. Mr. Cooley says: "If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered." Cooley, Const. Lim. (4th Ed.) 477.

The questions raised by appellant will not be discussed, because they are no longer practical. For the reasons indicated the judgment is reversed, and the prosecution is dismissed. Judges all present and concurring.

AMERICAN ACC. CO. OF LOUISVILLE v. REIGART.

(Court of Appeals of Kentucky. Sept. 16, 1893.)

ACCIDENT INSURANCE POLICY — CONDITIONS — CAUSE OF DEATH — "EXTERNAL VIOLENT MEANS" — WHAT CONSTITUTE — CHOKING TO DEATH — TRIAL — CLOSING ARGUMENT.

1. Where an accident insurance policy is, by its terms, made payable in case of death "received through external, violent, and accidental means," the intent is that the means, or that which caused the injury, should be external, and not that the injury must be external.

2. Where the assured chokes to death while attempting to swallow a piece of beefsteak which accidentally lodges in his windpipe, death results from "violent and accidental means," within the meaning of the conditions of such policy.

3. No construction should be placed on an accident insurance contract that would defeat the intention of both parties to it.

4. Where, in an action on such policy, the only issue of fact is the denial by defendant that the accident causing death happened as alleged by plaintiff, the fact that the court had overruled a demurrer to the petition, thus deciding the case in favor of plaintiff if the accident occurred as alleged, does not entitle defendant's counsel to the closing argument.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by Julia J. Reigart against the American Accident Company of Louisville, Ky., on an accident insurance policy issued by defendant to Thomas I. Reigart, and made payable to plaintiff. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas H. Hines and Whittaker & Robinson, for appellant. Cochran & Sons, John F. Lacey, and E. W. Hines, for appellee.

PRYOR, J. The appellee, Julia J. Reigart, the widow of Thomas I. Reigart, instituted this action in the Mason circuit court to recover \$5,000 upon an accident policy issued by the American Accident Company of Louisville, Ky., to said Reigart, and made payable to his wife if she survived him. Her husband lost his life by eating a piece of beefsteak that, in the attempt to swallow, accidentally passed into his windpipe, choking him to death in a few moments. By the terms of the policy, the insurance was made payable for injury or death received through external, violent, and accidental means. That the death of the insured was accidental is conceded, but it is contended that the contract of insurance only embraces accidental injuries caused by external violence, or accidents brought about by means externally violent. It is argued that the act of chewing or eating food is natural and harmless, and if, in eating, a part of the food passes into the windpipe, causing death, it cannot be said that death was produced by means of external violence or force; in other words, that

the plain meaning of the language of the policy, "through external, violent, and accidental means," is that the accident causing death must have been caused by an external force. The court below, placing a different construction on the contract, said, in effect, to the jury, if the death was accidental, and caused by the passing of the steak into the windpipe, they should find for the plaintiff.

The rule laid down by Mr. May in his work on Insurance (3d Ed. § 175) is as follows: "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain and cover the loss must, in preference, be adopted." And we might add that no construction should be placed upon such contracts as would defeat the intention of both parties, as it is manifest, if the interpretation given the language of this policy by counsel for the defense is adopted, it would defeat the intention of both the contracting parties. The doctrine of this court, as announced in *Hutchcraft's Ex'r v. Insurance Co.*, reported in 87 Ky. 300, and 8 S. W. Rep. 570, where the authorities were reviewed on the question there presented, recognizes fully this rule of construction, and that regard must be had to the purpose sought to be accomplished by both the parties.

This appellant is an accident insurance company, and its policies are termed "accidental policies," and the very object of insuring in such companies is to obtain indemnity where injury or death results from accident; and while the policy provides that the liability arises when the injury "is through external, violent, and accidental means, independently of all other causes," it was not designed that there should be such external violence, as a fall, a kick, or a blow, on the person, as would cause death or an injury, before the liability of the company could arise. This language was inserted in the contract to protect the company against hidden or secret diseases, resulting in injury, where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries, not originating from accidental causes, and that were liable to occur at any time from natural causes. If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion, or to completely stay the operations of nature in such a manner as to produce

disease, no one would contend that the pain or the disease was the result of accident, or that the terms of this policy embraced such a case; but when the substance causing the death is visible, and placed in the mouth of the assured, lodging by accident in the windpipe, instead of the stomach, producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine. There is no external force or violence from the poison, and the injury internal in its character, and yet the authorities hold that the insurance company is liable in such a case. *Healey v. Association*, 133 Ill. 556, 25 N. E. Rep. 52. It is plain, we think, that the means or that which caused the injury should be external, and not that the injury should have been external.

It is said, however, that, if the injury is not to be external, the death must have resulted from "violent and accidental means." It is universally understood, when it is said that one died a violent death, that it was unnatural,—a death not occurring in the ordinary way; and, in fact, the definition of the word "violent" is "unnatural," and in using this word the insurance company was attempting to prevent the assured from asserting a claim when the injury or death was the result of some natural cause. In the case of *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. Rep. 847, on a similar policy, it was held "that a death unnatural, the result of accident, imports an external and violent agency as the cause." This same view was taken by the Illinois supreme court in the case of *Healey v. Association*, already cited. A similar construction to the verbiage of like policies has been heretofore given by courts of last resort, and, if companies organized as this is intend that actual external force causing the accident must be shown before a recovery could be had, it would be easy to so frame the language of the policy as to leave no doubt as to its meaning. The instructions below were proper, and, in our opinion, the widow entitled to recover.

Another ground of reversal is the refusal of the court below to give to appellant's counsel the concluding argument. A demurrer had been overruled to the petition, which, in effect, was a decision for the plaintiff if the accident occurred as alleged. The legal question was therefore settled, but there were two defenses to the claim: First, a denial that the accident causing the death happened as alleged by the plaintiff; second, that the deceased was under the influence of intoxicating drinks when the accident occurred, and that, by an express provision of the policy, this exempted the appellant from liability. The proof failed to sustain the second ground of defense, and the denial that the accident was caused as alleged was the only issue of fact that the appellee was required to establish. The

overruling of the demurrer did not dispense with the necessity of the plaintiff's showing that the death of the intestate was caused by the accident as alleged, and, while the sufficiency of the answer may be questioned by reason of the manner in which the denial is made, still it was the appellant's defense, and it attempted by it to place the burden on the plaintiff, and will not be allowed now to say that, because its pleading was bad, the burden was not on the plaintiff. The judgment below must be affirmed.

COMMONWEALTH v. DAY.¹

(Court of Appeals of Kentucky. Sept. 16, 1893.)

INTOXICATING LIQUORS—FLEMING COUNTY PROHIBITION LAW—WHEN IN FORCE—CONVICTION OF VIOLATION—SUFFICIENCY OF EVIDENCE.

1. An act known as the "Fleming County Prohibition Law" provides that the certificate of the county board of examiners, showing that a majority of the votes of the county had been cast against the sale of liquors at an election held under such act, shall be recorded in the office of the clerk of the county court, and that "then" the provisions of the act shall be in full force. *Held* that, on a trial for violation of such law, the evidence must show that such certificate had been filed.

2. A statement in the bill of exceptions, immediately after such certificate, as follows: "Showing that the law * * * was in full force and effect in said county at the time of the sale,"—is but an erroneous conclusion, and does not show that the law was in force.

Appeal from circuit court, Fleming county.
"Not to be officially reported."

David Day was acquitted of the charge of selling intoxicating liquors in violation of what is known as the "Fleming County Prohibition Law," and the commonwealth appeals. Affirmed.

W. J. Hendrick and James H. Sallee, for the Commonwealth. W. G. Dearing, A. E. Cole & Sons, and G. A. Cassidy, for appellee.

HAZELRIGG, J. The appellee was indicted for a violation of what is known as the "Fleming County Prohibition Law." Upon the trial it was shown by the commonwealth that one Robert J. Samuel's wife was sick, and the family physician gave her a prescription for brandy. It was not directed to any one, nor did it state the quantity, but was otherwise regularly made out, and signed by the physician. Samuel took the prescription to the appellee, a distiller, who hesitated to fill it, but finally, at the urgent appeal of the husband of the sick woman, sold him a quart of brandy, and kept the prescription. In some two weeks thereafter, Samuel returned, and, without a further prescription, induced appellee to let him have another quart for the same purpose. He testifies that the liquor was used solely by his wife as a medicine, save a small quantity he let his brother have for sickness in his family. No other testimony was offered by

the state, save that the original certificate of the Fleming county board of examiners was read, showing that a majority of the votes of the county had been cast against the sale of liquors, at an election held under the act specified. The orders of the county court appointing the officers of the election were also read. Now, the law under consideration provides that this certificate of the examining board should be recorded in the office of the clerk of the county court, and that "then the provisions of the act shall be in full force." The indictment, as was necessary it should do, charged that this certificate "had been duly recorded in the clerk's office of the Fleming county court by the clerk of the court," but nowhere does it appear from the evidence that the certificate was so recorded. Without this, there was no evidence that said law was in force. Immediately following the certificate in the bill of exceptions is this language: "Showing that the law known as the 'Fleming County Prohibition Law' was in full force and effect in said county at the time of the sale by Day to Samuel." This is but a conclusion, and an erroneous one at that. This certificate does not show the law to have been in force. It must appear to have been recorded as provided by the act before the law can be held to be operative for any purpose. By his plea of "Not guilty," the defendant put the allegation of the indictment on the vital question of whether the certificate was recorded in issue, as well as the other allegations therein. The commonwealth having failed to make out the case, the motion of the defendant to have the court instruct the jury to find him not guilty should have been sustained. The jury, on instructions given by the court, and supposed by the commonwealth to be erroneous, but which we need not discuss, found the defendant not guilty. Judgment affirmed.

COMMONWEALTH v. WARREN, (two cases.)

(Court of Appeals of Kentucky. Sept. 7, 1893.)

FALSE PRETENSES—OBTAINING SIGNATURE TO NOTE—INDICTMENT.

Gen. St. c. 29, art. 13, § 2, provides that if any one, by false pretenses, with intention to commit a fraud, obtain the signature of another to a writing, the false making whereof would be a forgery, he shall be confined in the penitentiary. *Held*, that an indictment charging that defendant obtained a signature to a note by falsely representing that it was a renewal of a note on which defendant was liable as principal, and the person signing it was liable as surety, and that said original note was due, did not charge an offense under the statute, as the gist of the charge was that defendant obtained the note by the promise that he would use it in renewal of the old note, and a false promise to do something is not a "pretense," within the statute.

Appeals from circuit court, Marion county.
"Not to be officially reported."

¹For supplemental opinion, see 28 S. W. Rep. 952.
v.23a.w.no.6—13

William Warren was indicted for obtaining a signature to a note by false pretenses. From a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

Wm. J. Hendrick, for the Commonwealth.
W. J. Lisle and John D. Fogle, for appellee.

HAZELRIGG, J. The sufficiency of the following indictment is in question on this appeal: "The grand jury of the county of Marion, in the name and by the authority of the commonwealth of Kentucky, accuses Wm. Warren of the crime of obtaining the signature of another to a writing, the false making whereof would be a forgery, by false pretenses, with the intent to commit a fraud, committed in manner and form as follows, to wit: The said Wm. Warren, in the said county of Marion, on the 9th day of July, A. D. 1890, and before the finding of the indictment herein, did falsely pretend to A. Lee that two notes, to wit, negotiable promissory notes, promising to pay to the Marion National Bank of Lebanon, Ky., at the said bank, \$350 each, and executed by said Wm. Warren as principal and the said A. Lee as security, were then due, and the said Wm. Warren did then present to the said A. Lee another negotiable promissory note, payable to the said Marion National Bank in Lebanon, Ky., dated 9th day of July, 1890, and due in four months thereafter, for \$700, which said note was all drawn up in due form, and signed by the said Wm. Warren, and the said Wm. Warren did then and there falsely represent and pretend to the said A. Lee that the said note so drawn up and signed by the said Wm. Warren was a renewal of the former notes aforesaid, and, by said false and fraudulent representations so made, did obtain the signature of the said A. Lee as security to said note. Said first notes were not then due when said representations were so made, and said second promissory note was not a renewal note for said first two notes, and was not so used, but was made and prepared by the said Wm. Warren, and at his instance, to satisfy other notes which he owed said bank, and which he did so satisfy by exchanging said \$700 for two other notes which he owed, and upon which A. Lee was not bound, and said false representations were made by the said Wm. Warren with the intention to commit a fraud as aforesaid, and said second note and the signature of A. Lee were writings, the false making whereof would have been a forgery, and said false representations were feloniously made, and the said A. Lee, as security, and Wm. Warren, as principal, at the time said false representations were made, did owe said bank two notes for \$350 each, all of which was contrary to the form of the statute," etc. A demurrer to the indictment

filed by the appellee, Warren, was sustained by the circuit court, and the commonwealth has appealed, insisting that the indictment is a good one, under section 2, art. 13, c. 29, Gen. St., which is as follows: "If any person by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny, or if he obtain by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

Obviously, the false pretenses or representations attempted to be charged against the appellee are that the notes for \$350 each were due, when they were not due; and that the note for \$700, when presented to Lee for his signature, was a renewal of the smaller notes, when it was in fact afterwards used otherwise. Now, it is clear that Lee was not induced to sign the alleged renewal note upon the mere representation that the other notes had matured. If the representation had been that they would fall due on the next day, the same necessity would have existed for Lee's signature to the alleged renewal note. The statement as to the maturity of the paper was not a moving or controlling cause or inducement in obtaining the signature. It is, in fact, not so alleged in the indictment. It is apparent that the appellee obtained the signature of his friend to the new note by the promise that it would be used in renewal of the old ones, upon which he was bound at the bank. The language of the pretense, as laid in the indictment, that the note "was a renewal of the former notes," can intelligently mean nothing else than that it was intended to be used as such renewal note. Of course, a note cannot be a renewal of another note until it is signed by the obligor, and delivered to the obligee, and by him accepted as such renewal. The plain meaning of the charge in the indictment is that, after Lee should sign it, the note was to be delivered in renewal of the old notes, but that the appellee violated his promise, and used it otherwise. This is not a violation of the statute, as has been repeatedly held by this court. "It is essential to a conviction for obtaining property or money under false pretenses to allege and prove that the pretense was a statement of some pretended past occurrence or existing fact, made for the purpose of inducing the party injured to part with his property. No statement or representation of anything to take place in future is a 'pretense,' in the meaning of the statute, whether it be in the form of a promise or not." *Glackan v. Com.*, 3 Metc. (Ky.) 233. The judgment sustaining the appellee's demurrer, and dismissing the indictment, is therefore affirmed.

WILCOXEN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 7, 1893.)

MURDER—SELF-DEFENSE—INSTRUCTION.

1. It appeared that from the beginning of the trouble between defendant and deceased until they were left alone, just before the killing, the latter was the aggressor; that defendant stated that deceased tried to kill him, and he had cut him with his pocketknife; that deceased was stabbed in his left breast, and, when found, his pistol was lying near him. There was evidence that deceased was quarrelsome, and habitually carried a pistol, and that defendant's reputation was good. *Held*, that it was error to modify the usual charge as to self-defense by adding: "Unless the jury believe from the evidence that 'defendant brought on' the trouble, in which event he cannot avail himself of the plea of self-defense, unless he had 'withdrawn from the difficulty prior to the stabbing,'"—since there was no evidence to authorize it.

2. Such instruction is objectionable in that it ignores the important questions as to the manner of bringing on the difficulty, and defendant's intent.

Appeal from circuit court, Barren county.

"Not to be officially reported."

John Wilcoxen was convicted of murder, and appeals. Reversed.

Lewis McQuown, for appellant. Wm. J. Hendrick, for the Commonwealth.

HAZELRIGG, J. The appellant, a negro, left his cabin, in Hart county, to go to Young's store, a few miles distant, to get some medicine for his sick child. One Forbis, a colored friend, fell in with him; and they went by the house of one William Butler, another negro, which was close by the road leading to the store, where Forbis and Butler consummated a horse swap. After appellant and Forbis had left the house, Butler followed, and, coming up to them, told appellant that he wanted him to take a certain woman—a white prostitute—to keep for him at his house. After some discussion, appellant refused, upon which Butler became angry, drew his pistol, and insisted that unless appellant would agree to take the woman he would kill him. Forbis interfered, quieted the difficulty, and the party proceeded towards the store. Twice after this, as they went along, Butler drew his pistol, and tried to make appellant agree to keep the prostitute for him. He was quieted by Forbis. At length Spencer Butler, the son of William, joined the three; and about this time William told Forbis and his son to go on, that he had gone as far on that road as he was going, and that he had a settlement to make with appellant. Forbis and Spencer walked on, and in a short while heard a call of distress from Butler, according to the testimony of Spencer, and from appellant, according to the statement of Forbis. Spencer went back, and, not seeing his father, supposed he had gone home. He then went off to a dance. Appellant ran up to Forbis, told him that Butler had tried to kill him, and, using his pocketknife, (a

small Barlow,) he had cut him, but did not know how badly. They then went to the house of a neighbor, got them to go with them, with lights, and found Butler, dead, some 20 feet from where the struggle took place, as pointed out by appellant. He was cut on the wrist of the right arm. A stab was found over the left breast, which was supposed to have penetrated the heart. The pistol of the dead man was found near by. Appellant surrendered himself to the authorities; was subsequently tried, and convicted. His sentence was for 15 years, and he has appealed. The principal error of which he complains is in the modification of instruction No. 4, depriving him, as he contends, of the right of self-defense. Appended to the usual instruction on that subject is this language: "Unless the jury shall further believe from the evidence, to the exclusion of a reasonable doubt, that defendant brought on the difficulty in which Butler was stabbed, in which event the defendant cannot avail himself of the plea of self-defense and apparent necessity, unless the jury shall believe, from the evidence, defendant had withdrawn from the difficulty prior to the stabbing." We are of opinion that this modification should not have been given. First, there is no testimony to authorize it. From the beginning of the trouble until the combatants were left alone, the deceased was the aggressor. Moreover, it was in proof that he was a vindictive, quarrelsome, dissipated negro, and habitually carried a pistol. Appellant's reputation was shown to be good. No one saw the final combat, and there is not the slightest proof on which to base such an instruction. See *Hamlin v. Com.*, (Ky.) 12 S. W. Rep. 146, and *Martin v. Com.*, (Ky.) 19 S. W. Rep. 580. In the second place, the form of the instruction is objectionable. "The term 'brought about' a meeting is of too general a character, however, for use in an instruction to a jury, where life or liberty is involved." *Crane v. Com.*, (Ky.) 13 S. W. Rep. 1079. Neither the manner of bringing on the difficulty, nor the intent of the accused, are supposed to be material by the court, in this instruction. Both are vitally important. *Allen v. Com.*, 86 Ky. 642, 6 S. W. Rep. 645. Judgment reversed, and cause remanded for a new trial upon principles consistent with this opinion.

COMMONWEALTH v. HIDE.

(Court of Appeals of Kentucky. Sept. 9, 1893.)

FORGERY—WHAT CONSTITUTES—EVIDENCE—QUESTION FOR JURY.

1. Where the figure 8 is wrongfully inserted between the dollar mark and the figures 70 in the upper margin of a check, thus making it appear to be a check for \$3.70, instead of 70 cents, it is forgery, though the amount was written "Seventy cts." in the body of the check, and was unaltered.

2. Where, on a trial for forging such check, there was no evidence that any person

except defendant had possession of it from the time of its execution until he received the money on it, it was error to direct an acquittal.

Appeal from circuit court, Allen county.

"To be officially reported."

Will Hide was acquitted of the crime of forgery, and the commonwealth appeals. Reversed.

Wm. J. Hendrick, for the Commonwealth.

HAZELRIGG, J. The appellee, under an indictment for forgery, was, upon trial, found "not guilty" by the jury, under a peremptory instruction from the court, and the commonwealth has appealed. The indictment charges that the defendant committed the crime named by feloniously and corruptly writing the figure 3 just after the dollar mark, and before the figures 70, on the face of a check drawn in his favor by one J. S. Morehead on P. J. Potter & Co., bankers, with intent to defraud, etc., thus making the check one for \$3.70, when it was in fact one for only 70 cents. The proof disclosed that Morehead gave Hide a check for 70 cents, writing the figures thus, \$ 70, near the top of the check, towards its right hand margin. The line below read: "— Seventy cts.70 Dollars." Shortly after the date of the check, Hide presented it to the clerk of Wade & Co., merchants, and asked to be given two dollars in cash, and balance in goods. The check was unchanged, save the figure 3 stood between the dollar mark and the figures 70. Without observing the writing closely, the clerk made the exchange, and thereafter, upon discovering the mistake, had the accused arrested, and put on trial, as named. Clearly, the writing was a forgery, and the indictment, in apt terms, charged the defendant with the crime. It is certainly not necessary that the whole instrument should be made false or fictitious. Making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. This check, in a material—and we may say a prominent—part, was altered; and it does not matter that the words "Seventy cts." remained as written, or that by close observation the merchant could have detected the forgery, and prevented the consummation of the fraud.

While, therefore, the alteration of the check must be held to have been a forgery, the question yet recurs whether the proof is sufficient to show that the accused made that alteration, or, in other words, committed the forgery. That he uttered the forged instrument is uncontradicted, but for that he was not on trial. There is no proof directly showing that he inserted the figure in question, but no one else is implicated or interested. He alone got the benefit of the change made, or had possession of the writing, so far as the proof shows, from the time of its execution by Morehead until its delivery to the clerk in its altered condition.

It seems to us that the jury could have readily concluded, beyond any reasonable doubt, that the prisoner was guilty. The case should have been submitted to it. Quite rarely can the very act of falsifying a writing be shown, and to require the state to show more than it has in this case would furnish a too convenient loophole for the escape of the guilty, and result in the frequent failure of justice. A like conclusion was reached by the court upon a similar state of case in *Mitchell v. State*, 84 Ga. 448, which is ordered to be certified as the law of the case.

STATE ex rel. KLOTZ v. ROSS, Judge, et al.
(Supreme Court of Missouri. June 27, 1893.)

SPECIAL JUDGE—POWERS AND DUTIES—JUDGMENT
—COLLATERAL ATTACK.

1. Under Rev. St. 1889, § 3328, giving the special judge elected by members of the bar, in case of the absence or disqualification of the regular judge, all the powers of the circuit judge, he is under no duty or obligation to the regular judge; and the fact that he adjourned the court before the arrival of the regular judge, in violation of a promise made to the latter, does not affect the regularity of such action.

2. An order of a special judge, vacating an order previously made by the regular judge appointing a receiver for a corporation, cannot be attacked on the ground of such judge's relationship to an interested party, in a mandamus proceeding by the person whose appointment is so revoked to procure the delivery to him of the corporate property by a receiver appointed by another court.

3. Nor can such order be attacked in such collateral proceeding as having been fraudulently issued. Sherwood, J., dissenting.

4. After court has been adjourned until the next regular term by a special judge, the regular judge has no power to reopen it.

In banc.

Mandamus on the relation of Eli Klotz against Alexander Ross, judge, and others. Writ dismissed.

Alex G. Cochrane and H. S. Priest, for relator. J. W. Noble, G. D. Reynolds, and M. R. Smith, for respondents.

GANTT, J. This is an original proceeding in this court to obtain a peremptory writ of mandamus, commanding the above-named respondents to deliver to the relator, Eli Klotz, all and singular the railway property, effects, and credits of the St. Louis, Cape Girardeau & Ft. Smith Railway, a railroad organized under the laws of this state, and running from the city of Cape Girardeau westward to a point in Carter county, Mo., about 100 miles in length. Upon an application filed in this court on March 16, 1893, an alternative writ issued to the respondents to show cause, on March 25, 1893, why a peremptory writ should not issue. The alternative writ was duly served, and return made on the 25th of March, and leave taken by both sides to take evidence. John W. Dryden, Esq., of the St. Louis bar,

R. H. Swearing

was appointed a special examiner to take the proof and report to this court on May 2d. This was done, and on the 2d day of May the evidence was submitted, and argument heard, and leave taken to file briefs. The alternative writ alleges the incorporation and extent of the said railway; that Louis Houck was and is its president and general manager, and the owner of a majority of its stock; that Alexander Ross is the judge of the Cape Girardeau court of common pleas; and that said court is a court of limited jurisdiction, created by an act of the legislature, approved February 22, 1851, (Acts 1850-51, p. 201,) and an amendatory act, approved February 17, 1853, (Acts 1852-53, p. 80.) It then avers that Eli Klotz was appointed receiver of said railway on the 3d day of March, 1893, by the Honorable John G. Wear, judge of the circuit court of Stoddard county, Mo., in vacation, in a certain cause wherein E. G. Merriam is plaintiff and the said railway company, Leo Doyle, trustee, and the Mercantile Trust Company, are defendants, then pending in said Stoddard county circuit court, and returnable to the fall term thereof, for the year 1893; that afterwards said provisional appointment, made in vacation as aforesaid, was duly confirmed by the circuit court of Stoddard county on March 13, 1893; that, in pursuance of said appointment, the relator duly qualified as such receiver by taking the oath and filing his bond as such; that he demanded of said Louis Houck, the president of said railway, the possession thereof, but said Houck refused to deliver the same, claiming that he had been duly appointed receiver himself on the 4th day of March, 1893, by Hon. Alexander Ross, judge of the Cape Girardeau court of common pleas, in a suit in said court wherein said railway company was plaintiff and Leo Doyle, Edward Hidden, and the Mercantile Trust Company of New York are defendants; that he had qualified under said appointment, and had taken possession of said railway by virtue thereof. It is then averred that relator appeared in said Cape Girardeau court of common pleas, and exhibited to Judge Ross a copy of his appointment by the circuit court of Stoddard county, and suggested that Judge Ross had no jurisdiction to appoint said Houck because of the prior proceedings in the circuit court of Stoddard county, and because said common pleas court had no jurisdiction over equity cases, especially such a case as is set forth in the bill filed by said railway company against said Leo Doyle et al., in which said Houck was appointed receiver. The said bill is copied in full in the writ, and it is unnecessary to repeat it here. It then appears that Judge Ross declined to take any action at the time, but, in vacation, continued the hearing till the May term of his court, to which relator excepted at the time. It then avers that the petition in the Cape Girardeau court of common pleas does not

state facts sufficient to constitute a cause of action. The writ then avers that relator is thus unable to obtain possession of said railway, and prays this court to command the respondents to show cause why they should not be directed by this court to turn over said property to him.

Return by respondents: The returns of the railroad company and other respondents aver that the order of Stoddard circuit court appointing relator, Klotz, receiver, was annulled on March 13, 1893, by that court; that he never had possession of the railroad, but that Houck, receiver, always has had since his appointment and qualification; that the common pleas had and has jurisdiction; that its judge, the respondent Ross, has so adjudged, and in his orders and proceedings under the bill named had acted judicially, and is proceeding in due course to hear and determine the same and all questions in relation thereto, as the same may arise; that Klotz, pretending to be a receiver, appeared in this common pleas court on that proceeding, and filed a petition for possession, which was ordered filed and continued to the May term, 1893, and is there now pending. This return also sets forth as a separate defense that the mortgages under which Merriam claims to hold the bonds, the coupons of which are not paid, and because whereof he begins suit, cover only 25 miles of this whole road, of which it has been attempted to give Klotz as receiver possession, which road is 100 miles long; that of the 25 miles covered only 5 are in Stoddard county; and the bill seeks, not a foreclosure, but that the road may be sequestered for payment of interest heretofore accrued and that may hereafter accrue, and a receiver appointed to take possession and operate the railroad as a unit, and for general relief. This portion of the return also states the provisions of each of these mortgages to the effect that the bonds do not mature until 1901, but that, if interest was not paid, the trustee therein, Leo Doyle, should, on demand of holders of not less than one-fourth of outstanding bonds thereunder, take possession of the road as far as covered by the mortgage, and operate the same for bondholders; and that it was in said mortgages expressly provided that nothing therein could be construed to affect or put any burden or liability on the right of way, bridges, property, or lands acquired or to be acquired on or along (in the first mortgage) the Lakeville Division of the road, extending from the (Delta) junction to Lakeville, or beyond that point, and (in the second mortgage) on or along the roadway lying and being southwest of Lakeville, or any donation or gift made to aid the road. And the return avers and claims, on the facts stated, that an order taking the whole road under the circumstances and contracts just mentioned is in violation of the several constitutions of the

state of Missouri and of the United States, declaring that no person shall be deprived of property without due process of law, which guaranties are relied on and invoked by respondent. This return further sets forth the proceedings on the 13th of March, 1893, in the Stoddard circuit court in the Merriam suit, when this respondent, as well as Leo Doyle, filed its motion to annul the order appointing Klotz receiver, and for a change of venue; and that on that day the circuit court was open, and the court then and there, having fully considered the matter, vacated the appointment of Klotz, relator herein; and that the court was then adjourned to the next term in course by the legal and acting judge, who had up to that time been holding the term; and that the pretended order confirming the appointment of Klotz, set up by relator, was illegally entered after said adjournment, and is void.

The relator's answer to this return is aimed at this last averment, and sets forth the original order of March 3, 1893, of Klotz's appointment, and ordering the clerk to issue a summons and notice to defendants therein to appear before the circuit court at Bloomfield on March 13th, and show cause why said order appointing Klotz receiver should not be confirmed; that the railway company and Doyle did appear, and filed motions to vacate receivership and for change of venue; that George Houck, pretending to exercise the functions of the temporary and provisional judge, conspired with Louis Houck and his attorneys to fraudulently circumvent the confirmation of receiver Klotz, knowing Judge Wear was on his way to hold court pursuant to notice, and convened court at 8 o'clock, and, although motions were required to be filed one day, Houck, J., sustained said motion, and did immediately pretend to adjourn said court, and the conspirators fled the town, but Judge Wear, circuit judge, did convene said court, and did, on investigation by the minutes, enter an order as follows: "Monday, March 13, 1893, the 7th day of March term, 1893, court opened as usual, pursuant to adjournment, the Hon. John G. Wear, judge of the circuit court of this county, presiding, pursuant to notice duly made to the clerk and sheriff of this court. It appearing to the court that prior to convening at the usual hour, and pursuant to the aforesaid notices, that one George Houck, assuming to exercise the functions of a judge of this court, had, at an unusual hour, and with knowledge of the notices given that I, as judge of said court, would be present and open the court at the usual hour, and knowing that I, as said judge, was in the county, and on my way to hold the same, did contrive with the attorneys for the St. Louis, Cape Girardeau & Fort Smith Railway Company, and the president of said company, Louis Houck, the brother of George Houck, to defeat the hearing of an

application for the confirmation of a receiver heretofore by me, in vacation, appointed in the case of E. G. Merriam against the said St. Louis, Cape Girardeau & Fort Smith Railway Company et al., due notice of which had been given to be heard before me on this day; did attempt to fraudulently and collusively convene said court, and to make certain orders in said cause at an unusual hour; and did make orders dismissing the receiver appointed by this court, upon the pretended motion of the defendants in said cause, although the same had not been docketed, and was not returnable until the December term of this court, and other orders therein; and did immediately attempt to adjourn the court. It is now ordered, in view of said fraudulent purpose and want of authority in said Houck to hold this court this day, that all minutes heretofore made this day by said George Houck, while pretending to act as judge of this court, be expunged and stricken from the record, and all proceedings pretended to have been made in this court by said George Houck, as pretended judge on this day, are also stricken and expunged from the docket."

The respondents have replied to this that Houck, J., was elected for the term under the statute in such case at the commencement of the term legally, and had held court from day to day, that would otherwise have lapsed, and, having on the 11th March adjourned to the 13th, at 8 o'clock A. M., and said motions coming on to be heard in due course, disposed of the same, by vacating the receivership order, and continuing the motion for change of venue and the cause to the next term; that he, George Houck, was the lawful and acting judge for the term, and Judge Wear was without authority to act as he pretended to act, as set forth by relator; that there was no conspiracy, and the motion to vacate was sustained, as it ought to have been, and the record and minutes are pleaded in support of this response.

This statement so far covers substantially the averments in pleadings filed and offered to be filed. There is a large volume of parol testimony taken by the special examiner, and filed in the cause, and much documentary evidence filed on both sides. By this evidence the following facts appear: On the 3d day of March, 1893, the suit of Merriam v. St. Louis, Cape Girardeau & Ft. Smith Railway was filed in the office of the clerk of the circuit court of Stoddard county, and simultaneously the order of Judge Wear appointing the relator receiver. That order contains the following provision: "Twelfth. This order is a provisional one, made by the undersigned judge in vacation, and it is hereby ordered that the clerk of the circuit court of Stoddard county, Missouri, issue a summons or notice to said defendants, returnable on Monday, the 13th day of March, 1893, to appear at Bloomfield, in said Stod-

dard county, before the circuit court of said county, and show cause, if any they have, why the appointment of said receiver should not be confirmed. [Signed] John G. Wear, Judge 22 Circuit."

By the statutes of this state the spring term of the Stoddard county circuit court was required to convene on the first Monday in March, 1893. Laws Mo. (Ex. Sess.) 1892, p. 13, § 50. Said first Monday was the 6th day of March, 1893. The record of that court on the first day of said March term begins with the following convening order: "The Hon. John G. Wear not being present to hold this court, and having failed to procure another judge to hold said court, a special election was held by the clerk of this court, at which the Hon. George Houck was duly elected special judge, there being more than five members of the bar present, to wit, H. H. Bedford, W. F. Ford, Thomas Conley, C. L. Keaton, Ralph Wammick, William Kitchen, and others, and the Hon. George Houck, possessing all the qualifications of a circuit judge, took the oath of office, and entered upon the duties as such." Again, there is no controversy between counsel as to these facts.

The said special judge held said court, and disposed of the business, from the 6th of March, down to and including the morning hour of March 13, 1893. The record shows that on Monday, 6th of March, he adjourned court to Tuesday, at 9 o'clock in the morning. On Tuesday he adjourned court until 8 o'clock Wednesday morning. On Wednesday he adjourned court to 8:30 o'clock Thursday morning. On Thursday he adjourned court to 8 o'clock Friday morning. Friday he adjourned court until 9 o'clock Saturday morning. On Saturday, after transacting the business of the court, he adjourned the court until 8 o'clock Monday morning. On Monday morning, the record shows, the court convened pursuant to adjournment; "Hon. George Houck," judge, etc. On that morning, among other entries, appear the following:

"State v. Napoleon Hickson. Arraigned. Plea of guilty on count of larceny. Count of burglary dismissed. Sentenced to the penitentiary for 2 years at hard labor. Ordered that sheriff convey him there with all convenient speed."

"E. G. Merriam vs. St. Louis, Cape Girardeau & Ft. S. Ry. Co. Motion to vacate order filed."

"E. G. Merriam vs. St. L., Cape G. & Ft. S. Ry. Co. Separate motion of Leo Doyle, trustee, limiting his appearance in this court for the purpose of the motion, asking this court to vacate the order made by the judge of the court in vacation, on March 3d, 1893, appointing Eli Klotz receiver of the St. Louis, Cape Girardeau and Fort Smith Ry. Co., for the reasons filed; which motion, being submitted, taken up, and heard and considered, is in all things sustained, said order is vacated, and held for naught."

"E. G. Merriam against St. L., Cape G. & Ft. S. Ry. Co. et al. Separate motion of the St. Louis, Cape Girardeau and Ft. Smith Ry. Co., limiting its appearance in this court for the purpose of this motion, asking this court to vacate the order made by the judge of this court in vacation, on March 3d, 1893, appointing Eli Klotz receiver of the St. Louis, Cape Girardeau and Fort Smith Ry. Co., for reasons filed, which motion, being submitted, and by the court taken up, heard, and considered, is in all things sustained, said order is vacated and held for naught."

"E. G. Merriam vs. Leo Doyle, trustee, et al. Application for change of venue filed, and cause continued."

"E. G. Merriam vs. St. Louis, Cape Girardeau and Ft. Smith Ry. Co. et al. Application for change of venue filed, and cause continued."

"Ordered by the court that all business pending and undisposed of be, and the same is hereby, continued until the next regular term of this court, and the court adjourned until court in course."

"George Houck, Special Judge for March Term, 1893."

After the special judge had adjourned the court, Judge Wear arrived at the county seat that morning, and, finding that Judge Houck had adjourned, he repaired to the courthouse, and caused the entry hereinbefore copied in full in relator's answer to be spread on the record, by which he assumed to expunge and set aside the record made by Special Judge Houck. Two positions are assumed by the learned counsel for the relator as to the proceedings on Monday, March 13th. They claim, first, that Special Judge Houck had no right to adjourn the circuit court of Stoddard county before Judge Wear arrived on the 13th of March. They base this claim upon some kind of informal notice that Judge Wear would be present that morning, or some promise on the part of Mr. Houck to Judge Wear to hold the court open until Judge Wear should arrive. It must be borne in mind that this record, on its face, affirmatively shows that the occasion had arisen, within the contemplation of the laws of this state, when the bar of Stoddard county were authorized to elect a special judge. Moreover, it clearly appears that the requisite number of lawyers were present to elect the judge; that the proper officer, to wit, the clerk, held the election; that the person elected had all the qualifications of a circuit judge; that he was elected, and took the oath required by law, and entered upon the discharge of his duties as judge. Can it be questioned he was now the judge both de jure and de facto of that court? We think not. Nor do counsel deny this up to Monday morning, the 13th of March; but their contention is that, at some point of time between the adjournment Saturday evening and the convening of the court Monday morning, this special judge's commission expired, by virtue of a contract express or im-

plied with Judge Wear, and that all the acts of the court that morning before Judge Wear arrived must be by us held for naught in this proceeding, because a violation of that contract, or the result of a fraudulent conspiracy. The position of the learned counsel, in short, amounts to this: That a special judge is under some obligation to the regular judge; is under some kind of an implied contract to do just what the regular judge should desire, and nothing else. It must be evident upon consideration that no such principle has any foundation in our laws or the principles underlying our form of government. The very essence of the judicial office is that the incumbent thereof shall be independent, and owe allegiance only to the law of the land. If a regular judge, he derives his title by election or executive appointment; if a special judge, under our statute, to an election by the bar of the court. When he qualifies by taking the oath of office, he must act under a sense of high responsibility to the public alone and the law of the land. No other security for his good conduct can be or is exacted. The law of this state, recognizing that a special judge is sometimes necessary for the transaction of the public business, has provided when and how he shall be selected. The legislature, we think, rightly considered that, if a judge at all, he should be invested with all the authority necessary to command and enforce that respect due to the responsible position of a judge; hence it provided by section 3326, Rev. St. 1889, that "the person thus elected shall, during the period he shall act, have all the powers and be liable to all the responsibilities of the circuit judge."

Some discussion was had during the argument whether this election of a special judge could be chosen for a whole term, or only until Judge Wear should return, and whether a special judge could be chosen for a whole term, so as to deprive the regular judge of his right to preside, should he appear in court and seek to resume his duties. The facts of this case do not require us to pass upon that question. George Houck, Esq., was elected because Judge Wear was absent, and he did not attempt to hold the court at any time when Judge Wear was present. That a regular judge may adjourn his court at any time he sees fit, and that his reasons therefor cannot be assailed in a collateral proceeding, we take it, needs no argument or reason to support. This necessarily results from the nature of his office. If a regular judge might have adjourned the circuit court of Stoddard county on Monday, March 13th, at 9 o'clock in the forenoon, then Special Judge Houck could do so. He was the judge of that court, and did adjourn it, and that action terminated the March term, 1893. An agreement between Special Judge Houck and Judge Wear outside of the court cannot be permitted to affect the rights of suitors

in that court. The courts of record of this state speak by their records, and such corrections as were offered to be shown in this case are not competent to affect the integrity of the record. Upon the clearest principles of public policy, no such proof is allowed to impeach the verity of the record in this collateral proceeding. *Mobly v. Nave*, 67 Mo. 540.

Secondly, it is argued that George Houck was incompetent, by reason of his relation to Louis Houck, to sit in the determination of the motions vacating the receivership of relator. Our statute (section 3247, Rev. St. 1889) reads: "No judge of any court of record who is interested in any suit, or related to either party, or who shall have been of counsel in any proceeding pending before him, shall, without express consent of the parties thereto, sit on the trial or determination thereof." It is not claimed by counsel that George Houck had any pecuniary interest in the suit of *Merriam v. Railway Co.*, or that he had been of counsel in said suit, or that Louis Houck was a party to said action. On the face of the record, he was clearly not incompetent by virtue of this statute; but it is argued that, as Louis Houck was a stockholder in the railroad, this disqualified George Houck. The contention of relator is that his action is void. If voidable or erroneous only, it does not fall within our jurisdiction in this proceeding to entertain it. The effect of a disqualification of a judge by reason of relationship to the parties to an action has often been adjudicated in the courts of the several states, and the rule obtaining in a majority of the states is that such a judgment is voidable only, and not absolutely void. Especially is this true in those states which, like Missouri, have statutes permitting the parties to waive an objection of this character. *Fowler v. Brooks*, 64 N. H. 423, 13 Atl. Rep. 417; *Phillips v. Eyre*, L. R. 6 Q. B. 1-22; *Trawick v. Trawick*, 67 Ala. 271; *Rogers v. Felker*, 77 Ga. 46. The position of counsel for relator leads to this conclusion: they would have this court in this mandamus proceeding determine that the record made by Special Judge Houck is not true, and that he was a usurper when he made it; but, as he was the judge of that court, we know no reason why the record he made should not be accorded the same presumption of verity that is universally shown to the record made by other courts within their jurisdiction. We have therefore so held. *Green v. Walker*, 99 Mo. 68, 12 S. W. Rep. 353; *State v. Gamble*, 108 Mo. 500, 18 S. W. Rep. 1111.

But it is asked, how else can the fraudulent conspiracy be shown? We answer, by a direct proceeding for that purpose. The circuit court of Stoddard county has original jurisdiction to hear and determine whether the action of Special Judge Houck was tainted with fraud or corruption, but most clearly this court has no jurisdiction to

determine that fact in this collateral proceeding. That mandamus will not lie for such a purpose, we think, is well settled. *Dixon v. Judge, etc.*, 4 Mo. 286; *State v. Young*, 84 Mo. 94; *State v. Smith*, 105 Mo. 9, 16 S. W. Rep. 1052. Having reached the conclusion that the record made by Special Judge Houck could not be questioned by this proceeding and in this way, and that record having shown that the circuit court of Stoddard county had adjourned till the regular September term, it follows that the action of Judge Wear in attempting to reconvene that court, on the day after it had been adjourned by Judge Houck, was unauthorized, and of no binding effect upon anybody. His proceedings, on their face, disclose their own infirmity, and the minutes of the court, and the adjourning order, signed by Special Judge Houck, as required by section 323, Rev. St. 1889, fully corroborate the undisputed fact that the term had been finally adjourned by the said special judge.

Was there any power in Judge Wear to reopen court, and hold it, under these circumstances? We take it that it is immaterial whether Judge Houck ought to have waited or not. Inasmuch as he did adjourn the term, could Judge Wear reopen the court again as a part of the regular March term? The judicial power in this state can only be exercised at the times and places prescribed by law. Accordingly, the statutes have with great particularity specified the day on which each court, whether circuit, county, probate, or supreme court, shall meet. Out of abundant caution, it is provided that, if the judge shall be detained, the sheriff may adjourn the court till the third day, when, if the judge is still absent, he may adjourn to the next regular term; and it is provided that the courts may, upon notice, call special terms; but the whole scope of the legislation on this subject, as well as the common law, is to the effect that only at the stated times, and at the places specified, can a court lawfully meet. Rev. St. 1889, §§ 3248-3250. The mere coming together of the judge and the other officers of the court, unless at a time fixed by law, or on a day to which the court has been lawfully adjourned, does not constitute a court under our laws. *Freem. Judgm.* § 121, and cases cited. This is so clear that we doubt whether any court or lawyer ever questions it. *Galsma v. Butterfield*, 2 Scam. 227; *Brunley v. State*, 20 Ark. 77; *State v. Dunn*, 2 Ark. 229; *Stovall v. Emerson*, 20 Mo. App. 322. Again and again this court held that, after a term closes, neither the judge nor the court has any power to change a judgment or entry. An adjournment to the next regular term concludes all further action by the officers at that term. *Ashbey v. Glasgow*, 7 Mo. 320; *Hill v. St. Louis*, 20 Mo. 584; *Harber v. Railroad Co.*, 32 Mo. 423; *Van Dyke v. State*, 22 Ala. 57. It follows that the averment that the circuit court

of Stoddard county confirmed the additional appointment of relator as receiver on March 13th is not sustained by the record and the evidence. Counsel, anticipating this, asked leave to amend their petition and writ by averring that the judge confirmed the appointment, but this amendment is earnestly opposed. In the view we take of the evidence, the amendment will not help relator. It is very evident that Judge Wear was not attempting to exercise his authority as a judge in vacation, but was attempting to hold a court. This is his own positive declaration. As already said, his acts as a court were already void, and this proceeding cannot now be upheld as the act of a judge in vacation. The respondents were brought into court to answer to a record. They tendered the issue nul tiel record, and have sustained it. The provisional order of March 3, 1893, having been vacated, and the order of March 13th, by Judge Wear, confirming it, being void, the relator's title as receiver was destroyed, and he had no right to demand and take charge of said railroad. Having reached this conclusion, it becomes unnecessary to pass upon the other important questions discussed by counsel, such as the jurisdiction of the Cape Girardeau common pleas court, and the conflict of jurisdiction between that court and the Stoddard circuit court. A decision of those questions will be deferred until a case is made calling for their determination. The peremptory writ is denied, and the proceeding is dismissed, at the cost of the relator, including the compensation of the special examiner, John W. Dryden, Esq., and the fees of the witnesses, and it is adjudged that respondents have execution therefor. All concur, except SHERWOOD, J., who dissents.

SHERWOOD, J., (dissenting.) I was unable to concur in the first opinion delivered in this cause, and am equally unable to concur in the present one, which differs in some particulars from the one then delivered. Owing to the importance of the principles involved, I have thought it best to give some expression to my views and to the reasons why I cannot agree to what has been said in the majority opinion; and first as to the priority of jurisdiction,—which court acquired it?

That the petition of Merriam was prior in point of time, as to its filing, stands admitted, and it has recently been determined by this court that a suit is brought, within the meaning of the statute, when the petition is filed. *Lumber Co. v. Wright*, (Mo. Sup.) 21 S. W. Rep. 811. On the same day of the filing of the petition in this case, a provisional order was made appointing relator receiver. This was on the 3d of March, 1893. Touching these questions of priority, a well-known text writer says: "These questions have usually been determined upon principles of comity, and it is now the es-

established doctrine of both the state and federal courts that that court, whether state or federal, which first acquires jurisdiction of the subject-matter or of the res, and which is put first in motion, will retain its control to the end of the controversy, and the possession of its receiver will not be disturbed by the subsequent appointment of a receiver by the other court. Nor is it necessary in the application in the general doctrine here stated that the court, asserting its exclusive control, by reason of having been first to take cognizance of the subject-matter, should be the first to take actual possession of the property by its receiver." High, Rec. (2d Ed.) § 50. The same view is taken in North Carolina. On February 10, 1880, a bill was filed for the appointment of a receiver, and on the same day a preliminary motion looking to the appointment of a receiver and for an injunction was filed. This motion, postponed from time to time, was finally acted on on the 15th day of June next thereafter, and a receiver appointed. Pending this application, and on March 31, 1880, Roberts, an alleged judgment creditor, filed a bill in another court of that state, for the like purpose of securing the assets of the road by the appointment of a receiver for the same property. On the 9th day of April the bill last filed was heard, and receiver appointed. Thereupon it was claimed that the receiver first appointed had the prior right of possession of the property, because of such priority of appointment, but the court said: "The prior jurisdiction over the subject-matter acquired by the present action, and the pending and undecided motion for an injunction and a receiver, exclude the interference of the court in another, and especially at the instance of one who is competent to become the party in the first, and to obtain adequate redress in that. The authorities are decisive on that point, and the conflicts and perplexities attending the prosecution of several actions having the same object in view are in ample vindication of the principle." And the appointment of the receiver first appointed was held invalid. Young v. Rollins, 85 N. O. 485. Another text writer, in circumstances like the present, states the prevalent rule thus: "The general rule is well understood to be that the court which first takes cognizance of the controversy is entitled to retain jurisdiction until the end of the litigation, and, incidentally, to take possession of the subject-matter of the controversy, to the exclusion of all interference by other courts of concurrent jurisdiction, both in relation to the disposition of the subject-matter of the action, commencement of suits against a receiver without permission, and the general control and removal of the receiver. All attempts to interfere with the property involved, without permission of the court first acquiring jurisdiction, although done under color of legal process, may be treated as a contempt,

and so punished." Gluck & B. Rec. p. 66, § 30. To the same effect, see Beach, Rec. § 20, p. 21.

In Maynard v. Bond, 67 Mo. 315, this principle is distinctly declared, where it is said: "A receiver is said to be uniformly regarded as an officer of the court, exercising his functions, but for the common benefit of all parties in interest. He is elsewhere spoken of as 'the hand of the court,' and the property or fund intrusted to his care is regarded as in custodia legis, and his appointment is in effect an equitable execution. High, Rec. §§ 1, 2, and cases cited. In Steele v. Sturges, 5 Abb. Pr. 442, it is said: 'The counsel for the sheriff only objects that he was prior in right to the receiver because his levy was made before the receiver had executed and filed the bond to be given by him. When the court, in such cases, appoints a receiver, it is because the court has first adjudged that the property is no longer to be under the control of the parties to the suit, but is thenceforth to be and is in the custody of the court. The receiver then becomes merely an agent through whom the court acts; and whether he be forthwith appointed by the court, as in this case, or a reference be made to a master or a referee to appoint one, in either case the effect is the same. The title of the receiver is of the date at which it is ordered that a receiver shall be appointed.' We incline to the opinion that a receiver's appointment should date from the time the order is entered. Regarding this view as better sustained by reason, as it certainly is by authority, we the more readily incline to this view, because, if upheld, it will greatly tend to prevent any unseemly conflict of jurisdiction, and because, further, the party claiming an adverse interest may appeal to the court appointing the receiver for leave to take the necessary steps to protect their interest." A forcible illustration of the same principle is found in the case of Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197. A suit was brought in the United States circuit court for Illinois by the Union Trust Company against the Rockford, Rock Island & St. Louis Railroad Company, in which, among other things, the appointment of a receiver was asked. At the July term, 1874, a general demurrer was interposed to the bill, which being sustained, the bill was dismissed the 20th of July. On the 22d of July, a bill was filed in the state court against the same defendant, Mr. Nickerson, asking for a receiver, and one was accordingly appointed. On the 24th of July, the complainant in the federal court asked to set aside the judgment of dismissal, with leave to amend and file a supplemental bill, which was granted, and a receiver was subsequently appointed by the federal court. The court said: "It will hardly be necessary to cite authorities to show that it is and has long been the settled rule of law in all cases of conflict of

jurisdiction that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take possession of or control of the res, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction. *Bell v. Trust Co.*, 1 Biss. 260; *Riggs v. Johnson Co.*, 6 Wall. 166; *Bill v. Railroad Co.*, 2 Biss. 390; 1 Abb. U. S. Pr. 223, and cases cited. The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of the officers to get manual possession of the property; and, while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained." In accordance with this ruling, the receiver appointed by the state court was displaced. In *Gaylord v. Railroad Co.*, 6 Biss. 286, reported fully in a note to section 50 of *High on Receivers*, Judge Drummond, in an elaborate and exhaustive opinion, admirably discusses the question in hand, and approvingly cites the opinion in 6 Biss. 197, supra. Again, in the case of *Heldritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. Rep. 135, Mr. Justice Matthews, in delivering the opinion of the supreme court of the United States, says: "The rule simply requires, as a matter of necessity, and therefore of comity, that, when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it for the purposes of its jurisdiction." And it is also said in that case that "the mere bringing of a suit in which the claim is sought to be enforced may by law be equivalent to seizure, being the open and public exercise of dominion over it for the purposes of the suit." In the case of *Boswell's Lessee v. Otis*, 9 How. 336, (cited and approved in *Heldritter v. Oil-Cloth Co.*, 112 U. S. 301, 5 Sup. Ct. Rep. 138,) it is distinctly held that the filing of a bill in equity, claiming specific property or rights and equities in specific property described in the bill, gives the court jurisdiction over such property and suit, although there is no attachment, and that such a suit is substantially a proceeding in rem, and the property so described is within the dominion and control of the court, and its judgment in relation to such property, even upon constructive service process, is valid and binding upon the parties and the property. The court says: "It is immaterial whether

the proceeding against the property be by an attachment or bill in chancery. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem in ordinary cases; but when such proceeding is authorized by statute, on publication, without personal service of process, it is substantially of that character." In *Barton v. Barbour*, 104 U. S. 126, it was held that a suit without leave of the court having prior jurisdiction did not only subject the plaintiff to liability to be attached for contempt, but was a jurisdictional fact; and it was there held that the court which subsequently undertook to exercise control over the res involved in the first suit had no jurisdiction to entertain the second suit. Other authorities collected by the industry of counsel for relator are of the same import. It is unnecessary to cite them. They establish in the clearest possible manner that, in circumstances similar to those in the case at bar, the court which first takes cognizance of the controversy acquires, in consequence thereof, incidental control and right to the possession of the res embraced within that controversy,—a control that no other court of co-ordinate jurisdiction can trench upon, or has the power or authority in any way to interfere with, or to entertain any proceeding in any manner affecting that controversy or res.

Applying the principles already announced to the present case, no doubt, it would seem, can be entertained but that the Stoddard circuit court, having first taken cognizance of the controversy, could retain its jurisdiction over the res, to the exclusion of every other tribunal. Nor does it matter that notice of the rule to show cause on the 13th of March had not been served at the time the provisional order appointing Klotz receiver was made. The authorities show that while, as a general rule, courts will not entertain an ex parte application until notice be given to parties interested, or a rule to show cause, yet it seems that courts have jurisdiction to make such appointment without notice, etc., notwithstanding it would be erroneous to do so, unless in very peculiar circumstances. *High, Rec. §§ 111, 112, et seq.* In the present instance, Judge Wear pursued the precise course pointed out by the authorities when making the provisional order. He made a rule to show cause returnable on the 13th of March. But the fact that the notice or rule had not then been served when the provisional order was made or filed does not abate by a single jot or tittle the previously acquired jurisdiction of the Stoddard circuit court. Were the rule otherwise, the jurisdiction of the court would depend, not upon its being the first to take cognizance of the cause, but upon the fleetness of the officers employed to serve adverse or antagonistic jurisdiction-seeking writs. Besides, in this case process and the notice to show

cause were duly served on the defendants on the 7th or 8th of March, and a notice mailed to a nonresident defendant within a reasonably prompt time. More than that, the railway company is the only one as to whom or through whom conflicting interests or adverse rights are asserted or prior jurisdiction claimed to exist in the common pleas court of Cape Girardeau county, and in reference to this point it appears that, as to Louis Houck, the president of that railway company, he had actual notice of the filing of the bill in the Stoddard circuit court, and the particulars sent him by his brother George, through two telegrams sent by the latter on the 4th of March, and thereupon the bill under which Louis Houck was appointed was by him immediately filed, and he himself appointed receiver of his own road, in which he owned the large majority of the stock. Where actual notice is thus found to exist, it is as effective as though service of process had occurred. Recurring to the case in 6 Biss. 197, supra, it is there said: "The solicitors of Nickerson had notice of the motion to amend in this court, and, under the facts in this case, Nickerson is chargeable with notice of the action of this court in the premises, and that this court had resumed jurisdiction of the suit before he took his order appointing a receiver. Nickerson was not a stranger to this suit. He had appeared, by his counsel, on the argument of the demurrer, and resisted the complainant's suit, although not technically a party to the record. He was then chargeable with actual, as well as constructive, notice that this court might, at any time, during the July term, set aside its judgment on the demurrer, and proceed with the case." On this point an author already quoted says: "It is also a well established principle that, to render a defendant or other person liable by attachment for contempt in disturbing or interfering with property of which a receiver is entitled to possession, it is not necessary that he be officially apprised of the receiver's appointment, or even that the formal order should have been actually drawn, provided he has actual notice of the receivership, or of the order of court directing the appointment. Any actual knowledge of the granting of the order is sufficient to fix defendant's responsibility for its violation, the same principle being applicable in such cases as in case of the violation of an injunction. Thus, where defendants have knowledge of the granting of an injunction against their disposal of certain property, and the appointment of a receiver over the property, they are in contempt of court if they dispose of it, even though the order of the court is not yet served upon them. And where a defendant is present in court during the hearing of a cause, and knows that an order granting a receiver of his estates has been allowed, although the decree itself has not

yet been drawn, he is guilty of a contempt of court if he removes a portion of the property, and puts it beyond the receiver's possession, for the purpose of evading the decree, and he cannot justify on the ground that the decree has not yet been entered." High, Rec. § 166, and notes. The same law prevails as to injunctions. High, Inj. § 17. It seems clear from these authorities that Louis Houck was in contempt of the Stoddard circuit court when he filed his bill in the Cape Girardeau common pleas court. If so, how is it possible for a person to occupy the anomalous attitude of being in contempt of one court for doing the very same act which confers priority on him in another?

2. But the Cape Girardeau court of common pleas had no jurisdiction to appoint Louis Houck receiver for the further reason that the petition filed for that purpose states no grounds whatever for such an action. Nor could such a ground be stated in the circumstances set forth. Subjected to analysis, the bill, after setting out the mortgage and floating indebtedness, substantially alleges: "(1) That the company is unable to pay its debts; that it has been so for many years; that claims for unpaid interest, amounting to two hundred and fifty thousand dollars, are now being pressed against it. (2) That certain persons, with small claims, to it unknown, are endeavoring to secure control of the property of the company by expensive and useless litigation. (3) That certain creditors, to it unknown, are about to bring suit against the petitioner, and otherwise harm it and the great body of its creditors. (4) That such suits will impair the value of the property, and injure the stockholders and creditors as a body. (5) That the petitioner company is willing to pay its debts, and has sufficient property to do so, and will do so if given time. (6) That the purpose of such litigation is to greatly injure and destroy the value of the petitioner's property."

Except in a suit pending, a court of equity has no jurisdiction to appoint a receiver. Such an appointment is always ancillary to a bill pending between adverse parties. It is never made on the ex parte application of an insolvent corporation, calling upon a court of equity to administer its assets. A court of equity has no such power. This is abundantly shown by the authorities. Thus, in *Jones v. Bank*, (Colo. Sup.) 17 Pac. Rep. 272, the question was whether Trimble, appointed on the petition of the debtor, was a legal receiver, or whether a mere stranger to the suit, and having no standing in court, and therefore no right to contest the validity of certain attachment proceedings. In passing upon the question whether Trimble took any title as receiver under the proceedings of the bank, the court said: "This brings us to the examination of the propriety and legality of his appointment as receiver, and re-

quires a construction of the provisions of subdivisions one and three, section 141, and of section 142, Civil Code. Subdivision one provides that a receiver may be appointed, 'before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest in the property, which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired;' subdivision three, that a receiver may be appointed 'in such other cases as are in accordance with the practice of courts of equity jurisdiction.' Section 142 provides that 'the application for the appointment of a receiver shall be made by filing a petition, at any time, setting forth the facts upon which the application is based, which petition shall be verified as complainants are required to do by this act. And the party opposing the appointment of a receiver shall do so by filing an answer to the petition, verified as answers to complaints are required to be by this act.' If these provisions are anything more than a codification of the law and practice governing the appointment of receivers before this enactment, it is difficult to perceive where the difference lies; and, to determine to what facts the court will apply this statute, we are compelled to look to the practice and law as it was heretofore. Hitherto it has been the universally accepted opinion that the courts have no jurisdiction to appoint a receiver, except in a suit pending in which the receiver is desired, unless in cases of idiots, lunatics, or infants, which, as Lord Hardwicke says in *Ex parte Whitfield*, 2 Atk. 315, is 'a particular jurisdiction.' The doctrine is applied in *Baker v. Backus*, 32 Ill. 95; *Davis v. Mining Co.*, 2 Utah, 92; *Hardy v. McClellan*, 53 Miss. 507; *Hugh v. McRae*, Chase, 466; *French Bank Case*, 53 Cal. 550; *Kimball v. Goodburn*, 32 Mich. 10; *People v. Jones*, 33 Mich. 303; and *High*, Rec. § 17, and cases cited in note. Our statute certainly contemplates the same thing. Its plain intent is that there shall be a controversy between two or more adverse parties in court, involving some conflicting and hostile claims to property; that is, at least in part, the subject-matter of the litigation. It is evident that, in the mind of the legislature, it is necessary to this jurisdiction that there should be some party in all these proceedings who is adverse to the defendant, and whose rights to certain property were to be protected and adjudicated. It is impossible, by any process of reasoning, to construe the statute so as to make it apply to any case in which an 'action,' in the ordinary definition of the term, is not pending. To hold that courts of equity can entertain jurisdiction to appoint a receiver of property, as the substantive ground and ultimate object and purpose of the suit, on the peti-

tion of the owner of the property to be controlled and protected, would be to make them the administrators of every estate where the owners thereof were incapable or unwilling to administer them themselves. When Trimble was named by the court as receiver of defendant in error, no suit was pending against the bank. No one claimed to own or to have any interest in the specific property of the bank, except the bank itself. No one was before the court claiming a right to have the assets of the bank protected and preserved, until he could establish a right thereto adverse to that claimed by the bank. So far as is disclosed by the record, every one admitted the full and complete ownership of all the property claimed by defendant in error to be in it. But, apparently fearing suits and attachments, defendant asked the court to become the custodian of its effects and property,—in fact, its assignee for creditors. The court accepted the trust through Trimble, as receiver. This it could not do. Such jurisdiction is not found in either the general powers of a court of equity, or in the statute referred to. If, therefore, there is no other warrant for this action of the court, the appointment of Trimble as receiver was void, and he had no authority in the premises, and no right to be heard to object to the attachment proceedings in this case."

A bill prayed an injunction to restrain an insolvent bank from continuing to do business and to wind up its affairs, and, on this presentation of facts, Chief Justice Chase said: "The court is not aware of any case which will warrant its assuming the administration of the estate of a debtor, simply upon the ground of insolvency. If such a case could be found, the court will be called upon to administer every estate where a debtor found himself unable to administer it himself conveniently. A creditor, in a proper case, could come into court of equity for the appointment of a receiver, but a debtor could not. This, therefore, is not such a case as calls for the interposition of the court, and the prayer of the bill cannot be granted. It must be dismissed." *Hugh v. McRae*, Chase, 466. In *Kimball v. Goodburn*, 32 Mich. 12, the supreme court of Michigan said, speaking of an alleged receivership: "But the order appears to have been made in a proceeding where the Bushwick Company itself appears to be complainant, and we are aware of no case where a corporation, in its corporate capacity and name, can apply to be put in the custody of a receiver." In *New York*, in the case of *Bangs v. McIntosh*, 23 Barb. 599, the supreme court held that the statute (2 Rev. St. p. 463) authorizing the court, upon the petition of a judgment creditor of a corporation, to sequester the stock, property, and effects of such company, and appoint a receiver, had conferred new power on a court of chancery, saying: "Jurisdiction over corporations was expressly disclaimed by Chan-

cellor Sandford in the case of Attorney General v. Bank of Niagara, Hopk. Ch. 354, following the case of Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371." The supreme court of California (Neall v. Hill, 16 Cal. 145) said: "It is well settled that the court of equity, as such, has no jurisdiction over corporate bodies, for the purpose of restraining their operations and winding up their concerns. We do not find that such power has ever been exercised, in the absence of a statute conferring the jurisdiction." In Michigan the statute has provided (Comp. Laws, 1871, cc. 206, 207) for the winding up of corporations. The Michigan court, in *Port Huron, etc., R. Co. v. Judge*, 31 Mich. 456, said: "The directors or other board of management of a corporation, having general authority to manage its concerns, are vested by law with the only discretionary power that can exist in any one to carry on the corporate business; and such management cannot be assumed by a court of chancery or vested in a receiver, neither can it be taken from the board, except under proceedings instituted to wind up the corporation under the statutes. The appointment, ex parte, of a receiver to manage a corporate business, and the granting of an injunction on an interlocutory ex parte application, whereby the control of the business is taken from the directors, are more than irregular, and are absolutely void, as entirely beyond the power of the court, and are such an abuse as may be required to be corrected by mandamus." Other authorities cited by counsel announced with emphasis the same conclusion.

It is too plain for discussion that the bill in question is, in effect, merely one for the appointment of a receiver, and calling on a court of equity to administer its assets,—something entirely beyond the power of a court of equity to do; and therefore the act of the Cape Girardeau common pleas court should be held jurisdictionless and void. There are cases where amendments may occur to obviate defects in a petition, and thereby heal and cure radical defects. This is unquestioned, but this is not a case of that sort, for here, however much the allegations of the petition may be turned, twisted, or amended, it will still remain but the formulated endeavor of a debtor corporation on an ex parte application, where no adverse rights are being litigated, to have a court of equity appoint a receiver, administer its assets, and wind up its affairs. The authorities already cited show the absolute nullity of the appointment of a receiver made in such circumstances. When this is the case, the right to attack such an appointment collaterally, whenever and wherever its validity is asserted, is elementary law.

3. If the foregoing conclusions are correct, it is obvious that the receiver appointed by the Cape Girardeau court of common pleas has no standing in court. It now becomes necessary to ascertain the status of Klotz,

the receiver provisionally appointed by Judge Wear. That he was lawfully appointed in the first instance has already been shown, and it may be further said on that point that the order in Klotz's case was not an absolute order, but only a provisional one, and therefore may be regarded as in the nature of a reference to a master to appoint a receiver, in which case, under the authorities, his appointment would date from the date of the provisional order. Certainly so if subsequently confirmed; and it will be presumed in any event, and this is in accordance with a very familiar presumption, that the clerk of the Stoddard circuit court did his duty, and filed the petition of Merriam first, and then filed the provisional order. *Long v. Smelting Co.*, 68 Mo. 422; *Lenox v. Harrison*, 88 Mo. 491; *Mathias v. O'Neill*, 94 Mo. 520, 6 S. W. Rep. 253. And this presumption is especially invocable here, because the order recited the filing of the petition, and is founded upon it. In *Houck's* case, however, it is conceded by one of his counsel, and testified to by Clerk Engleman, that his petition, the order of appointment, and bond were filed simultaneously. This admission does away, of course, with any such favorable presumption. But it seems to me that the rule is more technical than sound, and should not be allowed to prevail when both petition and order are filed eo instanti. In support of this view, the ruling of this court may properly be invoked that, if a motion for a new trial and one in arrest be filed at the same time, the former shall, in its natural order, take precedence of the latter, and thus prevent a waiver which otherwise would occur. *McComas v. State*, 11 Mo. 117. But, at any rate, if the rule is to prevail, it is as fatal to *Houck's* claim of receivership as to that of Klotz, with this exception: that the appointment of the latter was only provisional, and was not complete until confirmed by the court. *Gluck & B. Rec. § 45*. And in this respect this case differs, essentially, it would seem, from an absolute order of appointment, such as is spoken of in the cases which support the rule mentioned, and therefore the provisional order does not fall under the ban of that rule.

I am thus brought to consider the effect of the action of Special Judge Houck in setting aside on the 13th of March the provisional order of Judge Wear made on the 3d of that month, appointing Klotz receiver. In discussing this point, it is well enough to remark at the outset that the authorities are in conflict as to whether the acts of a judge disqualified by reason of relationship are void or only voidable. It may be conceded for the present purpose that his acts were of the latter character, so far as concerns disqualification because of relationship. As already stated, the rule or notice to show cause why the provisional order appointing Klotz receiver should not be confirmed was made returnable March 13th.

This was merely a rule to show cause, and the cause in which it was made had not been docketed, nor was it docketable or returnable until the following September term. The parties defendant did not appear in response to the rule to show cause. They appeared by independent and special motions for that purpose alone, and moved the vacation of the provisional order. These motions were docketed at once, and at once taken up and granted. This was done in plain disregard of that section of the statute which declares that "every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an 'order,' and an application for an order is a motion," (Rev. St. 1889, § 2208;) and in plain disregard, too, of another statutory provision, requiring at least five days' notice before the time appointed for the hearing of the motion, (Id. § 2035.) *Henze v. Railway Co.*, 71 Mo. 643. Even if the statute did not in terms require notice, the law would imply that notice was intended, (*Wickham v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152; *Laughlin v. Fairbanks*, 8 Mo. 370;) and what the law will imply is as much part thereof as though set forth in the legislative enactment, (*State v. Board of Equalization of Buchanan Co.*, [Mo. Sup.] 13 S. W. Rep. 782.) These motions were original independent proceedings, and as relator was not in court in response to such motion, and as there was no notice given of them to the parties to be affected thereby, it follows that, if fundamental principles are not to be ignored, the action of the special judge in vacating the provisional order must be held a nullity, and therefore open to collateral attack. *Newton v. Newton*, 32 Mo. App. 162. "A sentence of a court pronounced against a party without hearing him, or giving him any opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh*, 93 U. S. 277.

4. The order of the special judge is otherwise assailable. There can be no doubt entertained, after one has read the evidence preserved in this cause, that the action of the special judge in vacating the provisional order made by Judge Wear was the result of a predetermined conclusion on the part of the special judge to do that very thing. No other rational construction can be placed upon it. He tells Judge Wilson on Friday next before Monday the 13th of March that he intended to adjourn the court on Monday morning to help out his brother Louis. This conversation is not denied by George Houck, and therefore stands admitted. *State v. Musick*, 101 Mo., loc. cit. 271, 14 S. W. Rep. 212. George Houck had previously expressed himself to Judge Wear "that his brother's private fortune was in it, [the litigation,] and all he had was at stake," and he evidently felt, as it was natural he should,

a great interest in the outcome of that litigation. He makes an arrangement with Judge Wear on Friday morning that the latter go back home, and then return to Bloomfield on Monday morning, and take up the regular business of the term. He admits this after much evasion, and it is abundantly otherwise established that he did so. He announces to several lawyers in attendance that this would be the case, and on Friday he so informed the jury, and excused them until Tuesday morning, and instructed them to return at that time. The evidence also shows that Judge Wear told him that on Monday he would take up the receivership matter, and he promises Judge Wear that the jury should be adjourned over to Tuesday morning. Now, of course, these agreements made by and between the regular and special judge could have no binding legal force or effect, as all will concede; but whether they were made or not is all important on the question whether deception was practiced and fraud was intended in making them; and the facts aforesaid are overwhelmingly established, and that George Houck communicated these facts and this agreement to several members of the bar, who were interested in causes to be tried by the regular judge during the next week. On Sunday, in response to a telegram which he received from his brother Louis, George Houck proceeds to Delta. He says he disliked to go there, but, under the urgency of the telegram, he felt forced to go. Arrived there, he meets his brother and his brother's counsel. He says, when he met his brother Louis at Delta, that the only conversation which passed between them in reference to the receivership was in response to these questions: "When were the papers filed in the Merriam Case?" "How did they come there?" "Was the petition filed before the appointment was made?" But this information he admits he had previously, in substance, communicated to his brother, and it seems singular, indeed, that such an urgent telegram should have been sent for the purpose of obtaining such unimportant information. While at Delta, George Houck was in consultation with his brother's counsel "as to the condition of the court over there, and possibly what course was to be pursued." During that consultation, or while at Delta, George Houck "volunteered the information" to defendants' counsel that court at Bloomfield had been adjourned to meet at 8 o'clock, Monday morning. The parties then separated, Louis Houck returning to Cape Girardeau, and his counsel and his brother George returning to Bloomfield, arriving there Sunday evening, which they spend in George Houck's office, consisting of two rooms, into both of which the parties freely passed in and out; and during the course of the evening George Houck came into the room where counsel were, and told them that he had made up his

mind to adjourn court early on the following morning, and that if they had any motions to file, etc., they would have to be prompt in attending to it. Motions were prepared on that evening to vacate the provisional order appointing Klotz receiver, and this was done with the view to have them passed upon by George Houck. The train from Poplar Bluffs to Dexter arrives there at 8:15 A. M., and it takes the hack from Dexter to Bloomfield something like an hour and a quarter to come from Dexter to Bloomfield. These things were well known to George Houck, who had lived at Bloomfield some 12 or 14 years. Court was opened by George Houck a few minutes after 8 o'clock on Monday morning. After sentencing two prisoners to the penitentiary, the special judge turned to the counsel who had been in his office the evening before, and asked them if they had any motions to file. They then presented motions to vacate the provisional order appointing Klotz receiver, and for application for a change of venue. The special judge thereupon ordered the clerk to docket the cause of Merriam, and to file the motions, and, after stating that he would adjourn court at 9 o'clock, took up the motions, waived the reading of the petition, on the ground that he had previously read it, heard the motions read, immediately granted them, and then adjourned court till court in course, the whole time consumed not exceeding 20 to 30 minutes, and then immediately left town, as also did counsel for respondents. That two of those counsel expected Merriam's counsel would be present on the 13th is shown by the evidence, and by the fact that it was their duty to be present, as the notices to show cause had been served and were returnable on that day. They were present in a few moments after the court adjourned, as well as the regular judge. George Houck says: "In view of the fact that Mr. Merriam and his attorneys were not there, I took it for granted they had no fight to make, and disposed of the motion on the law, as well as on the facts." He testifies this in the face of his knowledge that counsel for relator could not possibly reach Poplar Bluffs that morning before about half past 9 o'clock, and in spite of his knowledge that Judge Wear and the attorneys for Klotz and Merriam would soon be there to take up the matter of the receivership; but, without waiting to give them an opportunity to arrive, he adjourns court. That he did so with premeditated design to prevent them from appearing is too plain for comment. I can but regard his action as of the most high-handed and arbitrary character ever witnessed in a court of justice. Whatever his professions may be, this is a case where actions speak louder than words; and, as every man is presumed to intend the natural consequences of his acts, it must be presumed that he intended to vacate the

provisional order, and then adjourn the court, before the adverse counsel arrived. *Babcock v. Eekler*, 24 N. Y. 632. No other reasonable inference can be drawn from his acts. Nor can it be doubted either that a tacit understanding of some sort existed between counsel for defendants and himself, nor that they were en rapport with him. These acts spell "fraud," or they spell nothing. Fraud is rarely susceptible of direct proof. Its symptoms and manifestations are chiefly traceable by covered tracks and studious concealments. Whatever satisfies the mind and conscience that fraud exists is sufficient. *Massey v. Young*, 73 Mo. 260, and cases cited. Counsel for defendants, who took part in these proceedings, justify their action on the score that no notice was given of Klotz's appointment; that, therefore, such undue advantage can be offset by another. But, whatever may be the rule in *foro conscientiae*, the plea of *lex talionis* is obviously no answer to the charge contained in relator's reply,—that the vacating order was the offspring of fraud.

5. The next question for consideration is whether it is competent to break the force and effect of that order by a collateral attack on it. The reports show two examples of parties to a judgment being permitted to impeach it for fraud, (*Hall v. Hamlin*, 2 Watts, 354; *State v. Little*, 1 N. H. 257;) but under the Code Practice, a combination of both law and equity, the circuitous method of resorting to a court of chancery to vacate or annul a judgment because obtained by fraud is no longer in vogue or necessary; (*Mandeville v. Reynolds*, 68 N. Y. 528; *Rogers v. Gwinn*, 21 Iowa, 58; *Davis v. Headley*, 22 N. J. Eq. 115; *Dobson v. Pearce*, 12 N. Y. 165; *Ward v. Quinlivan*, 57 Mo., loc. cit. 427; 2 Freeman Judgm. [4th Ed.] p. 996, § 576; 2 Black Judgm. § 973; *Spencer v. Vigneaux*, 20 Cal. 442.) In a work of great research and accuracy, the learned author, treating of the present topic, says: "The line which separates the remedy by setting aside a judgment from that of impeaching it collaterally, i. e. impeaching it without setting it aside, appears to be fading out. It is clear that there is no distinction between two remedies, and there never was any, where the judgment in question is void upon its face, as for want of jurisdiction; and the same rule should prevail in principle though evidence is required to show that the judgment is void. But it seems that either proceeding may sometimes be proper, though the judgment be not deemed absolutely void, as where it was rendered in a case of 'meditated and intentional contrivance to keep the parties and court in ignorance of the real facts,' the fraud being in this way effectively concealed from notice at the trial. This appears to be an innovation upon what was formerly understood to be the law, to wit, that, in cases in which the judgment was not void, the remedy, if any remained,

was by a direct proceeding to vacate it." Bigelow, *Frauds*, p. 94. In *Mandeville v. Reynolds*, *supra*, Folger, J., says: "The court acts upon the matters involved in the action, now, in a double capacity,—as a court of law, and one of equity. As a court of equity, it meets the question of the validity of the judgment, not as one of law, but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which, by the changing nature of the issues in the progress of the suit and trial, has become the main question in the case, and legitimately before it for trial. It would be quite an abnegation of the conjoint power and jurisdiction of the court to proceed in the case as long as the issues were of legal cognizance, and, as soon as they became of equitable cognizance, to turn the party over to another action, in, perchance, the same court, before the same judge, to have, in another trial, that matter proved and decided against the validity of the judgment which, as the powers of the court are now in constant reciprocal activity, may as well be determined in one trial by the same tribunal. It is not merely that the same judges possess, in equal degrees, powers at law and powers in equity; it is that the distinction between actions at law and suits in equity and the forms of such actions are abolished, and that there is in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs. Code Proc. § 69. Nor does it differ that the matter of record brought into question is not a judgment, but an entry upon the docket thereof, or an order in a book in the clerk's office confirmatory of that entry. If, in the changes of the issues in a trial begun as one at law, it becomes necessary for the just disposition of the rights of the litigants to inquire whether that entry or that order is valid, the court is as ready then, and as fully has the jurisdiction then, to investigate and determine, as if the trial was laid aside, a new action brought, and another trial had, burdened also with the issue of validity. The intent of the Code is clear that all controversies respecting the matter involved in litigation shall be determined in one action. Whether fraud or imposition, in the entry of a judicial matter of record, could, before that enactment, have been set up against it collaterally at law or not, it may now be alleged against it as an equitable defense to defeat a recovery upon it." Under these authorities, there can be no doubt that it was admissible to maintain the reply of relator, nor but that the evidence adduced was ample for that purpose.

6. Should the relator have been permitted to amend his pleading so as to show that the order of Judge Wear was made in vacation? The order in question was signed "John G. Wear, Judge," who also filed the order thus signed by him with the clerk.

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This was evidently done out of abundant caution, in order that the confirming order might be valid, whether regarded as made during term or made in vacation. There is no doubt under our statute and under our rulings of the power of a judge of the circuit court to appoint a receiver as well in vacation as in term. *Cox v. Volkert*, 96 Mo. 511; *Greeley v. Bank*, 103 Mo. 212, 15 S. W. Rep. 429; Rev. St. 1889, § 2198. Nor is there any doubt under our adjudications and statutory provisions but what the power of amendment is given as largely in mandamus cases as in any other civil action whatsoever. *State v. Baggott*, 96 Mo. 63, 8 S. W. Rep. 787; Rev. St. 1889, § 2116. Hence no difficulty is encountered in permitting the amendment desired, thus showing that the order was made in vacation. Most certainly the evidence affords ample basis for making the amendment, for whoever heard of a judge of a circuit court in term time writing out such an order, signing it, and then filing it with the clerk? And if Judge Wear possessed the power to perform the act,—to make the order,—either on the bench or at chambers, it is wholly immaterial what recitals were made in the order concerning that power. This is exemplified by a number of cases, and denied by none. Thus, in *McClure v. McClurg*, 58 Mo. 173, it was held that the false recital that the certificate of acknowledgment of a sheriff's deed was taken before the judge, instead of in open court, would not vitiate the acknowledgment, and among other reasons given therefor was the fact that the certificate was not signed by the judge, as would have been the case had the acknowledgment been privately taken, but was signed by the clerk, etc. In *Chouteau v. Allen*, 70 Mo. 290, there were two statutes, on either one of which certain patents might have been issued, but the order of the county court recited the wrong statute; but, inasmuch as the order would have been good had the order recited the right statute, and as the county court had the power to make the order under the unrecited statute, it was ruled that the order was nevertheless valid. In *Commissioners v. January*, 94 U. S. 202, a similar ruling was made, where it was ruled that, the commissioners having the power to issue the bonds, it mattered not that they referred to the wrong statute for their authority, *Swayne, J.*, saying: "*Falsa demonstratio non nocet: The bad here does not hurt the good.*" Other authorities are cited by counsel for relator, which more or less strongly tend towards the same conclusion. Whenever instruments of officers or private persons are brought into question, it has hitherto been the endeavor of courts in construing them, if it can be reasonably done, so to construe them "*ut res magis valeat quam pereat*," and their aim has been to preserve, and not to destroy. They should be astute, as Sir Matthew Hale says, to find means to make acts effectual

according to the honest intent of the parties. *Roe v. Tramarr*, Willes, 682; *Kelly v. Calhoun*, 95 U. S. 710. Guided by these authorities, and for the reasons already stated, it should be ruled that the amendment prayed for could be made; that the order made by Judge Wear on the 13th of March was a valid order, whether regarded as an original or confirmatory order; that the vacating order made by the special judge was void by reason of its fraudulent character, and by reason of being granted without notice or opportunity of being heard; that the court of common pleas never acquired any jurisdiction in the premises; and, consequently, that Klotz is the lawful receiver, and as such entitled to the possession of the litigated property.

7. The remaining point for determination is whether relator can invoke the remedy of mandamus. The authorities show that the remedy by a writ of that name is no longer regarded as extraordinary, but, owing to its frequent use in modern practice, is deemed quite an ordinary writ and remedy. Thus, in *Com. v. Dennison*, 24 How. 66, Chief Justice Taney said: "It is equally well settled that a mandamus, in modern practice, is nothing more than an action at law between the parties. It is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ and the power to use it has ceased to depend upon any prerogative power, and is now regarded as an ordinary process in cases to which it is applicable." In *La Grange v. State Treasurer*, 24 Mich. 468, Campbell, J., said: "It was urged on the argument that this writ [mandamus] will only lie where there is an authoritative statutory duty and an entire absence of any other remedy; and it is claimed that the decisions heretofore made sustain this view. We do not know of any such doctrine, and have never understood it to have been established in this state or elsewhere. In the frequent instances of application for this writ, the occasion has quite as often been to enforce duties not imposed by statute as obligations which were statutory. There may very possibly be found isolated expressions which, apart from their context and the occasion of their utterance, might favor one of the grounds claimed. Thus, in *People v. Judges of Branch Circuit Court*, 1 Doug. (Mich.) 319, it was said: 'There must be no other remedy.' In that case, there was a better remedy in the ordinary course of law, which reached all that could be desired. But in *People v. Judge of Wayne Circuit Court*, 19 Mich. 296, the doctrine was laid down more guardedly, that relator must show 'a clear legal right, and that there is no other adequate remedy.' And in *People v. State Ins. Co.*, Id. 392, it was expressed more fully that the writ might issue for a

specific duty where there is no other 'specific and adequate remedy.' * * * In cases where the right is clear and specific, and public officers or tribunals refuse to comply with their duty, a writ of mandamus issues for the very purpose, as declared by Lord Mansfield, of enforcing specific relief. It is the inadequacy, and not the mere absence of all other legal remedies, and a danger of a failure of justice without it, that must usually determine the propriety of this writ. Where none but specific relief will do justice, specific relief should be granted, if practicable; and, where a right is single and specific, it usually is practicable." Subsequently the same court, in discussing the functions of a writ of mandamus, and referring to the case just cited, said: "As pointed out by the eminent authorities there cited, it is from its very nature a remedy that cannot be hampered by any narrow or technical bounds. The right, coupled with the necessity of such a vindication of it, supports the jurisdiction; and the court, in using its discretion, while careful not to use this writ where it is not essential, will apply it where it is." *Tawas, etc., R. Co. v. Iosco Circuit Judge*, 44 Mich. 479, 7 N. W. Rep. 65. Touching this writ, Blackstone says "that it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed, for it is the peculiar business of the court of king's bench to superintend all other inferior tribunals or ministerial powers with which the crown or the legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence, and obviating the denial of justice." 3 Bl. Comm. 110. Under the provisions of our constitution (article 6, § 3) giving this court a general superintending control over all inferior courts, we have the same power over such courts as was possessed by the court of king's bench at common law. This view was taken in *State v. Phillips*, 97 Mo. 331, 10 S. W. Rep. 855, when we held that if the court of appeals, erring upon a plain point of practice, abused its judicial discretion, and in consequence dismissed an appeal, this court would issue its mandamus to compel the reinstatement of the cause. Similar views are taken of the enlarged functions of the writ of mandamus in the states of Michigan, Arkansas, Alabama, and Louisiana, which now possess constitutional provisions like our own. In *Virginia v. Rives*, 100 U. S. 313, where the federal circuit court issued its writ of habeas corpus, and took from the custody of the state circuit court two prisoners condemned to death, thereupon a writ of mandamus was issued by the supreme court of the United States; and, upon the ground that the federal court had abused its judicial discretion and exceeded its jurisdiction in issuing the writ of habeas corpus, a peremptory mandamus issued to that court commanding

it to return the prisoners to the state court, Judge Strong, in disposing of that case, and speaking of the remedial functions of the writ of mandamus, remarked: "Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds. *Bac. Abr. 'Mandamus,' Letter D; Tapp. Mand. 105; 3 Bl. Comm. 110.* * * * In our judgment, it vindicates the use of a writ of mandamus in such a case as the present."

Under these authorities, I make no doubt that this court possesses full power and authority to compel the Cape Girardeau common pleas court to set aside its order appointing Louis Houck receiver, on the ground that such order was outside the jurisdiction of that court, besides being an abuse of its judicial discretion, for reasons already stated, and for the additional reason that Louis Houck, being the chief stockholder in the road, was incompetent to be appointed receiver for that reason alone, and should not have been appointed unless the urgency of the case demanded it, and only then upon the consent of those whose interests were to be intrusted to his charge. *Atkins v. Railroad Co., 29 Fed. Rep. 161; Gluck & B. Rec. § 29.* And it is said that a court ought not, and ought not to be expected, to appoint a person under whose charge and control the resources of the corporation have been exhausted and the necessity created for a receiver. *Id.* And, if necessary, the prayer of the petition could be amended to that effect. *State v. Baggott, supra.* But it would seem that it is not necessary for such a course to be pursued here, for the controversy has been narrowed down to the question as to the prior right of possession of the property as between Klotz and Houck. And at any rate, if I am correct in position heretofore taken, it is competent for this court, in the exercise of its superintending control, so to order matters that the property in controversy shall be turned over to the arm of the court which first acquired jurisdiction, and without which turning over that jurisdiction will be but barren and futile; and this I believe this court can do by that writ of constitutionally comprehensive functions and force known as "mandamus," for it must be obvious that no appeal lies from an interlocutory order appointing a receiver, (*High, Rec. § 26;*) and, even if it did, it would lack a great deal of being "plain, speedy, adequate,

and specific," and, lacking this, affords grounds for invoking mandamus, (*Merrill, Mand. §§ 51-53, and cases cited.*) For these reasons, I am of the opinion that the peremptory writ should be awarded.

ILLINOIS CENT. R. CO. v. SPENCE.

(Supreme Court of Tennessee. Sept. 21, 1898.)

VICE PRINCIPALS AND FELLOW SERVANTS—PROXIMATE CAUSE OF INJURY—DAMAGES.

1. The conductor of a freight train, whom, by the rules of the company, the engineer is bound to obey, and who is accountable for the conduct of the trainmen, is a vice principal, and not a fellow servant of a brakeman who is injured in a collision.

2. The negligence of the engineer, who was a fellow servant, in violating the time card of the company, was not the proximate cause of the collision where the negligence of the conductor in permitting such violation contributed to such collision.

3. Error in excluding testimony is harmless when the record shows that the party objecting subsequently got the benefit of the testimony.

4. In an action by a widow for the death by wrongful act of her husband, it is error to charge on the measure of damages that the jury must decide what deceased would have earned during his "expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during the expectancy of life from the time of his death."

Error to circuit court, Madison county; Levi S. Woods, Judge.

Action by Ella Spence against the Illinois Central Railroad Company for damages for killing her husband. Judgment for plaintiff, and defendant brings error. Reversed.

McCorry & Bond and M. Brown Gilmorme, for plaintiff in error. Haynes & Hays, for defendant in error.

McALLISTER, J. The plaintiff below, Mrs. Ella Spence, brought this suit to recover damages for the killing of her husband, which she alleges was occasioned by the negligence of the railroad company. The plaintiff's intestate, W. G. Spence, at the time of the accident was a fireman on a freight train going north from Jackson, which collided with a south-bound passenger train a few miles above Oakfield, and in the collision Spence sustained personal injuries from which he died in about one hour. The passenger train was coming south, and was designated on the time table as "No. 3." The freight train was going north, and was designated as "No. 22." The passenger train was on time, and, according to the schedule, was due at Medina, a station seven miles north of Oakfield, at 2:02, and at Oakfield, a station eight miles north of Jackson, at 2:18, and at Jackson at 2:35. The freight train received orders at Jackson at 1:38, the engineer and conductor both receipting to the train dispatcher. These orders referred to other trains. They were told that the pas-

senger train was on time. The engineer and conductor both had time cards showing the time of the passenger train, and when due at stations. The time cards required that this freight train should reach Oakfield and take the siding five minutes in advance of the arrival of the passenger train. The freight train was, however, not stopped at Oakfield as it approached this station. The engineer sounded the whistle, the brakes were applied, and one of the witnesses,—a brakeman on this train,—named Poe, testified that the engineer gave him a signal to let the brakes off, which was done, and the train, passing Oakfield, went forward to the place of the accident. It appears that the crew in charge of the passenger train were in no default, but the collision was brought about by the negligence of those in charge of the freight in wrongfully passing Oakfield. The gravamen of the plaintiff's action is that her intestate husband was in the employment of the defendant company in the capacity of fireman on the locomotive engine of the freight train; that said train was in charge of one Barnett as conductor, who was superior in rank and grade, and whose orders the plaintiff's intestate was bound to obey; that said conductor represented the company in the management of said train, and was in command of the crew, with authority to order and direct their movements. Plaintiff claims it was the duty of the conductor and engineer, under the rules of the company, to have taken the siding at Oakfield, and to have held the said freight train there until the arrival and passage of No. 3, which they knew was approaching from Medina; and that by passing Oakfield a collision was inevitable, as there was no intermediate station or side track. Plaintiff claims that she is entitled to a recovery whether the collision occurred by reason of the negligence of the conductor or by the combined negligence of the engineer and conductor, as the latter represented the company, and plaintiff's intestate assumed no risk of any negligence on the part of the company or its immediate representatives. It is further insisted that plaintiff's intestate was not guilty of contributory negligence in not observing the approach of the passenger train, since his duty was that of obedience, and he had a right to presume that the engineer and conductor had orders from the train dispatcher to pass Oakfield, and to meet the passenger train at some other station. There was a verdict and judgment in favor of the plaintiff for \$12,000. The railroad company appealed, and has assigned errors.

The first assignment of error is based upon the following instructions of the court given in charge to the jury, viz.: "Where the direct or immediate cause of the accident is caused alone by the fault or negligence of the conductor in charge of the train, or where the fault or negligence of the conductor and engineer equally bring about a

collision and cause the death of the fireman, he not being at fault, and," etc., "a recovery can be had." And again: "If it was the duty of Spence, the fireman, to put coal in the engine, and also to look ahead for any obstructions on the track, and to look out for signals by the conductor through the brakeman, and he did not have the control or management of the train, and no right to say whether it should stop or not, then he would stand in relation of a subordinate to the conductor." And again: "If the proof shows that he was fireman, * * * and the conductor and engineer were both furnished with the rules and regulations of the company and a time card, and * * * you find that the company held the conductor and engineer equally bound for the safety of the train, and the observance of the rule not to run on the time of the passenger train, and further find that the engineer carried the train on by, and failed to stop at Oakfield, and that the conductor failed or neglected to signal the engineer or try to stop the train, and you further find that the train went on and made no stop, and had the collision, and plaintiff's husband was killed in the performance of his duty as fireman, without fault or negligence on his part, then plaintiff could recover." Again: "If the rule or regulation of the company was equally binding on the engineer and conductor to stop and side track, and they failed to do it, and the conductor took no steps to have the engineer stop at Oakfield, and you find that the failure to stop at Oakfield was the immediate and direct or proximate cause of the injury, and brought about by the fault or negligence of the conductor, then plaintiff could recover."

The specific exceptions to the instructions of the court recited above are that Barnett, the conductor, Hillsman, the engineer, and Spence, the deceased fireman, were fellow servants engaged in the common employment of operating the train and getting it over the track, and that the company is not liable for personal injuries sustained by Spence by reason of the negligence of either the conductor or engineer, or as the result of their combined negligence. The general rule is well settled that when the particular duties to be discharged require the services of several persons, as in the movement of railway trains, the safety of the employe depends not only upon his own individual skill and prudence, but likewise upon the caution and competency of other persons associated with him in the business; and the employe assumes the risk of danger, not only from his own negligence, but likewise from the negligence of his fellow servant. But this general rule exempting the employer from liability to one servant for injury sustained in consequence of the negligence of his fellow servant does not apply when it appears from the facts in the case that an employe in a subordinate position has been injured by the

negligence or improper conduct of another servant placed by the master in a superior position over the former; and when such inferior servant is made subject to the order of such superior, and when the injury occurs during the performance of their duty, a servant who is in a position of authority over the subordinate servant is not in the sense of the law of fellow servant in a common employment, but represents the master, who is liable for his negligence. The reason for this rule stated by Judge McFarland in *Railroad Co. v. Wheless*, 10 Lea, 746, is based not upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and direction of the other, and required to submit to and obey such orders in the performance of his duties; that the inferior is placed in the position of a servant to the superior. In such cases the superior is held to represent the master. In the case of *Railroad Co. v. Lahr*, 86 Tenn. 340, 6 S. W. Rep. 663, Judge Lurton said, viz.: "Where the inferior is injured while executing a lawful command of his superior, or where the superior represents and stands for the master, and has a right to control the movements of the train and of all the employees, in all such cases the rule of respondeat superior applies with reference to any injury resulting from the official negligence of such superior. *Railroad Co. v. Bowler*, 9 Helsk. 866; *Railroad Co. v. Collins*, 85 Tenn. 227, 1 S. W. Rep. 883." Says Judge Cooper in *Railroad Co. v. Handman*, 13 Lea, 423: "In order to charge the master the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of the duty towards the inferior servant which under the law the master owes to such servant." To the same effect is the statement of the rule by Judge McFarland, who says: "The plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter, stands in the place of the master." *Railroad Co. v. Wheless*, 10 Lea, 748. Judge Lurton, in *Mining Co. v. Davis*, 90 Tenn. 718, 18 S. W. Rep. 387, says: "Where there is proof tending to show negligence of a superior servant, whereby an inferior servant has been injured, the jury should be instructed that the mere superiority of grade or rank will not determine the liability of the common employer, but that they must look and see whether the negligence was in regard to some duty to the inferior imposed by law upon the master, and by the master intrusted to the negligent superior servant. If this be so, then the rule of respondeat superior applies, for such a superior stands in the shoes of the master, and is a vice principal."

The cardinal inquiry, then, that arises on

this record is whether the defendant company owed any duty to the plaintiff's intestate, the performance whereof was intrusted to the conductor, and whether the injuries were sustained in consequence of a violation of that duty. It will be conceded that it is the duty of a railroad company to regulate the movements of its trains so that those moving in opposite directions will not come in collision, as stated by the court in *Railroad Co. v. Keary*, 3 Ohio St. 210. "From the very nature of the contract of service between the company and its employees the company is under obligation to them to superintend and control with care and skill the dangerous force employed upon which their safety so essentially depends. For this purpose, said the court, the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operation of the train which essentially pertains to the prerogative of the owner, and in its exercise he stands in the place of the owner in the discharge of a duty which the owner as a man and as a party to the contract of service owes to those placed under him, and whose lives may depend upon his fidelity." It necessarily follows that a conductor placed in charge of a freight train, with authority to direct and control its movements, is a representative of the company, charged with the performance of a duty which the company owes to the public and its employees on the train. That the conductor was the superior of the fireman, and in full charge of the freight train, we think is abundantly shown in the testimony of J. A. Frates, the train dispatcher of the defendant; A. H. Ellington, the conductor of the collided passenger train; Wiggins, the division superintendent; and other railroad employees who were examined as witnesses. Ellington testified, viz.: "The engineer had no right to run by Oakfield; and the conductor had the right, and it was his duty, to have stopped the engineer in passing Oakfield. He had the authority and right to have stopped him." Again he says: "If on approach to Oakfield the engineer blew 'Off brakes!' the conductor should have stopped him, and after he got past he ought to have stopped him." J. A. Frates testified: "If he [the conductor] did not have time to make Medina, it would have been his duty to see that the train was stopped at Oakfield, and get out of the way; to signal the engineer to stop, and see that the brakes were applied." Again: "He should have arrived at Oakfield and been on the side track five minutes before the schedule time of the passenger train." Again, he was asked if he (the conductor) had authority to stop the train, to which he replied in the affirmative. N. D. Wiggins, division superintendent, testified that it was the duty of the conductor to have signaled him to stop. W. B.

Dunn, a freight conductor, testified that if the engineer attempted to pass on it was the duty of the conductor to try to stop him. Rule 4 of the company is, viz.: "Engineers are required to obey the orders of the conductor, when not contrary to the spirit of these rules." Rule 91: "Conductors will be held accountable for the conduct of their trainmen." This evidence we think sufficiently shows the relation of the conductor to the company and the other employes, which was that of a vice principal and representative of the company.

In the case of *Railroad Co. v. Keary*, 3 Ohio St. 201, it was held that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor in such case was the sole and immediate representative of the company, upon whom rested the obligation to manage the train with skill and care. The case of *Railroad Co. v. Ross*, 112 U. S. 390, 5 Sup. Ct. Rep. 184, was an action brought by a locomotive engineer to recover damages for injuries received in a collision which was caused by the negligence of the conductor of the train. The negligence of the conductor was in failing to show to the engineer the order which he had received to stop the train at South Minneapolis until the gravel train coming on the same road from an opposite direction had passed, and the engineer, in ignorance of the approach of the gravel train, went forward, and the collision occurred. It was held that the conductor and engineer, though both employes, were not fellow servants; that the conductor was the representative of the company, standing in its place and stead in the running of the train, and that the engineer was in that particular his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible. It is stated by counsel for appellant in their brief that the *Ross Case* has been virtually overruled by a recent decision of the United States supreme court in the case of *Railroad Co. v. Baugh*, (decided May 1, 1893,) 13 Sup. Ct. Rep. 914. We have carefully examined that case, and do not find that it overrules the *Ross Case*. The *Ross Case* is in entire harmony with the adjudications of this court, and has been heretofore cited with approval. *Railroad Co. v. De Armond*, 86 Tenn. 78, 5 S. W. Rep. 600. The case of *Railroad Co. v. Kenley*, 92 Tenn. —, 21 S. W. Rep. 326, is the most recent enunciation by this court of the principles involved in this case. In that case it appeared that a brakeman had sustained personal injuries in consequence of a defective foot rest attached to the caboose, and used by the brakemen in ascending to the top of the car. The brakeman had made complaint to the conductor of his train that the foot rest was defective,

and the question presented for decision was whether notice to the conductor was notice to the company. It was contended that the conductor had no power or agency in the construction or repairing of cars, and that notice should have been served upon the car inspector or master of trains. The court held that the conductor was the immediate superior of the brakeman, and his assurance that the matter would be remedied is in law to be imputed to the master, as the vice principal in charge of the train, and as to the crew operating the train notice to him was notice to the master, and an assurance of remedy made upon complaint of one of his subordinates and in regard to an appliance upon his own train was an act within the sphere of his duty towards his inferior.

The record shows that as this freight train approached Oakfield the brakes were applied by the trainmen in accordance with their usual custom on reaching that station, but the engineer gave a signal to let the brakes off, and the train, without stopping at Oakfield, passed on to the place of accident. The conductor, in permitting his freight train to pass Oakfield in violation of the time-card rules, was guilty of official negligence, which in law is imputed to the company. It is strenuously insisted by the counsel for the company that the negligence of Hillsman, the engineer of the freight train, in passing Oakfield in violation of the time-card rules was the proximate cause of the accident, and that, as Hillsman, the engineer, and Spence, the deceased fireman, were fellow servants, the company is not liable. This position cannot be maintained, for the reason that we find from the record that the conductor, as the immediate vice principal and representative of the company, was in command of this train, and his official negligence is shown to have materially contributed to bring about the disaster. The rule, as stated by Mr. Thompson in his work on Negligence, (volume 2, p. 981,) is, viz.: "If the negligence of the master combines with the negligence of the fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master." This rule was approved by this court in *Railroad Co. v. Kenley*, decided at Nashville, and reported in 92 Tenn. —, 21 S. W. Rep. 326. Judge Lurton in that case stated that "the reason of the rule is obvious. The servant contracts to assume the damages incident to the negligence of his fellow servant, but he does not and cannot contract to assume the risk of the negligence of the master. Not agreeing to assume any part of the negligence of the master, if such negligence proximately contributes to his injury, he may recover notwithstanding his injury was due to the combined negligence of the master and his fellow servant."

The next assignment of error is, viz.: "Error in court charging railroads are operated through their employes, and whenever

any employe is guilty of any fault or negligence that it is the fault of the company itself, and when a party is injured because of that negligence, under certain circumstances, he can recover." This language was used by the circuit judge in opening his charge to the jury, and, when considered in connection with the language that immediately follows, it is fully explained, and could not have misled the jury. The very next sentence following the objectionable paragraph is, viz.: "The rule of law in this state is where a person is injured by the fault or negligence of a fellow servant then no recovery can be had." "The engineer and fireman," the court continues in his charge, "of an engine are fellow servants, and whenever the accident is brought about alone by the fault and negligence of the engineer, then no recovery can be had." We find no error in the instructions given by the court, nor in his refusal to charge as requested, but consider the charge a sound exposition of the law of the case.

It is next assigned as error that the court erred in excluding evidence, viz.: Defendant's counsel asked the witness Poe, if Hillsman (the engineer) had been looking, to state whether he could have seen the other train. While the court sustained the plaintiff's objection, the defendant in the very next answer got the benefit of the testimony desired, viz.: The next question asked Poe was as follows: "How was the road there? Answer. We were on a straight line." "How far ahead could he [Hillsman, the engineer] have seen in that straight line? A. He could have seen nearly a quarter of a mile." "Could he have seen ahead, if he had been looking? A. Yes, sir. He could have seen further around than the other trainmen could."

The next assignment of error is based upon the charge in respect to the measure of damages, viz.: "That in estimating the damages the jury should look to the proof as to what was the expectancy of life of the deceased, and see what amount he was able to and was earning at and before his death, and from all the proof * * * decide what he would have earned during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during the expectancy of life from the time of his death." This charge was erroneous. It was perfectly competent for the plaintiff to prove the expectancy of life of the deceased, his capacity for earning money, his habits, age, and condition. But it was erroneous for the court to charge that they must "decide what he [the deceased] would have earned during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death."

The assessment of damages in action of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The courts refuse to lay down any cast-iron rules or mathematical formulae by which such damages are to be ciphered out by juries. It is the duty of the court to point out the different elements proper to be considered in the assessment of damages, but is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem, in cases like this, where the future earnings of the deceased and his expectation of life are mere probabilities. As stated by Judge Snodgrass in *Railroad Co. v. Stacker*, 86 Tenn. 353, 6 S. W. Rep. 737, the age, condition, capacity of earning money, and expectation of life are all to be considered; but the circuit judge in this instruction tells the jury they must decide what the deceased would have earned during that expectancy of life, and allow his widow compensation for the loss of what he would have earned. The amount deceased would have earned during his expectancy of life was purely a matter of speculation, and his expectation of life was a mere probability. This instruction ignored the fact that plaintiff's intestate was engaged in a most hazardous occupation, and that his expectation of life, while it was exposed to the perils of railroad service, was more precarious than if he had been engaged in some less dangerous employment. The wages he would have earned were contingent upon his enjoyment of this precarious expectation of life, upon the constancy of his employment, and upon the performance of his duty with regularity and satisfaction to his employer. The objection to the charge is that both elements of damages are treated as assured facts, and the jury were invited to calculate the damages by this uncertain standard, instead of leaving the assessment of the damages to their sound discretion upon a consideration of all the elements of damages admitted in evidence. For the error indicated the judgment must be reversed, and the cause remanded for a new trial.

MATTINGLY et al. v. BERRY.

(Court of Appeals of Kentucky. Sept. 16, 1893.)

HOMESTEAD—ABANDONMENT.

Where a married man removes with his family from his homestead to a neighboring town, to act as tax collector, and at the expiration of his term keeps an hotel in another city for several months, and later a butcher shop, he has abandoned his homestead.

Appeal from circuit court, Daviess county. "To be officially reported."

Action by V. E. Berry against George D. Mattingly & Co. to recover lands of the

plaintiff sold under execution by defendants. Judgment for plaintiff. Defendants appeal. Reversed.

R. S. Todd and Weir, Weir & Walker, for appellants. Birkhead & Clements, for appellee.

BENNETT, C. J. In the spring of 1886 the appellee purchased and built upon a lot in the town of Yelvington, which he thereafter occupied with his family as a homestead until October of the same year. He then moved to Knottsville, in the same county, and there went to housekeeping; and engaged, while he lived at that place, which was six or seven months, in collecting taxes. He says he moved to said place and there lived because it was nearer the center of the taxing district. He then moved from that place with his family to the city of Owensboro, and there engaged in the business of hotel keeping in partnership with Mr. Aull. He continued in said business several months, and during the continuance of said business he created the debt for the purchase of whiskies, for the payment of which the house and lot in Yelvington was sold. When he quit the hotel business he engaged in the business of butchering in said town. In July, 1888, and before the appellee had returned to said property, or indicated any intention to do so, the house and lot was sold under execution to satisfy said debt. The appellee then brought this suit to recover said property as a homestead, alleging that he only abandoned it temporarily, with a fixed purpose at the time to return and occupy it as a homestead. Did he have at the time he left said property a fixed and actual purpose and intention to return and reside on the property again? and did that intention continue to exist to the time of the sale of the property? That is the question. It is well settled by this court that in order for a person to claim his homestead as against the rights of creditors, after abandoning the same, the abandonment must be temporary, with a fixed purpose at the time of the abandonment to return to said property, and occupy it as a homestead. See *Carter v. Goodman*, 11 Bush. 228; *Burch v. Railroad Co.*, 6 Ky. Law Rep. 636; *Curran v. Culp*, (Ky.) 15 S. W. Rep. 657; *Nethercutt v. Herron*, (Ky.) 8 S. W. Rep. 13. It seems that the appellant's moving to Knottsville to collect taxes was entirely consistent with the idea of a removal for a temporary purpose, and would so indicate; but his thereafter moving to the city of Owensboro, and engaging in the hotel business, and, after having failed in that business, engaging in butcher's business, would indicate that he had left his home in Yelvington with the fixed purpose of permanently abandoning it. His movements clearly indicated that purpose, and the persons with whom he dealt and contracted debts doubtless understood it that way, and that the property at Yelvington was subject

to his liabilities. Now it seems that, after giving to the persons with whom he dealt the reasonable assurance that he had permanently abandoned his old homestead, and made his home elsewhere, and contracted debts on the faith thereof, it would be a deception and a fraud upon them to allow him to claim a homestead in said property by making known, after incurring these obligations, his secret intention of returning to said property, and occupying it as a homestead. See *Burch v. Railroad Co.*, supra. The judgment is reversed.

ELLIOTT v. ELLIOTT.

(Court of Appeals of Kentucky. Sept. 12, 1893.)

ACTION FOR SERVICES—COUNTERCLAIM—INSTRUCTIONS.

In an action for services rendered in taking charge of the farm of his father under an alleged memorandum under which defendant was to have one-half of the rental value of the farm, and plaintiff was to board defendant and wife, defendant filed a counterclaim for moneys advanced and stock sold to plaintiff. *Held*, that an instruction to find for defendant "on his counterclaim" for such balance as might be found due after deducting anything due plaintiff was not misleading as including debts paid by the father several years previously, and incidentally referred to in evidence.

Appeal from circuit court, Nelson county. "Not to be officially reported."

Action by H. C. Elliott against William Elliott to recover for work and services. Verdict for plaintiff for one cent, and he appeals. Affirmed.

John D. Wickliffe, for appellant. Fulton & McKay, for appellee.

HAZELRIGG, J. The appellant sued his father, the appellee, on account for work, services, etc., done for him on his farm from the years 1884 to 1888, inclusive. He contends that he was induced to quit his own farm on the Ohio river, and, with his family, move to Nelson county, and take charge of his father's farm of some 500 acres, under a written memorandum, which, though not signed, was in fact the contract between himself and father. This paper was written in the spring of 1884, and was to the effect that the appellant and his wife were to come to the appellee's as his guests until September following, to see whether they would like living there. In the mean time the son might put under cultivation such portion of the farm as was not already rented, so as to prepare it for pasturing; the rent of the land to be used in buying seed for that purpose. If the contracting parties were satisfied to live together at the expiration of that time, (September,) then two or three reliable neighbors were to be selected to estimate the rental value of the whole farm per year. Appellee was to take one-half of this sum for the rent, and with

the money have such improvements made on the place as would add to its value in the judgment of the father and son; the lease to last for three or five years, as the son wished. The latter was to board his father and Mrs. Barnett, and be paid board for any visiting children or grandchildren of the appellee. The appellant says that after he moved to his father's he expended much money and labor on the farm during the years 1894 and 1895, all the time insisting on the selection of the neighbors to estimate the rental value of the place, but his father refused or delayed doing so until the latter part of the year 1895, when the arbitrators met, and fixed the annual rental for three years, beginning December 25, 1895, at \$300 per annum, in addition to the board of his father and Mrs. Barnett; the rent to be paid in such improvements as the father and son might agree upon. That he thereupon took charge of the place under the terms of the original proposition and the arbitration, but that the defendant called on him to make many improvements and do much work over and above the value of the rent, such as building a barn, crib, hauling manure for the farm, etc.; the total charge against his father, after deducting the rent, being \$4,287.91, for which he sues.

The defendant claims that, learning in 1884 that his son's farm on the river had been subjected to continuous overflow, and that his family were in reduced or straightened circumstances, he invited him to come and make what he could out of his farm, or so much as had not theretofore been rented to others for that year; that afterwards, if matters proved satisfactory to defendant, and their joint occupancy was harmonious, he would let him have the farm on reasonable terms, but that he never had agreed to the terms in the paper known as "Proposition;" that this paper originated with plaintiff; that the plaintiff got the benefit of the products of the farm in 1884, and likewise in 1885, and that defendant furnished him large sums of money also, and that, as to the plaintiff's claims set up for these two years, more than five years had elapsed since their alleged creation; that he did rent his farm to plaintiff for the years 1886-88, but that the plaintiff expended no moneys for him, or built any improvements, or did any work for him on the farm in excess of the rent money which was to be so expended, or, if in excess, it was without his consent; that, on the contrary, he paid out divers sums for the plaintiff, let him have large quantities of lumber, sold him stock to the amount of \$385, for which he had his wife's note, etc.

The defendant's counterclaim amounted to several thousand dollars. Upon the trial of the case before a jury, and after the introduction of an unusually large number of witnesses for each side, a verdict for one cent was returned for the plaintiff. He has

appealed, complaining very urgently that the finding is not sustained by the evidence, that the court erred in giving the instructions, etc.

The instructions offered by the plaintiff and refused by the court were perhaps more likely to confuse than to aid the jury. The instructions given are general, but we think sufficiently plain to furnish the jury with a knowledge of the issues.

If there was no memorandum of the contract upon which to base the claims arising in 1894-95, the lapse of five years before suit barred them, and such was the purport of the first instruction.

If the memorandum or paper marked "Proposition" was dictated or authorized by the defendant, or was afterwards ratified or approved by him, then the jury were told to find for plaintiff such amounts as would compensate him for work, etc., in 1894-95 furnished to the defendant, unless the evidence showed that the defendant did not receive the products or benefits of the farm. This was the second instruction, and was right. The plaintiff was contending that, under a contract, he did the work, and that the defendant got the benefit of it. If so, says the court, find for the plaintiff the value of his services, unless the plaintiff himself got the products of the farm.

To the third instruction the plaintiff urges most earnest objection. It reads thus: "That they may find for the defendant on his counterclaim such balance, if any, as may be shown to be due by the evidence after deducting such amounts as may have been paid by plaintiff to defendant, or put upon the farm in improvements with the consent and agreement of defendant." It is thought that the expression "on his counterclaim" should have been followed by the words "not exceeding the sums claimed by defendant in his pleadings;" that, there being no limit fixed, the jury may have allowed certain old debts paid by defendant for his son many years ago. But it will be observed that no such claim is set up by the defendant either in his pleadings or in his proof. On his cross-examination he speaks incidentally of having paid certain moneys for his son, but we cannot believe that this could in any way have been taken into the account by the jury. The effort to show that it did, we think, failed and afforded no sufficient ground for a new trial, and will not be reviewed here.

The instructions charging the jury not to find for plaintiff for improvements in excess of \$300, unless they were done with the knowledge or consent of the defendant, or were of value to him, were manifestly right, even if the terms of the memorandum are to prevail.

On the whole case, we think the plaintiff had a full and fair chance to establish his claims before the jury, and we will not disturb the verdict. Judgment affirmed.

COMMONWEALTH v. DAVIS.

(Court of Appeals of Kentucky. Sept. 7, 1893.)

PERJURY—INDICTMENT—VARIANCE.

On a trial for perjury in swearing falsely in a bastardy proceeding, which the indictment alleges was had on October 1, 1892, the record of that proceeding is admissible, though it states the date as September 19, 1892; both dates being before the finding of the indictment.

Appeal from circuit court, Graves county.

"Not to be officially reported."

Will Davis was tried for perjury, and acquitted. The commonwealth appeals. Reversed.

Wm. J. Hendrick, Atty. Gen., for the Commonwealth.

LEWIS, J. Appellee, Will Davis, having been indicted for the offense of false swearing, and, under a peremptory instruction of the court, found by verdict of the jury not guilty, the commonwealth prosecutes this appeal. The circumstances under which the alleged offense was committed are stated in the indictment substantially as follows: That upon trial in the Graves county court of the cause of the commonwealth against appellee on a warrant charging him with being father of a bastard child, he appeared as a witness on his own behalf, and, being duly sworn as such, did willfully, falsely, and feloniously state and give in evidence that he never at any time had sexual intercourse with Lella Sawyer, mother of said bastard child, whereas in truth he had, before testifying, such intercourse with her. Upon trial of this case the commonwealth offered in evidence duly authenticated record of the proceeding in the bastardy case against appellee, showing the trial, verdict, and judgment of the county court. But objection was made and sustained by the lower court to said record as evidence, upon the ground that trial of the bastardy case appears therefrom to have been pending and determined September 19, 1892, whereas it is alleged in the indictment such trial was had October 1, 1892. The commonwealth then offered to prove the same facts by oral testimony, objection to which was made and sustained because record evidence thereof was the best evidence, and, as no other evidence was offered by the commonwealth, verdict of not guilty necessarily followed. To convict for false swearing under the statute it is essential to allege in the indictment and prove on trial that the false oath was taken knowingly and willfully, on a subject concerning which the party could be legally sworn, and before a person authorized to administer the oath. *Com. v. Powell*, 2 Metc. (Ky.) 10; *Com. v. Still*, 83 Ky. 275; *Richey v. Com.*, 81 Ky. 524. These essential facts were all fully and sufficiently stated in the indictment. But it would not have been competent or available for the commonwealth to prove the alleged false oath was knowingly and

willfully taken, without first showing it was so taken on a subject concerning which appellee could be legally sworn, and before a person authorized to administer the oath. These two facts could be properly shown alone by the record, which the lower court rejected as evidence, and are fully shown thereby; and it seems to us it was error to sustain the objection made to the competency of that record as evidence, because, whether trial of the bastardy case took place September 19, 1892, as appears therefrom, or October 1, 1892, as stated in the indictment, is not at all material, inasmuch as it appears from both that the alleged offense was committed before finding of the indictment. The statement of facts was made in the indictment quite fully and explicitly enough to enable a person of common understanding to know what particular offense was intended to be charged, and to enable the court, in case of conviction, to pronounce judgment that would bar another prosecution for the same offense; and the Criminal Code does not require a charge to be made in an indictment more directly or with a greater degree of certainty than that.

We are utterly unable to see wherein the variance in date of the bastardy trial as stated in the indictment, and shown by the rejected record, could possibly defeat the right of the case, or prejudice that of appellee. Moreover, it has been expressly held by this court in *Richey v. Com.*, 81 Ky. 524, that in a prosecution for false swearing date of commission of such offense need not be alleged at all in the indictment, because not material.

In our opinion, the lower court erred to the prejudice of the commonwealth in sustaining objection to said record as evidence, and this opinion is directed to be certified.

COMMONWEALTH v. ALEXANDER.

(Court of Appeals of Kentucky. Sept. 9, 1893.)

Appeal from circuit court, Estill county.

"Not to be officially reported."

Theodore Alexander was indicted for defacing the brands on sawlogs. A demurrer to the indictment was sustained, and the commonwealth appeals. Reversed.

Wm. J. Hendrick, Atty. Gen., for the Commonwealth.

BENNETT, C. J. The indictment charges the appellee with the crime of cutting off and defacing the brands on certain sawlogs belonging to the Asher Lumber Company, and which were in the Kentucky river, and which were branded with the brand of said company, which brand was recorded as required by the act of the legislature, and that the brands were cut and defaced in the county where same was recorded. The lower court sustained a demurrer to the indict-

ment. As there is no brief on file for the appellee, the objections, if any, to the indictment, are not pointed out; but according to the case of *Com. v. Puckett*, (Ky.) 17 S. W. Rep. 353, the indictment is sufficient. That case is approved. The case must be reversed, and remanded for further proceedings consistent with this opinion.

SCOTT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 9, 1893.)

HOMICIDE — EVIDENCE — LETTERS FROM DEFENDANT TO WIFE.

1. In a homicide case, a letter written by defendant to his wife is not admissible against him, however the letter was obtained from her.

2. The fact that defendant, on being compelled by the court to answer the questions asked him on cross-examination, admitted he wrote the letter, and identified it, did not legalize it as evidence.

3. The punishment for manslaughter being imprisonment for from 2 to 21 years, to be fixed by the jury, the admission of incompetent evidence, the natural effect of which is to lessen the force of other testimony, tending to show criminal intimacy by deceased with plaintiff's wife, is reversible error.

Appeal from circuit court, Bath county.

"To be officially reported."

Henry Scott was convicted of manslaughter, and appeals. Reversed.

Smoot & Godgell, for appellant. Wm. J. Hendrick and C. W. Goodpaster, for the Commonwealth.

LEWIS, J. The evidence in this case—of witnesses present—shows that, about or soon after nightfall, appellant went through the back door into the storehouse of deceased, situated in a village where they both resided, and, without other warning than simply pronouncing the given name of deceased, commenced to fire his pistol at and killed him; so that, although deceased fired also very soon after appellant's first shot, and both continued to fire until as many as seven or more shots were exchanged, there is no ground whatever upon which to base the excuse of self-defense. The jury, however, found a verdict of manslaughter only, fixing punishment at confinement in the penitentiary 16 years.

We perceive no error in instructions to the jury, and the single inquiry left is whether the court erred in permitting read in evidence a letter which appellant, while confined in jail, wrote to his wife. Appellant, on being cross-examined as a witness in his own behalf, admitted he wrote the letter, and identified it. But that does not seem to us to legalize the evidence, if not otherwise competent, inasmuch as he was required by the court, over his objection, to answer questions relative to the letter propounded by the commonwealth. He testified on the trial that he committed the homicide in a state of passion and excitement

caused by the belief that his wife and deceased were criminally intimate; that his suspicion was aroused by their conduct at the railroad depot in Mt. Sterling the day before, where they were together, as he believed, by prearrangement; that after their return home, and on the day of the killing, he sought an interview with deceased at his storehouse, and, as other witnesses also testify, harsh language passed, or rather was used by appellant; that, being harassed with suspicion, he asked his mother, who lived at his house, if she believed his wife was unfaithful, and the affirmative answer to his question, and his mother's statement that about one week previously she had seen his wife and deceased together at night, and under circumstances showing they were guilty, caused him to seek deceased, and take his life. In addition to the information given to appellant by his mother, the correctness of which she swore to on the trial, other witnesses testified to conduct, on various occasions, of deceased and appellant's wife, inconsistent with their innocence, and from which the jury was authorized to infer they had been criminally intimate. Although manslaughter is an offense, in every case, without legal excuse, still it is the policy of the statute to vary the punishment so as to suit circumstances of aggravation or extenuation, as the case may be; and hence the margin fixed is not less than 2 or more than 21 years. It thus becomes a substantial error of the court to permit incompetent evidence to go to the jury, the natural effect of which is to either increase or lessen the punishment that would be otherwise inflicted. An invasion of marital rights by a seducer or adulterer is always treated as a great provocation, and juries are prone to palliate the offense, and lessen the punishment of a party who takes the wrongdoer's life under sudden heat and passion induced thereby. The letter in question—we need not quote it—does not contain an admission, in terms, that appellant then believed his wife innocent of wrongdoing with deceased, but does contain expression of affection for and desire to see her. It seems to us the natural effect of that letter upon the minds of the jury—and, from the severity of punishment inflicted, the actual effect—was to lessen or break the force of other testimony tending to show the guilt of the deceased, and thereby deprive appellant of that extenuating fact. If, therefore, it was error to admit the letter as evidence, it must be treated as reversible error.

The rule excluding husband and wife testifying for or against each other in a criminal prosecution, except in case of personal injury by one to the other, is, as stated in *Greenleaf on Evidence*, (volume 1, § 334,) founded partly on the identity of their legal rights and interests, and partly on principles of public policy which lie at

the basis of civil society. "For it is essential to the happiness of social life that the confidence subsisting between the husband and wife should be sacredly protected and cherished in its most unlimited extent, and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solaces of human existence." In *Ellswick v. Com.*, 13 Bush, 155, this court, citing as authority *Greenleaf on Evidence* and *Phillips on Evidence*, uses this language: "Information coming to a husband or wife in consequence or by reason of the existence of the marriage relation is to be treated as confidential, and the confidence which the law creates while the parties remain in the most intimate of all relations cannot be broken even after that relation has been dissolved." In *McGuire v. Maloney*, 1 B. Mon. 224, it was, to the same effect, held that the policy of the law so far protects that privacy and confidence essential to the marriage relation, and necessarily springing from it, as not only not to allow, but prevent, even after termination of the coverture, any disclosure by the wife, in a court of justice, which implies a violation of the confidence which was reposed in her as a wife. The evidence in this case shows the letter in question was procured from appellant's wife by a brother of the deceased, and thus came into possession of the commonwealth's attorney. But it seems to us, whether given up by her voluntarily, or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the marital relation, and the use of it against the husband in this case was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in the confidence and privacy of the marriage relation. The case of *Selden v. State*, 74 Wis. 271, 42 N. W. Rep. 218, was a prosecution of a person for perjury, who, in a proceeding against his wife for divorce, made affidavit that he did not know her place of residence; and the question on the trial was whether letters written by him to her pending proceeding for divorce, showing he did know her place of residence, and which she had placed in possession of her attorney, were competent evidence against him in the criminal trial. Applying the rule mentioned, it was there held that, the letters being confidential communications, not even the address on the envelopes could be used as evidence against the husband; and, in support of the ruling in that case, numerous decisions of English and American courts are cited. In our opinion, the admission as evidence in this case of the letter written by appellant to his wife was an error prejudicial to his substantial rights, and the judgment is reversed for a new trial consistent with this opinion.

BUTLER v. DAVIS.

(Court of Appeals of Kentucky. Sept. 12, 1893.)

HOMESTEAD—IMPROVEMENTS—LIABILITY TO EXECUTION.

The owner of a homestead pulled down the old residence thereon, and in part with the material thereof built a new residence. Held, that the residence was an "improvement," and subject to a debt created before its erection, under Gen. St. c. 38, art. 13, § 16.

Appeal from circuit court, Breckinridge county.

"Not to be officially reported."

Action by L. M. Davis against Felix Butler to subject his homestead to an indebtedness due plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed.

N. McCl. Mercer and Knott & Edelen, for appellant. Thomas H. Hines and M. Eskridge, for appellee.

BENNETT, C. J. The appellant is a housekeeper with a family, and is entitled to a homestead. There was an old and dilapidated residence house on the land that he owned as a homestead. He concluded that the old house was not worth being repaired; consequently he tore the same down, and built a new residence house in its stead, working some of the material of the old house into the new one. The appellee sought to subject the homestead to the extent of the value of the new house to the appellant's indebtedness to him, which existed prior to the erection of the new house. Chapter 38, art. 13, § 16, Gen. St., is as follows: "The exemption provided for in this chapter shall apply to all persons, of any race or color, who are actual bona fide housekeepers, with a family, of this commonwealth, but shall not apply to sales under execution, attachment or judgment at the suit of creditors if the debts or liability existed prior to the purchase of the lands, or of the erection of the improvements thereon. The policy of the statute is not to allow to the debtor a homestead as against the claim of an existing creditor. Nor to allow him to withdraw his money or means from such creditor erecting improvements thereon." It seems that the erection of the new building was the erection of an improvement, in the sense of the statute. The fact that the old building was torn down, and some of the material worked into the new building, is in no sense an ordinary repair of a residence, but is the erection of an improvement. The judgment is affirmed.

DEMPSEY v. TAYLOR et al.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

CONTINUANCE—NEW TRIAL—SURPRISE—RECORD ON APPEAL—IMPEACHMENT—WILLS—CONSTRUCTION.

1. In trespass to try title, where a witness called by defendant to prove the execution of a

deed refused to testify to its authenticity, a motion to continue the case on the ground of surprise is properly denied where there is no offer to connect the deed with any defense, or to show that it could not be established by other testimony.

2. The refusal of a motion for new trial was in the discretion of the court, though defendant was surprised by the testimony of the grantor in the deed, where defendant does not show that the deed in question was necessary to his defense.

3. When the transcript on appeal shows that a certain deed was dated 1888, the affidavit of an attorney in the case, showing that it is a clerical mistake, and that the date was 1878, cannot be considered.

4. A devise of "two town lots" in U., "together with all the buildings, all the cattle, and all other property," conveys all the real and personal property of testator, including a farm.

Appeal from district court, McCulloch county; J. W. Timmins, Judge.

The other facts fully appear in the following statement by COLLARD, J.:

This is an action of trespass to try title, brought April 15, 1889, by appellees, J. M. Taylor and Henry Mueller, against appellant, Joseph Dempsey, to 386 acres of land in McCulloch county, patented to Heinrich F. Kohler. Defendant answered by plea of not guilty and 10 years' statute of limitation. Verdict and judgment were rendered for plaintiffs, and defendant has appealed. Affirmed.

Plaintiffs introduced in evidence patent to Heinrich F. Kohler to the land in controversy, and the will of Kohler, duly probated in Comal county, Tex., on the 27th day of July, 1868. The will begins: "I, the subscriber, publicly declare before all that I give and bequeath my estate, although in a sickly condition, but still of full conscience and free use of my mental faculty, as follows: (1) I give and bequeath to my son Heinrich Kohler the two town lots situated in Comal Town No. —, together with all the buildings, all the cattle, and all other property. (2) I give and bequeath to my son Heinrich Kohler the outstanding and the cash money on hand, and he may, according to his pleasure and free will, give same to my youngest son Friedrich, because he as yet received nothing from his father: provided, if any remains after the maintenance of the father. (3) In consideration my son Heinrich obligates himself to alone provide for the maintenance of the father, first with good, comfortable clothing, clean, good bed, wholesome food, doctor and medicines, and after my demise a decent funeral. This, my last will, subscribed by two trustworthy witnesses. Sealed and deposited. Done at Comal Town, the 20th April, 1867, in county Comal. Name of testator: [Seal.] Heinrich Friedrich Kohler. Name of heir: [Seal.] Heinrich Kohler." There are two subscribing witnesses. Plaintiffs introduced deed from Heinrich Kohler to themselves. Defendant proved by one Sam Avants that he, Avants, "bought the claim of one Franklin

of 1888; that Franklin remained on the property by his permission for about one week, when he, Avants, sold out to W. R. Weldon, Weldon taking immediate possession, and Franklin moving out." Defendant proved by W. R. Weldon that "after purchasing from Avants he lived on the property with his family, using and cultivating it, for about one year and a half, when he sold out by written conveyance to J. B. Hogg." Here defendant closed his testimony. A bill of exceptions shows that he "endeavored to prove by W. R. Weldon the execution of a deed (a part of defendant's title) made by him, the said Weldon, to J. B. Hogg; but when he placed the witness upon the stand he refused to testify to its authenticity, whereupon defendant requested leave of the court to withdraw his announcement of ready for trial, and make a motion for a postponement or a continuance on the ground of surprise, which request was by the court overruled," to which ruling defendant duly excepted. The court thereupon directed the jury to return a verdict for the plaintiffs, which was done, and judgment was rendered for plaintiffs for the land.

Bell & Drane, for appellant. J. M. Taylor and Walter Anderson, for appellees.

COLLARD, J., (after stating the facts.) Defendant has appealed, and assigns as error the action of the court in refusing to allow him to withdraw his announcement, and postpone or continue the case. The application was addressed to the discretion of the court, and its exercise should not be condemned unless it was clearly erroneous. There was no offer to connect the deed with any defense, or to show its importance, or that it could not be established by other testimony. The fact of surprise was not stated to the court, nor was it supported by affidavit. Under the circumstances as stated in the bill of exceptions, it cannot be held that the court abused his discretion in requiring the trial to proceed. The court reviewed the entire matter upon the motion for a new trial, in which the grounds of surprise and other facts were set up, which motion was overruled by the court. The refusal to grant a new trial is assigned as error. The question, then, is, did the court err in refusing a new trial on the ground of surprise? The motion for a new trial sets up that Weldon was duly subpoenaed by defendant, and was present in court before announcement, "for the purpose of proving the execution of the deed from him to J. B. Hogg; that proof of the execution of the deed was a necessary part of defendant's case; that some time prior to the issuance of said subpoena, before the present term of this court, the said W. R. Weldon, with the deed in question before him, and after examining the same, stated to defendant and to defendant's attorney, G. L.

Beatty,—as will appear from his affidavit hereto attached,—in his (defendant's) presence, that said deed was the one he executed to J. B. Hogg; that he recognized it as such, and could swear to it. Defendant further says that he relied upon these representations, and did not know, and could not have known by any amount of diligence, that said W. R. Weldon would swear differently when placed upon the witness stand; and that he, defendant, was greatly surprised by the testimony of said witness; that all of this was through no fault of defendant, but was the result of being overreached and deceived by the fraudulent and false representations of said Weldon. Defendant further says that he has a good and meritorious cause of action; that he and those whose estate he claims in the land in controversy have had and held open, peaceable, uninterrupted, adverse possession, using, occupying, and enjoying the same for more than ten years consecutively next preceding the filing of plaintiffs' petition. He further says he can and will prove the execution of said deed by other means than by said Weldon, and that he verily believes that if granted a new trial the result of the suit will be different on another trial." The motion was sworn to by defendant, and was supported by the affidavit of the attorney, G. L. Beatty. We cannot say that the trial judge abused the discretion which the law gives him in refusing a new trial in this case. *Dotson v. Moss*, 58 Tex. 156; *Delmas v. Margo*, 25 Tex. 1. The motion shows clearly enough that defendant was surprised at the testimony of Weldon, the grantor in the deed, by whom he expected to prove its execution, (*White v. Holliday*, 20 Tex. 679; *Wiggins v. Fleishel*, 50 Tex. 64,) but it does not show the materiality of the deed in establishing his defense. He shows that he has a good defense by 10 years' possession in himself and those whose estate he claims, but he does not show that the deed was essential to that defense. His connection with that deed is not shown. He should have exhibited to the court his chain of title, so as to enable the court to determine whether or not he had a meritorious defense, and whether another trial would change the result. "He must set forth under oath, not in general terms, but specifically, the facts upon which he claims such merits." *Montgomery v. Carlton*, 56 Tex. 431; *Contreras v. Haynes*, 61 Tex. 108; *Holliday v. Holliday*, 72 Tex. 585, 10 S. W. Rep. 690. The motion does not show to us that, if the judgment were set aside, a different result would be reached upon another trial, or that even a prima facie case would be made by the aid of the deed in question. Defendant may have had a good defense under the statute of limitations, and he may be able to prove it by other testimony than this deed,—at least to 160 acres of the land. If the plea did not depend upon the deed, it

would be unimportant, and the failure to sustain the plea could not be attributed to the want of the deed. The necessity of the deed to such defense is not shown. The statement of facts, as found in the transcript, shows that Avants bought the claim of one Franklin to the property in the spring of 1888. This, it seems, is the beginning of the possession relied on to support the plea of limitation of 10 years. This proof makes it impossible to support the plea, this suit having been commenced April 15, 1889. In such case it would not be pretended that there was any merit in the motion for a new trial. There is not sufficient other testimony upon the subject in the transcript to enable us to say that the date "1888" is a clerical mistake. Appellant's attorney appends to his brief his affidavit showing that it is a clerical mistake, and that the date should be "1878." This affidavit cannot be considered; the transcript cannot be so corrected. We will say, however, that our decision would be the same if the date had been 1878 instead of 1888.

It is unnecessary to discuss at length the assignment of error that plaintiffs could not recover because the will of Kohler does not give the land in controversy to his son Heinrich. Taking the entire instrument in all its parts, and construing it under established rules, there can be no doubt that the intention of the testator was by the will to bequeath and devise all his estate, real and personal, to his son Heinrich. This intention is clearly derived from the will. There was no error in the judgment of the court below, and it is affirmed.

BENDER et al. v. PEYTON.¹

(Court of Civil Appeals of Texas. Sept. 21, 1893.)

CONTRACT FOR SERVICES — BREACH — WHAT CONSTITUTES — BROOMING PARTNER OF EMPLOYER'S COMPETITOR — ACTION BY EMPLOYEE — EVIDENCE — ASSIGNMENTS OF ERROR — SUFFICIENCY.

1. Where a person agrees with a certain firm to exert himself to sell all the lumber cut at their mill during a certain year, the fact that he, during such time, becomes the managing partner in a firm which operates a competing mill, does not of itself constitute a breach of his contract with the former firm, in the absence of an agreement to give his entire services to either firm.

2. In an action by a lumber broker against lumber manufacturers for commissions and money advanced under a contract with defendants to exert himself to sell all the lumber cut at their mill during a certain year, defendants claimed damages for breach of contract, in that plaintiff failed to sell all the lumber cut by them, and became the managing partner in a firm operating a competing mill, while plaintiff claimed that defendants sold their best lumber, and were unable and failed to fill his orders. Held, that it was not error to admit evidence to show the amount and different classes of lumber that should be carried in stock by a mill to enable it to fill the usual run of orders.

3. Plaintiff testified that he and one of defendants had an accounting; that they agreed

¹ Rehearing denied.

to all matters except commissions claimed by defendants on sales made by them during the latter half of such year, and on lumber on hand at the end of the year; and that a memorandum was made out at the time as a basis to act on. *Held*, that it was not error to admit such memorandum in evidence, with instructions to the jury that it was admitted as bearing on the question of general indebtedness, and not as an account stated.

4. An assignment of error which states that "the evidence in this case shows that defendants did not violate" the contract, and that plaintiff did violate it, "and by a subsequent contract made with" a third person "did put himself in a position directly antagonistic to defendants' interest, and did thereby forfeit and violate the said contract," is sufficient to present the question as to whether or not plaintiff's subsequent contract of partnership with such third person was ipso facto a violation of his contract with defendants.

5. Such assignment does not support a proposition that, as plaintiff had the power to discharge the shipping clerk, who acted for both parties, he could not complain of the failure of defendants to ship lumber to his order.

Appeal from district court, Polk county; L. B. Hightower, Judge.

Action by John B. Peyton against C. Bender & Son to recover a balance claimed to be due on a contract for services and for money advanced by plaintiff to defendants. From a judgment for plaintiff, defendants appeal. *Affirmed*.

James E. Hill, for appellants. Holshousen & Feagin and J. R. Burnett, for appellee.

GARRETT, C. J. John B. Peyton brought this suit against C. Bender & Son to recover certain advances and commissions alleged to be due him on two certain written contracts made by the parties, whereby plaintiff was to advance certain money and supplies to the defendants in the operation of their sawmill for the year 1887 at Curry, in Polk county, and for the year 1888 their sawmill at Holshousen in said county, and to sell the product of said mills, for which he was to receive a commission of 10 per cent. Plaintiff set out said contracts, and an account of the alleged transactions between plaintiff and defendants, showing an alleged balance due him for the years 1887 and 1888, for which he sued. He also pleaded in another count in his petition an alleged accounting had between himself and defendants on July 16, 1889, showing a balance in his favor. Defendants pleaded a general denial, and answered specially, admitting the execution of said contracts, which they averred they had performed on their part, but that plaintiff had neglected and failed to sell the lumber cut by defendants, so that it accumulated at the mill, and prevented said mill being run at its full capacity, to their damage \$6,750; also that on account of plaintiff's failure to sell as he contracted to do said lumber remained in stock, and became mildewed and deteriorated in value; and defendants were obliged to turn out and seek a market for themselves, by reason of which they claimed further damage of \$5,000. They

set up also an account of transactions between plaintiff and themselves showing balance due them by the plaintiff. They charged that sales to the amount of \$15,557.02 were made by them with the consent of the plaintiff, who was unable to sell all the lumber cut by the defendants; and that the commissions thereon amounted to \$1,555.70, to their further damage. Plaintiff replied by general denial, and alleged also that if he failed to sell all the lumber cut by the defendants it was because of their failing, neglecting, and refusing to ship lumber and fill the orders given to them by plaintiff, etc. The case proceeded to trial before a jury, and judgment was rendered in favor of the plaintiff for \$1,561.46.

Conclusions of Fact.

(1) The plaintiff, John D. Peyton, was a lumber broker, and resided at Trinity, in Trinity county. The defendants, C. Bender, Sr., and O. Bender, Jr., composed the firm of C. Bender & Son, and as such were engaged in the sawmill and lumber business in the county of Polk, on the Houston, East & West Texas Railway.

(2) On the 25th of February, 1887, the plaintiff and defendants entered into a contract, which was to continue in force for 12 months from March 1, 1887, by which plaintiff was to advance to the defendants money and supplies to the extent of \$4,000 for the operation of their sawmill at Curry, and to sell all the product of said mill, for which he was to receive a commission of 10 per cent.

(3) On the 14th of January, 1888, the said parties entered into another contract for the year 1888, as follows: "The State of Texas, County of Polk. Know all men by these presents that we, John B. Peyton, of the county of Trinity, and the said state of Texas, of the first part, and Bender & Son, of the said county of Polk, of the second part, have made and entered into the following contract and agreement, to wit: Said contract is to take effect and be in force from and after January the first, 1888. Said contract is to continue for a period of (12) twelve months; that is, until January 1st, 1889. Said Peyton on his part agrees and obligates himself to advance and furnish to the said Bender & Son as much as (\$4,000.00) four thousand dollars, which advances are to be made as follows, to wit: (\$2,000.00) two thousand dollars in merchandise and stock feed from time to time as needed, and (\$2,000.00) two thousand dollars in money, to be advanced as follows, to wit: \$750 by January 10th, 1888; \$250.00 on February 10th, 1888; \$250.00 on March 10th, 1888; \$250 on April 10th, 1888; \$250.00 on May 10th, 1888; and \$250.00 on June 10th, 1888. During the continuance of this contract said Peyton is to sell all the lumber cut by Bender and Son on their mill in the said county of Polk, situated at Holshousen, on the H., E. & W. Texas Railway. Said Peyton also is

to exert himself to make sales of said lumber so cut, obtain the best possible price, etc. On the 10th of each month said Peyton is to turn over to said Bender & Son all collections made by him up to the first of said month. He, the said Peyton, is also to use diligence in making collections for lumber sold. All feed, merchandise, etc., bought by said Peyton is to be consigned to and owned and controlled by said Peyton, but the said Bender & Son are to have the profits on same. A clerk is to be employed to take charge of the store and lumber shipping, who is to represent the interest of both parties to this contract. Said clerk is to be paid by Bender & Son. Should said clerk so employed fail to represent the interest of both parties to this contract, then either party becoming dissatisfied with him may have him discharged, in which event another clerk shall be employed to take charge of said business. Said Peyton is to receive in consideration of the money, merchandise, feed, etc., advanced by him, and for his services in making sales of lumber, making collections, etc., 10 per cent. on all sales of lumber, which is to be charged up monthly. On any day of settlement the advances in money, merchandise, feed, etc., are not to exceed more than bills receivable, and the lumber in stock estimated at \$5.00 per thousand feet. At the expiration of this contract the said Bender & Son are to pay back said (\$4,000) four thousand dollars advanced by said Peyton as above stipulated. Said Bender & Son, a firm engaged in the sawmill and lumber business in the said county of Polk, and composed of Charles Bender, Sr., and Charles Bender, Jr., hereby agree and bind themselves to put their mill at Holsausen, on the H., E. & W. Texas Railway, in the said county of Polk, in good condition, and they further bind themselves to log and run it to its full capacity, cutting and stacking the same, and shipping all the lumber cut to the order of said Peyton. They further bind themselves to construct and put in operation at an early date a good planer in connection with said mill. It is further understood and agreed that all lumber cut from January 1st, 1888, until January 1st, 1889, is to be bound to said Peyton for advances, and handled by him, the said Peyton, under the terms of this contract. It is also understood and agreed that all lumber on the yard of said mill on the first day of January, 1888, is bound to said Peyton for advances furnished and to be furnished as above stipulated, and is to be sold by him, shipped to his order, etc. In testimony of the above we hereby subscribe our names on this, the 14th day of January, 1888. [Signed] John B. Peyton, Party of First Part. O. Bender & Son, Party of Second Part. Witness: B. H. Holmes."

(4) On March 2, 1888, appellee bought one-third interest in the McDuffie mill in Trinity county, and entered into a contract of part-

nership with Eliza A. McDuffie, under the firm name of McDuffie & Peyton, "to conduct at McDuffie switch, in Trinity county, Texas, a general sawmill, lumber making, store, commissary, and business usual in the lumber business, excepting speculating in the purchase and sale of lumber not manufactured by them, which is not permissible." Said Peyton obligated himself to give to said partnership business his attention and general control and supervision, to sell all lumber, to collect all bills, to see that the indebtedness of the firm was properly paid, to purchase all goods and supplies, to pay off all laborers, and to do and perform all acts usually performed by the principal head of a copartnership. An office, containing all the books, papers, correspondence, etc., pertaining to the business, was required to be kept at the mill at McDuffie switch, but it was contemplated in said contract that the said Peyton would continue his residence at Trinity, from which place correspondence might be conducted. For his services above stated as managing partner of McDuffie & Peyton the said Peyton was to receive the sum of one hundred (\$100.00) dollars per month.

(5) Business was commenced in accordance with said contracts between plaintiff and defendants, the former making the advances of money and supplies as he undertook to do, and selling the lumber of defendants, which they shipped out on his orders, and it appears to have been continued substantially in compliance with said contracts until after the organization of the firm of McDuffie & Peyton. But after said time, and during the latter part of the year 1888, appellee's sales for Bender & Co.'s mill amounted to only \$3,838.88, while defendants themselves made sales to the amount of \$15,557.02. There was a conflict of testimony as to the reason why appellee did not sell the lumber as required by the contract, but upon the issue as to whether or not the plaintiff failed to exert himself and to use diligence to sell defendants' lumber the jury found for the plaintiff, and the verdict is sustained by the evidence, unless we should hold that the contract of partnership between the plaintiff and Mrs. McDuffie was of itself a breach of the contract between him and the defendants.

Conclusions of Law.

1. Appellants' tenth assignment of error is the first presented in their brief, and is as follows: "The evidence in this case shows that defendants did not violate either the contract of 1887 or the contract of 1888, and that plaintiff did violate the said contract of January 14, 1888, and by a subsequent contract made by him with Eliza A. McDuffie did put himself in a position directly antagonistic to defendants' interest, and did thereby forfeit and violate the said contract of 1888." It is objected by the appellee that this assignment does not specifically point out any error, but we think that it presents

the question whether or not the subsequent contract of partnership entered into between the plaintiff and Mrs. McDuffie was ipso facto a violation of his contract with the defendants. The jury found, by rendering a verdict in favor of the plaintiff, that he had exerted himself to make sales of all of the lumber cut by the defendants, as required by the contract, and there is evidence to support the verdict. Neither the contract with defendants nor the contract of partnership with Mrs. McDuffie called for the entire service of the plaintiff, and there is nothing in the two contracts that renders them so antagonistic to each other that the latter would of itself be a violation of the terms of the former. The contract of partnership was undoubtedly very pertinent evidence tending to show, in connection with other testimony, a violation by the plaintiff of his contract with the appellants; but it all went properly to the jury for its determination of the issue.

As maintained by the appellee, the second proposition under the tenth assignment, to the effect that appellee, having the power to discharge the shipping clerk, could not complain of the failure of appellants to ship lumber to his order, is not supported by the assignment.

2. Upon the trial the court allowed the plaintiff to put in evidence, over the objection of defendants, the testimony of witnesses to show what amount of lumber, the different classes of lumber, and the amount of dry lumber that should be carried in stock by a sawmill to enable it to fill the usual run of orders. The objection was that the issue was not raised by the pleadings, nor warranted by the terms of the written contract in evidence. The stipulations in the contract with reference to the sales of lumber are: "During the continuance of this contract said Peyton is to sell all the lumber cut by said Bender & Son on their mill in the said county of Polk, situated at Hols-housen, on the H., E. & W. Texas Railway. Said Peyton is to exert himself to make sales of said lumber so cut, obtain the best possible price," etc. "It is further understood and agreed that all lumber cut from January 1, 1888, until January 1, 1889, is to be bound to said Peyton for advances, and handled by him, the said Peyton, under the terms of this contract." Evidence of usage is not admissible to vary the terms of a contract, but it may be received in explanation thereof. Peyton was not by the very terms of the contract to sell "all" of the lumber cut by the defendants on their sawmill, but he was to exert himself to do so. His explanation of his failure to do so was that the defendants failed to ship the lumber on his orders; that they shipped out on their sales the best and most salable grades, and a stock was left from which his orders could not be filled. Appellee testified that if appellants had cut and stacked the lumber as

they agreed to do, and put it into a marketable condition, and had not broken the stock as they did by selling the better and most salable kinds, he could and would have sold every foot of lumber cut by them. It is very true that parties to a contract are bound as they bind themselves, but they contract with reference to the usages of the particular trade or business about which their agreement is made. The evidence was pertinent to the issue as to whether or not the plaintiff was in default in failing to sell "all" defendants' lumber, and there was no error in admitting the same, and no pleading was necessary.

3. There was no error in admitting the written memoranda made by the parties in their effort to settle in July, 1889. Plaintiff testified that he and the defendant C. Bender, Sr., on the 10th of July, 1889, had an accounting together, or an attempt to adjust their differences in accounts; that they checked up and agreed to all differences then, except commissions on sales of defendants from August 1, 1888, to January 1, 1889, and commissions on lumber on hand January 1, 1889; and that the memoranda was made out at the time as a basis to act on, and had been agreed to excepting commissions as before stated. Defendants objected that it did not show an account or an account stated. In explanation of the ruling the trial judge in signing the bill of exceptions stated that the plaintiff testified that the defendant Bender, Sr., had agreed to the items, and had the instrument made out by his clerk, and ordered it copied in his letter book; that it was admitted, not as an account stated, but as bearing on the question of general indebtedness, and the jury was so informed.

4. The next assignment of error is objected to by the appellee as too general, and the proposition under it as not germane to the assignment. We think, however, that the questions sought to be raised by this assignment are disposed of in our consideration of the admission of the testimony of the witness with reference to the character of stock of lumber necessary to be carried. The charge complained of does not submit the construction of the contract to the jury, especially when taken in connection with the other portions of the charge. There was no error, for which the judgment should be reversed, in the stating of the amount claimed in the petition at a greater sum than was admitted to be due, as the verdict of the jury was evidently not affected by it, nor is the question properly raised by an assignment of error.

5. Counsel for plaintiff, while addressing the jury, stated as evidence matter that had been offered and excluded. No objection was made by counsel for defendants, nor was there any notice taken of it at the time. The judge, in giving a bill of exceptions, stated that he did not remember the language used by counsel as stated, but thought it was

correct. The statement was that Peyton told Mrs. McDuffie and her counsel, Mr. Hill, at the time the contract of partnership was made, "that he could only give half his time to the McDuffie mill." No cause for the reversal is shown. There is nothing further that requires the attention of the court. The case is one of fact, in which the issues have been determined by the jury in favor of the plaintiff, and, having been submitted on proper evidence, properly admitted, and no error being shown, the judgment rendered thereon will be affirmed.

GREATHOUSE v. MOORE et al.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

FRAUDULENT CONVEYANCES—BURDEN OF PROOF—INSTRUCTIONS.

1. In an action for the value of goods seized by defendants under attachment against one from whom plaintiff had purchased them, in which defendants answer that the sale was in fraud of creditors, plaintiff may rest on his bill of sale until defendants have proven facts showing fraud, the burden of proof being on them.

2. An instruction in a civil action requiring facts to be "conclusively" shown is erroneous.

Appeal from Bell county court.

Action by R. W. Greathouse against Moore Bros. and W. Saulsbury. From a judgment for defendants, plaintiff appeals. Reversed.

Tyler & Andrews, Matthews & Wood, and Geo. W. Tyler, for appellant. A. M. Monteith, for appellees.

FISHER, C. J. Appellant sued the appellees for the value of certain goods and merchandise seized by them under a writ of attachment in favor of the appellee Moore Bros. against Witter & Co., the alleged debtors of Moore Bros. Appellant, Greathouse, claimed the goods by purchase from Witter & Co., and exhibited a bill of sale therefor. Appellees, by answer, alleged that the sale made by Witter & Co. was in fraud of their creditors, and that Greathouse was a party to such fraud. Verdict and judgment were in favor of appellees.

It is assigned as error that the charge of the court, in effect, placed the burden of proof upon the appellant to show the bona fides of his purchase from Witter & Co., and failed to instruct the jury that the burden of proof as to the issue of fraud rested upon the appellees. We think the charge in this respect is justly criticised. Appellant could safely rest upon the fact of his purchase, and the burden was not cast upon him to show that it was valid until it became necessary to show the bona fides of the transaction in order to overcome or explain the case of fraud, if any, that was made by the party attacking the sale. The burden rested upon the appellees to prove the facts showing the fraud or vice in the sale and the purchase by appellant. Until this was done, the

appellant was not called upon to prove any facts, except the ownership and value of the goods and the trespass by appellees. For the error complained of in the charge, the judgment is reversed, and the cause remanded.

In view of another trial, we will notice an error in the charge, although not assigned. The court uses the expression that certain facts must be "conclusively" shown. Such degree of certainty in the effort to establish facts is not required in any civil action. Reversed and remanded.

GULF, C. & S. F. RY. CO. v. COURTNEY.

(Court of Civil Appeals of Texas. Sept. 14, 1893.)

RAILROAD COMPANIES—FIRES—INSTRUCTIONS.

In an action against a railroad company for burning plaintiff's cotton while lying on defendant's platform, the petition alleged that, through the negligence of defendant, the fire escaped from its engines; but it did not allege a delivery of the cotton to defendant, or that defendant was negligent in not providing a warehouse for the protection of cotton awaiting shipment. The evidence showed that the fire was set by one of defendant's engines about 1 o'clock P. M., and defendant introduced evidence that the engine in question was provided with the best appliances for preventing the escape of fire, and was operated by a competent man, and in a careful manner. Plaintiff testified that when the engine passed he was about to go to defendant's agent to get his bills of lading for the cotton signed; that the agent always signed the bills whenever they were presented, though he did not like to do so until 4 o'clock. *Held*, that the only evidence presented by the pleadings and evidence was whether defendant was guilty of negligence in burning the cotton, and it was error to give an instruction based on a hypothetical delivery to defendant for shipment.

Appeal from Burleson county court; John Alexander, Judge.

Action by William Courtney against the Gulf, Colorado & Santa Fe Railway Company to recover the value of eight bales of cotton destroyed by fire from defendant's engines. There was a judgment in favor of plaintiff, and defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant.

PLEASANTS, J. Appellee instituted suit in the county court of Burleson county, against appellant, for the recovery of the value of eight bales of cotton charged to have been burned by fire escaping from the engines of defendant through the carelessness and negligence of defendant's servants. The appellant answered by general and special demurrers and general denial and special plea,—that it used the most approved appliances for the prevention of the escape of fire from its engines, and that the burning of the cotton was not due to any negligence of defendant, but was the result of plaintiff's own negligence, in placing his cot-

ton upon defendant's platform, where it was likely to be set on fire. Trial was had, and judgment was rendered for appellee for \$332.32, with interest, and for costs; and, motion for new trial being overruled, the defendant appealed to this court, and assigns several errors, only two of which will be considered in this opinion. The evidence shows that the plaintiff's cotton was destroyed by fire while lying upon the platform contiguous to the depot at Lyons, and that the fire was kindled by sparks from a passing locomotive. There is no averment of delivery, either actual or constructive, made in the pleadings of appellee, but the petition does charge and complain that defendant was guilty of culpable negligence in not having provided a warehouse for the protection of cotton and other freight awaiting shipment by its trains. The evidence shows that without objection by appellant, or its officers or servants, those bringing cotton to Lyons had been accustomed, for several years, to place their cotton on the platform, and weigh and sample it, preparatory to selling it to the buyers in that market, and after sale the buyer would obtain from the appellant's agent at that station a bill of lading. The owner of this cotton testified: "The cotton was burned about 1 o'clock P. M. It was set fire by sparks from defendant's engine. I saw the engine as it was passing the depot, and the fire caught just after the train had passed. I was in the door of my store, with receipts, to go after bills of lading, when I saw the fire. I always got bills of lading signed whenever I carried them to the agent. He had never refused to sign them, no matter what time of day I carried them to him; but he did not like to do so before 4 o'clock, and had told me that was the custom. I expected him to sign the bills of lading for this cotton, though I presented them between 1 and 2 o'clock." There was evidence on the part of appellee that the engine, as it passed the depot, threw sparks and cinders upon cotton which was lying 40 or 50 feet from it. The platform upon which the appellee's cotton was, was about 15 feet from the train. The company had provided no other convenience for weighing or storing cotton than this platform. It was also shown, by other witnesses than the plaintiff, that the custom was to give bills of lading after 4 o'clock. The train was going at the rate of four or five miles an hour when it passed the depot, and the grade was slightly ascending. On part of defendant, there was the uncontradicted testimony of several experienced railroad men that the appliances for preventing the escape of fire, used by the defendant company upon its engines, were the very best known to railroad men, and that the appliances upon the engine from which the fire which burned the cotton escaped were in good condition on the day of burning; that this engine was

inspected by the agent of the defendant company charged with that duty on the 28th of August, and on the 29th, the day on which the cotton was burned, and again on the 1st of September, and upon each inspection both the engine and its fire appliances were found to be in good repair and condition. The engineer in charge of the train at the time of the burning testified that he took the train to the station, and backed out onto the main track, moving slowly and handling the engine carefully.

The following charge given by the court is assigned as error by appellant: "If you shall find from the evidence that the plaintiff deposited the cotton on defendant's platform for the purpose of shipment on defendant's road, and you further find that it was defendant's custom, or the custom of its agent at that point, not to receipt for cotton, or give bills of lading for same, until 4 o'clock P. M. on the day such cotton was so deposited on defendant's platform with its consent, or the consent of its agent, then if said cotton was burned by sparks communicated by a passing train on defendant's line of road, and by defendant's negligence, or its operatives', then defendant would be liable to pay to plaintiff the value of the cotton so destroyed, as may be shown by the evidence at the time it was destroyed, and you will so find your verdict. If not, you will find for defendant." A charge should present the law applicable to the issues raised by the pleadings and the evidence. The issue presented by the pleadings and the evidence was whether the defendant was guilty of negligence in burning plaintiff's cotton or not. The pleadings raise no issue of the delivery of the cotton to defendant for shipment, and if plaintiff is entitled to a recovery, under the pleadings, it is solely upon the ground that defendant negligently set fire to his cotton while operating its trains upon its line of railway, without negligence upon the part of plaintiff. The fact that the cotton was burned by fire emitted from defendant's locomotive being established by evidence, the burden of proof was upon defendant to show that the fire was not the result of its negligence, and if defendant showed by satisfactory evidence that it was using on its engine, at the time of the burning, the best mechanical appliances to secure safety from fire; that they were in good repair, and operated carefully and skillfully by a competent engineer,—defendant could not be chargeable with negligence, and the plaintiff should not recover. The charge complained of does not fully present to the jury the law applicable to the facts in evidence. It should have been supplemented by the charge asked by the defendant, and which is nominated in the assignment of errors "the appellant's fifth special charge." It was error to refuse this charge without giving another, embracing the rule of law

which the charge refused invokes. It is a sufficient answer to the assignment that the court erred in not giving a charge on contributory negligence to say that none was asked by the defendant. For the errors indicated in this opinion the judgment is reversed, and the cause remanded. *Vide* *Railway Co. v. Bartlett*, 69 Tex. 79, 6 S. W. Rep. 549, and *Railway Co. v. Benson*, 69 Tex. 407, 5 S. W. Rep. 822.

SOHMDIT v. BURNETT.¹

(Court of Civil Appeals of Texas. Sept. 14, 1893.)

EXECUTION FOR COSTS—SETTING ASIDE SALE.

Where a judgment for costs included items for which the party was not liable, and no bill of costs was presented, a sale for \$10 of land of such party, worth \$7,000, under execution issued on the judgment, made without the personal knowledge of the party, will be set aside.

Appeal from district court, Harris county; James Masterson, Judge.

Action by J. H. Burnett against Louis Schmidt to recover land sold under execution against plaintiff, and purchased by defendant. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by WILLIAMS, J.:

This was a suit by appellee to recover of appellant two lots of land in Houston, the petition embracing also an action to set aside a sheriff's sale of the property, at which appellant purchased it, on the ground of great inadequacy in the price, and irregularities in the execution and proceedings thereunder. Judgment was rendered in the court below for plaintiff, from which this appeal is taken.

Appellee was a defendant in a suit pending in the district court of Harris county on a change of venue from Galveston county, in which T. O. Becker et al. were plaintiffs, against the Gulf City Street-Railway & Real-Estate Company et al., defendants. In that cause, on the 15th day of May, 1890, a final judgment was rendered in favor of defendants therein against the plaintiffs, adjudging all the costs of the suit against plaintiffs. An appeal was taken by plaintiffs, and the supreme court reversed the judgment of the district court, (15 S. W. Rep. 1094,) remanding the cause for a trial, and adjudged all costs of the appeal against the defendants in that suit. On the 24th day of June, 1891, an execution was issued, under which the sale and purchase by appellant took place. The execution recites that on the 15th day of May, 1890, in that cause, a judgment was rendered against Theo. Becker et al., and that the sum of \$261.75, "costs of suit in this behalf," was adjudged against the Gulf City Street-Railway & Real-Estate Company et al.,

and that same was appealed to the supreme court, and said judgment was reversed, and cause remanded, and "said defendants were adjudged to pay all costs in this behalf incurred, as appears by the mandate of said supreme court filed this day," etc. It then proceeded to command the sheriff, in the usual language, to make out of the property of the defendants, naming them, and including appellee, the full amount of said costs, together with fees to accrue by virtue of the writ. Attached to this was the following statement, which is the only bill of the costs accompanying the writ:

Clerk's Fees.		Sheriff's Fees.	
Harris county.....	\$100 00	Harris county.....	\$ 4 25
Galveston county..	80 00	Galveston county....	67 00
	\$180 00		\$71 25
		Sheriff Harris county	8 25
			\$74 50

No bill of the costs incurred by them in the suit had been made out and presented to the defendants, or any of them, nor had any demand been made of them for the costs for which they were liable prior to the issuance of the writ. While the writ was in the hands of the sheriff the attorney for the defendants declined to pay the sum demanded under it, but expressed to the sheriff and to the district clerk, before the levy, a willingness to pay the costs properly chargeable to the defendants; and after the sale such costs were paid by the defendants. Burnett resided in Galveston county, and had an agent in Houston with authority only to collect rents upon this and other property. To this agent the sheriff carried the execution, and demanded that he either pay the amount called for by it or point out property on which to levy it, which the agent refused to do. Burnett had no personal knowledge of the issuance of the execution, levy, and sale until after the latter had taken place. As soon as he learned it, he tendered to Schmidt \$10, the amount paid for the two lots at the sheriff's sale, and, upon Schmidt's refusal to receive it, brought this suit. The property is shown to have been worth from \$7,000 to \$8,000.

Howard Finley, for appellant. Jas. B. & Chas. J. Stubbs, for appellee.

WILLIAMS, J., (after stating the facts.) At the time the execution was issued there was no judgment which authorized the collection from the defendants in the former suit of all the costs of the suit for which it was issued. The judgment of the supreme court adjudged against them only the costs of the appeal. Part of these must have accrued in the district court, and then could have been collected by execution issued from that court upon the judgment of the supreme court after the mandate was filed. This was all that could lawfully have been collected from defendants by execution. It does not appear from the execution whether the costs

¹ Rehearing denied.

of the appeal which accrued in the district court are included or not. If they are, they are not separated from the remainder of the costs, so as to give the defendants an opportunity to pay them. The sheriff had no right to collect any other. Assuming that the writ issued upon the judgment of the supreme court, which is the view most favorable for appellant, but which is not clear from its terms, it commanded the collection of money not authorized by that judgment. It is not necessary for us to decide that the writ was void, for, treating it as voidable only, it was so grossly irregular that, coupled with the enormous inadequacy of the price which the property brought, it affords just grounds for avoiding the sale. The writ cannot be upheld under article 1420b, Sayles' St. That provision authorizes the collection from any party of the suit of costs taxable against him by a certified bill of costs having the force of an execution after the payment thereof has been demanded and refused. This was not a certified bill of costs. It contained all of the costs of the suit, for which the defendants were not liable, and no demand had been previously made for those for which they were responsible. This suffices for the disposition of the case without considering the other points in which appellee claims the sale was irregular. The judgment is affirmed.

WEISS et al. v. DITTMAN.

(Court of Civil Appeals of Texas. Sept. 14, 1898.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE.

1. In an action to set aside deeds to defendant on the ground that they were in fraud of the grantor's creditors, there was evidence that the grantor had acted honestly, and there was also evidence of a state of facts which, if established, would show constructive fraud. Plaintiff propounded special issues as to such facts. The court submitted the special issues, and also charged that, unless the jury should find that the deeds were made for the purpose of defrauding the grantor's creditors, and defendant knew it at the time he took the deeds, they must find for defendant. *Held*, that the charge was erroneous, as leading the jury to believe that they must first find the fraudulent purpose on the grantor's part, before the facts contained in the special issues could have any effect.

2. Where the complaint in an action to set aside deeds to defendant on the ground that they were made to defraud the grantor's creditors also alleged that the deeds were intended as mortgages, and asked appropriate relief in case such should be found to be the fact, and evidence is adduced in support thereof, it is error for the court to refuse to charge on the hypothesis.

Appeal from district court, Colorado county; George McCormick, Judge.

Action by Weiss Bros., for the use and benefit of L. Kaufman, as assignee of H. Amthor, against C. A. Dittman, to set aside certain deeds as in fraud of the grantor's

creditors. There was a judgment in favor of defendant, and plaintiffs appeal. Reversed.

Foard, Thompson & Townsend, for appellants. Delany & Kennan, for appellee.

WILLIAMS, J. This suit was brought by appellants, as accepting creditors under a statutory assignment made by H. Amthor for the benefit of creditors, the assignee having declined to bring it, to set aside certain conveyances of property made by the assignor to the appellee, previous to the assignment, and to reduce such property to the possession and control of the assignee, to be applied to the payment of creditors. The petition charged that the conveyances were made in contemplation of the assignment, and with intent to defeat, delay, and defraud creditors, and with intent to give preference to one creditor over others. It was further alleged that the conveyances were made to appellee as mortgages to secure debts claimed by him against the assignor, and a prayer in the alternative was made that, if this should be found to be the case, and the transactions held to be valid as mortgages, the property be sold, and the excess, after satisfying appellee's claims thus secured, which were alleged to be much less than the value of such property, be declared assets in the hands of the assignee. Appellee denied all the material allegations, and the case was tried before a jury, and a verdict was rendered for defendant. At the request of the plaintiffs the court gave certain instructions to the jury upon the law of the case, and submitted special issues intended to obtain findings of fact from which the court could determine whether or not the conveyances were fraudulent, and also whether they were absolute or were intended as mortgages. The judge also prepared and gave other instructions upon the law of the case, among which were the following: "If you find that the sale and conveyance to Dittman was fraudulent and void, under the two preceding sections of the charge, then you will proceed to find from the evidence the true answers to the special issues or questions propounded you in the charges asked by plaintiff, which are given as a whole, both issues and law, as contained therein, with this charge as the law of the case, which you are to consider in connection with this charge." "Unless you find from the evidence that Amthor conveyed said property contemplating an assignment, and for the purpose of hindering, delaying, and defrauding his creditors, and that Dittman knew that was his intention at the time he purchased it, or could have known it by the use of ordinary diligence and inquiry, then you must find for the defendant Dittman." The jury made no finding in answer to the special issues, but returned a general verdict in behalf of defendant.

Both of these instructions are assigned as error, and concerning them it is claimed by

appellants that they were injurious to them in relieving the jury from the duty of passing upon the special issues except in the event they determined that the deeds were made with the fraudulent intent specified. The method of submitting the case to the jury, whether upon the general issue or upon the special issues, was largely discretionary with the court below. Having the right to refuse to submit special issues, it was not necessarily a reversible error to withdraw them after they were submitted. To make it such some injury must have resulted to the party complaining. Here, however, the facts especially called to the attention of the jury by the special issues were those upon the existence or nonexistence of which the question whether or not the deeds were fraudulent in law depended. There was evidence tending to prove the honesty of Amthor in these transactions, and the absence of any intent actually corrupt on his part. But there was also evidence which tended to show a state of facts which deprived him of the right to make the conveyances, and to constitute them fraudulent in the sense of the law, because of their effect upon the rights of other creditors. The finding of these facts was sought by the special issues. The charge, which in effect informed the jury that, unless they found a fraudulent purpose on Amthor's part, they need not consider the questions presented in the special issues, was very well calculated to impress them with the belief that they must first find a fraudulent purpose on Amthor's part, before the other facts sought to be elicited could have any effect; in other words, that the fraud charged might not result from the effect of the conveyances upon the rights of creditors as well as from an established purpose in Amthor's mind to defraud them. Facts were charged which, if established, would avoid the conveyance under the statute of frauds, without reference to the assignment law. Those transactions were attacked on both grounds. Though the deeds may not have been made in contemplation of the assignment, and with the specific intent charged, they may still have been fraudulent as against creditors, under the general rules of law upon that subject. The plaintiffs, having requested charges submitting issues intended to ascertain the facts upon which the latter question would depend, were entitled to have the jury pass upon the issue in some form, and of this right we think the charges quoted, in effect, deprived them.

Another objection to these charges, which we think is well taken, is that they withdrew from the jury the issue submitted in the charges requested by appellants as to whether or not the deeds were given as absolute sales or as security for debts. There was some evidence that the deed and bill of sale of December 6, 1887, were intended merely as securities for a debt due from

Amthor to Dittman, and that the property was worth much more than the debt, though as to both facts there was a conflict of testimony. For these errors the judgment must be reversed.

It is unnecessary to enter upon a discussion of the rules of law by which the validity of the deeds is to be determined, as they are well settled and understood. In connection with the deed of December 12, 1887, a question is presented which, in view of another trial, it is proper for us to decide. In that transaction appellee bought from Amthor the land conveyed by that deed, paying him \$3,900 in cash. It was stated at the time by Amthor that he wanted the money to pay some debts. He was insolvent, and the next day made the assignment. He did, according to his testimony, pay one debt out of the money received from this sale before he assigned, and paid out the whole of the remainder of the consideration upon other debts after the assignment was complete. It is now well settled by the decisions in this state that a purchaser who knows or has just reason to believe his vendor to be insolvent, and who pays cash for the property bought under such circumstances, must see that it is applied to the discharge of debts of the vendor, in order to make valid the conveyance. The debtor having the right to prefer his creditors, the law does not ordinarily concern itself with the application of the consideration further than to require that it be made to the discharge of just and valid debts. But the debtor has not the right to make an assignment and retain the money in his hands, for the purpose of preferring certain of his creditors above the others. With the making of the assignment his right to prefer comes to an end, and the money in his hands passes with his other assets to his assignee for the benefit of all of his creditors. The principle which requires the purchaser from a debtor known to be insolvent to see the application of the purchase money exacts of him that he see to the lawful application of it. It is because the application is lawful that his conveyance is upheld, the law permitting him to aid the debtor in doing that which it permits the latter to do. It does not permit him, however, by his improvident action to place it in the power of the debtor to practice a fraud upon his creditors. That is just what appellee by this purchase did, if he knew, or ought to have known, that Amthor was insolvent. It is urged by appellee that the deed was complete and valid when made, and was not affected by the subsequent action of Amthor; but such is not the law. Such a conveyance by a debtor known to be insolvent is permitted by law upon condition that the consideration is lawfully applied. That Amthor thought the debts which he paid after he had assigned, and which he had individually contracted, were superior to those incurred in the mercantile business conducted

by Braden, for which Amthor was liable, cannot affect the question. After the assignment all creditors had the right to an equal participation in the money. The proper application for Amthor to have made of it was to turn it over to his assignee. In not doing so he practiced a legal fraud upon those of his creditors who were excluded from the benefit of it. Our conclusion is that, Amthor being insolvent when this deed was made, it cannot be upheld if appellee knew of such insolvency, or knew of circumstances which should have put him on inquiry. As to whether the conveyances were made in contemplation of the assignment, and with the intent charged, and as to other questions of fact upon which the case depends, we express no opinion, as they should be submitted to the jury upon the evidence. The other objections to the charge are not well taken. Reversed and remanded.

TRIPIS v. ROSBOROUGH et al.

(Court of Civil Appeals of Texas. Sept. 14, 1893.)

TRIAL—SPECIAL VERDICT—SUFFICIENCY TO SUPPORT JUDGMENT—REAL ESTATE COMMISSIONS.

Plaintiffs alleged that defendant agreed to join with them in a certain land purchase, each taking a third interest; that, unknown to them, defendant was agent for and received commissions from the vendor; that afterwards he refused to carry out his agreement with them; and that he transferred his interest in the purchase to one of them in consideration of his release from the obligation to pay part of the price. Defendant denied generally, and, for special answer, admitted that he bought the land with plaintiffs, and alleged that his transfer to one of them was made in a settlement, by which it was agreed that he should retain all commissions received by him. The court submitted to the jury the questions whether plaintiffs, when purchasing, knew that defendant was the agent of the vendor, and whether they relinquished their claim to commissions received by defendant, as he alleged. *Held*, that answers by the jury in the negative to both questions did not justify a judgment for two-thirds of the amount of commissions alleged to have been received by defendant.

Appeal from district court, Aransas county; H. Clay Pleasants, Judge.

Action by J. B. Rosborough and another against Joseph Tripis and others. From a judgment for plaintiffs, defendant Tripis appeals. Reversed.

M. J. Hathaway, for appellant.

GARRETT, C. J. Appellees brought this suit against Joseph Tripis, the appellant, and Clara Smith and her husband, Sam H. Smith, and Fannie E. Picton and her husband, David M. Picton, to recover of Tripis certain commissions for the sale of land, which they alleged had been paid to the said Tripis by his codefendants, and to be subrogated to the right of Tripis to recover of said Smith and wife and Picton and wife

further commissions, which had not been paid, and for which suits were then pending by Tripis against them. Plaintiffs alleged that they had entered into a joint agreement with the said Tripis to purchase certain lands of the other defendants, which was concluded by a written contract signed by all of the parties, whereby Smith and wife and Picton and wife, in consideration of \$10,000 paid in cash, and other sums to be afterwards paid, as specified, obligated themselves to convey said land to J. B. Rosborough, J. M. Rosborough, and Joseph Tripis jointly; that, at the request of Tripis, the Rosboroughs advanced for him the one-third of the cash payment to be made by him, which was to be repaid to the Rosboroughs when the second payment on the land fell due; that plaintiff did not discover until some time afterwards that at the time of the sale Tripis was the agent of Smith and wife and Picton and wife to effect a sale of said land, which they alleged to be a fact. They averred that Tripis fraudulently concealed the fact of his said agency from plaintiffs, and charged other acts of fraudulent conduct on the part of Tripis, done to mislead and cheat plaintiffs; that he had received as commissions for making said sale the sum of \$1,000 from Smith and wife, and the sum of \$450 from Picton and wife; and, for further commissions, had recovered a judgment in the county court of Aransas county against Smith for \$737.48, which was pending in the court of appeals, and had a suit then pending in said county court against Picton for \$450. Plaintiff also alleged that Tripis was unable and refused to carry out his part of the contract to purchase the land, and they had procured one Packard to do so; and that, in consideration of a release from his obligation to pay one-third of the purchase money, Tripis transferred his interest in the said purchase to the said Packard. Smith and wife and Picton and wife made no answer. Tripis answered with a general and special demurrer, general denial, and for special answer to the merits he admitted that he had bought the land with plaintiffs, and set up that he had transferred his interest to Packard, but that said transfer was made in a settlement, in which it was agreed that Tripis should retain all of his commission on said sale.

Upon the trial in the court below the judge submitted to the jury the following two special issues, directing the jury to find neither for the plaintiffs nor the defendant, but simply to answer the questions "Yes" or "No." The questions were: "(1) At the time of the purchase by the defendant, on joint account for himself and plaintiffs, of the interest of Mrs. Smith and Mrs. Picton in the lands of their father's estate, did the plaintiffs know that the said defendant was the attorney or agent of said Smith and said Picton for the sale of said land? (2) When defendant conveyed all of his right and in-

terest in the lands purchased for himself and plaintiffs from said Smith and the said Picton to J. Q. Packard, did plaintiffs agree and promise, in part consideration of such release and conveyance, to relinquish to defendant all their right and claim to the commissions paid and to be paid by the said Smith and the said Picton to the said defendant for making the sale of their lands?" The jury answered both of the questions "No." Upon this verdict the court rendered judgment in favor of the plaintiffs for two-thirds of \$1,450 in money, and subrogating them to the ownership of two-thirds of the claim and judgments against Smith and Picton, describing the judgment against Smith and the suit against Picton and wife. All the issues made by the pleadings in the case were not submitted to the court, and the facts elicited by the verdict upon the special issues were not sufficient to support the judgment that was rendered thereon. When a case is submitted by the trial court to a jury upon special issues, the court cannot look beyond the verdict to the evidence for facts upon which to enter the judgment. *Newbolt v. Lancaster*, 83 Tex. 272, 18 S. W. Rep. 740; *Mussina v. Shepherd*, 44 Tex. 626; *Clalborne v. Tanner*, 18 Tex. 78; *Kuhlman v. Medlinka*, 29 Tex. 385. The judgment of the court below will be reversed, and the cause remanded.

PLEASANTS, J., did not sit in this case.

TEXAS-MEXICAN RY. CO. v. CAHILL.¹

(Court of Civil Appeals of Texas. Sept. 14, 1893.)

SPECIAL JUDGE—AUTHORITY—CONSOLIDATION OF CAUSES—FORCEFUL ENTRY—JUDGMENT—ATTORNEYS.

1. A judge specially appointed to try a cause, because the regular judge is disqualified, cannot consolidate the cause with another, which he has not been authorized to try.

2. An action for forcible entry and detainer for holding over under a lease cannot be consolidated with a suit in trespass to try title to the same property.

3. Though a judgment in trespass to try title has been rendered against a landlord, the attornment of the tenant to the successful party will not relieve it of the necessity of restoring possession to the landlord on termination of its lease.

4. A writ of possession issued by a federal court in 1879, which remained in possession of the agent of the successful party until 1882, when it was placed in the hands of a deputy marshal for execution, was *functus officio*, and did not affect the rights of the parties evicted under it.

5. In forcible entry and detainer a judgment against a tenant for the possession of a certain lot, and damages for its detention, is erroneous, where the evidence shows that a small fraction of the lot, only, was leased.

Appeal from district court, Nueces county; James B. Wells, Special Judge.

Forcible entry and detainer by Johanna Cahill against the Texas-Mexican Railway

Company. Judgment for plaintiff. Defendant appeals. Reversed.

Thos. W. Dodd and G. R. Scott, for appellant. F. E. MacManus and Henderson & Henderson, for appellee.

PLEASANTS, J. This suit was instituted in justice court in December, 1884, under the statute of forcible entry and detainer, to recover the possession of lot No. 2 in block No. 2 in the city of Corpus Christi from appellant. Judgment was rendered by the justice for appellee, from which an appeal was prosecuted to the district court; and after trial in that court, and appeal to the supreme court, and judgment therein reversing and remanding the cause, (12 S. W. Rep. 1128,) it was again tried in the district court of Nueces county before the Honorable J. B. Wells, special judge, and judgment rendered on the 20th of April, 1892, for the possession of the lot, and damages for detention of the premises by defendant company after the expiration of its lease, and after demand for restoration of the possession to the appellee, who had leased to the appellant in November, 1892. The trial was by jury, and after motion for new trial, which was overruled, the defendant appealed to this court. The assignments of error are numerous, but we shall consider and dispose of only such of them as we deem it necessary to decide for the guidance of the court upon another trial.

There was no error in refusing the motion of appellant to consolidate this suit with that of the Corpus Christi Land Company v. the appellee, pending in the same court at the time of the trial. The judge who tried this cause was specially appointed to do so, the judge for that judicial district being disqualified. One who is appointed specially to try one cause is not authorized to try any other cause pending in the court unless he be selected to do so by the parties to the suit. But apart from the want of power in the judge presiding to try the case of the Corpus Christi Land Company v. Johanna Cahill, the motion to consolidate was properly refused. The appellee's suit, as we have seen, was brought under the statute which provides a remedy for the recovery of the possession of real estate when the premises are in the quiet occupancy of one, and they are forcibly entered by another, or where a lessee, after the expiration of his lease, refuses to restore possession to his lessor. The statute provides a speedy and efficient remedy for restoring possession to him who is wrongfully deprived of the same, and no inquiry as to the title to, or the superior right of either party to the suit or that of any third person in, the property, is permitted. The suit of the Corpus Christi Land Company against Johanna Cahill was a suit of trespass to try title to the lot in question. To permit the consolidation of such suits

¹ Rehearing denied.

would be contrary to the obvious policy of the law, and in most cases defeat the object of the statute,—the prompt adjudication of the right of possession to the premises, without reference to the right of title to the property.

While there are exceptions to the rule which forbids inquiry as to the title of the property in proceedings under the statute of forcible entry and detainer, we are of the opinion that the appellant does not bring himself within any of these exceptions. When the lease was made from appellee to appellant, appellee was in quiet possession of the premises, and while it may be conceded that the decree rendered by the circuit court of the United States for the eastern district of Texas in 1873 establishes the right of those claiming under the plaintiff in that suit to the lot in question, as against the appellee, as she seems, from the evidence, to deraign title from those who purchased pendente lite, yet unless there has been a change in the possession of the premises, effected by legal proceedings under and by virtue of that decree, the attornment of the appellant to the Corpus Christi Land Company will not relieve it from its obligation to restore possession of the property leased.

It is insisted by appellee that the decree, so far as it directs the issuance and execution of a writ of possession, is null and void; and, while we are not prepared to assent to this, we are aware that the power to issue writs of execution is not inherent in courts of chancery, as in courts of law, and that the chancery courts of the United States, except when the decree is for land, only issues such process when expressly authorized to do so by statute, or by rules of the supreme court made and published by authority of the statute. Vide *Freem. Ex'ns*, § 10, pp. 10, 11; *Daniell, Ch. Pr.* (4th Amer. Ed.) p. 1031. The decree of a court of equity, unless it be for land, operates only in personam, and the method of enforcing it is by means of what is termed "process of contempt" against the party disobeying the decree. Where land is the subject-matter of the decree, if within the jurisdiction of the court, the court does not exclusively rely on proceedings in personam, but will put the successful party in possession of the land, if the other party remains obstinate, and refuses to comply with the decree. Vide 2 *Daniell, Ch. Pr.* (5th Ed.) p. 1032; *Story, Eq. Pl.* § 744. It seems that the decree itself does not operate to divest title, but the divestiture is complete when the party entitled is put in possession of the land. The vice in appellant's case is that it does not appear that the appellee had ever refused to obey the decree rendered in chancery by the United States circuit court, for the plaintiff, in the suit of *J. Temple Doswell v. The Personal Representatives of H. L. Kinney*, under whom the appellee deraigns title, or that any proceedings had been instituted

in that court, subsequent to the decree, for the purpose of showing to the court that the defendants in the suit, or those claiming under them, had refused to surrender possession in obedience to the decree. Until this was done, it would seem that a writ of possession could not legally issue from that court in favor of plaintiff, or those claiming title under him. It appears, also, that the writ of possession by virtue of which it is contended the appellee was ejected from the premises, and the Corpus Christi Land Company was placed in possession, issued in 1879, and remained in the possession of the agent of the last-named company until he placed it in the hands of the deputy marshal for execution, in the fall of 1882. From this evidence it would seem that the writ was functus officio long before its execution by the marshal, and, if so, the acts of that officer were without authority of law, and therefore could not affect the rights of the appellee. The marshal was an intruder and a trespasser. Under these circumstances, we cannot hold that there has been a change in the relation of the appellee towards the lot in question since the lease was made to and accepted by the appellant, and consequently we cannot say that the learned judge who presided in the trial of the cause committed an error in withdrawing from the consideration of the jury the decree in chancery, and the alleged execution of the writ of possession by the deputy marshal, as well as evidence of the attornment by the appellant to the Corpus Christi Land Company.

The judgment is for the possession of the whole of the land, and damages for its detention, while the evidence is that a small fraction, only, of the lot was leased. If such be the case, the plaintiff could only recover for so much as was actually leased, and damages for the detention thereof, from the perfection of defendant's appeal from the justice's court to the district court, the measure of damages being the rental value of that portion of the lot leased and occupied by the defendant. The plaintiff should also recover a reasonable attorney's fee. For the errors here indicated the judgment of the court is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. WOLSTON
et al.

(Court of Civil Appeals of Texas. Sept. 14,
1893.)

ACTION—RIGHT TO MAINTAIN.

One B., to whom butter had been consigned over defendant's road, turned it over to plaintiffs, with a request that they sell it for his account, and sue defendant for damages through delay in delivery. *Held*, that plaintiffs had no cause of action; the claim of B. not having been assigned to them, and they not having been his factors, and entitled to possession of the butter, when the cause of action accrued.

Error from Galveston county court; William B. Lockhart, Judge.

Action by R. W. Wolston & Co. against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

J. W. Terry, for appellant. John W. Campbell, for appellees.

WILLIAMS, J. The shipment of butter, for damage to which this suit is brought, was consigned by a firm in Kansas to G. C. Bauman, at Galveston. After the damage had resulted, and after the butter had arrived at Galveston, it was turned over by Bauman to appellees with request that they sell it for his account, and sue for the loss. There was no evidence that appellees had any property in the butter, either general or special, at the time it received injury, nor was there any evidence of an assignment by Bauman of his cause of action. They were not, so far as the record discloses, the factors of the consignee, having any sort of right to the possession of the butter, when the cause of action accrued. The fact that the agent of appellant, when appellees were investigating the damage to the butter, requested them to take and sell it, and make out a claim for the loss, could not confer upon them a cause of action to which they were not otherwise entitled. There was no promise to pay the amount of the loss to them, and they show no cause of action in themselves. For this error the judgment is reversed, and the cause remanded.

WACO STATE BANK v. STEPHENSON MANUF'G CO.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

GARNISHMENT.

The answer of a corporation, as garnishee in an action, stated facts showing that certain shares of corporate stock were community property of defendant and his wife, and defendant's answer denied this, and averred that the stock was the separate property of his wife. *Held*, that it was error to discharge the garnishee on defendant's answer, without hearing evidence in support thereof.

Appeal from McLennan county court; H. H. Jenkins, Judge.

Action by the Waco State Bank against W. S. Martin, in which the Stephenson Manufacturing Company was summoned as garnishee. There was a judgment discharging the garnishee, and plaintiff appeals. Reversed.

The other facts fully appear in the following statement by COLLARD, J.:

This is a garnishment proceeding ancillary to the suit of appellant, the Waco State Bank, against W. S. Martin. The writ and its service upon the garnishee were of date 17th of January, 1891. The appellee, the

Stephenson Manufacturing Company, is a private corporation, and as such, in addition to the usual answers, was required to answer as to W. S. Martin's ownership of shares of stock of the company, or interest therein. The answer of the garnishee upon this subject is as follows: 'That said company or affiant [its secretary and business manager] has no positive knowledge as to whether or not the said W. S. Martin was at the time of the service of said writ, or now is, in any way interested in said Stephenson Manufacturing Company. That the books and records of said company did not at the time of the service of said writ, and do not now, show that the said W. S. Martin now owns, or ever owned, any shares or share in the stock of said company. That the following are all of the facts known to affiant or said company relating to said W. S. Martin's connection with or interest in, if any, share or shares of the stock of said company: In October, 1890, A. Symes was the owner of five shares, of the par value of one hundred dollars each, in the said Stephenson Manufacturing Company; and about the middle of October, 1890, said A. Symes called at the office of said company, and told affiant that he (Symes) had sold his said stock to 'Mr. Martin,' and that he (Symes) would be down in a few days to have it transferred. Affiant then asked, 'What Martin?' and said Symes replied, 'The sheep man Martin.' On October 22, 1890, said Symes called again at the office of said company, and produced his certificate for said shares of stock, and said to affiant he (Symes) then wished to have the stock transferred to Martin. Affiant, who was then the business manager of said corporation, herein garnished, then instructed the bookkeeper of said company to fill out a new certificate of stock; and he (said bookkeeper) asked said Symes in what name the certificate should be written, to which said Symes replied, 'M. E. Martin.' Said bookkeeper also, then, at the instance of affiant, wrote in the office record book of said company an acknowledgment of the fact that A. Symes had sold his said shares of stock to M. E. Martin, which affiant then requested said Symes to sign. This said Symes refused to do, saying that it was unnecessary, and thereupon affiant refused to issue the certificate, for the reason that the by-laws of said company required affiant to keep such a record. Said Symes then went away, and returned next day with said W. S. Martin, and the former said they now desired to make said transfer; and he also remarked that he had consulted Mr. Seley and others, and that it was not proper for affiant to require him to sign a record stating to whom he had sold his stock. Affiant still insisted that such record be kept, and at length said Symes signed such record of sale of said shares of stock to M. E. Martin, and Symes returned certificate of stock No. 17, for said five shares; and affiant, in ex-

change therefor, then issued and delivered to said Martin stock certificate No. 21, issued to M. E. Martin, for five shares of stock in said corporation, of the par value of one hundred dollars each, and said Martin received the same, and on the stub of the stock book of said company receipted for the same, signing, simply, 'M. E. Martin.' That, a few days after said transfer of stock, Mr. W. W. Seley, of the Waco State Bank, met affiant, and asked if Mr. Symes had transferred his said stock to Martin, and affiant answered in the affirmative, affiant then supposing that the said W. S. Martin's initials were 'M. E.' That about the middle of the month of December, 1890, said W. S. Martin called at the office of said company, and told affiant that M. E. Martin was his wife, and that said stock belonged to her, which was the first time affiant heard of Mrs. Martin in connection with the matter, and the time when affiant first learned the initials of said W. S. Martin. That, a few days after the service of the writ of garnishment herein, Mr. H. O. Wilson called at the said office, and told affiant that he had purchased the said five shares of stock, and asked that the same be transferred to him, and affiant refused to make any transfer of said stock, because of said writ having been served on said company. Affiant says that the above is a full and correct statement of all the facts relating to the connection of said W. S. Martin, if any, with the stock of said corporation, as the same were and are known to said corporation, and are recollected by affiant, * * * and that said stock now stands on the books of said company in the name of 'M. E. Martin.' Plaintiff made no reply to the answer of the garnishee, but defendant Martin did controvert it under oath. Sayles' Civil St. art. 212. He denies that the stock is his property, but says it is the separate property of his wife, M. E. Martin, or of Wilson, for that, he says, before the writ of garnishment, it was the separate property of his wife; that on July 1, 1890, he and his wife owned a homestead in McLennan county, of 200 acres of land, a part of a larger tract owned by them; that about October 1, 1890, they sold the homestead, with the other land, to A. Symes; that before the sale, and before his wife would agree to sell the homestead, it was agreed between defendant, his wife, and Symes that the stock should be assigned to his wife as her separate property, as part consideration of the homestead, and that in compliance with the agreement, and as part consideration to her for the homestead, Symes, on October 1, 1890, transferred the stock to her; and that it has all the time, until the sale to Wilson, been her separate property, and is not, and never was, the community property of himself and wife; is not, and never was, subject to the payment of his debts. Defendant, also, in due order of pleading, excepted to plaintiff's maintain-

ing the suit, as the answer of the garnishee shows that Mrs. M. E. Martin and H. O. Wilson should be made parties defendant, and that the answer also shows that M. E. Martin or Wilson, and not defendant, was the owner of the stock. The garnishee demurred to defendant's answer upon the ground that it states no facts in addition to, and does not deny, the facts set up in the garnishee's answer. Plaintiff, the Waco State Bank, moved to strike out the answer of the defendant W. S. Martin, because it does not controvert the answer of the garnishee, and because Martin alleges that the stock was transferred to one H. O. Wilson, but shows no reason why he should make defense for Wilson, who is not a party to the suit. Plaintiff denied the answer of Martin, and alleged that, at the time of the alleged transfer of the stock to M. E. Martin, W. S. Martin was insolvent, and the pretended transfer to his wife was fraudulent, and that the subsequent transfer by Martin and wife to Wilson was also fraudulent, intended to hinder and delay creditors of W. S. Martin, including plaintiff, and passed no title, and that the stock belonged to the community estate of Martin and wife, and was subject to the garnishment. Plaintiff's reply was not sworn to. Defendant demurred to the reply of plaintiff, and denied the facts stated. The cause was submitted to the court upon the law and facts. The demurrer of the garnishee to the answer of defendant, and the exceptions of plaintiff to such answer, were overruled, plaintiff reserving exception. The court sustained defendant's objections to any evidence on the part of plaintiff, to which plaintiff excepted; and judgment was rendered, discharging the garnishee upon its answer, adjudging costs against plaintiff, including \$20 as attorney's fee in favor of the garnishee. Plaintiff appealed.

Herring & Kelly, for appellant. Baker & Prendergast, for appellee.

COLLARD, J., (after stating the facts.) We will notice but one of appellant's assignments of error, to the effect that the court should have rendered judgment in favor of plaintiff upon the answer of the garnishee, which showed that the garnishee held stock subject to garnishment, belonging to the community of Martin and wife. The answer of the garnishee stated facts which, in our judgment, in the absence of proof to the contrary, established the fact that the stock was the community property of W. S. Martin and his wife. The garnishee states in the answer that Martin informed him that M. E. Martin was his wife. This statement would be an admission of the fact against the interest of the defendant, and, besides this, he sets up the fact in his answer. The fact that she was his wife was in this manner unquestionably before the court. She being his wife at the time of the

acquisition of the stock would constitute it community, unless the contrary be shown. Defendant controverted this conclusion by his sworn answer, setting up facts which put the title in the wife in her separate right. His answer did not prove itself. The burden was upon him to establish it by evidence. His answer controverted the answer of the garnishee, which answer of the garnishee made a prima facie case in favor of plaintiff. The answer of the garnishee did not state as a fact that the property was the separate property of Mrs. Martin, or facts that would make it her separate property. It only stated that Martin said it was her property, which was a statement of hearsay. It was made to appear by the answer of the garnishee that the stock was community of Martin and wife. This fact not being controverted by proof, the court should have entered judgment against the garnishee, as required by the statute. Rev. St. arts. 208, 209. See, also, *Id.* arts. 205, 206. Such judgment could not affect the rights of persons not parties to the suit, so that if the stock was in fact the separate property of Mrs. Martin, and had been transferred to Wilson, he would not be prejudiced by the judgment against the garnishee. If the stock was transferred to Mrs. Martin as her separate property, as part consideration of the sale of their homestead by her and her husband to Symes, the transfer to her would not be a fraud upon creditors. They could have no interest in such a transaction, and would not be injured. In view of the condition of the case, and after proper consideration of the matter, we have concluded it would be best not to render judgment final in this court, but to reverse the judgment of the court below, and remand the cause for another trial, and it is so ordered.

RECEIVERS INTERNATIONAL & G. N. RY. CO. v. ARMSTRONG.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

CARRIERS—INJURIES TO PASSENGERS—AUTHORITY OF TRAINMEN—OPINION EVIDENCE.

1. A provision in a contract of shipment of live stock that the shipper, to whom a shipper's pass on the same train was given, should feed and water the animals on the way, is not void as an attempt by the carrier to relieve itself of its duty in that respect, but is a license to the shipper to look after his stock; and he does not, by exercising such license, lose his status as a passenger, so as to preclude him from recovering for injuries, while so engaged, caused by the carrier's negligence.

2. Where a trainman in authority tells a shipper of live stock that the train will remain standing for some time at a certain point, and directs him to look after the stock at that time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for their stock.

3. Where a train is in charge of a conductor, a brakeman is not authorized to make

statements to passengers as to the movements of the train, and a passenger who is injured by relying on such statements cannot recover from the company.

4. Where a shipper of live stock stands on the drawhead of a car while caring for the animals in the car, and is injured, the question as to whether it was necessary for him to assume that position is one of fact, and is not the subject of opinion evidence.

Appeal from district court, Williamson county; W. M. Key, Judge.

Action by J. E. Armstrong against the receivers of the International & Great Northern Railway Company for personal injuries. There was a judgment in favor of plaintiff, and defendants appeal. Reversed.

Fisher & Townes, for appellants. J. W. Parker, for appellee.

FISHER, C. J. Appellee was a passenger upon appellants' freight train, by virtue of a stock shipper's contract, wherein it was provided that he should look after and feed and water his car load of horses en route from Taylor, Tex., to Memphis, Tenn. While the train had stopped at Rockdale, in the night, he, in an effort to get up one of his horses that was down in the car, got upon the drawhead of the cars between the caboose and the car in front, in which his horses were confined; and, when in such position, the train was, without warning or signal, backed, and thereby caused his foot to become fastened between the deadwood and the drawhead of the cars, and severely crushed. For the damages resulting from the injuries sustained, he brings this suit, and, upon trial, verdict and judgment were in his favor.

The first assignment of error goes to the ruling of the court in overruling the demurrers addressed to the petition. No error was committed in this ruling, and we dismiss the question without discussion.

The fourth subdivision of the charge of the trial court instructs the jury that, "under the contract of shipment, the plaintiff was a passenger on defendants' freight train on the occasion in question, having the right and privilege, when said train was not moving, of leaving the caboose, (in which it was his duty to remain while the train was in motion,) to see about and attend to his said car load of horses, being transported on said train. Such right and privilege, however, did not relieve plaintiff from the duty of avoiding apparent danger, and the exercise of care and caution to protect himself from injury. The law requires him to exercise such care while attending to said live stock as a man of ordinary prudence would have exercised under such circumstances." Appellants contend that it was error to give this charge, for the reasons, substantially, that the provision in the contract of shipment requiring the appellee to feed and water and to generally look after his stock was void, and could not be en-

forced, as the duty, in such case, rested upon the carrier, and that it could not shift it by a contract to that effect, and that the appellee was under no obligation or duty to look after his stock, and when he did so he attempted the exercise of a right not ordinarily given a passenger, and that the charge quoted permits him to exercise such a right free of the risks and burdens he assumed as an employee by virtue of his conduct. It is held that provisions in contracts of this character, making it the duty of the shipper to feed and water and care for his stock, will not be given effect, so as to relieve the carrier of its duty to the shipper as a passenger traveling upon a drover's pass, and will not relieve the carrier from its negligence in failing to exercise the proper degree of care in the general exercise of its duty that it, as a carrier, owes to stock placed in its possession for transportation. *Railway Co. v. Lockwood*, 17 Wall. 357; *Railway Co. v. Ivy*, 71 Tex. 414, 9 S. W. Rep. 346; *Railway Co. v. Smith*, (Tex. Sup.) 16 S. W. Rep. 803. The primary reason why a carrier cannot, in this respect, shift its responsibility and duty, is that it is not just and reasonable, in the eye of the law, to permit it by contract to relieve itself from responsibility for the negligence of itself or servants, and to permit it by contract to shift a duty and responsibility that it, as a common carrier, owes to the shipper, and to the preservation and care of the thing confided to its custody for shipment. But do these rules of law necessarily result in denying the privilege to the shipper to look after his stock, when so agreed to by the carrier? It is true the carrier cannot, by contract, relieve itself of this duty by placing its performance upon the shipper, nor can it, by contract, relieve itself of its duty to the shipper as a passenger, when accompanying the shipment, but it may grant the privilege or license to the shipper to look after his stock, holding him liable for his negligence in the exercise of it. The shipper, in looking after his stock under such a grant of privilege or license from the carrier, does not lose his status as a passenger, and the duty of the carrier in the exercise of proper caution and care towards him still exists; and if the shipper, under such circumstances, exercises due care and caution, the carrier will be liable for the results of its negligence in inflicting injury upon him. But if when exercising this privilege, granted by the carrier, the shipper fails in the exercise of proper care and caution, such consequences rest upon his shoulders, and the carrier is not responsible for injury received under such circumstances. The law does not deny the privilege of the shipper to look after his stock, if he so desires, under a license from the carrier, provided he does so in a prudent manner. What it does deny is the right of the carrier to contract away its duty in this respect. Granting the priv-

ilege to the shipper to look after his stock, and his doing so, is not necessarily the exercise of authority, or the performance of an act that is in conflict with the duty of the carrier in that respect. Doing this thing by the shipper does not relieve the carrier of its duty in the premises. If the shipper, in the exercise of that privilege, places himself in a position of peril and danger that does not ordinarily exist to passengers generally in traveling upon freight trains, he assumes what extra risk may exist by reason of such acts, but performing the act that places him in such extra hazardous or dangerous position does not relieve the carrier from the exercise of proper care in its conduct towards him. This reduces the questions to simply those of care, caution, and negligence, which are properly matters to be considered by the jury, and which are left to their determination by the charge quoted.

It appears that, when the freight train upon which the appellee was injured arrived at Rockdale, one of the brakemen told him to get up and look after his stock, that the train would be there some little time, and that they would wait for a train to pass, or words to that effect. The appellee, after this statement was made, went out of the caboose for the purpose of looking after his stock, which was in the car immediately in front of the caboose, and found one of his horses down, in the end of the car next to the caboose. In order to get up the horse, he stood on the drawhead between the caboose and the car, and prodded the horse with a stick or pole; and, while in such position, the train, within a few minutes after it had stopped, without signal, backed, and appellee's foot was caught and crushed between the drawhead and the deadwood of the cars. The principal fact in the case, upon which the appellee bases his right to recover, is the authority given him by the brakeman to look after his stock, claiming that such authority from the brakeman is binding upon his employers, the appellants, he being at the time one of their servants employed in operating the train. The appellee contends that he placed himself in the position he occupied when injured—that is, upon the drawhead between the cars—by reason of the statement made to him by the brakeman, authorizing him to look after his stock, and that the train would remain stationary for some time; believing that the effect of such statement was an invitation to that extent, and that he could rely upon the servants of the appellants not moving the train without a timely warning to him, contending that the authority coming from the appellants through the brakeman to him, to look after his stock, implied the right for him to assume any position on or about the car that was necessary for him to occupy in order to get up the horse that was down, although such position may have been one of extra hazard or danger, and the effect

of such invitation, coming from the brakeman, was notice to appellants that he might assume such dangerous position in his effort to look after his horses, and they were guilty of negligence in moving the train before giving him timely notice of their purpose. It is not denied that the position upon the drawhead, between two cars of a moving train, or one likely to move at any moment, is one of danger. Such is virtually admitted by the appellee, for when he was asked the question, "Would you have put yourself in the position you did, but for the statement of the brakeman?" he replied, "I would not, for the whole road,"—thus recognizing the peril he assumed by reason of placing himself in that position, his excuse for so doing being the authority from the brakeman. The evidence shows that there was a conductor in charge of the train, and that he was not present when the statement was made by the brakeman, and knew nothing of it, and that at the time he was towards the front of the train, and that he knew nothing of the matter until after the appellee was injured. It also appears that when the brakeman made the statement he immediately left the caboose, and went towards the front of the train, and that neither he, nor any of the servants of the appellants engaged in operating the train, knew of the position occupied by appellee until after he was injured. The moving of the train when appellee was standing on the drawhead was for the purpose of placing some cars upon the side track, which the conductor was ordered to place there. There is evidence tending to prove that it is usual and customary to stand upon the drawheads of trains, when still, in order to get up stock that are down in a car. The evidence also tends to show that, when drovers engaged in working with their stock assume dangerous positions, they usually notify the operatives of such fact. The only evidence in the record, bearing upon the authority or want of authority of the brakeman to bind the appellants by the statement made to the appellee, is the evidence of appellee to the effect that he "did not know that the appellants had denied to the brakeman the right to advise him about looking after his stock, and that brakemen had acted with a good deal of authority in what they have said and done when the conductor was absent, on trips that he had made before."

This is a summary of the facts and issues in order to understand the reasons for our disposition of this appeal. This brings us to the consideration of two questions: (1) Do the facts show authority in the brakeman to bind the appellants by the statement made, and the invitation extended, to the appellee? (2) If such authority exists, was the appellee justified in assuming a position of danger without informing some of the servants of the appellants of such fact?

The second question we will consider first.

If the brakeman had the authority to extend the invitation, it is properly a question of fact for the jury to determine the effect of the invitation, and the reasonable implications arising therefrom. Having invited the appellee to look after his stock, and given him the right to be there for that purpose, and having told him that the train would not move, the carrier should have known that he might be there, and, being there, the facts and circumstances might show that he was engaged in working with his stock, in such a position that was dangerous if the train should move, and comparatively safe if it remained stationary. Finding that the invitation was extended by the carrier to the shipper to look after his stock, and that he was there for that purpose, and that it was usual and customary for the shipper to assume a position, in accomplishing such purpose, that was free from danger so long as the train was stationary, but became dangerous when moved, the duty would fairly be chargeable to the carrier of seeing that the shipper was not in danger, or refraining from doing any act that would increase his danger, that, from the facts and circumstances, it might know would exist if the train was moved. From the fact of the invitation, knowing that the shipper might be looking after his stock, and knowing that shippers usually may occupy positions of danger if the train was moved, the jury would be justified in inferring that the carrier was guilty of negligence in moving the train without proper and timely warning to the shipper of its purpose to do so, giving the shipper an opportunity to escape a danger that arose after he assumed such position. The position was not necessarily dangerous, so long as the train remained standing, and the shipper was there by reason of a statement that the train would not move, but only became dangerous when it was moved. *Orcutt v. Railway Co.*, 45 Minn. 369, 47 N. W. Rep. 1063; *Olson v. Railway Co.*, 45 Minn. 537, 48 N. W. Rep. 445. We cannot say that the fact that none of the servants of appellants actually knew of the purpose of the appellee to put himself in a position of danger, or that he was in such position, would excuse them in moving the train, because the jury may have, from the facts and circumstances, inferred that such knowledge existed.

There is less difficulty in disposing of the first question than the one just discussed. As said before, this is the principal question in the case, because appellee's right to be upon the drawhead,—thus in a position of danger,—and his right to recover, are bottomed upon the authority of the brakeman to invite him to look after his stock, coupled with the statement that the train would not move for some time. His own testimony shows that he assumed such position solely by reason of such statement. If the brakeman had no authority to extend such invita-

tion or to make such statement, the appellee could not rely upon it as justifying his conduct. In order to bind the master by the act or invitation of the servant, it must be by one who is invested with the apparent power to do the act or extend the invitation, and this must be while the servant is engaged in the performance of his duties. This train was in charge of a conductor, whose duties are well known, and who was the representative of the company in the movements and management of the train. The passenger dealing with him could safely rely upon his authority to bind the master by statements made when in the performance of his duties, concerning the movements and management of the train. The nature of the employment vests the conductor with the apparent authority to represent his principal in the movement and management of his train, in his conduct and dealing with a passenger. One dealing with the conductor under such circumstances can safely rely that the authority in fact rests in whom it is apparently lodged. The policy of the law is that in the operation of trains there should be one in authority, who shall control and manage the train. This is justly lodged in the conductor, who stands as the representative of the carrier in the operation and control of the train, and in the performance of its duty to the shipper or passenger. *Railway Co. v. Anderson*, 82 Tex. 520, 17 S. W. Rep. 1039; *Wood, Ry. Law*, § 316. The agent's power must stand upon either the express or implied authority conferred upon him by his principal. An agent cannot increase his power by his own act, and a principal is not liable for the acts of the agent beyond the sphere of his duty. This leads us to inquire, what authority or control has a brakeman over the management or movements of a train, when it is in charge of a conductor? What apparent power is lodged in him, when the very fact that a conductor is in charge of the train conveys the information that the representative of the master in the management and control of the train is some one other than the brakeman? The duties of the brakeman are ordinarily as well known as those of the conductor. *Railway Co. v. Anderson*, 82 Tex. 520, 17 S. W. Rep. 1039; *Farber v. Railway Co.*, (Mo. Sup.) 22 S. W. Rep. 633. His duties, ordinarily, do not extend to the control and management of the train, but that power is lodged, as before said, in the conductor. The power to grant a license to the passenger, or to control the train, is not within the apparent scope of his powers as a brakeman. The nature of his office does not imply that he is authorized to give directions on this subject that will bind the company. In order for the act of the agent to bind the principal, the act done must pertain to the particular duties of that employment; and the employment for a particular purpose gives only the authority necessary for that agency under ordinary

circumstances, or the authority usually exercised by similar agents. Under such circumstances as these, when it is undertaken to extend the authority of the agent beyond the exercise of power ordinarily vested in him, and beyond the apparent power that is implied by reason of his employment, the burden rests upon him who seeks to charge the principal to prove the existence of the authority in such agent. *Railway Co. v. Anderson*, 82 Tex. 517, 17 S. W. Rep. 1039; *Farber v. Railway Co.*, (Mo. Sup.) 22 S. W. Rep. 634. The extent of the evidence in this case simply shows that, in former trips made by the appellee, brakemen, in the absence of the conductor, "generally acted with a good deal of authority in what they said and done." It is not shown what power they generally exercised in this respect, within the knowledge of their principals, nor is the authority of this particular brakeman shown, nor does it appear that the duties of brakemen generally extend to the authority exercised by the brakeman in this case. His authority must be proven. We cannot infer it from the meager evidence before us. There is no pretense in this case that the conductor was aware of the misconduct of the brakeman; but, upon the contrary, the inference is fair, from the evidence shown, that he knew nothing of it until after the accident. In *Sherman v. Railway Co.*, 72 Mo. 62, an infant, who was held to be a passenger upon a freight train, was invited by the brakeman to ride upon the train, but if he did so he must assist in operating the brakes. The brakeman instructed him, while the train was moving, to adjust some boards on a car, and while so doing he was injured. Held, that the company was not liable, and that the brakeman exceeded his authority. In *Railway Co. v. Miles*, 40 Ark. 298, a drover, who was a passenger, was instructed by a station agent to ride on top of a cattle car, and was injured. Held, that the station agent did not have the authority to confer the privilege. Other cases in point could be quoted, but we are contented in citing the following additional authorities that support the principles announced: 2 *Wood, Ry. Law*, § 316; *Farber v. Railway Co.*, (Mo. Sup.) 22 S. W. Rep. 633, and cases cited; *Railway Co. v. Anderson*, 82 Tex. 519, 17 S. W. Rep. 1040. From what has been said, we think the court erred in admitting evidence as to the statement of the brakeman, and in submitting to the jury, by its charge, as an issue in the case, the authority of the brakeman.

Upon the trial the plaintiff was asked if he could have gotten the horse up in any other way than by standing upon the drawhead, and he answered: "I had to get up there to reach the other horses that were standing over the one that was down, and I could not get up the one down while they were over him." This question and answer were objected to, because it was an attempt to elicit the opinion of the witness as to a mat-

ter which the jury was authorized to determine only from the facts. One of the issues in the case was whether the appellee was guilty of contributory negligence in getting upon the drawhead, and it was also contended that the horse could have been gotten up without the necessity of appellee placing himself in such position. These were facts to be passed upon by the jury from the facts and circumstances showing the position or situation of the car, and the horses in it. As to the ability of the appellee to get up a horse in the car, that was down, this was properly a matter of fact, and not the opinion of the witness. It was error to admit the evidence.

Under the peculiar facts of this case, wherein it is claimed by appellee that the appellants were guilty of negligence in not having at the rear of their train, at the time of the accident, some employe who, if being there, could have prevented the injury to appellee, or lessened its severity, the court should have given a charge embodying the principle stated in special charge No. 4 asked by the appellants. It was error not to do so when requested.

There is no issue in the case, raised by the pleadings, charging negligence for failure to furnish a caboose with a platform. Consequently, it was error to permit the appellee to testify what he could have done if the caboose had been furnished with a platform. If such an issue had been made, we do not see how the appellee could have complained of the failure to furnish a caboose with a platform as an act of negligence, because the carrier rested under no duty to place his car of horses next to the caboose. They could have been placed in any other part of the train. If he found his horses next to the caboose that did not have a platform, he must accept the situation as he finds it, and he cannot justify his position of peril or danger, which he voluntarily assumed, by saying that, "if you had done something that your duty did not require of you, I could have, without injury, performed that which I voluntarily attempted."

Upon the trial, over the objection of the appellants, the plaintiff was permitted to testify "that, but for the statement of the brakeman, he would not have placed himself in the position he was when injured for the whole road, and that in so doing he expected the train to stand still." The first objection is that the evidence fails to show authority in the brakeman to make the statement he did. We think this objection well taken, and for this reason hold the evidence inadmissible. But, in view of another trial, we will notice the second objection urged to the testimony, which is to the effect that the evidence is speculative and conjectural, and permits the witness to give the reason for his act, and the motive that influenced him in its performance. If the authority of the brakeman to make the state-

ment had been shown, we think the second objection to the evidence would be without merit. Under the strict rule of the common law, when parties were incompetent as witnesses in their own behalf, the reason or motive that influenced the performance of an act was to be gathered from the surrounding circumstances, or the declarations explanatory of the act that would fall within the rule of *res gestae*. But in those jurisdictions where the common-law rule of exclusion on account of interest has ceased to exist, and parties are permitted to testify, the courts have almost uniformly held that when the physical act is the subject of inquiry, and the rights of the parties may depend upon the motive or reason that influenced the act, it is admissible to show such motive or reason that actuated its performance. The reason given may not be binding upon the court or jury, and they may disregard it as impossible or not true, in reaching a result. They can weigh it like other evidence in the case. The question of motive or reason that influenced the party in the performance of the act is a fact, and why may not a party who is permitted to testify as to the facts showing his acts and conduct be permitted to testify as to his reason or motive that influenced the act, when this becomes a material inquiry in the case? If it is a fact that he knows, why should he not be permitted to testify to it, as well as the physical fact or act itself? The fact that this character of evidence is concealed and concealed in the mind of the declarant, and that human skill has furnished no reliable method of disproving it, other than may be gathered from the facts and circumstances, furnishes no just ground for its exclusion. This fact may affect its weight, but not its competency. *Hamburg v. Wood*, 66 Tex. 176, 18 S. W. Rep. 623; 1 *Thomp. Trials*, § 383; 1 *Whart. Ev.* §§ 482, 508. For the errors discussed, the judgment will be reversed, and the cause remanded.

NEEDHAM v. DIAL

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

PLEA TO JURISDICTION—SALE—IMPLIED WARRANTY.

1. In an action in a justice court, one of the defendants, who was a nonresident of the county in which the action was brought, filed a plea negating all the jurisdictional facts, if he had been sued alone, and averring that his codefendant, who was a resident of the county, was not his partner, or in any way interested in the business out of which the action arose, or liable to plaintiff, but omitting to aver that the codefendant was made a party for the fraudulent purpose of conferring jurisdiction. *Held*, that the plea was fatally defective because of such omission.

2. In an action to recover damages for the sale by defendant to plaintiff, for use in plaintiff's meat market, of hogs which were so diseased that they died soon after delivery, plaintiff testified that he examined the hogs before

he bought them; that they did not appear to be in very good condition, and defendant told him that they were not doing well in the pen, and wished to get rid of them, but did not tell him that they were diseased. Defendant testified that, as far as he knew, the hogs were healthy when he sold them; that there was no perceptible disease among them; and that they ate and drank heartily, though they did not improve as they should have done. *Held*, that the evidence did not show an implied warranty, and a judgment for plaintiff could not be sustained.

Appeal from Robertson county court; O. D. Cannon, Judge.

Action by R. G. Dial against John F. Needham and another. There was a judgment in favor of plaintiff, and defendant Needham appeals. Reversed.

Campbell & Dunn, for appellant. Simmons & Crawford, for appellee.

KEY, J. This suit was brought by appellee, Dial, against J. E. Schute and appellant, Needham, in justice of the peace court, from which it was appealed to the county court. In the latter court a judgment was rendered in favor of appellee for \$121.81, from which this appeal is prosecuted. The statement of the plaintiff's cause of action, as appears in the citation issued by the justice of the peace, is as follows: "Plaintiff alleges that said defendants on and about the 28th day of September, 1889, sold to plaintiff 30 head or more of hogs, at \$3.81 per head, to be used by plaintiff at his meat market in Hearne, Tex.; that said hogs, at the time defendants sold to plaintiff, were diseased with cholera, and, immediately after the delivery of said hogs to plaintiff, 30 of said hogs died of cholera; that defendants well knew that said hogs were diseased when they sold them to plaintiff; that plaintiff paid them for said hogs at the time of the delivery. And plaintiff sues for \$114.30, the value of said hogs, and for \$7.50, cost of hauling off said dead hogs, and \$50, damages to plaintiff's business by reason of defendants selling plaintiff diseased hogs." The defendant Needham filed a sworn plea showing that he resided in another county, and negating all the facts which would confer jurisdiction on the courts of Robertson county, if the suit had been against him alone. He also averred in this plea that he and Schute were not partners; that Schute had no interest in the hogs sold to Dial, and was in no wise liable for any damages resulting from said sale. Schute was sued in the county of his residence, but made default, however, and judgment went against him. The plea referred to did not charge that Schute was made a party for the fraudulent purpose of conferring jurisdiction on Robertson county. For this reason, it was defective, and should not have been sustained, whatever the testimony may have been, tending to show such fraudulent purpose.

It is contended on behalf of appellant that the judgment of the court below is not supported by the testimony, and, after a careful

consideration of all the evidence contained in the record, our conclusion is that this contention is correct. There is no pretense that there was any express warranty of the quality, health, or fitness for a particular use of the hogs sold, or that there was any misrepresentation of their condition. Appellee's contention is that, as he was engaged in the market business, and bought the hogs for use in his business, that fact, and the other circumstances of the case, raise an implied warranty that the animals sold to him were suitable for slaughter. There is no conflict in the testimony concerning the material facts. Appellant had a bunch of hogs which he desired to sell. He let it be known that they were for sale; sent word to appellee to come and look at them, which appellee did. Appellee testified that he examined the hogs before he bought them; that they did not appear to be in very good condition; that appellant told him that they did not seem to be doing well in his pen, and he wanted to get rid of them, but did not tell him that they were diseased; that he purchased them for use in his market; that they were of mixed ages, but the most of them were young hogs; that he wanted young hogs, because they would grow; that he paid an average of \$3.81 per head for them; that two of them were found dead the morning after they were delivered, and they continued to die, at the rate of from three to five per day, until 30 head had died; that they were diseased with what was generally called, and witness understood to be, cholera, and this disease caused the death of the 30 head. Appellant testified that, so far as he knew, the hogs were sound and healthy when he sold them to appellee; that they ate and drank heartily, and acted like healthy animals; that they did not look as well as, and improve like, he thought they ought to, considering the amount of corn they ate; but that there was no perceptible disease among them. This is all of the evidence material to the question now under consideration, and in our opinion the facts shown do not justify the conclusion of an implied warranty. As a general rule, in a sale of an existing, specific chattel, inspected or selected by the purchaser, or subject to his inspection, the maxim of "caveat emptor" applies, and a sound price does not, in and of itself, import a sound quality. *Benj. Sales*, (Amer. Ed. 1888,) p. 623; 10 Amer. & Eng. Enc. Law, pp. 127, 136. There are several qualifications to this doctrine, one of which is that in purchases for a particular use, made known to the seller, if the buyer relies on the vendor's judgment to select, and not on his own, there is an implied warranty that the article furnished is reasonably fit and suitable for that purpose. *Benj. Sales*, p. 626. The case of *Jones v. George*, decided first in 56 Tex. 149, and again in 61 Tex. 345, comes within the latter rule. But the doc-

trine of implied warranty of fitness does not arise, in the absence of fraud, when the buyer selects his own article on his own judgment, although the vendor, not being the manufacturer or producer, knows it is intended for a particular use. *Benj. Sales*, p. 628, and cases cited. While some cases hold that, in a sale of food or provisions, it is implied that the thing sold is wholesome, the weight of American authorities is that in sales made to a dealer, who purchases to sell again, and not for his own consumption, there is no implied warranty. *Benj. Sales*, (Amer. Ed. 1887,) p. 629; 10 Amer. & Eng. Enc. Law, pp. 156, 157. The case of *Howard v. Emerson*, 110 Mass. 320, is quite similar to the one at bar; and, in an opinion citing many authorities, it is there held that, in the sale of a live cow by a farmer to retail butchers, there was no implied warranty that she was fit for food, although the seller knew that the purchasers bought the animal for use in their business. We do not agree with appellee's contention that, because the animals were in appellant's possession up to the day before they began dying, therefore he must have known that they were diseased. The testimony does not show that cholera is a disease, the symptoms of which would necessarily be discovered by a person in possession of hogs afflicted with it. Appellant testified, and his evidence is undisputed, that the hogs in question ate and drank heartily, and, so far as he knew, were free from disease; and appellee, being in a business in which hogs were constantly handled, was equally as well prepared as appellant to judge from appearances. If appellee was not willing to risk his own judgment as to the soundness of the animals he bought, he could have required a warranty. Not having done this, and as the facts do not raise an implied warranty, and as there is no proof of fraud or deceit, the trial court should not have rendered judgment against appellant. The judgment of the court below is reversed, and the cause remanded.

LONG v. CRUGER.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

APPEAL BOND—SURETIES.

1. A surety on a bond for costs is not, by the rendition of judgment in the action against his principal, disqualified from becoming a surety on the appeal bond. *Trammell v. Trammell*, 15 Tex. 291; *Saylor v. Marx*, 56 Tex. 90; *Sampson v. Solinsky*, 13 S. W. Rep. 67, 75 Tex. 663,—followed.

2. An appeal bond is not insufficient because there is only one surety.

Appeal from district court, McLennan county; L. W. Goodrich, Judge.

Action by W. H. Long, Jr., against Frances Cruger. There was a judgment in favor of defendant, and plaintiff appeals. Defendant moves to dismiss the appeal. Overruled.

Pelre & Boynton and Chas. A. Boynton, for appellant. *Scarborough & Rogers*, for appellee.

FISHER, C. J. We are asked to dismiss this appeal for want of jurisdiction for the want of a sufficient appeal bond, for the following reasons: This is an injunction suit, in which appellant gave an injunction bond on which Leonard Magee was a surety. Judgment was rendered in favor of appellee against appellant and said surety for damages and costs on the appeal bond filed in this case. The said Leonard Magee is one of the sureties. That there is only one surety on said bond besides Magee. The point here raised is that the appeal bond is insufficient because it has only one surety; that Magee is not a proper surety, as judgment was rendered against him for damages and costs by reason of his being a surety on the injunction bond. We will follow the cases of *Trammell v. Trammell*, 15 Tex. 291; *Saylor v. Marx*, 56 Tex. 90; and *Sampson v. Solinsky*, 75 Tex. 663, 13 S. W. Rep. 67,—which authorize us to hold the bond sufficient. The alleged defects in the bonds passed upon in those cases, and the liabilities of the sureties against whom the judgments were rendered, are practically the same as exist in the case before us. The motion to dismiss the appeal will be overruled.

DANIEL et al. v. BLAKE et al.¹

(Court of Civil Appeals of Texas. Sept. 21, 1893.)

COUNTY JUDGES—RECONSTRUCTION ACTS—JURISDICTION.

Under Act Cong. March 2, 1867, (one of the reconstruction acts,) providing that when the people of Texas should adopt a constitution containing certain requisites the powers of the military commander should become inoperative, county judges appointed by such commander did not at once lose jurisdiction theretofore exercised, on the adoption of the constitution of 1869, referring such jurisdiction exclusively to district courts, but only after said courts had become fully organized through appropriate legislation, and the military government was at an end. *Daniel v. Hutcheson*, (Tex. Sup.) 22 S. W. Rep. 933, followed.

Error from district court, Harris county; James Masterson, Judge.

Action by Annie E. Daniel and others against Eugene C. Blake and others to recover certain lots of land. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

W. F. Robertson, for plaintiff in error.

PER CURIAM. This is a suit for certain lots of land situated in the city of Houston. Judgment was rendered in the court below in favor of the defendants, from which this appeal was taken. The questions presented on this appeal are identical with those in the case of (No. 103) *Daniel v. Hutcheson*, (22 S. W. Rep. 278,) decided by this court on the

¹ Rehearing denied.

13th day of April, 1893, and afterwards, on a certificate of dissent, finally determined by the supreme court, (Id. 933.) In accordance with the decision of the supreme court, the judgment of the court below is affirmed.

BERGMAN et ux. v. BLACKWELL.

(Court of Civil Appeals of Texas. June 15, 1893.)

VENDOR'S LIEN — NOTICE — SALE OF REALTY AND PERSONALTY — UNDIVIDED INTERESTS — BONA FIDE PURCHASER.

1. In an action to enforce a vendor's lien, the fact that the complaint states that the lien exists for the whole amount of a note, while the evidence shows that it is for only part thereof, is not ground for denying its enforcement for the part established; there being no variance between the pleading and proof, but merely a failure to establish the whole of the cause.

2. A recital in a deed that the consideration is a certain amount, to be paid in sheep and cattle, gives notice to one claiming under it that the consideration was unpaid, and is sufficient to put him on inquiry as to the existence of a vendor's lien therefor.

3. A provision in a note that it is to retain a vendor's lien on certain land till paid creates a contract lien, good as to purchasers of the land with notice of it.

4. Where land and chattels are sold for a lump sum, there will be a vendor's lien on the land for such part of the sum as represents the proportional value of the land.

5. Where one's interest as an heir in an estate consisting of personal and real property is sold, the vendor's lien attaches to the undivided interest in the lands of the estate, and, on partition, follows the tracts set apart to the purchaser.

Appeal from district court, De Witt county; H. Clay Pleasants, Judge.

Action by E. L. Blackwell to enforce a vendor's lien. From a judgment for plaintiff, defendants appeal. Affirmed.

Crain, Kleberg & Grimes and R. A. Pleasants, for appellants. Fly & Hill and A. B. Davidson, for appellee.

Conclusions of Fact.

WILLIAMS, J. (1) On the 3d day of September, 1885, N. A. McFadden and wife sold to N. B. Means the interest of Mrs. McFadden, as an heir of Lazarus Nicholls, in his estate, consisting of both personal and real property. The consideration was recited in the deed to be "three thousand dollars," to be paid in 1,000 head of sheep and \$1,500 worth of cattle. The sheep were subsequently delivered. For the balance of the consideration the following note—which is unpaid, and which is the one sued on—was given: "\$1,500.00. Medina, Sept. 3d, 1885. For value received, I promise to pay N. A. McFadden or order fifteen hundred dollars on the 1st day of May, A. D. 1886, with interest at the rate of ten per cent. per annum from date until paid. Said note can be paid in good average stock cattle, at market price at the time of delivery. This note is to retain a vendor's lien on all

land in De Witt county, Texas, sold to me by N. A. McFadden by deed dated the 3d day of September, A. D. 1885, and is to retain a lien until paid. [Signed] N. B. Means." (2) On October 19, 1885, there was a voluntary partition among the heirs of Nicholls, in which a deed was made by them, conveying to Means property in satisfaction of the interest acquired from the McFaddens, valued at \$2,525, including the tract of land on which the lien is asserted in this suit, at a valuation of \$625. The court below adjudged a lien upon the land for \$625, as its purchase money. (3) Before the institution of this suit, Means sold the land to one from whom appellants purchased, also before suit, paying a valuable consideration, without notice of any lien upon the land, other than such as was conveyed by the recital in the deed from McFadden to Means.

Conclusions of Law.

1. The position of appellants—that, because appellee alleged that a lien existed on the land to secure the whole of the note, he could not be permitted to show that such lien existed for a part, only, of such note—is not tenable. This did not, under our law, constitute a variance between the allegations and proof, but was only a failure of the plaintiff, if the lower court was correct in its holding, to establish the whole of his cause of action. This was no reason why he should be denied the enforcement of the part which he did establish.

2. The recital in the deed from McFadden and wife to Means conveyed notice to all persons claiming under it, as does appellee, that the consideration was unpaid, and was sufficient to put them upon inquiry, which would have led to knowledge of the lien here asserted.

3. The note itself creates a lien on the land, to secure it, and as a contract lien it is good against Means, and purchasers from him with notice of it. Whether the recital in the deed would affect appellants with notice of such a lien—that is, with notice of any lien except a vendor's lien for the purchase money—is a question which we need not decide. Notwithstanding the fact that both land and chattels were embraced in the sale to Means, such portion of the consideration, at least, as represents the value of the land sold, is secured by a vendor's lien on the land, and it was competent to ascertain, by any legitimate evidence, what that was. There being no agreement between the parties, at the time of the sale, fixing the value of the land, (unless the note is to be treated as such,) equity will ascertain the part of the consideration which it formed by fixing the proportion which its value bore to the whole value of the property. What that proportion was, Means himself, and the heirs of Nicholls, fixed in the partition which they made of the prop-

crty. Appellants took subsequent to such partition, and claim under it, through Means. It is to be borne in mind that at the time of the trade between McFadden and Means the property of the former consisted of an unascertained interest in an estate. Whether any land, and what land, would be obtained in partition, could not be foreseen. The vendor's lien, therefore, attached to the undivided interest in the lands of the estate. On partition, it followed the tracts set apart to the purchaser, and became fixed upon it according to that partition. The valuation put upon the property therein was less than Means agreed to pay for it, and that operates favorably to appellants in the determination of the part of the debt which is to be charged upon the land as its purchase money. In any view that can be taken, the judgment rendered below is the most favorable one which the facts admit of for appellants, and it is therefore affirmed.

O'BRIEN v. GILLILAND et al.

(Court of Civil Appeals of Texas. Sept. 21, 1893.)

REAL-ESTATE BROKERS — RIGHT TO COMMISSIONS — COMPLIANCE WITH CONTRACT OF EMPLOYMENT.

Where a broker is employed to sell land for cash only he is not entitled to commissions on procuring a person who agrees to take the land, having already resold it to third persons, who are to pay half cash and give notes for the balance, it being the intention of such first purchaser to immediately negotiate the notes given by the second purchasers, and with the money thus obtained comply with the requirement of "all cash."

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Action by G. W. O'Brien, surviving partner, against Gilliland and Armstrong, executors. From a judgment for defendants, plaintiff appeals. Affirmed.

Douglass & Lanier and O'Brien & O'Brien, for appellant. Greer & Greer, for appellees.

PLEASANTS, J. This is the third appeal in this cause, having been twice appealed to the supreme court. The decisions of that court upon the two appeals are reported in 79 Tex. 602-604, 15 S. W. Rep. 681, and in 83 Tex. 635-649, 19 S. W. Rep. 268. The appellant sues the appellees for the recovery of commissions upon the alleged sale of certain lands belonging to the estate of appellees' testator, made by appellant, under an alleged contract between him and appellees, by which appellant was engaged to make sale of said lands for appellees. The will of James Armstrong gave the executors power to sell all the lands of the testator, and it directs that no action should be had in the probate court in relation to the estate of the testator, other than the probaton of his will, and the filing of an inventory of his property. The petition alleged that plaintiff

was originally employed conjointly with one John, appellant and John being at the time partners in the business of buying and selling lands for others; and that before the sale was perfected the partnership was dissolved by the death of John, and that after said dissolution appellees employed appellant, upon the same terms and conditions upon which the contract with O'Brien & John was made, to make sale of said lands; and the suit was prosecuted for the benefit of the plaintiff and of the estate of John. The defendants answered by general and special demurrers and by general denial and several special pleas of defense. Trial was had on June 3, 1892. Verdict for defendants, and judgment thereon rendered that the plaintiff take nothing by his suit, either in his individual right or as surviving partner of the firm of O'Brien & John, and, plaintiff's motion for a new trial having been overruled, he appealed to this court.

The assignments of error are numerous, and several of them, in our judgment, are well taken; and for errors of the court committed in the admission of evidence over the objections of plaintiff, and in its instructions to the jury, as pointed out in appellant's brief, the case would have to be reversed, but for our conclusion that, notwithstanding these errors, no other judgment could have been rendered under the law, upon the facts of the case, than that which was rendered. Under our view of the law, the errors of the trial court did the plaintiff no injury, and the judgment must be affirmed. The evidence is conflicting as to the employment of the plaintiff by appellees, as it is on several other issues presented by the pleadings; but there is no conflict whatever in the evidence as to what was done by the plaintiff in the performance of his alleged engagement with appellees to effect a sale of their lands. The petition avers that plaintiff made sale of the lands on the 1st day of June, 1889, to one C. Dart, for the price fixed by appellees, to wit, \$3 per acre, and that, after due notice to them of the sale, the appellees, without cause, wrongfully disavowed plaintiff's contract with the purchaser, and refused to execute deed to him. Says Mechem in his work on Agency, (pages 964-966:) "The broker must show, before he can recover commissions, that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by the principal. What constitutes completion, however, is a question of no little difficulty in many cases, depending, as it does, upon vague and indefinite agreement between parties. The duty of the broker is performed when he has found a purchaser ready, willing, and able to purchase upon the terms specified, or, if no particular terms were agreed upon, when he produces a purchaser to whom the principal sells." The will of appellees' testator authorized the sale of his lands for cash only, and plaintiff was not au-

thorized to sell except for cash. C. Dart, a land broker in the city of Galveston, was engaged by the plaintiff to assist him in effecting the sale, and he made an agreement with Messrs. Lutchter & Moore, of Orange county, to purchase the lands at \$3.25 per acre, one-half cash, and the balance in two equal installments, payable in four and eight months, the deferred payments to be secured by promissory notes of the purchasers, with a lien on the land. By telegram and by letter Dart advised plaintiff, on the day of its consummation, of this sale, and requested plaintiff to have deed executed by the executors to him, Dart, and sent to the First National Bank of Houston; telling plaintiff that, while the sale was for only half cash, he would be able to raise the other half by negotiating the notes of the purchasers, and thus meet the requirement of the will and the terms of the sale specified in the contract between O'Brien and the executors. The plaintiff promptly advised the executors of the agreement between Dart and Lutchter & Moore, and of Dart's intention to advance a sufficient sum to make good to the executors the full price of the land cash in hand. The executors did not execute the deed, assigning several reasons for not doing so. Upon the trial the witness Dart testified: "I received a letter from Lutchter & Moore, saying they would take the Armstrong league and the Joseph Taylor 640 acres at \$3.25 per acre, and would pay for them one-half cash, one-fourth in four months, and one-fourth in eight months. I wrote to them the lands belonged to an estate, and could only be sold under the will by the executor for cash; but that I could discount their notes, and pay cash for the lands, the deeds to be made to me; and I also wrote to the same effect to Mr. O'Brien." In reply to question by counsel for plaintiff whether the money would have been ready when the deeds were ready for delivery, the witness replied: "Certainly, the money could have been raised in half an hour. I could have just walked to the bank and have gotten the money. I considered the sale conclusive, so far as the question of cash was concerned. When the deed executed to me came to the bank, I could have executed a deed to Lutchter & Moore. They could have executed their notes to me. I could have gotten the money on them, and paid to the executors the cash, all in one transaction. As soon as the papers could have been turned over, the money would have been there to pay Capt. O'Brien the \$3 per acre for the land. Lutchter & Moore had agreed to take it from me at \$3.25 per acre. That is what they were to pay me." "I was engaged in buying and selling lands. I was not buying on my own account at all. If Lutchter & Moore had refused to take them, I presume I would not have taken them from the estate. Would not have taken any lands at all, unless I had sold them first. I intended

to get the money through Lutchter & Moore's paper, given with a lien on the lands. The paper was to be made payable to me certainly. If I had failed in the negotiation of those notes, there would have been no sale. It was necessary for the title to have gone out of executors and into Lutchter & Moore before the notes were signed. I was not going to pay for the lands until I sold Lutchter & Moore's notes. Deeds could have been deposited in bank, and the whole transaction closed at the time. I expected to get the money from the bank in Houston. Lutchter & Moore stated when we were talking to them in Orange about it, in October, 1889, that they had had the money on hand ever since the trade was closed. There was no trouble about payment at all. The money could have been raised as soon as the papers were deposited in the bank. As soon as we met in Houston, the money would have been there. Am satisfied of that. The discount would have been taken out of the 25 cents per acre, as the executors had to have \$3 per acre." This testimony of the plaintiff's witness Dart is the only evidence in the record touching his readiness, willingness, and ability to purchase the lands upon the terms agreed upon between the plaintiff and the executors, as stated by plaintiff in his petition; and we are unanimously of the opinion that the evidence is insufficient to warrant a recovery by the plaintiff. Dart's inability and his want of readiness to comply with the terms of the sale upon delivery of the deeds to him is clearly shown by his own testimony when he declares he did not intend to pay the money until he had negotiated the notes of Lutchter & Moore; and that he could not do this until he had conveyed the lands to them after receiving a deed from the executors; and that, had he failed to negotiate the notes, he would not have taken the lands from the estate. The declaration of this witness that there would have been no difficulty whatever in negotiating the notes of Lutchter & Moore, and thus paying for the lands, is but the opinion of the witness. The terms of the sale were explicit, and the proposal to fulfill should have been equally so. Nothing should have been left to speculation or conjecture. Certainty in the offer to fulfill is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale—that is, he must find a purchaser in a situation ready and willing to complete the purchase on the terms agreed on—before he is entitled to his commissions. Vide *McGavock v. Woodlief*, 20 How. 221, and *McCarthy v. Cavers*, 66 Iowa, 342, 23 N. W. Rep. 757. Applying the law as we find it announced in the treatise and in the decisions cited above to the facts of this case, we can find no escape from the conclusion that the plaintiff, however honestly he may have labored in the service of the appellees,

has not shown himself entitled to recover in this suit. The judgment of the lower court is affirmed.

BANK OF CALIFORNIA v. MARSHALL.

(Court of Civil Appeals of Texas. Dec. 14, 1892.)

DEED OF TRUST — ACCEPTANCE BY TRUSTEE — FRAUDULENT CONVEYANCE—HINDERING CREDITORS.

1. Acceptance of a deed of trust for the benefit of certain creditors, by the trustee, will, in the absence of a repudiation of the deed by them, inure to their benefit.

2. A conveyance by an insolvent debtor, by deed of trust, for the benefit of certain creditors, of all the debtor's property, the value of which is less than the amount of the debts secured, is not void, as hindering and delaying the other creditors, by reason of a provision allowing the trustee to sell the property, consisting of merchandise, in the regular course of trade.

Appeal from district court, McLennan county; L. W. Goodrich, Judge.

Trial of right of property to attached goods between the Bank of California, as plaintiff, and John F. Marshall, as claimant. Judgment for claimant. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by FISHER, C. J.:

This was a proceeding under the statute to try the right of property to certain goods, wares, and merchandise levied on under an attachment sued out by the Bank of California, as plaintiff, against Eaton, Guinan & Co., from the district court of McLennan county. The property was regularly levied on under the attachment, and John F. Marshall filed an affidavit claiming the property, and gave a bond to try the right to the same under the statute. The case was tried by the court upon an agreed statement of facts, on the 11th day of November, 1891, and there was judgment for the defendant claimant, Marshall, from which judgment the plaintiff appealed. The following is a written agreement signed by the attorneys of the respective parties to this suit, stating the facts of this case, and the facts of seven others, which we adopt as the findings of fact in this cause:

"The following written agreement, signed by the attorneys of the respective parties, was offered in evidence: 'Suits in the district court of McLennan county: No. 5,002, Sweet Springs Milling Company v. John F. Marshall; No. 5,003, Steinwender, Stoffregen & Co. v. John F. Marshall; No. 5,004, the Bank of California v. John F. Marshall; No. 5,005, the Fairbanks Canning Company v. John F. Marshall; No. 5,006, Wm. Numsen & Sons v. John F. Marshall; No. 5,007, Wm. Numsen & Sons v. John F. Marshall; No. 5,008, Price & Lucas v. John F. Marshall; No. 5,009, Church & Co. v. John F. Marshall. In order to facilitate a trial, we, plaintiffs and defendants in the above suits, agree to the

following facts, upon which each of the above causes shall be submitted to the court:

(1) It is agreed that each of the plaintiffs was a creditor of the firm of Eaton, Guinan & Co. at and before the execution and delivery of the deed of trust to John F. Marshall, hereinafter named, in the several sums hereinafter set forth, for which judgments were rendered. (2) That by attachments duly and regularly sued out and issued from the district court of McLennan in suits by said several plaintiffs on their several debts against Eaton, Guinan & Co., the goods and property described in the several claimant's bonds were seized, and were, on the affidavits and bonds in the record, delivered by the sheriff to John F. Marshall, claimant; that said goods were a part of, and included in, the same conveyance to said Marshall by said deed of trust, and were of the values recited as the assessed values in said several bonds of claimants. (3) That the property conveyed by the said Eaton, Guinan & Co. to said John F. Marshall, trustee, and levied on by plaintiffs, was, up to the time of execution and delivery of said deed of trust, a stock of merchandise held and being disposed of by them as wholesale and jobbing merchants in Waco, Tex. (4) That said Eaton, Guinan & Co., and each and all the members of said firm, were at the time of the execution and delivery of said deed of trust wholly insolvent, and had no other property out of which plaintiffs could make their debts. (5) That said Eaton, Guinan & Co. were still and are so indebted to the several plaintiffs in the amounts of the judgments rendered in said several attachment suits against them, wherein said property was claimed by said Marshall, as follows: First. Steinwender, Stoffregen & Co. Judgment June 14, 1889, \$4,564.80, and 8 per cent. per annum thereon from date. Second. Bank of California. Judgment for \$6,784.56, June 10, 1889, with interest at 8 per cent. per annum from date. Third. Fairbanks Canning Company. Judgment for \$1,092.54, June 3, 1889. Interest at 8 per cent. per annum from date. Fourth. William Numsen & Sons. Judgment in No. 4,859 for \$1,747.60, and 8 per cent. per annum from date, dated June 10, 1889. Fifth. William Numsen & Sons. Judgment in No. 4,868 for \$807.74, and 8 per cent. per annum from date, June 3, 1889. Sixth. Price & Lucas. Judgment for \$875.16 on June 3, 1889, with 8 per cent. per annum from date. Seventh. Church & Co. Judgment for \$974.03, October 11, 1889. Interest at 8 per cent. per annum from date. Eighth. Sweet Springs Milling Company. Judgment for \$1,558 on June 3, 1889. Interest at 10 per cent. per annum from date, (which is entitled to a credit of \$437.85 on date of judgment,)—in all which cases there was judgment for costs, which it is agreed shall be shown by the fee books, except in last case, in which costs were paid. It is admitted that in each of these cases judgment was rendered, foreclosing plain-

tiff's attachment lien on the property levied on, subject to the claim of said John F. Marshall. (6) It is agreed that the deed of trust, a copy of which is hereto attached, was executed and delivered to said John F. Marshall, and that possession of the property was delivered to him at the time of said delivery of the deed, which was immediately registered, properly, as a chattel mortgage, and that he was so in possession when the bonds of the several plaintiffs were made, and that he claims the title and possession of said property only by virtue of said conveyance. It is further agreed that the writs of attachment of the several plaintiffs were sued out at the time and for the amounts and levied as alleged in plaintiffs' tender of issues. (8) It is admitted and agreed that said Eaton, Guinan & Co. were, at and before the execution of the deed of trust by them to John F. Marshall, indebted to the several creditors therein named in the amounts therein recited, but this is without prejudice to the right of plaintiffs to assail the validity of said debts in any other suit."

"The state of Texas, McLennan county. Know all men by these presents, that we, John C. Eaton, Michael Guinan, and Walter A. Malin, of the city of Waco, McLennan county, state of Texas, are merchants and partners engaged in the wholesale grocery and provision trade in said city under the firm name Eaton, Guinan & Co., and said Walter A. Malin has always used in connection with said business the name of his wife, N. Malin, by reason of the first money put in as share in the capital stock of said firm being her separate means; but, by sales and investments of the proceeds of the commodities first purchased, said interest or right of property in said firm has become and now is the community property of said Walter A. Malin and N. Malin, said share being the share of said N. Malin. And we, John C. Eaton, Michael Guinan, and Walter A. Malin, composing said partnership or firm of Eaton, Guinan & Co., for and in consideration of one dollar to us in hand paid, and for the further considerations hereinafter stated, have bargained, sold, transferred, and conveyed and delivered, and do by these presents sell, transfer, convey, and deliver, to John F. Marshall, of the city of Waco, McLennan county, Texas, all our goods, wares, merchandise, and commodities which usually constitute a stock of wholesale groceries, and everything now constituting our stock in trade, of every kind, which are in the storehouse or place of business now occupied by us, situated on South Fourth street, in said city of Waco, and all our office furniture, safe, showcases, scales for weighing, and every thing or implement used by us in connection with said business, which are in said storehouse; also, one candy works or plant, and all tools, apparatus, and implements connected therewith, which are now in said storehouse, and all fire-

works and commodities in store in a barn situated on the lots occupied by John C. Eaton as a homestead in said city. But this conveyance in sale is made to said John F. Marshall in trust, and for the purposes following, viz.: We are indebted, as partners aforesaid, to the corporations, firms, and persons in the manner and by the means shown hereinafter, and are desirous of procuring payment to them of all we so owe them. The corporations, firms, and persons, and the amounts we so owe, and the evidence of said indebtedness, and the residences of our said creditors, is here stated: To Waco State Bank, of said Waco, Texas, by our notes, as follows, made payable to said bank: One note dated August 25, 1888, due on demand, for \$6,500; one note dated December 20, 1887, due at ninety days, for \$4,250; one note dated November 2, 1888, due at sixty days, for \$855; one note for \$2,024.71, dated October 22, 1888, at thirty days; one note dated October 20, 1888, and due at one month, for \$7,500,—and each bearing interest at 12 per cent. per annum after date. To J. K. Armsby Company, of San Francisco, California, by our acceptances in their favor, as follows: One acceptance dated this third day of November, 1888, at sixty days, for \$1,672; one acceptance dated first of October, 1888, at sixty days, for \$575; one acceptance dated October 25, 1888, at sixty days, for \$1,650. To Niggerman & Sayres, of St. Louis, Missouri, the following acceptances by us in their favor: One dated November 8, 1888, at sixty days, for \$1,164.15; one dated October 10, 1888, at sixty days, for \$1,313. To N. K. Fairbanks & Co., of St. Louis, Missouri, by our note to them dated November 10, 1888, due at thirty days after date, for \$1,883.36; on open account dated August 7, 1888, due at four months, for \$1,443.75. To Kehler Bros., of St. Louis, Missouri, by our acceptances in their favor, one dated November 10, 1888, due at thirty days for \$1,545; one dated November 15, 1888, at thirty days, for \$940; one dated November 27, 1888, at seven days, for \$2,450.60. To Kellum & Rotan, of Waco, Texas, by our note dated November 6, 1888, due on 6th day of December, 1888, for \$622; another note, dated 6th day of November, 1888, for \$1,000, due December 15, 1888; by open account, for \$90. To Waco Lumber Co., of Waco, Texas, one note dated October 5, 1888, due at sixty days, \$82.00; one note dated November 8th, 1888, due at thirty days, for \$71.60; open account, for \$150. To Sanger Bros. of Waco, Texas, by our note of date November 28, 1888, due at thirty days from date, for \$1,260. To John W. Mann of Waco, Texas, by our note dated November 15, 1888, due at three months from date, for \$1,222.50, with 12 per cent. interest from date. To Parker, Hart & Co., by account, for \$297. To T. D. Clark, of San Francisco, Cal., by note made by us, dated November 1, 1888, for \$1,000, due at

ninety days from date. All above notes and acceptances are signed by our said firm, Eaton, Guinan & Co., and all of said accounts and all indebtedness above named are owing by said firm or partnership. And said Mrs. Malin, wife of Walter Malin, for the purposes and consideration, uses, and trusts stated above, joined in this conveyance, and does hereby convey to John F. Marshall all her right, title, and interest in all of said property stated above, in the same manner and to the same extent as the said Eaton, Guinan, and Walter A. Malin have done hereby. Said John F. Marshall is to take immediate possession of the property and assets hereby conveyed, and sell a sufficiency thereof, in the usual course of trade, for cash, to pay off all said debts hereinbefore stated, after reserving the said John F. Marshall $2\frac{1}{2}$ per cent. commission on the amount realized by such sale, and also a sufficiency to pay all expenses of sale and executing this trust, and the rent of storehouse; and after having sold a sufficiency to pay off said debts, commission, expenses, and rents, not exceeding \$150 per month, of storehouse, during the time occupied by him, and in which said property is kept, and while making said sale, then the remainder of said property and effects are to be returned to us, and this conveyance or instrument is to be of no further effect. And if, upon the expiration of three months from this date, a sufficiency be not sold for the purposes aforesaid, said John F. Marshall shall, after being so requested to do by writing signed by a majority in interest of said creditors, advertise said property and effects for sale at auction for cash at such place as he may select in the city of Waco. Said advertisement shall be printed, and shall state the time, place, and terms of sale, and one shall be posted at the courthouse door of said county of McLennan, and at two other and different public places in said county, for ten days previous to said sale, and shall sell only a sufficiency to realize such deficit as there may be for the payments, commissions, and expenses aforesaid, and rent; and then the remainder of said property and effects is to be returned to us, and this instrument is to be of no further effect, and null and void, when all before stated is paid. And in case said trustee, John F. Marshall, may become unable or unwilling to execute this trust, a majority of our said creditors in interest may, by a proper writing by them signed, appoint some other competent and suitable person to execute the same, with the same powers and limitations herein given to said John F. Marshall."

This deed of trust was properly signed and acknowledged by the members of the firm of Eaton, Guinan & Co., December 1, 1888, and was properly and duly recorded. We also find the total value of the goods levied upon in the several suits mentioned

in the agreement of the parties to be the sum of \$22,136.29, as shown by the estimate of the officer levying the writs of attachment; that \$44,911.67 is the total amount of the debts secured by the deed of trust.

L. O. Alexander, for appellant. W. W. Evans, Clark & Bolinger, and John L. Dyer, for appellee.

FISHER, O. J., (after stating the facts.) The appellant has a single assignment of error, which is as follows: "The court erred in holding that the property in issue, and claimed by the defendant in this case, was not subject to plaintiffs' writ of attachment, and in rendering judgment for the defendant, because it appears from the agreed case that the plaintiffs were creditors of Eaton, Guinan & Co., who made the deed of trust to Marshall, under which he claims, before the execution and delivery of the deed of trust by them to him; that the property was seized under an attachment regularly sued out and issued for plaintiffs' debt, being a stock of merchandise theretofore held by said Eaton, Guinan & Co., and being disposed of by them as wholesale and jobbing merchants; that the firm of Eaton, Guinan & Co., and each and all the members thereof, were at the time of making said deed of trust wholly insolvent, and had no other property than that levied upon; that said debt, and judgment rendered thereon, is still in full force and effect; that the deed of trust exhibited with the agreement, together with the property, was delivered to the trustee, and the deed was immediately registered as a chattel mortgage; and it appearing from the deed of trust that the trustee was authorized to sell the merchandise so conveyed, in the usual course of trade, to pay off the debts scheduled therein, provided that, if at the expiration of three months a sufficiency of the property was not sold to pay the debts, the trustee, after having been requested by a majority in interest of the secured creditors, might advertise said property and effects for sale at auction; it appearing also that the most of said debts were already due, and it not appearing that any of the creditors named have accepted said deed." Under this assignment, appellant makes the proposition "That as Eaton, Guinan & Co., having made a deed of trust, to secure certain preferred creditors named therein, to the claimant, John F. Marshall, on a stock of goods, wares, and merchandise, and said firm and its members being at the time of the execution and delivery of said deed wholly insolvent, and having no other property out of which plaintiffs could make their debts, and said deed of trust providing that said Marshall should sell said goods in the usual course of trade for three months, and until requested in writing by a majority in interest of the creditors se-

cured by the deed of trust, and it not appearing that said creditors, or any of them, ever accepted said deed of trust, the same was void, because, in connection with the uncontroverted facts, the effect of the same was to hinder, delay, and defraud their creditors." It is apparent that John F. Marshall, the trustee, accepted the terms of the trust, and, in the absence of a repudiation of its terms by the beneficiaries, his acceptance will inure to their benefit. *Burrill Assignm.* (5th Ed.) 400-402; 1 *Jones, Mortg.* (4th Ed.) § 88; *Wallis v. Beauchamp*, 15 Tex. 305.

The main question in the case, presented by appellant, is that, as the deed of trust requires the trustee to sell the merchandise in the usual course of trade, its effect is to hinder, delay, and defraud other creditors, and for this reason the instrument, upon its face, should be held void, taken in connection with the fact that Eaton, Guinan & Co. were insolvent at the time of its execution. It is a well-established principle of law that a debtor in failing circumstances may secure and prefer a bona fide debt of his creditors, although the effect of such preference would be to hinder and delay other creditors. The limitation imposed by law upon this right prevents the debtor from transferring to the creditor more property than is reasonably sufficient to satisfy the debt, and denies the creditor the right to give the debtor a moneyed consideration for the property, in addition to his debt. In such cases, and in others that may be mentioned, the effect of such transactions would be to give the creditor the right to control and dispose of property not necessary to the payment of his debt, and to place the debtor in a position to hinder, delay, and defraud his creditors. The court cannot determine from the face of the instrument that it will have the effect of defrauding other creditors. That can only be ascertained from the facts of the case. If it be true that the debtor has transferred to the trustee all of his property for the benefit of the preferred creditors, and the property is less in value than the debts secured, and the instrument permits a sale in due course of trade, or otherwise, we fail to see how such fact is calculated to hinder and delay and defraud other creditors. It is true that the effect of such a transaction would be to hinder and delay, and possibly defeat, the claims of the unsecured creditors; but it is successfully answered by the law permitting an insolvent debtor to prefer a creditor when no advantage results to the debtor by such transaction, or the creditor gets no more than his debt. In appellant's assignment of error it is admitted that "Eaton, Guinan & Co., and each and all the members thereof, were at the time of making said deed of trust wholly insolvent, and had no other property than that levied upon." It is seen from the facts that the value of the proper-

ty, as levied on by the writs of attachment in the several cases mentioned in the findings of fact, is much less than the amount of the debts secured by the terms of the deed of trust. Under the facts, we do not see how the fact that the trustee can sell in the usual course of trade operates as a fraud upon the appellant, as it is apparent that a disposition of all of the goods is not sufficient to satisfy the claims of the preferred creditors. We find no error in the record, and affirm the judgment of the court below.

Motion for rehearing refused.

SWANK v. SAN ANTONIO & A. P. RY. CO.

(Court of Civil Appeals of Texas. Dec. 7, 1892.)

FREIGHT SHIPMENTS—CONNECTING LINES—TERMINUS—CONTRACT—UNCERTAINTY—PAROL EVIDENCE.

A contract for shipment of stock provided that the party of the first part would transport the stock to J. City, the end of its line, on the route over which such stock was waybilled to be transferred to the railway company over which the stock was waybilled for further transportation by said railway company, the stock being waybilled through and consigned to S. at J. City; that, as the stock was to be transported over the roads of other railway companies, and as the party of the first part was only to transport the stock to the aforesaid station, at the end of its line, it was only to be bound for the transportation of the stock to said station, and should not be liable for injuries to the stock after it had left its line; and that the other railway lines over which the stock was billed should not be liable for injuries beyond their respective lines. Held that, the provision that J. City was the end of the line operated by the party of the first part being inconsistent with the provisions stating that the stock must go over other lines to reach its destination, parol evidence was admissible to show that S. was the terminus of the line of the party of the first part.

Appeal from district court, Karnes county; H. Clay Pleasants, Judge.

Action by H. H. Swank against the San Antonio & Aransas Pass Railway Company for injuries to a shipment of live stock. Judgment for defendant. Plaintiff appeals. Affirmed.

Lane & Mayfield, for appellant. Proctor & Proctor, for appellee.

FISHER, C. J. This suit was instituted by appellant on the 2d day of February, 1889, in the district court of Karnes county, Tex., upon a written live-stock contract, which was made a part of appellant's petition, to recover from appellee the sum of \$1,200 damages to 100 head of stock, which appellee received from appellant on May 11, 1888, at Beeville, Tex., to be transported by appellee over its line of railway from said Beeville to Junction City, Kan., under said written live-stock contract. Appellee answered, and admitted that the stock mentioned was shipped under said written live-

stock contract, but set up that its line of railway on said route only extended to the city of San Antonio, Tex., and contended that by the terms of said written live-stock contract its liability as a common carrier ceased upon the transportation of said stock to San Antonio; and that the injuries and damages to said stock resulted while the stock was in possession of another carrier. The case being tried by the court without the intervention of a jury, judgment was rendered for appellee against appellant.

1. On the 11th day of May, 1888, appellant and appellee entered into the following contract of shipment of the stock in controversy:

"The San Antonio & Aransas Pass Railway Company. Rules and Regulations for the Transportation of Live Stock. No station master of this company has any power or authority to bind this company in regard to shipment of live stock except by written contract, in the following form. Neither has such station master power or authority to agree to furnish cars to be loaded with live stock at any particular time, or to agree to furnish, under any circumstances, any particular class or kind of cars. Live stock will be taken in less than car load lots between points within the state of Texas at the rate of one-half of 1 cent per 100 pounds, actual weight, per mile; the rate in no instance to be less than 30 cents per 100 pounds. Between other points the rates on less than car load shipments will be subject to the charge for estimated weights, as provided by joint Texas classification in its application to interstate business. The San Antonio & Aransas Railway Company will not assume any liability over the actual value, and in no case exceeding \$100 per head on horses and valuable stock, except by special agreement. For the purpose of taking care of stock, the owner or men in charge, in proportion to the number of cars, as indorsed hereon, will be passed on the train with it, and all persons thus passed are at their own risk of any personal injury whatever, and will agree to sign release to that effect, indorsed on the contract.

"Live-Stock Contract: Beeville Station, May 11th, 1888. This agreement, made between the San Antonio & Aransas Pass Railway Company, of the first part, and H. H. Swank, of the second part, witnesseth that whereas, the San Antonio and Aransas Pass Railway Company transports live stock as per above rules and regulations, all of which are hereby made a part of this contract by mutual agreement between the parties hereto: Now, therefore, for the considerations and mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described below, and the parties in charge thereof, as herein provided, viz. — car loads of horses, said to contain — head of such stock from the station where this

contract is executed to Junction City, Kansas, station, the end of the line of road operated by the party of the first part on the route over which such stock are waybilled, there to be transferred to the railway company over which said live stock are waybilled for further transportation by said railway company, the said stock being waybilled through, and consigned to H. H. Swank at Junction City station; and the party of the first part covenants and agrees that the freight charge from point of shipment to final destination shall be only the sum of — dollars per car load, the same being a through rate, lower than the local rates which might be lawfully charged by party of the first part, and for and in consideration of which through rate and the guaranty thereof by the party of the first part, the party of the second part hereby covenants and agrees as follows:

"First. That he does hereby release said first party from any and all liability for delay in shipping said stock after delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.

"Second. That he does accept for the transportation of said stock the cars tendered him by party of the first part, and agrees that they are in all things satisfactory to him; and he hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly, or weak, or of their maiming each other or themselves, or in consequence of heat or suffocation or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw, or other material used by the person or persons in charge of said stock for feeding or bedding said stock or otherwise, and all risk of escape or robbery of said stock, or of loss or damage from any other cause or thing not resulting from the negligence of the agents of the party of the first part, said negligence not to be assumed, but to be proved by the party of the second part.

"Third. That the party of the second part will load, unload, and reload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk while it is in the stockyards of the party of the first part awaiting shipment, and while on cars, or at feeding or transfer points, or where it may be unloaded for any purpose.

"Fourth. That party of the second part will see that said stock are securely placed in the cars furnished, and that the cars are safely and properly fastened, so as to prevent the escape of said stock therefrom.

"Fifth. That in case the party of the first part shall furnish laborers to assist in loading and unloading said stock at any point, such laborers shall be subject to the orders of the person representing the shipper in charge of said stock, and shall be deemed

employees of the party of the second part while so assisting.

"Sixth. That in case the party of the first part should for any reason undertake to water and feed said stock, it shall not be liable for insufficient supplies, nor the imperfect discharge of said undertaking, it being expressly understood that the same is not a duty imposed upon it as a carrier of said stock.

"Seventh. And the party of the second part further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said stock, he, or his agent, the person in charge of said stock, shall give notice in writing of his claim therefor, and the full amount of such loss or damage, to the station agent of the party of the first part at the station hereinbefore named as the end of the line of the party of the first part, before said stock is removed from station, and before said stock is mingled with other stock, or delivered to any connecting line of railway.

"Eighth. It is further stipulated and agreed between the parties hereto that, as the live stock mentioned herein is to be transported over the road or roads of other railway companies, and in other cars than those of this company, and as the party of the first part is only to transport said stock to the aforesaid station named as the end of its line on the route over which said stock is to be shipped, the party of the first part is only to be bound for the transportation of said stock to said station; it being understood and agreed by both parties hereto that the only purpose of making this contract is that the party of the first part shall transport said stock to said station, and protect the through rate of freight named herein for the benefit of the party of the second part; and the party of the first part shall in no manner be responsible for any loss or injuries occurring to said stock after the same has left the line of the San Antonio & Aransas Pass Railway Company, nor be responsible for the carriage beyond.

"Ninth. It is further expressly agreed by the party of the second part that the other railway lines over which said stock are way-billed in order to reach their destination, having participated in making said through rate of freight of which the party of the second part has the benefit hereunder, when they receive said stock for transportation under this contract, shall, like the party of the first part, not be responsible for injuries or loss occurring beyond their respective lines of road, and shall each be entitled to the same notice of loss or damage occurring upon their respective lines as is herein provided for the party of the first part, to be given to the agent of each railway company at the station ending the run of said stock over such road.

"Tenth. The second party further agrees, for the consideration aforesaid, that in case

of total loss of any of said stock from any cause for which the carrier will be liable to pay for the same, the actual cash value at the time and place of shipment, but in no case to exceed \$100 per head, shall be taken and deemed as full compensation therefor; and in case of injury or partial loss the amount of damage to be recovered shall be in the same proportion; and in the event of any proceedings in court to recover damage upon this shipment, said actual cash value at the time and place of shipment, and not at the place of destination, shall control the court and jury in estimating the amount which may be due to the shipper.

"Eleventh. This contract does not entitle the holder or other parties to ride in the cars of any train except the train in which his stock referred to is drawn or taken. Neither does it entitle him (and the party of the second part, named in this contract, so expressly stipulates, admits, and agrees) to return passage from Junction City, Kansas, unless this said contract is presented within twenty days from the date thereof; and that no person except the party of the second part, and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of same, as specified in and upon said contract, and does not include women, infants, or other persons unable to do and perform the services required of parties in charge, as expressed on this contract, shall be entitled to such return passage within the said twenty days; the object, purpose, and intent of the return passage being to enable the party of the second part hereto, or his men in charge, as expressed in contract, and no other person, to return to Beeville, Texas, thereon, at any time within twenty days from date hereof, and not thereafter.

"The evidence that the said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract, is his signature hereto.

"D. B. Saffold,

"Station Master at Beeville Station, San Antonio & Arkansas Pass Railway Company.

"H. H. Swank, Shipper.

"Witness: H. O. Nash.

"(Executed in duplicate.)"

2. The line of the San Antonio & Aransas Pass Railway Company, on the route from Beeville, Tex., to Junction City, Kan., terminated at San Antonio, Tex.

3. The injuries and damage to the stock occurred at Taylor, Tex., on the line of the International & Great Northern Railway Company, a line of railway on the route from Beeville, Tex., to Junction City, Kansas.

4. The amount of damages sustained by appellant is the sum of \$1,000.

The appellant contends that the court erred in permitting evidence to be introduced, over his objection, to the effect that San Antonio, Tex., is the terminus of the San Antonio & Aransas Pass Railway, for the reason that

the contract of shipment names Junction City, Kan., as the station at the end of the line of railway operated by appellee, and that the effect of such evidence would be to vary and change the terms of the written contract; and that the court erred in giving such effect to the contract as would terminate the liability of appellee at San Antonio, Tex., and in not holding it liable under the contract for damages resulting on the entire line of route from Beeville, Tex., to Junction City, Kan. These are the main questions in the case, although others are suggested by assignments of error, which we will not notice, as not necessary to a disposition of the case.

The court below, in admitting evidence showing that San Antonio, Tex., was the terminus of the San Antonio & Aransas Pass Railway, evidently regarded, from the entire range of all the provisions of the contract of shipment, that the terminal point of that railway was uncertain as gathered from the contract, and that in this respect the contract was ambiguous, and that such testimony was admissible as tending to give it certainty. If the contract in this respect is uncertain, the evidence was admissible; and the court properly construed the contract, as such evidence would not have the effect of changing the terms of the contract, but simply gives effect to its terms, and renders that certain which was otherwise uncertain. If there is no uncertainty in the contract in this respect, the evidence was not admissible, and the court erred in its construction of the contract. By reference to the contract it will be seen that it provides that the horses are to be shipped from Beeville station to "Junction City, Kansas, the end of the line of the road operated by the party of the first part [the appellee] on the route over which such stock are waybilled, there to be transferred to the railway company over which said live stock are waybilled for further transportation by said railway company, the stock being waybilled through, and consigned to H. H. Swank at Junction City station." This is the provision of the contract that appellant contends fixes Junction City, Kan., as the terminal point on appellee's line of road. The eighth and ninth subdivisions of the contract of shipment are as follows: "Eighth. It is further stipulated and agreed between the parties hereto that, as the live stock mentioned herein is to be transported over the road or roads of other railway companies, and in other cars than in those of this company, and as the party of the first part is only to transport said stock to the aforesaid station named as the end of its line on the route over which said stock is to be shipped, the party of the first part is only to be bound for the transportation of said stock to said station; it being understood and agreed by both parties hereto that the only purpose of making this contract is that the party of

the first part shall transport said stock to said station, and protect the through rate of freight named herein for the benefit of the party of the second part; and the party of the first part shall in no manner be responsible for any loss or injuries occurring to said stock after the same has left the line of the San Antonio & Aransas Pass Railway Company, nor to be held responsible for the carriage beyond. Ninth. It is further expressly agreed by the party of the second part that the other railway lines over which said stock is waybilled in order to reach their destination having participated in making said through rate of freight, of which the party of the second part has the benefit hereunder, when they receive said stock for transportation under this contract, shall, like the party of the first part, not be responsible for injuries or loss occurring beyond their respective lines of road." It is seen by these provisions of the contract that it is expressly agreed that the stock is to be shipped over lines of road other than that owned or controlled by appellee, and that appellee shall in no manner be responsible for any loss or injuries occurring to said stock after the same has left the line of the San Antonio & Aransas Pass Railway Company, nor responsible for carriage beyond. It is not questioned but that Junction City, Kan., was the final destination of the stock shipped. It is evident from the two provisions of the contract last quoted that the stock, in order to reach their final destination, would have to pass over roads other than those owned or controlled by appellee. If such was not the case, why these provisions of the contract that in effect so provide? If the stock was to be carried through on the line of road owned or controlled by appellee, then these provisions of the contract are out of place, and express a fact that is not true, and provide for a contingency that in no possible event could, in the nature of things, occur. We cannot assume that the parties to this contract intended that these provisions should not be given a meaning as well as other parts of the contract; and it is our duty, in construing the contract, to view it as a whole, and give it such meaning as will best effectuate the intention of the parties to the instrument. That provision of the contract stating that Junction City, Kan., is the end of the line of road operated by appellee is evidently inconsistent with those provisions of the contract stating that the stock must go over other lines of road in order to reach their destination,—that is, Junction City. This inconsistency does not produce such an uncertainty as would render the contract void, but we think effect can be given to all of its provisions, and it can be explained upon the hypothesis that Junction City was simply named in the contract of through shipment as the place of final destination of the stock, and that appellee should not be re-

sponsible for damages resulting beyond the terminus of its own line, which is shown by the evidence to be San Antonio, Tex. We find no error in the record, and affirm the judgment of the court below.

KIOLBASSA v. RALEY.

(Court of Civil Appeals of Texas. Oct. 19, 1892.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—MORTGAGE ON HOMESTEAD—JUDGMENT—PRIORITY—ORDER CLASSIFYING CLAIMS—EFFECT—STATUTE OF LIMITATIONS.

1. Rev. St. 1879, art. 2037, classifies secured claims against an estate as claims of the third class, so far as they can be paid out of the proceeds of the property subject to such lien; and provides that when more than one mortgage or lien shall exist on the same property the oldest shall be first paid, but no preference shall be given to such claim further than regards the property subject to such mortgage or other lien. *Held*, that a mortgage on decedent's homestead, ordered by the probate court to be paid as a fourth-class claim, should be paid out of the proceeds of such homestead in preference to a prior judgment against decedent, ordered paid as a third-class claim.

2. Since, under such statute, a claim against an estate may be a claim of the third class as to a portion of the property, because secured by a lien thereon, and of the fourth class as to the remainder of the estate, in ordering such judgment to be paid as a third-class claim the probate court did not declare it to be a lien on the homestead, but that, if there was any of decedent's estate to which such judgment lien would attach under the law, then, as to such property, the judgment would be a third-class claim.

3. In the absence of a showing that the homestead was subject to a forced sale at the time or before such mortgage was executed, it does not appear that the former is a third-class claim and the latter a fourth-class claim.

4. A mortgage given on the homestead by an unmarried surviving spouse is valid.

5. Where an administrator of an estate is not appointed until more than 2½ years after the death of his intestate, a claim consisting of a note and mortgage, filed against the estate 4 years and 3 months after its maturity, is not barred by the statute of limitations, since by Rev. St. art. 3213, the statute of limitations was suspended for one year after intestate's death.

Appeal from district court, Bexar county; W. W. King, Judge.

Claims by James Rayley and Benjamin Kiolbassa against the estate of Thomas Martin, deceased. From a judgment ordering the funds in the hands of J. F. Mullaly, administrator, to be paid in satisfaction of Rayley's claim, Kiolbassa appeals. Affirmed.

Wurzbach & Goeth, for appellant. James Rayley, for appellee.

KEY, J. The statement of facts in the record in this case discloses the nature of the litigation, which statement is as follows: "The estate of Thomas Martin, who died in May, 1888, unmarried, was administered upon in the probate court of Bexar county, Texas, and J. F. Mullaly was duly appointed as administrator on January 23, 1889. The

only property of Thomas Martin was his homestead, on which he lived at the time of his death and previous thereto, with his children, one of whom was a minor, but without a wife, who had died long before. This homestead was sold in course of administration, and a balance of \$171.15 shown to be left in the hands of the administrator for distribution to the creditors. Two claims were presented against the estate, and allowed by the administrator, and approved by the court, and, as the estate was not sufficient to pay off both these claims, hence arose this contention between the two claimants. One of the claims—that presented by James Rayley, the appellee—was a promissory note given by Thomas Martin, the deceased, on May 15, 1884, payable six months after date, and secured by a deed of trust on the homestead, on which Thomas Martin, deceased, resided at this time with his minor child and other children, but without a wife. On February 15, 1889, this claim was presented and allowed by the administrator for the full amount of \$303. This claim was examined and approved as a fourth-class claim by the probate judge on March 19, 1889, and ordered to be paid in due course of administration as a fourth-class claim. The other claim—that presented by Ben. Kiolbassa, appellant—was a judgment recovered by Ben. Kiolbassa in the justice court against Thomas Martin on March 13, 1883, on which judgment execution issued on April 17, 1883, and not thereafter; and the judgment, not being satisfied, was then duly recorded, so as to preserve a valid lien against any property that Thomas Martin might have subject to execution. This claim was presented and allowed by the administrator for the full amount of \$187.86 on July 8, 1889. And this claim was further examined and approved by the county judge for the full amount as a just and true claim, and ordered to be paid in due course of administration as a claim of the third class. The administrator advertised for final settlement at a subsequent term of the county court, held on Monday, January 19, 1891, and Ben. Kiolbassa, the appellant, holding a third-class claim against the estate, made application, asking that the administrator pay over all the sum that may be in his hands, less costs of this court and administration, to satisfy this claim, being a third-class claim, and therefore having a preferred right to other claims against this estate. And also James Rayley, the appellee, presented his fourth-class claim, with deed of trust securing it, asking an order of distribution, and that his claim might be paid. At the same time J. F. Mullaly, the administrator, came in and filed his report for final settlement, asking for its approval and an order of distribution. At this hearing the county court ordered the funds in the hands of the administrator to be paid in satisfaction of James Rayley's, the appellee's, claim, to which ruling the creditor, Ben. Kiolbassa,

excepted, and gave due notice of appeal." We adopt the above as conclusions of facts. The district court sustained the action of the county court, and rendered a similar judgment, from which this appeal is prosecuted.

The assignments of error are as follows:

"(1) The court erred in holding that the order of the county court ordering Klobassa's claim to be paid in due course of administration as a third-class claim was not final and conclusive, but that the claim can be reopened and reclassified at a subsequent term of the court. (2) The court erred in holding that the claim of James Raley was a secured claim, and should be paid out of the proceeds of the sale of the property belonging to the estate; because the facts show that this was the only property belonging to the estate, that the funds in the hands of the administrator were not sufficient to pay both Klobassa's and Raley's claims, and that the Klobassa claim was the only claim classed as a secured claim, or as a lien on the property of decedent. (3) The court erred in holding that the claim of James Raley should have priority of payment over the claim of Ben. Klobassa; because the facts show that Klobassa's claim is a third-class claim, and Raley's claim is a fourth-class claim. (4) The court erred in holding that the deed of trust given to secure Raley's note was a good and valid mortgage on the property of decedent, Thomas Martin—First, because the facts show that the only property belonging to decedent was his homestead, on which he lived with a minor child at the time the deed of trust was given; second, because the facts show that at the time the claim on the note was allowed by the administrator and approved by the probate court, the note was barred by the statute of limitations."

So much of our statute¹ classifying claims against estates of decedents as has application to this question reads as follows: "Art. 2037. The claims against an estate shall be classed and have priority of payment as follows: * * * (3) Claims secured by mortgage or other liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien; and when more than one mortgage or lien shall exist upon the same property the oldest shall be first paid; but no preference shall be given to such claim secured by mortgage or lien further than regards the property subject to such mortgage or other lien." Under this statute a claim against an estate may be a claim of the third class as to a portion of the property, because secured by a lien thereon, and of the fourth class as to the remainder of the estate. And if it be true (which we do not decide) that an order or judgment of a probate court declaring that a claim is secured by a lien on certain property, and is therefore a third-class claim

against the estate as to said property, is a final judgment, and binding upon the owners of other claims against the estate, unless set aside or appealed from, still we do not think that appellant's claim comes within that category. His claim was a judgment recorded in Bexar county, so as to create and preserve a lien on any real estate Thomas Martin owned in said county subject to forced sale. The probate court approved it, and ordered it paid in due course of administration as a third-class claim, but did not adjudge it to be a lien on Martin's homestead, or on any other property. We think that in ordering it to be paid as a third-class claim the county court never intended to declare this claim to be a lien on Martin's homestead. It should not be construed to mean more than this: That, if there was any of Martin's estate to which appellant's judgment lien would under the law attach, then, as to such property, this claim should have priority. We conclude that the first assignment of error is not well taken. *Eastham v. Sallis*, 60 Tex. 576; *Investment Co. v. Jackman*, 77 Tex. 622, 14 S. W. Rep. 305.

The second assignment involves substantially the same question that the first does, and need not be further considered.

The third assignment, alleging that the court erred in according appellee's claim-priority over appellant's, because the facts show that appellant's is a third and appellee's a fourth class claim, is not sustained by the facts. To have warranted the court below in classifying his claim as one of the third class as to the fund in controversy, he should have shown that the land the sale of which produced the fund was subject to forced sale, and therefore to his judgment lien at the time said judgment was recorded, or at any rate at the time Martin executed the trust deed to secure appellee's debt. Appellant failed to make such showing, and this assignment of error is not well taken.

As to the fourth assignment of error, it is settled that an unmarried surviving spouse can mortgage the homestead, and that the courts can enforce such mortgage. As to the first of these propositions, see *Lacy v. Rollins*, 74 Tex. 566, 12 S. W. Rep. 314; *Smith v. Von Hutton*, 75 Tex. 623, 13 S. W. Rep. 18. As to the second proposition, see *Harie v. Richards*, 78 Tex. 80, 14 S. W. Rep. 257.

As to appellant's proposition based on the assumption that the land sold was community property, and that the purchaser acquired only a half interest therein, it is enough to say that the purchaser paid his money for Martin's interest in the land, and whether he got title to only one-half, all, or none is wholly immaterial in this case. Nor is there any merit in the contention that appellee's claim was barred by the statute of limitations when presented for allowance. The statute of limitations was suspended for one year after Martin's death, and the claim was presented just four years

¹Rev. St. 1879.

and three months after its maturity. Rev. St. art. 8218. None of the assignments of error are well taken, and the judgment of the district court is affirmed.

TATE et al. v. KRAMER et al.

(Court of Civil Appeals of Texas. Nov. 2, 1892.)

VENDOR AND PURCHASER — INNOCENT PURCHASER — WHAT CONSTITUTES — AGREEMENT TO ACCEPT QUITCLAIM — TRESPASS TO TRY TITLE — JUDGMENT FOR UNPAID PURCHASE MONEY.

1. Where a person purchases land from the holder of the legal title for a grossly inadequate consideration, without actual notice of the equities of the true owners, and agrees to accept a quitclaim deed from his vendor, he is not an innocent purchaser, and will not be protected, because his deed, which both he and his grantor believed at the time was in effect a quitclaim, was in fact in form a conveyance with special warranty.

2. Where, in trespass to try title by the true owners against such purchaser and his grantees, it appears that such purchaser holds the notes of his grantees, who were innocent purchasers, for the greater part of the price, plaintiffs are entitled to judgment against such grantees for such unpaid price.

Error from district court, Gillespie county; A. W. Moursund, Judge.

Action of trespass to try title by Robert Tate and others against Oscar Kramer and others. There was a judgment for defendants, and plaintiffs bring error. Reversed.

Brown & Dunn, for plaintiffs in error. Lecky & Pyle, for defendants in error.

COLLARD, J. The statement of the nature and result of the suit made by plaintiffs in error is correct, and is accepted by the defendants in error. It is as follows: "This suit, in form of an action of trespass to try title to about 1,700 acres of land in Gillespie county, Texas, was brought in the district court of said county February 10, 1887, by plaintiffs in error against Kramer and Hardt, defendants in error. February 24, 1887, defendants answered by general demurrer, general denial, and plea of not guilty. September 23, 1887, the court granted leave to defendants to make their warrantor, J. I. Neely, party defendant. February 21, 1888, said Neely appeared, and filed an answer, making himself party defendant, and setting up, in substance, that at the time he sold the land in controversy to his codefendants, Kramer and Hardt, to wit, on June 19, 1886, he was possessed of the legal title to it, which he had acquired without any notice of the claim or rights of plaintiffs, and for a valuable consideration; that he sold said lands to defendants Kramer and Hardt for a valuable consideration, and that at no time prior to the filing of this suit did he or they have any notice of the claims or rights of plaintiffs, etc. February 27, 1888, plaintiffs filed their supplemental petition, in which they denied the allegations made by Neely,

and averred that he sold said land to his codefendants on a credit, and had not received payment of the price or purchase money therefor, to wit, the sum of \$3,800, agreed upon by the defendants; that said sum of \$3,800 is still due to said defendant (Neely) from his codefendants for said land; that defendants, at the time of their purchase, had notice that said land was held in trust by Mary A. Tate for plaintiffs, who were the owners thereof, and they prayed as in their original petition; 'and, further, in case they may not be entitled to recover said land, then that they have judgment against said defendants for the unpaid purchase money, and interest thereon; also that they have such other and further relief as their case may require.' On the 28th of February, 1888, the case was tried by the court, a jury being waived, and judgment was rendered that plaintiffs take nothing of defendants, etc. This judgment was duly excepted to, and notice of appeal given by plaintiffs, and ten days were allowed within which, after adjournment, to make and file statement of facts. Findings of facts and conclusions of law were filed by the court, and a statement of facts was approved and filed on the 8th of March, 1888."

The plaintiffs have brought the case into this court for revision by writ of error, and assigned errors as follows:

The second assignment of error: "The court erred in the conclusions of law and fact found, and especially (1) in finding as a fact (section 5) that Mrs. M. A. Tate conveyed to J. I. Neely the land in controversy, when all the evidence relating thereto, given by said Tate and defendant Neely, with Neely's letters, and conclusions of the court in section 10, show that both said parties fully intended and understood the deed to be only a quitclaim of whatever right she might have to the land, and not a conveyance of the land, said land being worth, as shown, \$3,800, and the price paid by J. I. Neely to Mrs. M. A. Tate being only \$100. (2) In finding as facts (section 6 et seq.) that defendant Neely conveyed to the other defendants by warranty deeds the land sued for, and thereby vested in said codefendants the legal title to said land, when, as the evidence shows, said Neely only made a conditional contract to sell the land to his codefendants, and that codefendants had paid only a small fraction of the agreed purchase price for the land, and were wholly in default as to the entire balance, thereby renouncing claim or title to the land. (3) In finding as law (sections 2 and 3, conclusions of law) that the deed from Mrs. M. A. Tate to defendant J. I. Neely vested in said Neely the title to the entire tract of land sued for, 'and the defendants Kramer and Hardt could not be affected by understandings, etc., between said Tate and Neely,' since it was shown by all the evidence relating thereto, viz. the evidence of said Neely and Tate, and the con-

tracts of sale by said Neely to his codefendants, that defendant Neely bought only such claim as Mrs. M. A. Tate might have, paid only \$100 therefor, when the market value of the land was \$3,860 at least, and that defendants Kramer and Hardt had paid only \$530 of said market value, made default as to the balance, and forfeited or relinquished all claim to the land."

The third assignment of error: "The judgment rendered in this cause is erroneous, contrary to the law and the evidence adduced, in that it is for the defendants when it should have been for the plaintiffs for at least seven-eighths of its value, as prayed for in plaintiffs' first supplemental petition, as is shown by all the evidence adduced on the trial, and especially by the evidence and conclusions of fact hereinbefore specified."

The court's findings of facts and conclusions of law are as follows:

Findings of Facts: "(1) In 1873, plaintiffs and their mother, Mrs. M. A. Tate, were the heirs of Waddy Tate, Jr., and each entitled to an equal share of his estate. (2) In a suit had between plaintiffs herein and Mrs. M. A. Tate, as heirs of Waddy Tate, Jr., who was one of the heirs of Waddy Tate, Sr., and the other heirs of said Waddy Tate, Sr., J. C. Brown was appointed receiver, and ordered to sell the property belonging to the estate of Waddy Tate, Sr. for partition. (3) At this sale, had in 1874, the premises in controversy were bid in by the attorney of M. A. Tate and her children, the plaintiffs herein, and the purchase money for same charged against their joint interest in the estate of Waddy Tate, Sr. (4) By direction of the attorney for plaintiffs and Mrs. M. A. Tate a deed for these premises was executed by said receiver, J. C. Brown, to Mrs. M. A. Tate alone, which deed was recorded in Gillespie county, December 22, 1875. (5) On November 23, 1884, Mrs. M. A. Tate conveyed the premises conveyed to her by said Brown to defendant J. I. Neely, by deed with special warranty of persons claiming by, through, or under her, which deed was recorded in Gillespie county on April 25, 1885. (6) On June 19, 1886, defendant J. I. Neely conveyed by general warranty deeds, retaining, however, vendor's lien, to defendant Oscar Kramer, 640 acres of the premises conveyed to him by Mrs. M. A. Tate, and to Herman Hardt the balance of said premises. (7) On February 10, 1887, plaintiffs filed this suit. (8) In 1878 the land was sold for taxes, and taxes have ever since been paid by purchaser at tax sale, and after he conveyed his claim to defendant Neely taxes were paid by said Neely. (9) Defendant J. I. Neely paid to Mrs. M. A. Tate the consideration expressed in her deed to him, and had at the time no actual notice of any claim on part of plaintiffs. (10) Mrs. M. A. Tate intended the conveyance to J. I. Neely as a quitclaim, and defendant J. I. Neely agreed to receive a

quitclaim. (11) Defendants Kramer and Hardt paid to Neely so much of the purchase money as shown by their deeds, and executed negotiable notes for remainder as shown by said deeds."

Conclusions of Law: "(1) Mrs. M. A. Tate was invested by the deed from J. O. Brown to herself with the legal title to the land, unvalued, in this litigation, holding same, however, as an undivided seven-eighths of same, in trust for plaintiffs herein, who were the equitable owners of said seven-eighths interest. (2) The defendants Oscar Kramer and Herman Hardt, having purchased said land from J. I. Neely for a valuable consideration, without notice, actual or constructive, of plaintiffs' equitable claim to same, and acquired from said Neely the legal title to same, are entitled to judgment quieting their title and possession of same. (3) The conveyance by Mrs. M. A. Tate to J. I. Neely being on its face a deed to the land, and not a quitclaim to grantor's interest therein, it passed the legal title vested in M. A. Tate to same; and defendants Kramer and Hardt could not be affected by any private understanding between Mrs. M. A. Tate and J. I. Neely as to the effect of said conveyance, it not being shown that they had any notice, actual or constructive, thereof. (4) Plaintiffs not being entitled to recover as against defendants Kramer and Hardt, judgment will be rendered that plaintiffs take nothing by their suit and that defendants recover their costs."

The findings of fact require some explanation, qualifications, and additions, as shown by the evidence. The receiver, J. C. Brown, bought the land at the sale made by him for \$87, for Mrs. Tate and her children, and the amount, so reported to the court by the receiver, was ordered, according to the rights of the parties, to be paid to Mrs. Tate and children in equal amounts. The money was never paid. The intention was that Mrs. Tate and her children should own the land equally and jointly. No money was paid Mrs. Tate for the land, or to the parties, by the receiver, as entitled, but the deed by the receiver was made to Mrs. Tate, the children having by resulting trust seven-eighths of the land, and she one-eighth. Tate bought in a tax title to the land from one Schuchard for \$275. The record discloses nothing of the regularity of the tax title but a tax deed by the sheriff of Gillespie county to Schuchard, and a deed from him to Neely, to the admission of which plaintiffs objected, because they did not show a legal assessment of the land for taxes, nor other precedent requisites authorizing the tax sale. (The clerk states that these deeds were missing since the filing of the petition for writ of error, and could not be found in his office.) The sale by Schuchard of his tax title was made over two years from the date of his purchase at the sale. Neely's purchase from Mrs. Tate was on the 26th day of November, 1884, she

at the time living in Yazoo county, Miss. He paid her \$100 for the entire 1,700 acres. He sold the land to Kramer and Hardt, defendants, on the 19th of June, 1886, for \$3,000,—\$536 in cash and \$3,124 on time, secured by their negotiable promissory notes,—the deeds reciting the facts, and retaining a vendor's lien upon the land sold to each to secure the unpaid balance. This suit was filed February 10, 1887, and at that time, and at the time of the trial, Kramer and Hardt still owed Neely the amount of the notes. It was understood between Mrs. Tate and Neely at the time of her deed to him that she was to make him a quitclaim deed for her claim to the land, but he had no blank form for quitclaim deed, and used a form of general warranty, inserting after the warranty clause, "by, through, or under me only," believing that this language made the deed a quitclaim, as he told Mrs. Tate. The deed purports to convey the land. There was some correspondence between them about the purchase, and two of his letters to her were in evidence, but the clerk states in a note that they are missing, and could not be copied. He sent the deed to her to sign. His agreement with her was to buy her claim, and take a quitclaim, and he believed he had done so. He knew of no title in the children, or other title, except the tax title, which he owned. The facts leave no doubt that Neely contracted for and intended to contract for a quitclaim deed from Mrs. Tate,—a quitclaim in its strict legal sense; that is, for her claim only. His deed is in form of a conveyance of land, it is true, and upon its face is not a quitclaim; but he is not in an attitude to insist upon the form of his deed. He claims to be an innocent purchaser, and contends that he is so because his deed purports to convey him the land, and not a mere chance of title. He insists upon the letter of the law in construing the deed, while it is shown by his own testimony that it misrepresents the facts, and is false. His letters to Mrs. Tate evidently contained the agreement that he was to have a quitclaim, as he swears he told her he was to buy her title only, he being in Texas, and she in Mississippi. It would work a fraud upon her children to refuse to give effect to the agreement. A quitclaim vendee cannot be an innocent purchaser, because it serves him with notice that he is only purchasing the chance of title,—such title as the vendor has, and no more. Such notice, or any notice of the fact that there is a better title, excludes good faith from the transaction. To be an innocent purchaser, the vendee must in good faith pay a valuable consideration, without notice of outstanding legal or equitable rights. His agreement to take a strict quitclaim has the effect to give him notice. His deed should be construed upon this question by all the facts attending the transaction,—his letters, his actual information, his agree-

ment for a quitclaim, the gross inadequacy of consideration, and any other circumstance tending to show notice, and the absence of good faith. He testifies that he was to have only Mrs. Tate's title, that he thought or believed the deed was a quitclaim, and that the special warranty made it so. Under such circumstances, he should not be allowed to take advantage of the form of the deed to establish good faith. He was himself responsible for the mistake in the deed. He knew what a quitclaim implied,—title of the vendor only. He was in the position of one who had all the notice a quitclaim could give, with a full understanding of what such title meant,—notice, and want of good faith. He asks to be protected upon equitable principles. These principles do not apply in his case. He is not what he claims to be,—an innocent purchaser. He should not, by force of legal rules of construction, (of his deed,) be allowed equitable protection when the undisputed facts show that he is not within the equity rule invoked. We are of the opinion that he had full notice of the character of title he was receiving, qualified and controlled as it was by the attending circumstances. Under such title he could not be a purchaser in good faith. *Harrison v. Boring*, 44 Tex. 262; *Taylor v. Harrison*, 47 Tex. 461; *Milam Co. v. Bateman*, 54 Tex. 155; *Richardson v. Ledi*, 67 Tex. 359, 3 S. W. Rep. 444; 2 Pom. Eq. Jur. § 753. Finding that Neely is in the same attitude of a vendee in a quitclaim, he is required to take notice of all other claims to the land. He cannot say he knew of one, the tax title bought in by himself, and therefore did not know of the equitable title in the plaintiffs. His position is that of one having notice of all titles. The question is not one of being merely put upon inquiry; the notice is absolute and conclusive as to all claims. It was in proof that the greater part of the purchase price of the land had not been paid to Neely by Kramer and Hardt, to whom he had contracted a sale of the land for \$3,660. It seems the notes are negotiable promissory notes, but at the time of trial they were still owned and held by Neely. They are not irrevocably bound to pay him these notes, and if they should do so after notice of plaintiffs' rights they would not be acquitted of their obligation to pay the true owners at least the amount unpaid at the time of notice. To this extent they would not be innocent purchasers. Plaintiffs' pleadings prayed for relief appropriate to the case,—judgment against them (Kramer and Hardt) for the unpaid purchase money,—but the court below refused it. 2 Pom. Eq. Jur. §§ 754-756; 1 Story, Eq. Jur. § 64; *Perry, Trusts*, §§ 210, 221; *Caldwell v. Fraim*, 32 Tex. 310; *Evans v. Templeton*, 69 Tex. 375, 6 S. W. Rep. 843. The judgment of the lower court should be reversed and remanded, and it is so ordered. Reversed and remanded.

**TEXAS LAND & MORTG. CO., Limited,
et al. v. STATE et al.**

(Court of Civil Appeals of Texas. Dec. 13,
1892.)

**PUBLIC LANDS — DUPLICATE CERTIFICATE — AD-
VERSE POSSESSION—VOID PATENT.**

1. A duplicate land certificate, issued in place of one which never had any existence, confers no rights. *Gunter v. Meade*, 14 S. W. Rep. 562, 78 Tex. 634, followed.

2. Adverse possession under a patent void for want of authority of the officer issuing it gives no prescriptive title under the three-years statute of limitation.

Appeal from district court, Wichita county; A. H. Carrigan, Special Judge.

Actions by J. N. Lee against Meade & Bomar and others, and by Gunter & Munson against Meade & Bomar, which were consolidated, and the state of Texas intervened. Judgment for Gunter & Munson and the state of Texas, and the other parties appeal. Affirmed.

Bomar & Bomar, for appellants. H. G. Robertson, James & Chambers, and Robertson & Gray, for appellees Gunter & Munson. Barrett & Eustis, for appellee J. N. Lee.

STEPHENS, J. The land in controversy in this suit, consisting of a tract of 642 acres and a tract of 3,337 acres, situated in Wichita county, was patented in the month of August, 1884, in the name of M. M. Purinton, as assignee of Donato Leona. These patents were issued by virtue of a duplicate certificate for a league and labor of land, issued in the name of said Donato Leona by the commissioner of the general land office, December 4, 1874, in lieu of headright certificate alleged to have been issued to said Donato Leona by the board of land commissioners of Nacogdoches county, March 24, 1838. The duplicate certificate was issued upon a showing made of the loss of the original by S. H. Cooper, through his attorney in fact, G. W. Diamond, under a purported conveyance of this original certificate from Donato Leona to said Cooper, of date January 3, 1848, and recorded in 1883. In the year 1875 the duplicate certificate was located on the land in controversy. By deed dated October 4, 1883, said Diamond, under power of attorney from Cooper of about the same date, conveyed the land to M. M. Purinton. Donato Leona lived in Nacogdoches county from 1834 to 1838, and died in 1839. It is manifest that the purported conveyance from Donato Leona to Cooper was a forgery. In March, 1878, prior to the issuance of said patents, Gunter & Munson located valid land certificates on the larger part of the two tracts of land in controversy. Their location, in conflict with said larger survey, consisted of three sections of land of 640 acres each, numbered 7, 8, and 9, of which No. 8 was located for the state; and at the same time they locat-

ed for the state also survey No. 10. In July, 1890, J. N. Lee, claiming in right of the heirs of Donato Leona, instituted a suit to recover the lands in controversy of those claiming under the patent to M. M. Purinton, including Meade & Bomar. In February, 1891, Gunter & Munson instituted a suit against Meade & Bomar to recover so much of the larger tract of land in controversy as was covered by their location. These two suits were consolidated, and the state of Texas intervened, claiming the land not covered by the odd sections of Gunter & Munson, and asking to have the patents issued to Purinton canceled. The cause was tried without a jury, and judgment was rendered in favor of the state, canceling said patents, and in favor of Gunter & Munson for the recovery of the land claimed by them, from which judgment the other parties have appealed.

The record contains no conclusions of law and fact, but the trial court must have found that there never was in existence an original headright certificate to Donato Leona for a league and labor of land in lieu of which the duplicate was issued. After a careful consideration of the facts contained in the record we conclude that the preponderance of the evidence sustains this finding. It appears from the evidence, however, that there was an original certificate issued March 27, 1838, by the board of land commissioners of Nacogdoches county to John L. Roberts and George Allen, assignees of Donato Leona, for one labor of land, which was approved as a valid certificate to Donato Leona for one labor of land by the board of land commissioners appointed to detect fraudulent land certificates under the law of 1840. It appears also that the Mexican government granted to Donato Leona a league of land as a colonist, located in Angelina county, in the year 1834. In the year 1890 Meade & Bomar instituted suit against Gunter & Munson to remove cloud from their title to 1,322½ acres of the larger tract in controversy, alleging, as one ground for relief, that they had acquired title under the three-years statute of limitations. In that suit the trial court found that they had not had such continuous possession as would sustain their plea under the three-years limitation, but found that they were innocent purchasers, and entitled to recover against Gunter & Munson. The supreme court, in October, 1890, on appeal from this judgment, held that Meade & Bomar showed no such title as to warrant a judgment in their favor, and reversed and rendered judgment for Gunter & Munson. 14 S. W. Rep. 562. Section No. 7 of the Gunter & Munson location was involved in that suit. The statement of facts in this record contains an admission that, upon the trial of said suit, proof on the question of limitation of three years was introduced pro and con by both parties, and passed upon by

the court in favor of Gunter & Munson, and that Meade & Bomar introduced the patent and their claim of title thereunder as shown in this case. It was also admitted that Meade & Bomar, and those under whom they claimed, had been in peaceable, adverse, and exclusive possession of said 1,322½ acres of the larger tract in controversy, cultivating, using, and enjoying the same, and paying taxes as they accrued, since May 5, 1885; and that M. M. Purinton entered into the possession of the rest of the larger tract on May 15, 1886, and that she and the defendants claiming under her had been in the actual, adverse, and exclusive possession thereof ever since, paying taxes thereon regularly as they accrued. It was neither proven nor admitted that the possession of any of the parties was held under deeds duly registered. It was further admitted that Meade & Bomar bought the 1,322½ acres of land claimed by them, and paid value therefor, without any notice of defect in title, and that A. J. Roberts bought in the same way.

In the case of *Gunter v. Meade*, 78 Tex. 634, 14 S. W. Rep. 562, it is held that, inasmuch as a duplicate certificate professes to confer no rights other than such as original gave, if there be no original, it confers no right whatever. This decision rests upon a finding by the trial court in that case (which was sustained by the supreme court) that the records of the general land office did not show that any original certificate for a league and labor of land had ever been issued by the board of land commissioners for Nacogdoches county to Donato Leona, but that a colonist's grant for one league of land had been made to him by the government in 1835, which was situated in Angelina county, and that that board issued to the assignees of Leona a certificate for one labor of land. It follows, from the conclusions of fact set forth above and the law as announced in that case, that J. N. Lee, who is admitted to have such rights as the heirs of Donato Leona would be entitled to maintain in this suit, cannot recover, against Gunter & Munson and the state of Texas, the land sued for by him. It also follows, as we think, that the other parties to the suit who claim under the patent to M. M. Purinton cannot successfully resist a recovery herein of the land sued for by the state; nor can they prevent a recovery by Gunter & Munson, unless the defense interposed under the statute of limitation can avail them. The five-years statute cannot be invoked, because the record contains no proof that they held under deed or deeds duly registered. It is contended by counsel for Gunter & Munson that the three-years clause cannot avail Meade & Bomar as to section No. 7, because the decision in the former suit of *Gunter v. Meade* precludes this defense as being res adjudicata. We are of the opinion that this contention cannot be sustained. This rec-

ord discloses that on the former trial proof was introduced pro and con as to the possession, but does not show what that proof was, nor that it was identical with the proof upon the last trial. This issue on the former trial was determined against Meade & Bomar, because the proof failed to show at that time a sufficient continuous possession. It is admitted in the statement of facts that on the last trial a possession of the requisite character was held by Meade & Bomar, and those under whom they claimed, from May 5, 1885, up to that time. We have, however, reached the conclusion that under the construction placed upon the three-years statute of limitations by our supreme court, inasmuch as possession is held under a grant void for want of power in the officer issuing it, none of the defendants in this case can avail themselves of this defense. While the decided cases establish the rule that the three-years clause of the statute of limitations is applicable where the patent purports to pass the legal title, and does pass all the title the state has or can convey, though in fact no title passes to the grantee, yet a proper observance of the distinctions made in these and analogous cases seems to us to lead to the conclusion that, where the patent is utterly void for want of authority in the officer issuing it, and does not in any manner bind the state, giving no protection, as title, against any person, the three-years adverse possessor cannot prescribe under it. *League v. Rogan*, 59 Tex. 427; *Davila v. Mumford*, 24 How. 223; *Smith v. Power*, 23 Tex. 33; *Bates v. Bacon*, 66 Tex. 348, 1 S. W. Rep. 256; *Gunter v. Meade*, 78 Tex. 634, 14 S. W. Rep. 562; *Marsh v. Weir*, 21 Tex. 110; *Stegall v. Huff*, 54 Tex. 193; *Veramendi v. Hutchins*, 48 Tex. 531. The decision in *Winsor v. O'Connor*, 69 Tex. 571, 8 S. W. Rep. 519, construing section 2, art. 14, of our constitution, and interpreting the phrase "land titles," might seem to be in conflict with this result. It seems to us, however, that a patent might be entirely without efficacy to pass any character of title as against the state, or to give protection, as title, against any person, and still be held effective, by force of that provision of our constitution—enacted in furtherance of public policy, and not to confer any private right—to withdraw the land from location.

The point is made by appellants in their brief, that if it be assumed that the original certificate to Donato Leona was only for one labor of land, the commissioner, in issuing a duplicate, was not entirely without jurisdiction to act, and that, therefore, the grant, though excessive, would not be absolutely void, but only voidable; citing the case of *Maxey v. O'Connor*, 23 Tex. 235. This question, though not expressly decided, seems to have been, in effect, passed upon in the case of *Gunter v. Meade*, discussed above. It is not entirely clear to the mind

of the writer, however, that this contention is without force. These conclusions dispose of all the assignments of error which relate to the merits of the controversy.

The objections raised by exception to the authority of the attorney general to intervene in the name of the state are not well taken. Rev. St. art. 1265; Laws 1887, p. 138; State v. Delesdenier, 7 Tex. 95; State v. Thompson, 64 Tex. 690.

The assignments which relate to the admission of testimony are likewise not well taken. A part of the deposition of R. M. Hall, commissioner of the land office, might not have been admissible, but the court before whom the case was tried without a jury, in the explanation appended to the bill of exceptions, states that the testimony which we think was objectionable was excluded from his consideration. It follows that the judgment of the court below must be in all things affirmed.

A motion for rehearing in this case was overruled.

BOSSE v. CADWALLADER et al., (OGDEN et al., Interveners.)¹

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

TRESPASS TO TRY TITLE — TITLE FROM COMMON SOURCE—EVIDENCE—DEEDS—FRAUDULENT CONVEYANCES.

1. Rev. St. art. 4802, providing that in trespass to try title plaintiff may show common source of title by certified copies of deeds, and such deeds shall not be evidence of title for defendant unless offered by him, does not change the effect of original deeds when offered as evidence of common title.

2. Original deeds offered by plaintiff in trespass to try title to show common source of title are evidence of title in defendant, though not offered by him.

3. In trespass to try title, where plaintiff admits that the legal title is in defendant, but avers that it is founded on fraudulent conveyances, he cannot rest his case on proof of title in himself, but must establish the invalidity of defendant's title.

Appeal from district court, Bexar county; W. W. King, Judge.

Trespass to try title by Henry Bosse against A. H. Cadwallader and others. Charles W. Ogden and Sam M. Johnson intervened, and A. G. Clark was made a party. From a judgment for plaintiff, Ogden and Johnson appeal. Reversed.

William Aubrey, for appellants. C. H. Clifford and B. L. Aycock, for appellee.

NEILL, J. On August 18, 1885, the appellee, Henry Bosse, filed his petition in the district court of Bexar county in the ordinary form of trespass to try title against A. H. Cadwallader and J. D. Snyder to recover lots 3 and 4, block 8, in the city of San Antonio. On September 5, 1885, the defendants Cadwallader and Snyder filed their answer, in which they pleaded not guilty, and that they

occupied the premises sued for as tenants of Sam M. Johnson, praying that Johnson be cited as a defendant in the cause, and that they be dismissed, with their costs. On March 9, 1886, the appellee, Henry Bosse, filed in the cause what he styled his "first supplemental petition" to his original petition, in which he alleged that the title of Johnson to the lots was null and void, for the reason that A. G. Clark, under whom he alleged Johnson claimed the premises, being insolvent on the 24th day of November, 1882, made a pretended conveyance of the property to R. M. Moore, reserving in himself the beneficial use and enjoyment of the property, as well as the real title, and that on the 5th day of February, 1885, the said Moore, at the request of Clark, with full notice of the want of title in him by Johnson, and of his purpose thereby to defraud his creditors, pretended to convey the lots to Johnson; that plaintiff was a creditor of Clark's, and that the conveyance was made to hinder and delay him in the collection of his debt. On September 10, 1889, Sam M. Johnson and Charles W. Ogden, styling themselves "Interveners," filed what they termed an "amended original answer," in which they pleaded not guilty, a general denial, and a special answer, to the effect that if, as charged by plaintiff in his supplemental petition, the title to the property was not absolute and indefeasible, the same was held by Johnson under a conveyance to Moore to secure Charles W. Ogden in the payment of \$1,500 due by Clark to him, and to indemnify Ogden against certain general warranties of titles to lands sold by Clark to Ogden, and which Ogden had sold to other parties. They prayed that Clark be made a party to the suit, and that, if plaintiff recovered the land sued for, he should recover only subject to said rights of Ogden to the premises, and that he be first compelled to pay off and discharge the indebtedness due Ogden, and indemnify him against his liability upon said covenants of warranty, or, failing in that, Ogden have judgment, with a decree against all parties foreclosing his alleged lien, etc. A. G. Clark, on the 29th day of August, 1889, accepted service on said answer, waived notice, and agreed that such acceptance and notice should have the full force and effect of an appearance by him for all purposes of the suit, but he never filed an answer. On November 30, 1889, plaintiff filed his "second supplemental petition," excepting generally and specially to defendant's said amended answer, and pleading, in effect, the facts alleged in his first supplemental petition, and sought to avoid the deed from Moore to Johnson as fraudulent. On December 13, 1889, the case came on for trial. A jury was impaneled, the evidence of the plaintiff introduced, whereupon Johnson and Ogden demurred to plaintiff's evidence, and offered no evidence themselves. Issue was joined

¹For opinion on rehearing, see 23 S. W. Rep. 730.

on the said demurrer, and, the jury being discharged, the court held the demurrer to plaintiff's evidence not well taken, overruled the same, and gave judgment for plaintiff. The court, upon the trial, found the following conclusions of facts: "First. A judgment of the district court of Bexar county, 87th judicial district, rendered May 19, 1885, in case No. 2,074, in favor of plaintiff, wherein Henry Bosse recovered against A. G. Clark, Cyrene Clark, T. D. Clark, T. S. Harrison, and John Crosby, composing the Lytle Coal Company, for the sum of three hundred and twenty-five dollars. Second. Execution on said judgment issued June 13, 1885, and levied on the property in controversy on the 15th day of June, 1885, by the sheriff of Bexar county; also said sheriff's return, showing said levy and sale at public vendue, before the courthouse door of Bexar county, on the first Tuesday, it being the 7th day of July, 1885, the property having before that time for twenty days been advertised at three public places in Bexar county, one of which was the courthouse door of Bexar county. Third. That the plaintiff, Henry Bosse, at the sale, bought the lots in controversy. Fourth. The sheriff of Bexar county, in pursuance of said sale, conveyed by his deed, dated August 11, 1885, said property to the plaintiff, Henry Bosse; that said deed was duly authenticated and recorded in the records of Bexar county, August 15, 1885. Fifth. That plaintiff introduced the following original deeds, for the purpose of showing a common source of title, and so stated his purpose in so doing, and proved their execution as at common law: (1) Deed from A. G. Clark and Cyrene Clark (his wife) to R. M. Moore, conveying said two lots and two others in the same block, dated 24th day of November, 1882, duly recorded 24th day of November, 1882; (2) deed from Moore to Sam M. Johnson, conveying the same property, dated February 5, 1885, and duly recorded the 5th day of February, 1885. Sixth. Plaintiff rested his case, and defendants demurred to plaintiff's evidence, without introducing any testimony." Upon the foregoing facts, the court below found the following conclusions of law: "First. That, when plaintiff introduced in evidence defendants' deeds for the purpose only of proving a common source, said deeds were not in evidence for any other purpose, nor could they be considered, when thus offered, as evidence of title in defendants. Second. That under article 4902, Rev. St., plaintiff could prove common source by original deeds, as well as by certified copies, and, when thus offered, they were not evidence of title in defendants. Third. Said article of the Revised Statutes should be liberally construed, with a view to effect its object, and promote justice. Fourth. That, if common source under the Revised Statutes can only be proved by certified copies, it can still be proved, as at common law, by original deeds, and, when

offered for that purpose only, they are not evidence of title in defendants. Fifth. If all the deeds were in evidence for the purpose of proving title, then the superior title is in defendants, and the demurrer to the evidence should have been sustained, and the judgment rendered for defendants. Sixth. But defendants' deed being in evidence only for the purpose of proving common source, and plaintiff's deeds being the only evidence of title, the plaintiff showed the superior title; whereupon the demurrer was overruled, and judgment rendered for plaintiff."

By bills of exceptions taken on the trial by appellants to the admission in evidence of the execution, and sheriff's return thereon, mentioned in the second findings of fact by the court below, it is made to appear that the execution showed on its face that it was issued on a judgment in favor of "Henry Busse," and that the return of the sheriff thereon showed a sale to "Henry Busse," and that sheriff's deed referred to in the fourth findings of fact by the court below recited that it was made by virtue of an execution issued out of the district court of Bexar county in favor of "Henry Bosse" against Cyrene Clark and A. G. Clark and others, on a judgment rendered on the 19th day of May, 1885, and that the levy on the property was made by virtue of the writ on the 6th day of June, 1885, and that it was sold on the first Tuesday of the succeeding month to "Henry Busse." The admission in evidence of the deed just referred to, over appellants' exceptions, is assigned by them as error, upon the ground that it varies materially from the execution and return thereon, in that the former recites a sale to Henry Busse, and the latter a sale to Henry Bosse. Upon a demurrer to the evidence, every fact must be taken as proved which could be legally inferred from the evidence. *Booth v. Cotton*, 13 Tex. 362. If the rule that a return on an execution is conclusive as to all parties to the writ upon which it is made, and all others in privity with them, (*Sanger Bros. v. Trammell*, 66 Tex. 362, 1 S. W. Rep. 378; *Simon v. Day*, 84 Tex. 520, 19 S. W. Rep. 691), does not preclude the inference that "Henry Bosse" mentioned in the sheriff's deed is the same person called "Busse" in his return, we think it could be deduced from the evidence, and in that event there would be no error in the admission of the deed; but, as the case will be decided in appellants' favor on another assignment, we will not pass upon this question.

The 1st, 2d, 3d, 4th, and 6th conclusions of law found in the trial court, which are hereinbefore set out, are assigned as error by appellants, and the question for determination under it is, could the deeds from A. G. Clark and wife to R. M. Moore, and from R. M. Moore to Sam M. Johnson, when offered in evidence by appellee for the purpose of proving title from a common source,

be considered as evidence for any other purpose? If they could, then, as stated by the trial court, they would show the superior title in appellant Johnson, and the demurrer to the evidence should have been sustained, and judgment rendered for appellants. Article 4802, Rev. St., provides: "It shall not be necessary for the plaintiff to deraign title beyond a common source, and proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain of title to the defendant emanating from and under such common source; but before any such certified copies shall be read in evidence they shall be filed with the papers of the suit three days before trial, and the adverse party served with notice of such filing as in other cases: provided that such certified copies shall not be evidence of title in the defendant unless offered in evidence by him, and the plaintiff shall not be precluded from making any legal objection to such certified copies or the originals thereof when introduced by the defendant." Under this statute, the court below held that the plaintiff could prove common source of title by original deeds, and, when they were offered for that purpose, they could not be taken as evidence of title for defendants. This statute makes no reference to original deeds or other original evidence, and has no application to these, or to the effect that shall be given them when offered in evidence for the purpose of proving common source of title. Common source can be proved, as at common law, by original deeds. The statute quoted did not add to or take anything from this mode of proof, but left it, and the effect to be given such deeds when offered in evidence for that purpose, as it was before. Before this statute was passed, it was not necessary for the plaintiff to deraign title beyond a common source, but it was incumbent upon him, when so deraigned, to show the better or superior title under the common source. *Keys v. Mason*, 44 Tex. 143; *Sebastian v. Martin Brown Co.*, 75 Tex. 292, 12 S. W. Rep. 986. The plaintiff, in trespass to try title, must recover on the strength of his own title. This does not mean that he must show a good title against the world. It is enough that he shows a right to recover against the defendant. When both parties derive their title from the same source, the plaintiff ordinarily need not go behind this source to prove his title, but he must show that his title, emanating from this source, is superior to the defendant's; and, if the proof made by him to show common source shows also a superior title in the defendant, his own proof demonstrates that he has no right to recover, and that it is unnecessary for the defendant to introduce any testimony. If, at common law, the effect of deeds introduced for the purpose of proving common source of title was limited to that purpose, and they could not be evi-

dence of title in defendant unless offered in evidence by him, why did the legislature, in providing that the proof could be made by certified copies, add the proviso? It would have been wholly unnecessary, for courts would not have given effect to copies that was never given to originals when introduced for that purpose. This proviso, "that such certified copies shall not be evidence of title in the defendant unless offered in evidence by him," shows that it was understood by the legislature that evidence of common source of title offered by the plaintiff before the statute was passed might also be evidence of title in the defendant, and the proviso, for that reason, was made to prevent that effect from being given to the copies. Counsel for appellee has cited this court to no case supporting the position that, when a plaintiff introduces deeds for the purpose of showing common source, they cannot be considered in evidence for any other purpose. In deference to the learned judge who tried this case, and counsel for appellee, we have examined all cases accessible to ascertain whether such position has ever been maintained, and have not been able to find a single case in support of it.

Appellee, in his supplemental petition, admitted that the legal title to the land in controversy was in Sam M. Johnson, but averred that such legal title rested on fraudulent conveyances made by Clark to Moore, and by Moore to Johnson, at the instance of Clark. In an action of trespass to try title, where the plaintiff admits the legal title to the property in controversy to be in defendant, but alleges that such legal title is invalid, he cannot rest his case upon proof of title in himself, but he must establish the invalidity of defendant's title. *Hill v. Allison*, 51 Tex. 390; *Wade v. Love*, 69 Tex. 522, 7 S. W. Rep. 225. As is appropriately remarked by appellants' counsel: "When the basis of plaintiff's relief is an allegation of a conveyance prior in point of time to his own, but which he seeks to postpone to his own, as made in fraud of creditors, the burden of proof rests upon plaintiff to show the fraud which he claims invalidates the elder conveyance." The record in this case shows no attempt whatever on part of appellee to prove fraud in the conveyance through which he alleges Johnson claims the land from Clark, and the appellants were not required to prove the title that appellee had by his pleadings admitted in Johnson, nor were they required to show good faith on the part of Johnson in the acquisition of the title, when no evidence of any character had been introduced in any way tending to impute bad faith to him. The deeds under which appellants claim being prior in time to the execution of the sheriff's deed under which appellee claims, and no evidence having been offered by him to support his allegations that the deed to Johnson was

fraudulent, it established a superior title in appellee to the property in controversy. The demurrer to the evidence should have been sustained, and judgment rendered for appellants.

This case was on appeal before our supreme court before, (*Bosse v. Johnson*, 73 Tex. 608, 11 S. W. Rep. 860,) but the questions presented and determined on that appeal do not arise in this case as it is now presented to us. Appellants only prayed for relief against A. G. Clark in the event it should be held their title was defeasible. There being no other issue of fact or of law for determination, the judgment of the district court is reversed, and here rendered in favor of appellants for the land in controversy, and a dismissal of the case ordered entered as to the defendant A. G. Clark.

STATE v. HOWELL.

(Supreme Court of Missouri, Division No. 2.
June 27, 1893.)

PROSECUTION FOR MURDER — CONTINUANCE —
GROUNDS FOR NEW TRIAL — MISCONDUCT OF
JURY—EVIDENCE—SUFFICIENT.

1. A criminal case will not be continued on account of the absence of a witness who can be used only to impeach a witness for the adverse party.

2. Every reasonable presumption is indulged in behalf of the action of the trial court in refusing a continuance.

3. It is not ground for a new trial in a murder case that while the jury were on the street in charge of the sheriff a juror called across the street to a relative to ask about the physical condition of his mother, and with the sheriff walked partially across the street in view of the other jurors, and, in a voice loud enough for them and the sheriff to hear, spoke of the possible death of his mother.

4. The action of the lower court in refusing a new trial in a murder case on account of prejudice on the part of certain jurors will not be disturbed when such jurors deny any such prejudice, and there are conflicting affidavits as to their reputations for veracity.

5. Evidence is admissible that, pending an appeal from a conviction on a previous trial for the same offense, defendant attempted to escape from jail.

6. A new trial will not be granted merely to enable defendant to impeach a witness.

7. The fact that on a previous trial the state and defendant stipulated that a certain person, if present, would testify as to the existence of a certain state of facts, is not ground for rejecting the evidence of such witness at the second trial, though he then testifies as to a different state of facts.

8. On a prosecution for murder it appeared that a farmhouse, in which deceased and her mother lived, was destroyed about 10 o'clock P. M. by fire, and their bodies taken from the ruins in a much charred condition, but showing signs that murder had been committed before the fire took place. Tracks were found in the snow, leading from a strawstack to the house, along which straw was scattered, as if some had been carried to the house in order to start a fire. There were other tracks leading from the house, which were immediately followed up, and which led to a railroad yard, where a man was seen, who was identified as defendant. This man was followed to a point near

an hotel, and on inquiry there it was found that defendant had just registered. When found in his room his clothes were drabbed with snow and mud, and when told that a house and its occupants had been burned he said that he had not been to the country that night, though he had not been told that the house was in the country. There was evidence that defendant, who had at times lived at the farmhouse, had had improper relations with the mother, had tried to have an abortion committed, and had said that the child would "have to be gotten rid of," and after the fire a foetus was found in the cellar of the burnt house. Defendant was at the house on the afternoon of the day on which the crime was committed, and later was seen in a neighboring town, and after 8 o'clock he was seen leaving the town, and going in the direction of the house. *Held*, that defendant was properly found guilty.

Appeal from circuit court, Grundy county;
C. H. S. Goodman, Special Judge.

Joseph A. Howell was convicted of murder in the first degree, and appeals. Affirmed.

The facts appear in the following statement by SHERWOOD, J.:

The indictment charges the defendant with the murder of Nettie Hall, in Linn county, on the 19th of January, 1889, and this cause comes to this court for the second time. See 100 Mo. 628, 14 S. W. Rep. 4, where a reversal of the judgment occurred because of error in some of the instructions. On the return of this cause the defendant, at the June term, 1890, took a change of venue on account of the prejudice of the inhabitants of the counties of Linn and Chariton. Thereupon the cause was transferred to Grundy county, in the same circuit, and at the April term, 1891, of the Grundy circuit court another trial of the cause occurred, in which the jury failed to agree. At the August term next ensuing defendant filed an application for a change of venue, urging that the trial judge was prejudiced. This resulted in the Honorable C. H. S. Goodman, then judge of the then twenty-eighth circuit, being called in to sit in the cause, which he did at the adjourned August term, 1891, and, having overruled an application for a continuance made by defendant, the parties announced ready for and went to trial on the 3d day of October, 1891, resulting in a verdict of guilty of murder in the first degree, delivered October 9, 1891, and after judgment and sentence defendant appealed.

The bill of exceptions in this cause was signed and filed April 20, 1892, and yet the transcript herein was not filed in this court until January 23, 1893, or nearly 16 months after the trial occurred. Although the record is voluminous, there is no excuse for such an unreasonable delay, and investigation should be made as to the cause of such delay. On the arrival of the transcript the cause was set down for argument on the 13th day of April, 1893, and argued and submitted on that day. Subsequently, however, on suggestion accompanied by affida-

vits that the bill of exceptions was false and forged, and had been mutilated and changed since being signed by the Honorable C. H. S. Goodman, and filed in the office of the clerk of the circuit court of Grundy county, on motion of the attorney general it was set aside on the 2d day of May, 1893. On May 15, 1893, the attorney general moved the court for a rule and order on the Honorable C. H. S. Goodman, who had then ceased to be judge, commanding him to examine into the suggestion thus made. On May 17, 1893, this motion was granted, and the following rule and order issued to the Honorable C. H. S. Goodman: "Now at this day, it being suggested to this court by the attorney general, who appears on behalf of the state, that the bill of exceptions in this cause, since the same was signed and sealed by the Honorable C. H. S. Goodman, who tried said cause, and prior to the time the same was filed in this court, has been tampered with, changed, and fraudulently altered in the following points and particulars, to wit: That the testimony of James Hall, R. N. Vorce, D. C. Orr, and Jas. O. Moore, who were sworn on behalf of the state, and testified upon said trial, and Joseph A. Howell, the defendant herein, who was sworn upon his own behalf and testified upon said trial, has been so changed and altered in the copies of same in the bill of exceptions on file in this court and in the office of the clerk of the circuit court of Grundy county, Missouri, so as to omit much material and important evidence adduced upon said trial, and so as to insert in said bill of exceptions statements not made by said witnesses upon said trial; that the transcripts on file as aforesaid in this court, and in the office of the clerk of the circuit court of Grundy county, do not contain the testimony as given by said witnesses upon said trial, nor do they contain the true copy of said testimony as written in shorthand during said trial, and transcribed by the official stenographer, nor as signed and approved by said circuit judge, but are each false, forged, and untrue as aforesaid, and in other particulars; and whereas, the suggestion thus made by the attorney general is duly supported by affidavits: Now, therefore, in order that it may be determined whether in deed and in truth said bill of exceptions has been thus fraudulently altered and spoliated as aforesaid, it is considered and ordered by this court that a rule go to the Honorable C. H. S. Goodman, judge, as aforesaid, commanding him that he do careful examination make of the said bill of exceptions in connection with the transcribed stenographic notes of said trial and evidence and affidavits filed herein, and in connection with such other evidence as he may deem it necessary to take, and that from such notes of evidence, affidavits, and other testimony he do determine whether such bill of exceptions has been fraudulently altered, as has been sug-

gested; and if he, the said judge, do find in manner as aforesaid that said bill of exceptions has been altered, that he do proceed at once upon the transcribed stenographic notes of evidence taken at the trial of this cause and the affidavits and evidence as aforesaid, and on his own knowledge to restore the said bill of exceptions to what it was at the time the same was signed and sealed by him, and forward the same to this court. And it is further considered and ordered by the court that if the Honorable C. H. S. Goodman, the judge who tried this cause, shall, upon examination of said bill of exceptions duly made, in connection with said affidavits and other evidence and on his own knowledge, find that the notes of the stenographer of the evidence taken in this cause and transcribed herein were fraudulently altered before the bill of exceptions was signed and sealed by him, the said judge, so that he, the said judge, was fraudulently imposed upon and induced to sign and seal an untrue and false bill, that then he, the said Honorable C. H. S. Goodman, do from said transcribed notes of the evidence, affidavits, and from other evidence, as well as his own knowledge, determine what was the evidence which should have been contained in such bill; and, having thus determined, that he do cause to be prepared a just and true bill of exceptions in this cause, duly signed and sealed by him in duplicate, and that he, the said judge, do forthwith file one of said duplicate bills in the office of the clerk of the Grundy county circuit court, and that he do forthwith forward the other duplicate bill to the clerk of this court; and that he, the said judge, do on or before the 31st day of May, 1893, certify under his hand and seal to this court how he has discharged this rule and order, together with all evidence taken by him in said cause, together with the bill of exceptions which he shall determine as aforesaid to be the true bill of exceptions herein. And it is further ordered that a copy hereof be duly certified to the Honorable C. H. S. Goodman by the clerk of this court."

On May 31, 1893, the Honorable C. H. S. Goodman reported that in obedience to the mandate of this court he had examined into the matter committed to his care, and, having found that the bill of exceptions had been changed and falsified in part before the same had been signed and filed and in part afterwards, he corrected the same from the notes of the stenographer and from other legitimate sources, and forwarded the corrected bill to this court, together with his report. This report was duly and fully approved by an order entered to that effect, and the corrected bill of exceptions ordered to be filed, and to stand as the true bill, and the cause was submitted on the 13th of June, 1893, without argument.

Mrs. Minnie Hall, a widow, lived on a farm some 5½ miles southwest of Brook-

field, in Linn county. Her family consisted of four children, William, May, Nettie, and Roy, aged, respectively, nine, seven, five, and three years. The family lived alone, the husband and father, Ansel Hall, having died some time in 1887. The nearest neighbor lived about one-half mile distant. On the night of Saturday, the 19th of January, 1889, at about 11 or half past 11 o'clock, Mrs. Minnie Hall's house was discovered to be in flames. The neighborhood was comparatively thickly settled, and the neighbors quickly thronged to the scene. The house was a small pine frame, and underneath a considerable portion of it there was an old, unused cellar. At first, owing to the intense flames, nothing could be discovered but the blazing building, but so rapidly did the light materials of the dwelling consume that soon one of the sides burned away, which exposed to view the interior; then Mrs. Hall, the mother, was seen kneeling by the side or partly lying on a bed, her hair burned away, disclosing a wound on the top of the skull, as though it had been cut open, crushed, or the top knocked off. The body of one of the little girls was seen lying across the bed, with her head split open similar to her mother's. The bodies of the other children were not then seen. Underneath a portion of the house was an unused cellar. An effort was made to pull the body of Mrs. Hall out of the flames, but the heat was so great it was found impossible. Just then the flooring gave way and fell into the cellar. When this occurred the body of the little child, Nettie Hall, fell into the outside entrance of the cellar, and with a long rod, which had been procured in the mean time, it was drawn out, and, although considerably burned, was identified without difficulty. Her skull was found to be crushed or cut open. The other bodies were not rescued from the flames, and only the trunk of the mother's body, the spinal columns, and portions of the bones of the other children were found in the ruins. Upon an examination of the debris in the cellar a human foetus, which had probably reached the sixth or seventh month of gestation, was found in a pile of ashes. It had evidently been placed there before the fire, because it showed no marks of heat. It had snowed that night, a heavy, damp, clinging snow, and the ground was covered to the depth of three or four inches. After the fire the sky cleared up. It was a moonlight night, and the persons present discovered tracks in the snow of one person leading from the house in a southeasterly direction to a large pile of hay which laid against the north end of the barn, which stood some 60 yards distant. A portion of the top of this pile of hay, which was covered with snow, had been turned back, and an armful of dry hay removed. The tracks, and here and there straws from the hay, showed that the person had returned to the house with

the armful. Immediately under what had been the floor, against the bank of the cellar, near the northeast corner of the house, a pile of hay was found still burning. Further investigation disclosed tracks of one person leading away from the house. These tracks were fresh in the snow, as though the party had recently made them. Four young men—Lisher, Skowton, Smith, and Hall—started at once on the trail. They traced the tracks plainly and rapidly, as the moon was shining, and they were aided by the snow, first to a haystack in the corner of the meadow, then north some 35 rods over a fence, thence northwesterly until they came to a little branch or small stream. There the person seemed to have stopped and turned and retraced his steps until he came to a point where he could see Mrs. Hall's house. There the tracks went east. This was in a woods pasture. Thence through several farms and a woods pasture, in which there was underbrush, until they came to the road going to Brookfield, which the tracks had not followed before; thence across another farm, down by a creek, and back again into the Brookfield road; thence along the main road until a corner was reached. Instead of turning around the corner, the tracks went northward until they reached the middle of the railroad track; thence along the railroad track westward toward Laclede, a station west of Brookfield. After walking up the railroad a few rods, the person walked or stood around near the same place for a short time, when he retraced his steps, but not exactly in the same way he had gone, until he came to a cattle guard; thence across a bridge in a hollow in a yard or lot, where the person seemed to stop or turn and stand; thence to the railroad yards at Brookfield; thence across a street running east and west, until the Clark Hotel is reached. At this point two of the pursuers went to hunt the city marshal, while the other two continued on the trail. They followed it without difficulty into the railroad yards, when they were joined by a railroad hand, who was doing night work in the yards. The railroad hand went down one side of a line of cars standing in the yard, while the two young men followed along on the other side. In a few minutes the railroad man espied a man running, and hallooed to the two young men: "Here he is! Here he goes!" They were then joined by the city marshal and their two companions and several railroad yardmen, who had seen a man come into the yards, (whom they afterwards recognized as Howell, the defendant,) and the pursuit was continued down through the yard among the number of freight cars, out of the yards into a lumber yard on Main, where a switchman, Owen McKinney, who had gone there to watch for the fleeing party, saw a man climb over a high fence around the lumber yard and pass him. As he did so, McKinney

held his lantern up full in his face, and recognized him subsequently as Howell. Howell then ran up Main street about a block, turned west on another street, and went to Babb's Hotel, called for a room, went up stairs, and when the pursuing party reached there, and the marshal went into the room and arrested him, he (Howell) had undressed, but the bed had not been disturbed. His pants were wet above the knees, and the lower part of his overcoat was wet, and also his cap, and down around the roll of it was snow that had not melted. When the marshal told Howell to dress himself, the latter asked, "What does all this mean?" The marshal replied that there had been a house with a woman and four children in it burned, to which Howell said, "I haven't been in the country to-night." The marshal replied, "I didn't say the house was in the country," to which Howell made no reply. As he was fleeing through the railroad yards the night of the murder he was positively identified by the following witnesses: Oulatin; Miller; McKinney, within two feet of him as he jumped over the lumber yard fence, and flashed his lantern in his face; and Elmer Plopper, a switchman, who was 10 or 15 feet away from him.

Howell is a first cousin of Mrs. Minnie Hall's. He had come into the neighborhood where she lived in March, 1887, and secured employment as a farm hand. During the greater portion of the time that had elapsed between his coming to the neighborhood and the date of the crime he had worked for different farmers in the immediate vicinity of her home. From time to time he was at her house, kept his trunk and clothes there, and she did some of his washing. For several weeks preceding the murder of Mrs. Hall and her children and the burning of their home, Howell had been teaching a country school some four or five miles south of Mrs. Hall's, in the edge of Chariton county. Some two or three weeks before the date of the crime, Henry Smith, a witness for the state, who had come to the county with Howell, and who was then at work for a Mr. Vorce, who lived in the neighborhood, states that Howell came to Mr. Vorce's, and asked him to go with him over to Mrs. Hall's. That he went, and on the way Howell said that he had been criminally intimate with his cousin, Mrs. Hall, and that she was pregnant, and asked Smith what he should do. Smith says he advised Howell to complete his term of school and leave the country. That they went to Mrs. Hall's and remained for dinner. That after dinner Howell and Mrs. Hall went into a room adjoining the room in which Smith was, and he overheard them talking about Mrs. Hall's condition. That Howell became angry, and talked very abusively to Mrs. Hall about it. That about 2 or 3 o'clock in the afternoon Howell and Smith together left Mrs. Hall's. On the way Howell again brought up the subject of

Mrs. Hall's condition; told Smith that she was in a family way, and that he was the father of the child; that she had been taking medicine to produce an abortion, but that it had failed to do so; and finally wound up by saying that if Mrs. Hall did not get rid of the "damned young one" he would; that he did not intend to have his reputation ruined on account of it. Smith again advised him against such a course; told him that it would be committing a crime to produce an abortion; that he had better teach his school out, and leave the country. Howell swore that he would be "damned" if he would do it; that the "damned thing" had to be got rid of. The evidence also showed that Howell was at Mrs. Hall's house about 8 o'clock in the afternoon of the 19th of January, the day preceding the night when Mrs. Hall and her children were murdered, and remained for some time; that he went to Brookfield, reaching that place about 5 o'clock; that he left Almroth's store the second time about 10 or 15 minutes before 8 o'clock, as Lawrence Lawson testifies; that about 8 o'clock he was seen going south on Main street in Brookfield, and in the direction of Mrs. Hall's; that a few minutes after 8 o'clock he was seen by Walter Mitchell, who knew him well, who had done business for him, and who passed within five or six feet of him, about a mile and a quarter south of Brookfield, going south on the direct road towards Mrs. Hall's. Crutchfield, the city marshal, on the next day (Sunday) took the precaution to cover up with boards some of the tracks defendant made in the snow in the lumber yard, and the next day he went to Linneus, obtained from the sheriff defendant's shoes, and they corresponded in every particular with the tracks defendant had made in the lumber yard. Just one week before the 20th of January, 1889, defendant had purchased of a merchant in Brookfield a pair of arctic overshoes, and one of the young men who followed on his trail from Mrs. Hall's home towards Brookfield says that the tracks showed that they were made by new overshoes, because the creases which appear in the bottom of new overshoes showed plainly in the snow where these tracks were made. While in jail Howell confessed to three different persons who were confined there for minor offenses. To one he said that he had attempted to produce an abortion on Mrs. Hall, and that she died from the effect of it; that he then took a hatchet and killed the boy; "murdered the children next; then saturated the bed and the clothes of the children with kerosene oil." He wanted this witness to procure him some acid as soon as he got out, and send it to him by a Mr. Brinkley, marked "Rose Water," to enable him to cut out of jail and escape. To another, Howell said "that he had murdered Minnie Hall and the children. * * * Took the ax and knocked her [Minnie Hall] in the head. * * * Went back into the

house. Met the little boy in the other room. Knocked him in the head with the ax. I went in the other room and killed the other little children in the bed."

The defense relied on in the lower court is an alibi, defendant claiming that after reaching Brookfield about 6:30 o'clock he never left the town that night. But if, as he states, he reached Minnie Hall's at 4 o'clock, and after being there just long enough to get some handkerchiefs—6 or 8 minutes—he left then for Brookfield, he must have been almost 2½ hours on the road, which would be an unreasonable time in which to go over a space of 5½ miles by as thoroughly a trained walker as defendant is shown to be. But the testimony of defendant as to his whereabouts in town, and as to the length of time he remained there, and what way he employed his time from 6:30 o'clock to about 3:10 o'clock in the morning, when he was arrested at the Babb Hotel, is by no means satisfactory. His claim is that he wanted to go out with some farmer friend out towards the neighborhood of Griffith's, where he boarded, which was some 10¼ or 11 miles southwest of Brookfield, and, failing in that, that he wanted to go out on the railroad westward to Laclede, which would only have saved him some 2½ miles of walking, but he never went to the depot or to any railroad agent to inquire when the trains left going west; and, if the story of Henry Thornton be true, who says defendant saw him in Brookfield at 9:30, and asked him if he was about to start out with his team, defendant would have had an opportunity of going out with Thornton, who lived within some 4 or 5 miles of the locality to which defendant wished to go. The story is utterly improbable that defendant, in order to save only 2½ miles walking by taking a train going west to Laclede, would have failed to make inquiries from proper sources as to the time of the trains, and yet kept on his feet walking around over the town after he had transacted his business, from 7:30 P. M. to 2:30 A. M. It is true that Stroud, who had been in Linneus jail, testified that he saw defendant in Brookfield about 10:20 that night, but the jury no doubt preferred to believe the far more probable story told by numerous witnesses for the state. The defendant does not attempt to account for the condition of his clothes, and simply says, in regard to Smith's testimony and that of the others in regard to his confessions, that they are false. He admits his attempt to break jail, or that he wanted to escape. The credit of many of the witnesses on both sides is impeached, among them that of Thornton and Stroud. But the witnesses for the state, especially those who pursued and arrested the defendant, stand unimpeached. The chief defense relied on in this court proceeds on the theory of an entire lack of proof of the corpus delicti; but since the bill of exceptions has been corrected as aforesaid,

this contention, it may well be supposed, has been abandoned, though the briefs of defendant's counsel, making that point very conspicuous, have not been withdrawn.

The instructions given in the cause, as well as those refused or modified, are as follows:

"(1) The court instructs the jury that if they believe and find from the evidence in this cause beyond a reasonable doubt that at the county of Linn, and state of Missouri, the defendant, Joseph A. Howell, did on the 19th day of January, 1889, or at any time prior to the finding of the indictment in this cause, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought kill and murder one Nettle Hall in the manner and form charged in either count of this indictment, you should find the defendant guilty of murder in the first degree, and so state in your verdict.

"(2) The court instructs the jury that by the term 'feloniously' is meant wickedly and against the administration of the law; that is, wickedly and unlawfully. By the term 'willfully' is meant intentionally, and not by accident. By the term 'deliberately' is meant done in a cool state of the blood. It does not mean brooded over or considered or reflected on for a week or a day or an hour, but it does mean an intention to kill, executed by a party not under the influence of a violent passion suddenly aroused; and the passion here referred to is that only which is produced by what the law recognizes as a just cause of provocation. By the term 'premeditation' is meant thought of beforehand for any length of time, however short. The term 'malice,' as used in the indictment, does not mean, in a legal sense, mere spite, ill will, hatred, or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts one person to take the life of another person without just cause or justification, and signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and 'malice aforethought' means that the act was done with malice and premeditation.

"(3) The jury are instructed that in criminal cases circumstantial evidence is legal and competent to establish the guilt or innocence of the defendant; that if, in this case, the evidence be such that upon a full and fair examination of all the facts and circumstances you are satisfied of the guilt of the defendant as charged beyond a reasonable doubt, it is your duty to find the defendant guilty.

"(4) The jury are instructed that while the law makes the defendant in this case a competent witness, still the jury are the judges of the weight which ought to be attached to his testimony; and in considering what weight ought to be given it the jury should take into consideration all the facts and circumstances surrounding the case as disclosed by the evidence, and give the defendant's

testimony only such weight as they believe it entitled to in view of all the facts and circumstances proved on the trial.

"(5) The jury are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility, weight, and value the jury should take into consideration the character of the witnesses, their manner on the witness stand, their interest, if any, in the result, their relation to or feeling for or against the defendant or deceased, the probability or improbability of their statements, as well as of all the facts and circumstances given in evidence in this cause; and in this connection you are instructed that if you shall believe from the evidence that any witness or witnesses have willfully testified falsely to any material fact in this cause you are at liberty to disregard the whole or any part of such witness' or witnesses' testimony.

"(6) If the jury believe beyond a reasonable doubt from all the facts and circumstances as detailed in evidence in this case that the defendant is guilty of the crime as charged in the indictment, then in that case it is the duty of the jury to find the defendant guilty, even though the jury may be satisfied from the evidence that the defendant sustained a good character and reputation previous to and up to the time of the commission of the crime charged.

"(7) The jury are instructed that to authorize an acquittal on the ground of reasonable doubt alone such doubt should be a substantial doubt arising out of the evidence, and not a mere possibility that the defendant is innocent.

"(8) The court further instructs the jury that, if they believe and find from the evidence that the defendant made any statement or statements in relation to the homicide charged by this indictment after said homicide is alleged to have been committed, the jury must consider such statement or statements all together. The defendant is entitled to the benefit of what he said for himself, if true, and the state is entitled to the benefit of anything he said against himself in any statement or statements proved by the state. What the defendant said against himself the law presumes to be true because said against himself. What the defendant said for himself the jury are not bound to believe because it was said in a statement or statements proved by the state, but the jury may believe or disbelieve it as it is shown to be true or false by the evidence in this cause. It is for the jury to consider under all the circumstances how much of the whole statement or statements of the defendant proved by the state the jury from the evidence in this cause deem worthy of belief.

"(9) The court instructs the jury that while an attempt to escape of itself does not establish the question of guilt or innocence,

yet if the jury believe from the evidence that the defendant, while confined in the Linn county jail, charged with the commission of the crime of which he is now being tried, attempted to escape therefrom, then the jury may take such fact into consideration, in connection with all the other facts detailed in evidence, in determining the guilt or innocence of the defendant.

"(10) The court instructs the jury that, if they find the defendant guilty, their verdict may be in the following form: 'We, the jury, find the defendant guilty of murder in the first degree, in manner and form as charged in the indictment.' "

"(1) The court instructs the jury that the indictment preferred against the defendant in this case is a mere formal accusation, and is of itself no evidence whatever of his guilt. Before the jury can find the defendant guilty they must believe and find from the evidence before them, and that beyond all reasonable doubt, that he, the said defendant, and in the manner and by some of the means mentioned in the said indictment, willfully, intentionally, deliberately, and premeditatedly, on purpose, and with malice aforethought, did kill the said Nettie Hall. And the court further instructs the jury that by the term 'reasonable doubt' is meant that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that the charge is true.

"(2) The court instructs the jury that if the whole evidence in this case leaves their minds in such condition that they are neither morally certain of the defendant's innocence nor morally certain of his guilt, then a reasonable doubt exists, and the jury must give the defendant the benefit of such doubt, and acquit him.

"(3) The court instructs the jury that before they can find the defendant guilty of the crime charged against him in this case they must believe and find from the evidence before them, and that beyond a reasonable doubt, and to a moral certainty, (1) that said Nettie Hall was killed and murdered as charged in the indictment; (2) that the defendant was present at the time and place mentioned in said indictment, and did then and there willfully, intentionally, deliberately, and premeditatedly and of his malice aforethought, in the manner and by some of the means specified in said indictment, kill the said Nettie Hall; and unless the jury so find they are bound to acquit the defendant.

"(4) Evidence of alleged declarations, confessions, or conversations of defendant should be received by the jury with great caution, taking into consideration the liability of witnesses to forget or misunderstand what was really said, to misquote the language used, the failure of defendant to have expressed his own meaning, or of the witness to com-

prehend the meaning intended to be conveyed, the infirmity of human memory, the probability of the witness intentionally or unintentionally changing or altering the expression used.

"(5) The jury are instructed, if they have a reasonable doubt that the defendant committed the homicide alleged in the indictment, or was present at the time said homicide is alleged to have been committed, they will find a verdict acquitting defendant.

"(6) The court instructs the jury that in making up their verdict as to the guilt or innocence of defendant they must consider the evidence offered in his behalf as to his previous good character just like any other fact in this case; and if, after duly weighing and considering such evidence of good character along with the other evidence in this case, it does not appear to the jury that defendant is guilty of the charge preferred against him beyond all reasonable doubt, then the jury should acquit the defendant.

"(7) The jury are the sole and exclusive judges of the credibility of the witnesses, and they are not bound to give to the testimony of any witnesses any other or greater weight than from all the facts and circumstances they deem it entitled to; and in determining what weight, if any, they will give to the testimony of any witness, they may take into consideration the probability or improbability of the truthfulness of the statement of such witness on the stand, his prejudice or bias in this cause in giving his testimony.

"(8) Under the law the defendant is a competent witness to testify in his own behalf, and the court instructs the jury that they should fairly and impartially weigh and consider the evidence of the defendant, who has testified in this case, along with the other evidence before them.

"(9) It is agreed in this case that Wm. Adams, on the night of January 19, 1880, about 2 o'clock A. M., while working with James Cullatin, Patrick Flynn, and others, saw a man in the Hannibal and St. Joe Railroad yards in Brookfield, Missouri; that he (said Adams) was within plain view, and within 20 or 28 feet of said man; that he saw said person in said yards two or three times; that he did not and could not recognize said person; that afterwards, when defendant was arrested, and he saw him, he could not and did not recognize him as being the man he had so seen in said yards. Therefore the jury must take this admission as conclusive of the facts stated by him, and in determining their verdict in this case will exclude from their consideration all evidence contradictory of or inconsistent with said admission.

"(10) [The prosecution seeks a conviction of the defendant in this case upon what is known in law as 'circumstantial evidence.'] In order to justify the conviction of defendant upon circumstantial evidence alone, the

court [therefore] instructs the jury that it is not sufficient to justify them in convicting the defendant upon such evidence that the facts proved coincide with, account for, and even render probable the hypothesis sought to be established; but they must exclude to a moral certainty every other hypothesis but the one sought to be established, viz. the guilt of defendant. And unless all the facts and circumstances proved are consistent with each other and with the guilt of the defendant, and absolutely inconsistent with and unexplainable upon any other reasonable theory than that of defendant's guilt, the jury under the law would not be justified in convicting the defendant upon such evidence, but ought to acquit him.

"(11) The jury are instructed that where the prosecution relies upon circumstantial evidence alone for a conviction [as in this case] the jury must be satisfied beyond a reasonable doubt that the crime has been committed by some one in manner and form as charged in the indictment, and they must not only be satisfied that all the circumstances proved are consistent with defendant's having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other reasonable conclusion than that the defendant is the guilty person; and if the material facts necessary to constitute a chain of circumstances sufficient to authorize the jury in convicting the defendant under the other instructions herein are wanting in a single link in such chain that it is sufficient to raise a reasonable doubt, the jury should acquit the defendant.

"(12) The law presumes the defendant innocent of the crime charged against him, and the burden of proof rests upon the state to make out and establish by the evidence beyond a reasonable doubt and to the satisfaction of the jury every fact and ingredient necessary to show his guilt, and upon the whole case the evidence must be so strong and convincing as to establish in the minds of the jurors the guilt of the defendant to a moral certainty before the jury are authorized to find him guilty. If, therefore, after a full and deliberate consideration of all the evidence before them in the case, the jury entertain any reasonable doubt of the defendant's guilt, they should give him the benefit of such doubt, and acquit the defendant.

"(13) In every case where there is a crime charged against a citizen the law clothes the citizen charged with the presumption of innocence,—that is, the law presumes said citizen did not commit and is entirely innocent of the crime charged; and so strong is this presumption that it clings to, surrounds, shields, and protects the citizen until it is overcome and proved by the evidence that such presumption is in truth and in fact false, and that the citizen is beyond all reasonable doubt guilty of the offense and crime as charged; and in this case defendant is not only clothed with the presumption of inno-

cence attaching to every citizen charged with the commission of a crime, (before mentioned,) but he is clothed with the further presumption of the law that by reason of his kindred (blood) relationship with deceased (if such there was) he would be less likely to commit the offense charged than if such kinship had not existed; and before the jury would be warranted in depriving him of these presumptions with which the law clothes him as aforesaid, the evidence must be so strong, clear, and conclusive as, when considered in the light of each of these favorable presumptions, the previous good character, (if such has been proven,) and of all other facts and circumstances in evidence, to leave no reasonable doubt in the minds of the jury that he, notwithstanding such favorable presumptions, kinship, character, and circumstances, committed the offense charged.

"(14) When the state seeks to convict upon circumstantial evidence, each fact in a chain of facts from which the main fact in issue is to be inferred must be proved by competent evidence, and by the same weight and force of evidence as if each one was the main fact in issue, and all the facts proved must be consistent with each other as well as with the main fact to be proved.

"(15) The jury in making up their verdict will disregard all evidence tending to show that defendant was not talking to Lawrence Lawson in the store of witness Almroth in Brookfield at about fifteen minutes past eight o'clock on the night of January 19, 1889, or that he did not remain a few minutes thereafter talking to said Lawson, as the law conclusively presumes that the statement of said Lawson in this regard is true.

"(16) The law requires that no man shall be convicted of a crime until each and every one of the jury are satisfied by the evidence in the case, to the exclusion of every reasonable doubt, of his guilt as charged. So in this case, unless the jury are satisfied by the evidence of defendant's guilt as charged beyond all reasonable doubt, and to a moral certainty, they should acquit him; and if any one of the jury have a reasonable doubt as to defendant's guilt, they cannot convict him.

"(17) The court instructs the jury that on the previous trial of this cause it was admitted and agreed by both the state and the defendant that one Lawrence Lawson would testify 'that he, said Lawson, was talking with defendant in the store of witness Almroth, in Brookfield, at about fifteen minutes past eight o'clock on the night of January 19, 1889, and that he, defendant, remained there in said store a few minutes thereafter, talking to said Almroth.' The court therefore instructs the jury that such admission must be taken as a fact, and in their consideration of their verdict in this case they will exclude all evidence contradictory of or inconsistent with such admission.

"(18) Under the law and the evidence the jury must find the defendant not guilty."

The application for a continuance, filed September 29, 1891, so far as necessary to quote it, is the following: "That one Virgil Williams is a material and important witness for the defendant. That he resides in the town of Trenton, in the county of Grundy, in the state of Missouri. That his folks and family resided here, and that said Williams is now temporarily absent from his said home. That he has been so absent for about six or seven weeks. That about the 14th day of August defendant's attorneys made inquiry of the relatives of said Williams and others, his friends, and that they informed said attorneys that said Virgil Williams was, as they believed, in the city of Chillicothe, in the county of Livingston, in the state of Missouri. That on said 14th day of August, A. D. 1891, the defendant caused a subpoena to be issued by the clerk of this court, and delivered to the sheriff of said Livingston county, Missouri, and that on the 17th day of August, 1891, said sheriff, as shown by his return herewith presented, made return of said subpoena that said Williams could not be found in his said county of Livingston. That defendant is informed and believes, and so states the fact to be, that said Williams is but temporarily absent from his home in Trenton, Missouri, and that he is expected to return in a few weeks from this time to his said home in Trenton, Missouri. That the exact whereabouts of said Williams has not been known to the defendant or his attorneys or the said friends and relatives of said Williams since said Williams left here up to the present time. That one Owen McKinney has been subpoenaed by the state as a witness against this defendant. That defendant believes that on the trial of this cause the state will, as they have heretofore done, introduce said McKinney as witness against this defendant. That said McKinney will swear that on the night of the 19th of January, 1889, he saw this defendant just across the street from a certain lumber yard in the town of Brookfield, in the county of Linn, and near the railroad yards in said town, and that he recognized and identified the man that he so saw as being this defendant. That if said Williams was present he would testify that about the 27th of April, just about one day before the examination of the witnesses began on the trial of this case at the April term of the court, said Owen McKinney, witness for the state aforesaid, and at the Evans House, an hotel in said town of Trenton, where said McKinney was then stopping and in the presence and hearing of said Williams, and to one E. D. Larkins, in response to a question by said Larkins to said McKinney, asking what he, McKinney, was doing here, said McKinney said in substance and as follows: That he, McKinney, had come up here to swear against Joe Howell; that he did not know any more about the case than

did he, Larkins; that he did not know whether it was Joe Howell that he saw that night by the lumber yard or not; that he did not know any better than he, Larkins, knew who it was. That he said that he had been paid to come up here as a witness, and that he was getting good money out of it. That said Virgil Williams is not present at this court, and defendant has been unable to learn of his whereabouts, so as to have his deposition, or to have him subpoenaed. That E. D. Larkins is a material and important witness for the defendant. That defendant is informed and believes, and so states the fact to be, that said E. D. Larkins resides in the town of Trenton, in said county and state. That the wife of said E. D. Larkins resides in this town. That said Larkins left this town and his home here in Trenton about the 1st day of August, A. D. 1891, to look for a job on the railroad. That he is a railroad man, and follows the occupation of railroading for a livelihood. That he left this town as aforesaid, to be only temporarily absent, in order to look around for a job of railroading. That about the 13th day of August, 1891, the wife of said Larkins learned that her husband was in the city of Quincy, in the state of Illinois, and so informed plaintiff's attorneys, whereupon and about that date plaintiff's attorneys made inquiry in said city of Quincy, and learned, and affiant states the fact to be, that said Larkins left said city at said time, and that said Larkins will return to his home in said town of Trenton in a short time, and in a few weeks. That defendant does not now know, neither has he been able to learn of, the exact whereabouts of said Larkins since he left said city of Quincy. That said Larkins, if present, would swear that at the Evans House, an hotel in said town of Trenton, and on about the 27th day of April, 1891, one Owen McKinney said to witness Larkins, in the presence and hearing of one Virgil Williams, that he, McKinney, had come up here to swear against Joe Howell. That he did not know any more about the case than did he, Larkins. That he didn't know whether it was Joe Howell that he saw that night by the lumber yard or not. That he didn't know any better than he, Larkins, knew who it was. That he said that he had been paid to come up here as a witness, and that he was getting good money out of it. That said Larkins is not present at this court, and defendant has been unable to learn of his whereabouts, so as to subpoena him or take his deposition. That one Wm. Adams is a material and important witness for the defendant in these cases, and in each of said cases. That he resided in the town of Brookfield, in the county of Linn, in the state of Missouri, and has for some years past so resided there, and up to about the 14th day of August, 1891. That his family is still in said town of Brookfield,

and still resides there, as defendant is informed and believes, and so states the fact to be. That about said time he ceased the employ of the Hannibal and St. Joseph Railroad at that place, and left his home, in said Brookfield, to look for or seek employment with some railroad. That he is temporarily absent from his home, so seeking employment, and will be absent for several weeks, until he procures employment, when he will and intends to return to his family. That defendant has been unable to locate or find where said witness is, or where he went for employment, or to find his whereabouts, but that in a few weeks said Adams will return. That on said 14th day of August, 1891, defendant caused a subpoena to be issued for said witness by the clerk of the court, and delivered to the sheriff of Linn county, Missouri, where defendant believes said witness was, and where he knew he resided, not having been informed or learned or ascertained of his severance with said railroad, or his intention to seek employment elsewhere; but that said sheriff made return of said subpoena on the 21st day of August, 1891, which subpoena defendant herewith presents to the court, that he could not find said witness in Linn county, Missouri. That said witness would testify, if present, that 'I was switchman in the employ of the Hannibal and St. Joseph Railroad Company in the Brookfield yard on the night of the 19th of January, 1889. While there at work, helping to make up a train, with Pat Flynn, James Cullatin, and others, I saw a man in the yard there, and was within twenty-six or twenty-eight feet of him. Afterwards I saw him again, two or three car lengths away. I do not know who the man was. I cannot say the defendant was the man. Mr. Crutchfield, the town marshal, and two or three other men came along, they said tracking a man. James Cullatin and myself joined with them.' That he saw this man in the yards that night some two or three times, and at neither time, whether alone or with the other so tracking, could he say that he recognized the man, or that defendant is the man he saw. That he did not know the man. That said witness is not present at this term of court, and that on the trial it will become and be a material issue and question as to whether the defendant was in the city of Brookfield from about the hour of six o'clock P. M. of the 19th day of January, 1889, all the time on up to about the hour of midnight, or 12 o'clock, of that night. That the state will, as it has heretofore done, claim upon said trial that at nine o'clock P. M., and prior thereto, of said night, and on up to about midnight of said night, the defendant was absent from and not in the city of Brookfield aforesaid."

Other facts incident to the trial of the cause will be adverted to further on.

A. W. Mullins and Harber & Knight, for appellant. R. F. Walker, Atty. Gen., and Morton Jourdan, Asst. Atty. Gen., for the State.

SHERWOOD, J. 1. In discussing the various errors assigned for a reversal of the judgment in this cause, attention will first be turned to the application for a continuance, heretofore set forth. There is in this state a statute in which are formulated the statutory grounds for a continuance in criminal cases as follows: Rev. St. 1889, § 4181: "A motion to continue a cause on the part of the defendant on account of the absence of evidence must be supported by the oath or affidavit of the defendant or some reputable person in his behalf, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is for an absent witness, the affidavit must give his name, and show where he resides or may be, and the probability of procuring his testimony, and within what time, and what facts he believes the witness will prove, and that he believes them to be true, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured, and that the witness is not absent by the connivance, procurement or consent of the defendant, and what diligence, if any, has been used in the premises by the defendant, and that the application is not made for vexation or delay merely, but to obtain substantial justice on the trial of the cause." Analyzing this section, it will be found that the requisites for such an application are: (1) That it show the materiality of the evidence expected to be obtained; (2) that it show due diligence has been used by the defendant to procure such evidence, and in what that diligence consists; (3) give the name of the witness, and show where he resides or may be; (4) show the probability of procuring his testimony and within what time; (5) state what facts applicant believes the witness will prove; (6) that applicant believes them to be true; (7) that he is unable to prove them by any other witness whose testimony can be as readily procured; (8) that the witness is not absent by the connivance, procurement, or consent of defendant; (9) that the application is not made for vexation or delay, etc.; (10) lastly, the application must be supported by the oath, etc. There are no intendments of law in favor of such applications, and, examining the present one, it will readily appear that it lacks several of the essentials which the statute prescribes. The application does not comply with the first statutory ground, because it is well established that it is no ground for a continuance that there is an absent witness who can be used merely to impeach the chief witness of the adverse party. Whart. Crim. Pl. & Pr. § 592, and cases cited. No showing of diligence is

presented by the application, only a portion of which has been copied; but, looking to the original, it is shown that what Williams and E. D. Larkins would testify to was in relation to Owen McKinney's (a witness who twice before had testified on behalf of the state) making contradictory statements, and was known to defendant "after the trial of this cause in May, 1891." How long after this it was known does not appear, nor does it appear that immediately on its becoming known the proper steps were taken, or the proper process issued, to secure the attendance or the deposition of those witnesses; but, in any event, if due diligence had been used in this regard, still the testimony of the witnesses would only have tended to impeach McKinney, who was supported in his testimony as to recognizing defendant as he was running through the railroad yards by Miller, Cullatin, and Plopper, so that, even if McKinney's testimony had been overthrown, the result would have remained unaffected. And besides, the testimony of the absent witnesses mentioned was only to be used to impeach the testimony of McKinney, and therefore, for the reason already given, furnished no ground for a continuance. The same line of remark applies to the testimony of E. D. Larkins. As to the witness Adams, it does not appear when defendant became apprised of the knowledge of Adams on the subject, nor what steps he took on that occasion. But the testimony of Adams was wholly unimportant, as it was only of a very weak, negative character. It simply went to show that he saw a man in the railroad yards that night of the murder, whom he did not recognize as the defendant. This was certainly a very trivial ground on which to ask a continuance. The present application was made with the view to postpone an approaching third trial. Nearly two years had then elapsed since the crime had been committed, and it would have required a far stronger showing than that made by defendant to have authorized a continuance; for such applications have no presumptions indulged in their favor, while every reasonable presumption is indulged in behalf of the action of the trial court when it refuses a continuance. *State v. Whitton*, 68 Mo. 91; *State v. Ward*, 74 Mo. 253, and cases cited; *State v. Wilson*, 85 Mo. 134; *State v. Steen*, (Mo. Sup.) 22 S. W. Rep. 461; *State v. Gamble*, 108 Mo. 500, 18 S. W. Rep. 1111; *Kelly*, Crim. Law, § 339. No error, therefore, occurred in the trial court refusing to continue the cause.

2. Next for consideration is the point that the jury were allowed to separate. The record discloses that while the jury, in charge of the sheriff, was passing along the street, Juror Renfro called to his sister, Mrs. Winters, who was on the opposite side of the street, and inquired as to his mother's condition; that with the sheriff he walked partially across the street, in full view of the other

jurors, and in a tone of voice loud enough to be heard by them talked to her (his sister) about the anticipated death of their mother. The rest of the jury and the officer in charge heard all this conversation. Renfro was all the time in charge of the sheriff, and in full view of the officer and entire jury. This is shown by the affidavits of Sheriff Bain, Juror Renfro, Jurors Dent and Moe, and Susan Winters. We have hitherto ruled that section 4206, Rev. St. 1889, respecting the non-separation of jurors in capital cases, must be strictly observed. *State v. Murray*, 91 Mo. 95, 3 S. W. Rep. 397; *State v. Gray*, 100 Mo. 523, 13 S. W. Rep. 806. In this case, however, the state has assumed the burden, under the ruling in *State v. Orrick*, 106 Mo. 111, 17 S. W. Rep. 176, 329, and affirmatively shown the facts aforesaid, which facts directly establish that no such separation has occurred as would fall within the purview of our statute or former rulings. See, also, *State v. Sansone*, (Mo. Sup.) 22 S. W. Rep. 617.

3. The motion for a new trial alleges also that after the close of the evidence, and against the objections of defendant, one of the jurors was permitted to try on one of the overshoes which had been identified as that of defendant by Denbo and by Deputy Sheriff Winters; but the record makes no mention of such an occurrence, and so nothing need be said on this point.

4. In the motion for a new trial it is claimed that Jurors Ford and Cunningham had prejudged the case, were prejudiced against defendant, and were therefore incompetent to sit in the cause. These jurors, whose reputations for truth are established by numerous affidavits of residents of the county, deny this. There are, it is true, affidavits to the contrary; but when there are affidavits pro and con in a case of this sort it would require a very strong case, indeed, which would induce this court to interfere, and set aside the verdict on that account. *Morgan v. Ross*, 74 Mo. 318; *State v. Cook*, 84 Mo. 40; *State v. Gonce*, 87 Mo. 627.

5. The remarks of Mr. Bain, counsel for the state, in regard to the overshoes, were objected and excepted to at the time, but counsel for defendant at once withdrew his exception; so this left no exception standing. As to the subsequent remarks of the counsel, though excepted to, such exception was not preserved in the motion for a new trial, and consequently occupies a similar attitude to the exception which was withdrawn.

6. It is insisted that error occurred in the admission of evidence showing that after the first conviction of defendant he planned and endeavored to make his escape, and tried to induce others to assist him therein. Such evidence, tending, as it does, to indicate a consciousness of guilt on the part of a prisoner, and therefore a strong motive for escaping, is always competent, (*State v. Moore*,

101 Mo. 316, 14 S. W. Rep. 182; *State v. Jackson*, 95 Mo. 623, 8 S. W. Rep. 749; *State v. Williams*, 54 Mo. 170; *State v. Mallon*, 75 Mo. 355;) and the rule of evidence applies as well to a person in jail after conviction, and while his cause is pending in an appellate court, as before. No just distinction can be taken between the condition of a person thus circumstanced, and one upon whom no conviction has fallen or sentence been passed. It is too plain for argument that the same strong incentive would prompt endeavors to escape in the one case as in the other; indeed, it may be said, with great force of reason, more powerful motives would spur a defendant to make his escape after he had been solemnly adjudged guilty than before that period.

7. Contention is made that counsel for the state were allowed to cross-examine defendant in an unauthorized manner. His cross-examination, as disclosed by the present record, has been carefully read, and nothing is discovered therein which does not necessarily, or else legitimately, relate to the subject embraced in his examination in chief; and in thus ruling we adhere to the conclusions heretofore announced in *State v. Avery*, 21 S. W. Rep. 193.

8. Among numerous other grounds urged in the motion for a new trial is that, if one be granted, he will be able to show that "Gus Pratt" has a bad reputation for truth. To impeach the reputation of an adverse witness is no more a ground for a new trial than it would be if offered as a basis for a continuance. *State v. Welsor*, (Mo. Sup.) 21 S. W. Rep. 443, and cases cited.

9. Now, as to the instructions, they have been set forth at large in the accompanying statement. The most of them given on behalf of the state are in stereotyped forms, often approved by this court. No special objection is taken in the brief of defendant's counsel to any of them except the fourth instruction, but this instruction, when read in connection with the eighth instruction given at the instance of defendant, and the fifth instruction on the part of the state, placed the point involved fairly before the jury. On request of defendant the court gave instructions numbered from 1 to 9, inclusive, heretofore set forth. Instructions numbered 10 and 11 were also given, but were first modified, the modifications consisting of omitting certain portions of the original instructions, which omissions are indicated by brackets. These modifications were properly made. As to the tenth instruction, because, as originally drawn, it endeavored to make it appear that there was a distinction between the state and the prosecution, and was calculated to indicate to the jury that the latter was being used oppressively against defendant,—something which was highly erroneous and misleading. So as to the eleventh instruction as originally drawn, for there it is assumed that the

charge against defendant was supported only by circumstantial evidence, when in truth and in fact there was abundant testimony in addition to that of a circumstantial character which strongly tended to support the charge contained in the indictment. As to the instructions 12, 13, 14, and 16, asked for defendant, they were properly refused, either as misstating the law, or else as having been covered by those already given; and instructions 14 and 16 seem to have been purposely so drawn as to mislead the jury. Relative to instructions 15 and 17, they were framed so as to prevent the *viva voce* testimony of Lawrence Lawson from having any effect on the ground, as the seventeenth instruction in effect states, that it had been agreed by the state and defendant at a former trial that if he were present he would testify that defendant left Almroth's store on the night of the 19th of January, 1889, at "about 15 minutes past 8 o'clock," etc., when the oral testimony of Lawson, as heretofore stated, was that defendant left Almroth's store about 10 or 15 minutes before 8 o'clock, which statement is fully supported by Almroth himself. It would be a singular idea, indeed, if parties litigant, by any temporary agreement, made merely for convenience, could prevent a witness, if he subsequently comes into court, from telling the truth of the matter, and prevent the jury from regarding oral testimony if it happens to be opposed by some perfunctory and time-serving agreement that has long since performed its purpose. The instructions mentioned were therefore properly refused; and so was the eighteenth, in the nature of a demurrer to the evidence, for reasons already and presently to be given.

10. Of the *corpus delicti* it is needless to speak. The facts heretofore related establish the death of the little one beyond peradventure, and no one can read this very voluminous record, on which the hand of the spoiler is still freshly and painfully visible, without being profoundly impressed with the confident belief and abiding conviction of the absolute justice of the verdict. Within the compass of an opinion only the salient features of the incriminatory circumstances can be given, but those circumstances, though barely outlined, disclose a series of most outrageous murders, endeavored to be concealed by the torch-bearing hand of arson. If Henry Smith is to be believed, (and that was matter exclusively for the jury,) defendant was the only person in that locality who had and owned a powerful motive which might result in such a crime as here charged as its legitimate outcome and natural sequel. Then we have not only motive prompting, but we have defendant saying, "The damned thing has to be got rid of." That this was done is shown by independent testimony that the crime of abortion had been perpetrated. This utterance of defendant in reference to the re-

moval of the fruit of his crime by the commission of abortion is what is commonly called "declarations of intention," it being common for persons about to engage in crime to make similar observations. Such declarations are of great moment when clearly connected by independent evidence with some subsequent criminal action, for the effect of such language is to render it less improbable that a person so speaking would commit the offense charged, and serves to explain the real motive and character of the action. Burrill, Circ. Ev. 338. But, in addition to the foregoing, we have testimony showing that defendant was at the scene of the crime between 3 and 4 o'clock of the afternoon of the same day it was committed. He is next seen on his way to Brookfield, where, after remaining some hours, he is next seen about 8 o'clock going south on the main street of that town; then, a few minutes afterwards, a mile and a quarter distant, still further south, and on the road towards Mrs. Hall's; then soon we have the blazing dwelling, the hurried assembling of the neighbors, the discovery of the freshly-made tracks, the hot pursuit on the recent trail, the endeavors to elude the pursuers, the frequent recognitions and final capture of defendant with travel stains fresh upon him, his clothing dripping from recent exposure and rapid flight through the snow, and then his unintentional and virtual admission of knowledge of the crime. All these concomitant circumstances unite in declaring defendant the perpetrator of a cluster of atrocious crimes which never before have found parallel in Missouri. The judgment is affirmed, and we direct that the sentence of the law be carried into execution. All concur.

GANTT, P. J., concurs. BURGESS, J., not sitting.

BEAUMONT CAR WORKS v. BEAUMONT IMP. CO., (BORDAGES, Intervener.)

(Court of Civil Appeals of Texas. Oct. 5, 1893.)

CANCELLATION OF DEED—PAROL EVIDENCE—ESCROW.

1. Where an instrument, in form a deed, conveys certain property in consideration of a promise to locate car works thereon, parol evidence is inadmissible to show, in an action to cancel the deed, that the shops were never built, when no ground for equitable relief is shown in the circumstances surrounding the execution of the deed.

2. Where a deed of land to a car company, in consideration that it construct its car shops thereon, is executed to enable the grantee to secure the bonds, which it proposes to negotiate, and is delivered by the grantor to the trustee of the bonds on condition that it is not to take effect unless the bonds are negotiated, it is an escrow, and the fact that the trustee recorded the deed does not constitute a delivery, the bonds not being in fact negotiated.

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Suit by the Beaumont Improvement Company against the Beaumont Car Works to cancel a deed. I. R. Bordages intervened. Judgment for plaintiff. Defendants appeal. Affirmed.

Douglass & Lanier and O'Brien & O'Brien, for appellants. Greer & Greer, for appellee.

GARRETT, J. This suit was brought in the district court of Jefferson county by the Beaumont Improvement Company to cancel a deed executed by it to the Beaumont Car Works. Plaintiff averred in its petition that being desirous of securing the permanent location and operation of car works at Beaumont, in and upon plaintiff's real estate, and knowing that it would greatly enhance the value of plaintiff's other property, and relying upon the promises of the defendant that it would permanently locate, build, and operate a large establishment for the manufacture of all kinds of railway cars upon the two tracts of land described in the petition, plaintiff executed its general warranty deed to the defendant, whereby it conveyed to the defendant the said two tracts of land, which were fully described, and in the same deed, upon the same inducements and promises by the defendant, plaintiff conveyed to it certain blocks and lots of land, which were also fully described; that the real and only consideration for said deed was that the defendant should, as aforesaid, locate and establish its car works at Beaumont, but, instead of so locating and establishing its said car works at Beaumont, the defendant had abandoned its enterprise entirely, was insolvent, and in a bankrupt condition, having neither the means nor the intention of complying with the conditions of said deed, but instead thereof had placed an agent in possession of the two tracts of land described in the petition, with the instruction to hold the same adversely to plaintiff. It further averred that the consideration for said deed had wholly failed, and that said enterprise had been wholly abandoned, wherefore it prayed that the deed be canceled. The defendant, the Beaumont Car Works, pleaded the general issue. I. R. Bordages, one of the appellants, intervened in the suit, and set up title to the land conveyed by the deed, by virtue of execution sales on certain judgments against the Beaumont Car Works. Plaintiff replied to the intervention of Bordages, alleging, among other matters, that the deed executed by it to the Beaumont Car Works was delivered by it to the Holland Trust Company of New York in escrow, to take effect only when certain bonds of the Beaumont Car Works were sold by the said trust company in accordance with an agreement between the promoters of said car works and the people of Beaumont, and not to be delivered

to the Beaumont Car Works until the terms and conditions with respect to said bonds had been carried out, of all of which the intervenor had full knowledge. There was a trial without a jury, and judgment was rendered by the court in favor of the plaintiff, canceling the deed, adjudging that intervenor Bordages take nothing by his intervention, and awarding plaintiff a writ of possession for the land and lots described in the deed. Upon the trial of the case, parol evidence was admitted, over the objection of the defendant and intervenor, to show upon what terms and conditions the deed which was sought to be canceled was executed, and the action of the court in receiving such evidence has been assigned as error. This and other assignments bring before the court for consideration the proper construction to be given to the deed, and determination, also, whether or not the instrument was shown by the evidence to be the deed of the plaintiff, or only an escrow in the hands of the Holland Trust Company, to be used or delivered in the event the bonds of the Beaumont Car Works were negotiated.

Conclusions of Fact.

As shown by the evidence, the Beaumont Car Works was incorporated under the laws of the state of Texas on November 3, 1890, with its domicile at Beaumont, in Jefferson county, Tex. Its object was to establish a manufactory at Beaumont for all kinds of railroad cars. The promoters of the enterprise were nonresidents of this state, and the people of Beaumont were desirous of securing the location of such works at Beaumont, and their subscriptions to the enterprise were sought by the promoters. Citizens of Beaumont were among the incorporators. The Beaumont Improvement Company was also a corporation, composed of persons living at Beaumont, chartered June 6, 1890. It owned lands and lots situated in Beaumont, and some of its stockholders were also interested in the Beaumont Car Works. It was agreed between the promoters of the enterprise and the citizens that the latter should donate land for the building site of the car shops, and furnish the right of way for a railroad switch from the railroad to the works. Propositions were made with respect to raising the money to put the car works in operation, involving subscriptions on the part of the people of Beaumont in the ratio of one on their part to four on the part of the nonresident promoters of the enterprise. The first proposition to build by stock subscriptions was abandoned, and there was a proposition to raise the means by the execution of bonds to be secured by a deed of trust upon the property of the car works. The Holland Trust Company of New York submitted a proposition in writing to the Beaumont Car Works to act as its trustee in the matter, and negoti-

ate the bonds, and after stating the terms of its proposition with respect to the sale of the bonds, etc., it concluded as follows: "The full description of your company's real estate, and an inventory of its personal property, should be furnished at once, and the deeds of the former left with us, to be recorded and held in escrow by us." When the enterprise was first agreed on, the Beaumont Improvement Company agreed to donate the land for the location of the shops, and pointed out to the Beaumont Car Works the land to be occupied. The car-works people went into possession of the land about January 1, 1891, and felled trees, and built a small house for an office, tools, etc. Work was suspended for awhile, until the bond proposition was agreed on. After it was determined to issue the bonds of the Beaumont Car Works, to be secured by a deed of trust to the Holland Trust Company, the deed from the Beaumont Improvement Company to the Beaumont Car Works was executed. It is dated March 13, 1891, and is as follows: "The state of Texas, county of Jefferson. Know all men by these presents, that the Beaumont Improvement Company, a corporation duly chartered under the laws of Texas, domiciled at Beaumont, said county and state, acting herein by and through its president, L. B. Levy, for and in consideration of one dollar to it in hand paid by the Beaumont Car Works, and in further consideration of the location of its car works at Beaumont, said county and state, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said Beaumont Car Works, a corporation chartered under the laws of Texas, and domiciled at Beaumont, said state and county, all those certain tracts, pieces, or parcels of land," etc. "This conveyance being made on the condition that said Beaumont Car Works shall begin operation, either by the erection of buildings or otherwise, within ninety days, towards carrying on the business for which it was chartered. To have and to hold the above-described premises, together with, all and singular, the rights and appurtenances thereto in any wise belonging, unto the said Beaumont Car Works, its successors and assigns, forever. And the said Beaumont Improvement Company does hereby bind itself, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof. In testimony whereof, etc." This deed was properly acknowledged on the date of its execution, March 13, 1891, was filed for record in the record of deeds for Jefferson county on December 7, 1891, and was duly recorded. The consideration for the execution of the deed was the location and establishment of the car works at Beaumont, as expressed therein, and it was executed in accordance with a proposition to sell the bonds of the car works, to be secured by a mort-

gage or deed of trust on its property, to raise the means to put said car works in operation. It was delivered to the Holland Trust Company by the Beaumont Improvement Company to take effect only on condition that the bonds were sold, when it was to be recorded. The deed of trust was executed, and was placed, also, in the hands of the Holland Trust Company. No bonds were sold. The car works were never built, nor put in operation, and the company is insolvent. But it was shown that work was resumed by the car works within 90 days after the execution of the deed, more land was cleared, and brick foundations were put in for the car shops. The intervener showed that he was the purchaser of the property in controversy at execution sale made pending this suit. The court below found, upon evidence sufficient to support the finding, that he was cognizant of all the facts attending the execution of the deed by the improvement company, and the delivery thereof to the Holland Trust Company.

Conclusions of Law.

1. The instrument relied on in this case by the appellants as a deed is in form an executed contract, and, as such, parol evidence would be inadmissible to destroy the effect and operation thereof, although it is familiar doctrine that the greatest latitude of inquiry will be allowed "as to what consideration really passed between the parties, and the grantee is not estopped by his acknowledgment of payment in any action which he may bring for the recovery of the purchase money, or other object, so long as the validity of the deed as an operative conveyance is not attacked." 2 Devl. Deeds, § 834. See, also, *Railway Co. v. Pfeuffer*, 56 Tex. 66. When a deed is left executory by its terms, it may be rescinded for a failure to comply therewith, a familiar instance of the right to rescind a deed being upon default of payment of the purchase money for which a vendor's lien has been reserved in the deed. The instrument executed by the plaintiff is supported by a valid consideration recited therein,—a promise to locate and establish the car works at Beaumont,—and parol evidence is not admissible, in a suit to rescind the contract, to show that the shops were never in fact established, when no ground for equitable relief, arising out of the circumstances attending the execution of the deed, are shown. It is shown by the evidence that the condition that work should commence within 90 days had been complied with. An examination of the case of *Gibson v. Fifer*, 21 Tex. 260, cited by counsel for appellee, will show that the combined elements of mental weakness, undue influence, and overreaching were disclosed by the evidence, and were held to be quite sufficient to entitle the plaintiff to have the conveyance set aside, and the

property restored to him. No such facts are shown by the record in this case, and there is nothing shown that would entitle the plaintiff to a rescission of the instrument as a deed.

2. We are of the opinion, however, that the instrument sought to be set aside was an escrow, and not a deed. The evidence shows clearly that it was executed by the plaintiff for the immediate purpose of enabling the defendant to secure the bonds which it proposed to issue and negotiate, and was delivered to the Holland Trust Company, by the plaintiff itself, upon the condition that it should not take effect if the bonds were not negotiated. By the issue and sale of the bonds, money was to be raised to build the car shops, and put the concern going; and, as the benefit to accrue to plaintiff for the conveyance of the property was to come from the establishment of the car works, it is quite natural that it should desire to protect itself by delivering the instrument as an escrow to the Holland Trust Company. The subsequent record thereof by the trust company did not operate as a delivery.

3. It is unnecessary to inquire whether the intervenor acquired any rights from the record of the instrument, as an innocent purchaser, because the facts, as found, show that he had full notice of all the circumstances fixing the character of the instrument, and was also a purchaser pendente lite, and acquired no right to the land prior to the institution of plaintiff's suit. He took only such title as the defendant had, which was none. The judgment of the court below will be affirmed.

GALVESTON, H. & S. A. RY. CO. v.
SNEAD et al.

(Court of Civil Appeals of Texas. Sept 14,
1893.)

CARRIERS—LIABILITY TO TRESPASSERS—DEFECTIVE
ROAD.

1. Evidence that a person who was on a train at the time of an accident thereto, sitting among the passengers, without any attempt at concealment, was on the train without the knowledge or consent of the conductor, does not show her to have been a trespasser, though at the station, before boarding the train, the conductor had refused her request that she be carried free, as the wife of an employe of the road.

2. An instruction that it is the duty of a railroad company to use the greatest care and skill in constructing its road, "in order to transfer over it safely its passengers, and in like manner to use such care in keeping" it "in repair as to secure its passengers a safe travel, as the nature of the business reasonably requires to protect the traveling public," does not make the company an insurer of the safety of passengers.

Appeal from district court, Harris county;
James Masterson, Judge.

Action by Julius Snead and wife, and by George Snead, a minor, by Julius Snead, his

next friend, against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. N. Shaw, for appellant. Jas. A. Breeding, for appellees.

GARRETT, C. J. Action by Julius Snead and Effie Snead, his wife, the father and mother of George Snead, a minor, in their own behalf, and by the said George Snead, by his father, Julius Snead, as next friend, against the Galveston, Harrisburg & San Antonio Railway Company, to recover damages for personal injuries to said minor by a derailment of defendant's train of cars, on which he was a passenger. Defendant answered by a general denial, and, specially, that the mother of said minor, in whose charge he was at the time, was a trespasser on defendant's train, without a ticket, a pass, or permission of any kind; also, that there was nothing in the appearance or condition of defendant's track, at the time and place, from which said derailment could reasonably have been anticipated. There was a trial by jury, and upon the verdict of the jury a judgment was rendered for the plaintiff Julius Snead for \$1,000, and for the minor, George Snead, \$2,000. Upon appeal, errors have been assigned: (1) That the verdict and judgment are contrary to the law and the evidence upon the issue as to whether or not the minor, George Snead, was injured by the derailment of the train, and because the proof showed that defendant's track was in proper condition and repair; (2) that the court erred in not allowing evidence to show that said minor was a trespasser on the train, by proof that his mother, in whose custody he was, was upon the train without pass or ticket, and without the knowledge or consent of the conductor, who had previously refused to receive her without pass or ticket; (3) that there was error in the charge of the court, because it practically made the defendant an insurer of the safety of its passengers.

Conclusions of Fact.

(1) On July 7, 1891, Effie Snead, the wife of the plaintiff Julius, and the mother of the minor plaintiff, George Snead, got on board of defendant's train of passenger cars at Houston with her child, the said George Snead, to go from Houston to East Bernard, a station on the defendant's line of railway, where her husband, the plaintiff Julius Snead, was at work in the employment of the defendant, as its agent at said station. Julius Snead is the father of the said George Snead, and at the time of the accident the latter was about one year old. At a curve in the railroad near Stella, a station on said railroad in Harris county, and between Houston and Stella, the cars were derailed, and there was a wreck, and the car in which

Mrs. Snead sat with her child was partly turned over. The train left Houston at 7:30 o'clock in the morning; was due at Chaney Junction at 7:40 o'clock. Stella was the next station to Chaney Junction, and the wreck occurred at about 9 o'clock in the morning. (2) Mrs. Snead occupied a seat with her child in a passenger car in which there was quite a number of passengers. When the wreck occurred, the child fell on his back across the arm of a seat, and the mother fell on him. The child then fell from the arm of the seat to the floor. There is a considerable conflict in the evidence as to the extent of the injuries received by the child. Both the mother and Mrs. McDonald, who was a passenger on the train, testify that it was hurt, and the evidence shows that after the accident the child was not in good health, and was unable to walk or stand alone. Dr. Daniel testified that it was suffering from partial paralysis, which he believed to be the result of the injuries received in the wreck, as explained to him by the mother. There was testimony that before the injuries were received the child was in a healthy condition. On the other hand, there was much testimony by physicians and others that the child was unhealthy and afflicted from its birth. Dr. Harrison testified that he examined it before and after the accident, and that its condition was the result of the impoverished and unhealthy condition of its mother, and that it had chorea, or incipient St. Vitus' dance. It is unnecessary to state all the evidence. We conclude that there was sufficient testimony to support the verdict of the jury with respect to the injuries. (3) The wreck occurred on a curve. There was evidence that the curve was a sharp curve, and that the cars were being run at a high rate of speed. Henry Mack, a witness for the plaintiffs, a track walker for the defendants at the time of the accident, testified that in his opinion the curve was not safe for running a train of cars at a high rate of speed, and that, to render it reasonably safe where the wreck occurred, it was necessary to brace the rails all along and around said curve with iron braces made and used for said purpose. One Williamson, a telegraph operator, testified that he was at the time of the wreck an operator for the Houston & Texas Central Railway at Chaney Junction, where west-bound trains of defendant registered; that it was a part of his duty to take train orders to trainmen, and to make bulletins at that point directing the operation of trains; that on that morning he went off duty before the train passed, but before he went off duty he copied a message for the bulletin signed by defendant's division superintendent at San Antonio, J. T. McQueeney, to the effect that the curve near Stella was in bad order, and pinned it to the register, where all trains going west must register. On the other hand, Mack was contradicted by the

roadmaster, general superintendent, and division superintendent as to the necessity for braces to hold the rails together at the curve; and the division superintendent testified that he did not, prior to the accident, issue instructions to the trainmen that were, in effect, to look out, and run carefully over the portion of the track where the wreck occurred. The engineer testified also as to careful running, and that the train, on the curve, was going at the rate of 18 or 20 miles an hour. Our conclusion is that the evidence is sufficient to support the verdict of the jury upon the issue; also, that the accident was the result of the negligence of the defendant, in not constructing and maintaining its track in a proper condition, and in running its cars at a high rate of speed on said curve. (4) The evidence shows that on the morning of the accident, before the train left Houston, while at the depot, some one asked the conductor in charge of the train to carry Mrs. Snead and her baby, stating that she was the wife of the agent at East Bernard, and wanted to go to him. The conductor answered that he could not do it; that, if she was the agent's wife, she was entitled to a pass and ought to have it. Mrs. Snead also spoke to the conductor, and he told her that he could not carry her without a pass or ticket.

Conclusions of Law.

1. Appellant's fourth assignment of error is as follows: "The court erred in not allowing defendant to prove that the minor plaintiff, George Snead, was a trespasser on its cars, by reason of the fact, which defendant offered to prove, that Effie Snead, his mother, was upon the train of defendant without a pass or ticket, and against the previous refusal of the conductor to receive her without said pass or ticket, and that she was on said train without the knowledge or consent of the conductor thereof." This evidence, the exclusion of which is here complained of, differs very little from the testimony of the conductor as it appears in the statement of facts; the only difference being that Mrs. Snead was upon the train "without the knowledge or consent of the conductor thereof," which might happen to a passenger regularly provided with a ticket, or who expected to pay his fare when called upon to do so. Mrs. Snead was sitting openly in the car, with other passengers, without any attempt at concealment; and, if the defendant had been permitted to show the additional facts set out in the bill of exceptions, this would not have shown her to be a trespasser, so as to be withdrawn from the protection of the law applicable to the other passengers. Whart. Neg. § 354.

2. Appellant claims that the following paragraph of the charge of the court practically makes it an insurer of the safety of passengers: "It is the duty of all railroad companies to use the greatest care and skill

in constructing their roadbed, track, etc., in order to transfer over it safely its passengers, and in like manner to use such care in keeping same in repair as to secure its passengers a safe travel, as the nature of the business reasonably requires to protect the traveling public." We do not think the charge is fairly subject to the objection. The jury would not understand the word "secure," in connection with the other language of the charge, in the sense contended for.

3. We find the verdict to be sustained by the evidence, and no error for which the judgment should be reversed; so it is therefore affirmed.

BOLTON v. CITY OF SAN ANTONIO et al.¹
(Court of Civil Appeals of Texas. Sept. 13, 1893.)

APPEAL—REVIEW—QUESTION OF COSTS.

On appeal from dismissal, on demurrer, of an injunction against an issue of municipal bonds, complainant, in his motion for rehearing, admitted that pending the appeal the bonds had been issued, but prayed that as the judgment against him was for costs, and was an adjudication in any suit by the city against him for damages, the court should either reverse, or, admitting the fact that the bonds were issued, modify the judgment on that ground, and grant complainant costs in both courts. *Held*, that the court could not take complainant's facts as admitted by the demurrer in the court below, and, the bonds being issued, the question was narrowed to one of costs, which could not be considered.

Appeal from district court, Bexar county; G. H. Noonan, Judge.

Suit by John H. Bolton, a taxpayer, against the city of San Antonio and Bryan Callaghan, mayor, to enjoin an issue of city bonds. Dismissed. Complainant appeals. Dismissed.

T. J. McMinn and R. B. Minor, for appellant. Oscar Bergstrom and L. N. Walthall, for appellees.

NEILL, J. The appellant, John H. Bolton, brought this suit in the district court of Bexar county on July 20, 1889, against the city of San Antonio and Bryan Callaghan, mayor of said city, appellees, to enjoin appellees from issuing coupon bonds of said city to the amount of \$250,000, to run from 20 to 30 years, with interest at 5 per cent. per annum. The grounds alleged for the injunction were that the city of San Antonio, acting by its mayor and city council, was about to issue its said bonds to said amount without authority of law, (the facts intended to show that the issuance of the bonds contemplated would be illegal are fully alleged by appellant in his petition, but, in view of the disposition we shall make of the case, it is deemed unnecessary for us to reiterate them;) that appellant is the owner of property situated in said city, subject to taxation by the city; that if the bonds should be issued and sold to a bona fide purchaser, or pass by assignment

into the hands of bona fide holders, his property situated in said city would be taxed for the purpose of paying the interest on said bonds, and providing a sinking fund to redeem them; and that he would have no defense against such holders, but would be compelled to pay such tax on his property to pay the interest on and redeem said bonds, and thereby sustain irreparable injury. A temporary writ of injunction was issued on the 20th day of July, 1889, which, on motion of appellees, was dissolved on the 6th day of August, 1889. Upon final hearing, a general demurrer was sustained to appellant's petition, and, he having declined to amend, judgment was entered, dismissing the case, from which he appealed to our supreme court. Upon the organization of our courts of civil appeals the case was transferred to the court of civil appeals for the third supreme judicial district, which court, on the 18th of January, 1893, affirmed the judgment of the court below, (21 S. W. Rep. 64,) but afterwards, upon motion of appellant, filed in said court on the 1st day of February, 1893, granted him a rehearing, (21 S. W. Rep. 401,) and transferred the case to this court. Appellant, in his motion for rehearing, referred to above, admits that, since the trial of the case in the court below, the bonds, the issuance whereof was sought to be enjoined, have been issued, and consequently that an injunction would be futile. He contends, however, that as the judgment against him is for costs, and is an adjudication that he wrongfully sued out the injunction, and is available as such an adjudication in any suit for damages which may be brought by the city against him, this court should either reverse the judgment of the lower court, or, if the facts alleged are deemed admitted by the pleadings, and if the fact of the issuance and sale of the bonds since the trial below is, by his admission, properly brought to the knowledge of this court, that the court should reform the judgment, and render it as a judgment denying the injunction prayed for, (reciting as a reason for such denial the issuance since the trial of the bonds sought to be enjoined,) and adjudging that appellant recover of appellees all costs incurred in this court and in the court below.

Although it may be said that the purpose of appellant's motion for a rehearing has been accomplished, the motion still remains a part of the record in this case, and the court feels authorized in considering the admissions of appellant contained in it, and in acting upon them, for the purpose of determining the proper disposition of this case. In view of the fact that appellant admits in his motion that the bonds, the issuance of which was sought to be enjoined, have been issued, and that an injunction would now be futile, the question presents itself, should this court go into an examination and consideration of the record for the purpose of determining whether the judgment of the

¹ Rehearing denied.

court below should be reversed? The main object in reversing and remanding a case is that the issues involved in it shall be fairly and impartially tried according to law. The reason for a reversal ceases with its object. If we should, from a thorough examination and consideration of the record, conclude that the court below erred in refusing the injunction prayed for, and remand the case, there would be no issue for the district court to try. The issue before was whether the city of San Antonio was about to unlawfully issue and put in circulation certain coupon bonds that would affect appellant's taxable property within the limits of said city. This was the only issue, and it has been eliminated from the case by the issuance and sale of the bonds. Whether rightfully or wrongfully done, it is useless for us now to undertake to determine, for appellees cannot now be restrained from doing that which they have already done. Should this cause be remanded to the trial court, upon its being made to appear that the bonds have been issued and sold, it could only dismiss it, or render judgment for appellees. We cannot reverse, and render such judgment in the case as appellant asks in his motion for a rehearing, for the reason that we cannot for that purpose consider the matters pleaded by him as true. While a demurrer admits the truth of the matters to which it is interposed, the admission is solely for the purpose of the demurrer, and can be considered for no other purpose. Appellate courts are not authorized to take matters as true, for the purpose of rendering judgment upon them, which were admitted only for the purpose of considering a demurrer. We do not deem it our province to enter upon a consideration of this case, for the purpose of relieving appellant of the effect which he says the judgment of the court below may have on him in a suit which he alleges may be brought against him by the city of San Antonio for wrongfully suing out the injunction, nor do we think that he has any right to a decision of this case for such a purpose. It is apparent to us that this case now involves nothing more than the costs. As it is not customary to decide questions of importance, after their decision has become useless, merely to ascertain who is liable for costs, and, as the condition of the case is now such that the court below could not render an effective judgment upon its reversal, (*Lacoste v. Duffy*, 49 Tex. 767,) the case is dismissed.

JAMES, C. J., did not sit in this case.

MICHAEL v. KNAPP.¹

(Court of Civil Appeals of Texas. Oct. 4, 1898.)

JUDGMENT—LIEN ON LAND—INTEREST OF DEBTOR.

Defendant, by a deed absolute in form, conveyed land to one R. to secure a loan. Af-

ter the loan was paid, R. executed a reconveyance of the land to defendant, but it was not filed for record until several years later, and after plaintiff had obtained and docketed a judgment against R., and had issued execution thereon. *Held*, that plaintiff could not subject such land to his judgment against R., since a judgment creates a lien on land only to the extent of the debtor's actual interest therein, and the registration statutes do not apply to such a case.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Leopold M. Michael against Mary E. Knapp to subject land to a judgment recovered by plaintiff against one J. A. Reddick. There was a judgment in favor of defendant, and plaintiff appeals. *Affirmed*.

C. K. Breneman and Upson & Bergstrom, for appellant. Tarleton & Altgelt, for respondent.

NEILL, J. This case is submitted to us upon the following agreement of the parties, viz: "It is agreed between the plaintiff (appellant) and defendant (appellee) that the following facts were established on the trial of this cause in the district court of the forty-fifth judicial district, and the same is admitted as an agreed case for determination by the court of civil appeals: First. The property in controversy in this suit, to wit, all that certain tract or parcel of land lying and being in the county of Bexar and state of Texas, and within the corporate limits of the city of San Antonio, on the west side of the San Antonio, immediately east of the San Pedro springs, known as lots Nos. four (4) and five, (5), in block No. 1, in Adams and Wickes' addition to Upper San Antonio, according to a plat made by C. P. Smith, city engineer, recorded on page eight, (8,) City Atlas of Subdivisions. Said lots are bounded on the north by lot No. 6, same block; on the east by lots Nos. 8 and 9, same block; on the south by lot No. 3, same block; and on the west by San Pedro avenue; was deeded to said Mary E. Knapp on the 19th day of September, 1882, by Adams & Wickes. That on said date Frank Knapp, the husband of said Mary E. Knapp, was then living, and, together with his wife and children, used and occupied said property as his homestead continuously until his death, in December, 1883, and that thereafter the said defendant has so continued to actually reside on and occupy said premises as the homestead of herself and children to the present time. Second. That on the 3d day of April, 1883, the said Frank and Mary E. Knapp, desiring to borrow money for the purpose of procuring funds with which the said Frank Knapp purchased an interest in a business property known as the 'San Pedro Springs Lease,' made and executed a deed to one J. A. Reddick, which deed was on its face one of general warranty, upon the consideration of \$2,500 in cash and \$2,000 evidenced by a promissory note for \$2,000, with the usual conditions for conven-

¹ Rehearing denied.

tional interest, and attorney's fee, secured by a vendor's lien on said described property, and duly filed for record in Bexar county April 4, 1883. That said note was signed by said Reddick, and delivered to said Frank Knapp, but no part of the \$2,500 cash was ever paid by said Reddick, or was by any party to said deed intended to be paid. Third. That the said Frank and Mary E. Knapp indorsed said note to James Martin, and on the 3d day of April, 1883, the said J. A. Reddick executed and delivered to H. P. Drought, trustee for said James Martin, a deed of trust to secure the payment of said note for \$2,000. Fourth. That on December, 1883, Frank Knapp died, and his interest in the San Pedro Springs lease was thereafter sold, and the proceeds of such sale were by defendant, Mary E. Knapp, used to pay off and discharge the note of J. A. Reddick, held by said James Martin. Fifth. That on the 3d day of November, 1884, after the payment of the note of Reddick, held by said Martin, H. P. Drought executed a release to said J. A. Reddick, which release was filed for record on the 7th day of November, 1884. Sixth. That on the said 3d day of November, 1884, the said J. A. Reddick, by special warranty deed, reconveyed unconditionally the said described property to the said Mary E. Knapp, by deed duly acknowledged. That said deed was not filed for record until the 16th day of September, 1891, of the execution and delivery of which deed plaintiff had no notice at the time of filing his abstract of judgment, except in so far as defendant's possession was notice to plaintiff. Seventh. That on the 14th day of November, 1890, plaintiff, L. M. Michael, obtained a judgment against J. A. Reddick et al. for the amount of \$867.11, \$15.00 costs of suit, with interest from date of judgment at 12 per cent. per annum; and thereafter, on the 29th day of June, 1891, duly and according to the statute plaintiff filed, recorded, and indexed an abstract of said judgment in the county clerk's office of said Bexar county, and on the same day execution was issued on said judgment, which was returned nulla bona. Eighth. Plaintiff, L. M. Michael, brought this suit to subject the above-described property to his judgment against said J. A. Reddick, and to foreclose a judgment lien. Ninth. No consideration ever passed from the said Michael to said Mary E. Knapp. Tenth. The sole question for the determination of the court is whether or not the said property described above is subject to the judgment lien of plaintiff, L. M. Michael, for his judgment against said J. A. Reddick. Eleventh. The court below found the property described above was not subject to said judgment lien, and rendered judgment for defendant, Mary E. Knapp. Twelfth. If the court below was correct, this cause should be affirmed; if in error, this cause should be reversed and rendered, decreeing a foreclosure of a judgment lien

on said property, and order of sale, to satisfy plaintiff's judgment against said Reddick."

The deed from Frank and Mary E. Knapp to J. A. Reddick, if not absolutely void as between the parties, at most conveyed only the legal title to the property. The equitable title remained in the grantors, and the property continued to be their homestead. The grantee, if the deed had any effect at all as between the parties, was a trustee holding the legal title in trust for the grantors, who were the real owners. The reconveyance of the property by Reddick simply divested him of the legal title, and reinvested it in appellee. Her real interest was not affected by it. She owned the same interest in the property after it was reconveyed that she did before. The appellant, if he had acquired the note which was made by Reddick to his grantors for value without notice of the purpose for which the deed was made or note executed, could have enforced a vendor's lien on the land; if he had purchased the land from Reddick for value without notice he would have acquired the title; or if the land had been sold under execution against Reddick, as his property, a purchaser for value at such sale would have acquired title to it. And in none of these cases would the possession of Knapp and wife, or of the wife after his death, have been notice of their interest in or title to the property, for their possession would have been presumed to be in subordination to their deed to Reddick. *Eylar v. Eylar*, 60 Tex. 315; *Love v. Breedlove*, 75 Tex. 649, 13 S. W. Rep. 222; *Hurt v. Cooper*, 63 Tex. 362; *Heidenheimer v. Stewart*, 65 Tex. 321. But appellant does not claim the property in any of these ways, but claims that he has a lien on it, and that he is entitled to have it enforced by reason of his having an abstract of a judgment in his favor against Reddick, filed and indexed in accordance with statute, and that at the time such abstract was filed he had no notice of the reconveyance to appellee, or of the purpose of the original deed to Reddick. The statute providing for judgment liens only gives the party complying with it a lien on all the real estate of the defendant, and all real estate which he may acquire thereafter, situated in the county where the abstract is filed and recorded. In this case the "defendant's interest" never was more, if that, than a mere legal title. He never did have the equitable title, or own any interest in the land. It was the property of Knapp and wife when they made him the deed, and it remained their property. Michael has lost nothing nor gained anything. His position has in no way been changed. If he had purchased the property from Reddick with the knowledge of the facts in the record, which he admits, he would have acquired no title as against the appellee, nor would he if the property had been sold under an ex-

ecution issued on his judgment against Reddick, and he had purchased it with the knowledge of such facts. He knew these facts when he brought this suit, and we cannot see how he expects to accomplish through it what he could not attain with such knowledge at execution sale. Nor did he acquire any right by virtue of our registration statutes. They do not apply to a case of this character. In *Blankenship v. Douglas*, 28 Tex. 225, it is said that a judgment lien on the land of a debtor is subject to every equity against the lands in the hands of the judgment debtor at the time of the rendition of the judgment, and that courts of equity will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate, and that this kind of equity is beyond the contemplation of the statute of registration respecting creditors. The same principle has been frequently reiterated by our supreme court. *Ilse v. Seinsheimer*, 78 Tex. 459, 13 S. W. Rep. 329; *Allday v. Whitaker*, 66 Tex. 673, 1 S. W. Rep. 794; *Parker v. Coop*, 60 Tex. 111; *McKamey v. Thorp*, 61 Tex. 648. There was no error in the judgment of the court below, and it is affirmed.

SAN ANTONIO & A. P. RY. CO. v. WILSON.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

CORPORATIONS—CONTRACT TO DELIVER BONDS—BREACH—MEASURE OF DAMAGES.

1. Where a railroad company fails to deliver first mortgage bonds to a subscriber who has paid therefor, according to the terms of the contract of subscription, the measure of such subscriber's damages is the highest market value of such bonds between the date of the breach of the contract and the date of the trial of an action for such breach.

2. In an action, by one of many persons who subscribed and paid money to enable a railroad company to build its road, against such company, for failure to deliver to plaintiff first mortgage bonds in accordance with the terms of the written contract of subscription, which is unambiguous, it is not error to refuse to permit a witness for defendant to state what he understood the contract to be.

Appeal from Kendall county court; T. M. Paschal, Judge.

Action by N. T. Wilson against the San Antonio & Aransas Pass Railway Company for breach of contract to deliver first mortgage bonds to plaintiff in consideration of money subscribed and paid by him to enable it to build a certain extension of its road. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

William Aubrey, for appellant. J. H. McLeary, for appellee.

JAMES, C. J. The district judge did not err either in refusing to quash the citation, or in overruling the defendant's general demurrer.

The third assignment of error complains of the admission as evidence of the certified copy of the record of a deed of trust from the San Antonio & Aransas Pass Railway Company to the Farmers' Loan & Trust Company. The bill of exceptions touching this matter sets forth that this certified copy was objected to because—First, defendant had no notice thereof; second, the affidavit on file to admit the same was not sufficient; third, the evidence was immaterial and irrelevant. The second of said grounds we cannot consider, as the affidavit is not set forth in the bill of exceptions, or elsewhere in the record. It is evident that defendant did not have the requisite notice of its filing, for it was not filed until the day of the trial. As the cause was tried without a jury, and appellant admits that this evidence was of an immaterial character, and there is sufficient other evidence in the record that would entitle appellee to a judgment for some amount, there is no reason for considering this exception further.

Error is assigned on the refusal of the court to admit as evidence the following answer of B. F. Yoakum to an interrogatory in reference to what the contract was between the railway company and those desiring the building of the northwestern extension of its road: "I understood the contract to be that the company would build the northwestern extension to Kerrville, and deliver 280 of its first mortgage bonds, with three years' coupons deducted, for the sum of \$280,000, to be paid by subscribers who wanted the road." Appellant contended that the contract of subscription upon which the suit is brought was an entire and individual one with all the subscribers, and that the company was not required to deliver bonds to any subscriber unless all of the subscribers had paid. The contract will not bear that construction, and, being in writing, it was not competent for its terms to be varied or controlled by parol testimony of any kind, and the evidence was properly excluded. The contract of subscription, or "subscription list," as it is called, was the same that is set forth at length in the case of *Railway Co. v. Busch*, (Tex. Civ. App.) 21 S. W. Rep. 164, and it need not be copied here. The receipts given by appellant to appellee upon payment by the latter of the several installments of 10 per cent. of his subscription recite upon their face that such installments were received subject to the terms of appellee's subscription to the first mortgage, 40 year, 6 per cent. bonds of the San Antonio & Aransas Pass Railway Company. The subscription list was clearly the contract upon which the rights of the parties depend, and its terms are not ambiguous. It contemplated the delivery by appellant to appellee of one its \$1,000 bonds upon payment of appellee's subscription; and, such payment having been made prior to the completion of the road to Kerrville, appellee was at that time

entitled to the bond, less three years' interest coupons. Appellee agreed to pay \$1,000 for that much in bonds. He did not contract to pay a larger sum conjointly with others, nor was the delivery of his bonds conditioned upon what may have afterwards transpired between the company and the other subscribers. The rule for estimating damages for nondelivery of a chattel having a fluctuating value is the highest market value of the chattel between the date of the breach and the date of the trial, with interest to be computed from the date of valuation fixed, unless the plaintiff has unreasonably delayed bringing his suit. *Calvit v. McFadden*, 13 Tex. 324; *Masterson v. Goodlett*, 46 Tex. 402; *Railroad Co. v. Jackson*, 62 Tex. 212. We do not believe that the bringing of the suit was unreasonably delayed. The above rule was not applied by the judge trying the case, and in this there was error. The witness B. F. Yoakum testified by deposition in reference to the bonds, (and this was all the evidence as to value:) "Such bonds, with all the coupons attached, will sell now in the market at about 85 cents." We do not agree with appellant that this valuation was of the bonds independent of the three years' coupons. The witness states distinctly that he referred to bonds with all the coupons attached. If the testimony had related to the bonds without three years' coupons, the interest would not be deducted again. At what time the deposition of Mr. Yoakum was taken, and to what date his testimony referred, the record before us does not disclose, except the necessary inference that it was taken between the filing of the suit and the trial. Hence we would be unable to fix the time from which this market value should have borne interest. Appellee has consented, in his brief, to a remittitur of interest. With this element out of the case, the facts before us, and the prayer contained in plaintiff's pleadings, enable us to render such judgment here as should have been rendered on the trial; and we conclude that appellee should recover of appellant the sum of \$850, less \$180, (three years' interest at 6 per cent.,) to wit, \$670, with 8 per cent. interest per annum thereon from October 25, 1889, and all costs of the district court, and that the judgment of the district court be reversed, and rendered accordingly; the costs of this court to be adjudged against appellee.

CITY OF EL PASO v. DICKENS.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

APPEAL—DISMISSAL.

When the only assignment of error is based on a statement of the judge below, contained in a certificate which has been stricken from the record, there is nothing left to review, and the appeal will be dismissed.

Appeal from El Paso county court; Allen Blacker, Judge.

Action by J. F. Dickens against the city of El Paso. Judgment for plaintiff. Defendant appeals. Dismissed.

C. N. Buckler, for appellant. M. W. Stanton, for appellee.

NEILL, J. Appellee's motion is to affirm the judgment of the court below, or to dismiss the appeal. The motion to affirm will not be considered, as it does not purport to be based upon a certificate such as is provided for by section 21, p. 28, Acts Called Sess. 22d Leg. It appears from the transcript that no statement of facts was ever filed in the case. A certificate of the trial judge was sent up with the record, to the effect that the attorney for appellant prepared such statement in due time, and presented it to appellee's attorney, who refused to agree to it; and that, by reason of such refusal, as well as the incorrectness of the statement, the judge failed to approve it, and was prevented from preparing a statement himself by the promise of appellee's attorney to make out and present a correct one to him for his approval in time for him to have it filed, which he never did. The only assignment of error is predicated upon the statement of the judge contained in said certificate. This certificate was by an order of the court of civil appeals for the third supreme judicial district, on the 2d day of November, 1892, stricken from the record, the effect of which leaves the case without an assignment of error; and it is for that reason appellee asks that the appeal be dismissed. Section 24, p. 29, Id., provides that in all cases of appeal to this court the trial shall be on a statement of facts or agreed statement of the pleadings and proof, as agreed upon by the parties or their attorneys, or the conclusions of the law and fact, as the case may be; or, should the parties fail to agree, then the judge of the court below shall certify the facts; or on a bill of exceptions to the opinion of the judge; or on a special verdict; or on an error in law either assigned or apparent on the face of the record; and that, in the absence of all these, the case shall be dismissed. The record discloses an absence of everything upon which a case can be tried here. The appeal is therefore dismissed, at appellant's costs.

THORNTON v. GOLDSTEON et al.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

Appeal from Travis county court; William Von Rosenberg, Judge.

Action by Goldsteon & Phillips against P. R. Thornton on account for goods sold and delivered. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. W. Gregory and Walton, Hill & Walton, for appellant. Walton & Calhoun, for appellees.

FISHER, C. J. The judgment is affirmed.

MYERS et al. v. PAXTON et ux.

(Court of Civil Appeals of Texas. June 15, 1893.)

HOMESTEAD—ATTACHMENT—ABANDONMENT—VENDOR'S LIEN.

1. A levy of attachment, void because the property levied on is defendant's homestead, is not given validity by a subsequent abandonment of the homestead.

2. Where a vendor, instead of asserting a vendor's lien, brings suit for the purchase money, and attaches the land sold, persons claiming title under the attachment proceedings must depend on the validity of such proceedings, and cannot avail themselves of any right which the vendor had to a lien.

Appeal from district court, Shelby county; George F. Ingraham, Judge.

Trespass to try title by W. G. Paxton and wife against Abe Myers and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Tom C. Davis, for appellants. E. B. Wheeler, for appellees.

WILLIAMS, J. This case has been twice before the supreme court, and will be found reported in 67 Tex. 96, 2 S. W. Rep. 817, and 78 Tex. 199, 14 S. W. Rep. 568. Its character and the question upon which it depends are sufficiently indicated in those reports. At the last trial, the defendants, who are the present appellants, asked the court to charge the jury as follows: "If you believe the land in controversy was the home of J. B. Freeland when the attachment was levied, the levy of the attachment was void, and Freeland removing off the land, and to Panola county, would not give any validity to said attachment." This charge was refused, and the general charge contained no equivalent instruction. The rule laid down in the requested instruction was a correct application of the ruling of our supreme court in the last appeal of this case. It does not appear that the question as to the effect of an abandonment of the homestead subsequent to the levy of an attachment was raised before the supreme court. The language used in that decision is: "If the land in controversy was the homestead of Freeland at the time the attachment was levied upon it, the levy was a nullity as to the 200 acres, including the residence, and no lien was created except upon the excess." An abandonment of the homestead subsequent to the levy would not give validity to a nullity, and would not create a lien, where none before existed. The charge should have been given, and the decision of the case should have been made to depend upon the issue whether or not the land was the homestead of Freeland at the date of the levy. The plaintiffs showed that G. W. Weaver, under whom they claim, sold the land to Freeland before it was patented, taking Freeland's note for the purchase money, in which, as well as in the deed which he executed to Freeland, a lien for the purchase

money was retained, thus making the contract executory. The land, however, was subsequently, in 1859, patented to Freeland as a pre-emptor by virtue of his possession of same, and the legal title was thereby vested in him, and passed to defendant, claiming under him. The suit in which the attachment was issued was brought upon the note given for the purchase money. There is some uncertainty about the dates and the chronological order of all these transactions, and much conflict in the evidence as to whether Freeland took possession of the land, and made it his homestead, under his purchase from Weaver, before or after the latter caused the attachment to be levied on it. On another trial the case should be submitted on that issue. After this great lapse of time, and in view of the fact that Weaver sued Freeland on the note given for the purchase money, and caused an attachment to be levied on the land to secure it, and Weaver never either asserted his lien for the purchase money nor rescinded the contract, but directed all of his efforts towards the enforcement of it, the plaintiffs cannot avail themselves of any right which Weaver had growing out of the sale to Freeland, but must depend upon the title secured through the attachment proceedings.

MORGAN v. TURNER.**TURNER v. MORGAN.**

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

SEQUESTRATION—AFFIDAVIT—SALE—RIGHTS OF SELLER—APPEAL.

1. Under Rev. St. art. 4490, subd. 3, which requires the affidavit for a writ of sequestration to state the value of each article of property to be sequestered, it is not sufficient to state that each article is worth "about" a designated sum, but the allegation as to the value should be definite and certain.

2. Where chattels are sold partly on credit, and the purchaser agrees to execute at a specified date a note and mortgage to secure the deferred payment, his failure and refusal so to do give the seller an immediate right of action for the entire unpaid purchase money; and he need not wait until the expiration of the period of credit originally given.

3. Where there is no ambiguity on the face of a written contract, parol evidence is not admissible to show that it does not express the true intention of the parties, in the absence of a special plea showing the ambiguity, and alleging the true intent.

4. An error in the conclusions of the trial court is no ground for reversal where the same judgment as the one rendered would necessarily follow correct conclusions.

5. An error as to the amount of a judgment, owing to an improper computation of interest, will be corrected on appeal, though it is in appellee's favor, where he calls it to the attention of the court by cross assignments of error.

Appeal and error from district court, El Paso county; T. A. Falvey, Judge.

Action by G. W. Morgan against W. E. Turner to recover the purchase price for cer-

tain chattels, and to foreclose a lien thereon. There was a judgment for plaintiff in the sum of \$1,576.65, and he appeals, and defendant brings error. Modified.

Nugent & Stanton, for appellant and defendant in error. Millard Patterson and C. N. Buckler, for appellee and plaintiff in error.

NEILL, J. These cases are brought here, one on appeal by plaintiff below, and the other on a writ of error by the defendant, from a judgment rendered in the district court of El Paso county in appellant's favor for \$1,576.65, with a foreclosure of a lien given by the defendant to plaintiff on certain property to secure the debt upon which the judgment was rendered. The cases are consolidated, and for convenience will be treated under the style of the first; and Turner, who brought the case here on error, will be considered as an appellee filing cross assignments. This suit was instituted by appellant against appellee on the 23d day of November, 1888, to recover a money judgment, and to enforce a lien on a horse and certain cattle. Appellant alleged that he and appellee, on the 1st of February of that year, entered a partnership under a parol contract for the purpose of running a dairy business, in which they were to be equally interested. That he agreed to buy a car load of cows, which appellee was to purchase and bring to their ranch, and that during appellee's absence, in making such purchase, appellant was to remain on the ranch, put it in order, and buy other property needed in the business. That he, in accordance with the contract, advanced \$1,000 to buy said cows, and expended \$685.15 in purchasing other property and fixing up the ranch, making in all \$1,685.15 which he put into the partnership. That appellee agreed to and did put in the business ten head of cows at an agreed valuation of \$50 each, and one horse, at an agreed valuation of \$50. That appellee, to make his interest equal to appellant's, agreed to pay him between the 1st and 10th of April, 1888, the difference between \$550, the amount invested by him, and one-half of the aggregate amount invested by both parties, with interest; and to secure such payment it was agreed that all the partnership property should be the property of appellant. That about the 1st of April, 1888, appellant sold appellee his entire interest in the partnership property for the sum of \$1,685.15, to be thereafter paid, as follows: One-third cash on the 20th day of May, 1888, and on that day appellee was to execute to appellant his two promissory notes, well secured by approved personal security or by mortgages on all of said property, each for one-third of \$1,685.15, payable in three and six months respectively, with interest at 10 per cent. from date. Upon the payment of one-third of said sum, and the execution of the notes, appellant was

to make appellee a bill of sale conveying him all of said property belonging to or used in the partnership business. That under said contract it was agreed that all the property should be the property of appellant until paid for by appellee. And that appellee, until the 20th day of May, should have the use of said property to his own benefit. Appellant further alleged that on the 26th of June, 1888, appellee having failed to make said cash payment or to execute said notes, they entered into a written contract, which was annexed to and made a part of his original petition, and is as follows: "This agreement, made June 26th, 1888, witnesseth: Whereas, W. E. Turner has this day purchased of G. W. Morgan 28 head of cattle, (with calves,) 2 horses, one wagon, lot of harness, and other articles heretofore used by them in the dairy business, for \$1,720.25, it is understood and agreed as follows: Within one month from this date, Turner is to pay G. W. Morgan \$740.25, either in cash or a good, bankable note, due in three months from this date; also at that time to make and deliver to said Morgan his two notes for \$540 each, one due January 1, 1889, with ten per cent. from date of notes, which notes are to be secured by chattel mortgage in usual form on said cattle, horses, etc., to be executed by said W. E. Turner. In the mean time G. W. Morgan is to retain said property in his possession. It is further agreed that Morgan shall have the right within one month from date to sell a portion of said property, and the cash received therefor shall be credited on first payment of \$740.25 mentioned herein. This does not alter or affect any previous contracts heretofore made by us. W. E. Turner. G. W. Morgan." Appellant alleged that, by the stipulation in said written contract providing that the same should not alter or affect any previous contract theretofore made by the parties thereto, it was intended by both that, should the written contract not be complied with, the same should not alter or affect the two previous contracts, so as to deprive him of any right guaranteed by either of them. Appellant charged that on the 23d of February, 1888, upon a partnership settlement between them, it was agreed that the partnership was indebted to him in the sum of \$1,685.15, and to appellee in the sum of \$658; that, by virtue of the first contract, he had a lien upon all of said cattle and horses put into said business by the appellee to secure the payment of the money stipulated to be paid by him to make him equally interested with appellant in the business; that, under the second and third contracts, he acquired a lien on said property, as well as on all the cattle and other property put by him into said partnership, and which by said two contracts he sold to appellant. The appellant then averred that by virtue of the third contract, hereinbefore set out, he had a lien on all of the property described

therein, and was entitled to have it declared and enforced in his favor, to secure the payment of the sum of \$1,547.75, with interest from the 26th day of July, 1888, the day on which said contract should have been carried into effect. He then says that, should the court hold he cannot proceed on said written contract alone, he is entitled to have judgment under the three contracts, with a decree declaring and enforcing his lien, and that in any event he is entitled to judgment under the first and second contracts for \$1,512.15, it being the purchase price of said property, as specified in said second contract, less the sum of \$172.50, with interest from May 20, 1888, and in like manner to have his lien enforced against the property to pay the same. At the time the suit was brought, appellant sued out a writ of sequestration against 10 head of cattle. The appellee answered by a general denial only. Upon motion of appellee, the writ of sequestration was quashed. On the 3d day of January, 1890, the case was tried by the court, without a jury, and judgment rendered for appellant for \$1,576.65, with a decree foreclosing his lien as prayed for. The court filed its conclusions of law and fact, to which conclusions both parties excepted.

We conclude that the allegations in appellant's petition set out herein are facts fully established by the evidence, and that appellee owed the appellant on the third contract the sum of money adjudged against him. The affidavit for the writ, after fully describing the animals sought to be sequestered, states that they "are worth about the sum of fifty dollars per head, or, in the aggregate, about the sum of five hundred dollars." Upon motion of appellee, the writ of sequestration was quashed, upon the ground that the affidavit therefor did not state the value of the animals with sufficient certainty, and was not positive and definite as to their value. The appellant moved the court to set aside its order quashing the writ, which was overruled; and he assigns the action of the court in quashing the sequestration, and in overruling his motion to set aside the order, as error. Subdivision 3, art. 4490, Rev. St., requires the value of each article of the property to be sequestered to be given in the affidavit for the writ. The appellant contends that the requirement is intended only as descriptive of the property. We do not think so. If it should be so construed, then an affidavit which describes the property with such certainty that it may be "identified and distinguished from property of a like kind," which is also a statutory requisite, would be sufficient, without stating any value. Article 4492, Id., absolutely prohibits the issuance of a writ of sequestration in any case until the party applying for it has filed with the judge, clerk, or justice of the peace to whom he applies a bond payable to the defendant for a sum of money not less than double the

value of the property to be sequestered, as stated in the affidavit. Therefore, if the value of the property to be sequestered is not stated in the affidavit, a bond, such as is required, cannot be given, and, in the absence of it, a writ of sequestration would be null and void. Ten head of cattle were sought to be sequestered. Their value, at about \$50 per head, might or might not be \$500. If the value of each were \$55, (which might be considered about \$50 per head,) the property would be worth \$550, which could hardly be considered about \$500. A bond in the sum of \$500, which was its amount in this case, would be \$100 less than required, and a defendant would not have the protection against the seizure of his property by virtue of the writ of sequestration that the law provides and requires that he shall have. If his property was worth only \$500, and by the use of the word "about" the amount of the bond was fixed at \$550, he would be required to give a bond in a larger sum, in order to replevy it, than the statute requires. Suppose that upon such an affidavit as was made in this case a bond shall be given in about the sum of \$500, which would be as definite and certain in amount as the affidavit upon which it was predicated. It would not be contended that such an instrument was sufficiently definite and certain in amount for any purpose whatever. It is an essential requisite that the affidavit for a writ of sequestration state definitely and positively the value of each article of property sought to be sequestered; and, as the affidavit upon which the writ issued in this case was lacking in this requirement, the court did not err in quashing it.

The trial court, in its conclusions, found that, at the time the suit was instituted, only the sum of \$740.25 was due on the third contract, and that said contract abrogated the other two, relating to the same subject-matter, and that the written contract, having been made a part of appellant's original petition, authorized a judgment for the full amount of the contract, although a part of it was not due when suit was brought. The appellee moved for a new trial upon the ground that as the suit was brought before a large part of appellant's demand was due, and sequestration having been quashed, and no amendment having been filed alleging the maturity of that not due, it was improper for the court to enter judgment against him for the entire debt. The court overruled his motion, and he assigns its ruling as error. Under our view of this case, it is not necessary for us to determine the question whether, when a suit is instituted by a writ of sequestration on a claim upon which enough is due to bring it within the jurisdiction of the court, and a part is not due, and the contract upon which the demand is based is made a part of the petition, and shows that the balance is due at time of trial, it is necessary for the plaintiff to amend, and allege

the maturity of the full amount before he can recover it. We suggest, however, that the best and safest practice is to file such an amendment.

As has been seen by our statement of this case, the appellant sued on all three of the contracts, alleging that, by the stipulation in the third to the effect that it did not affect any previous contract, it was intended between the parties to provide that it should not operate so as to deprive him of any right guaranteed by them, or either of them, under the previous ones. We think this was their obvious intention, and is the proper construction to be given the stipulation referred to; and as the debt, by the terms of the first two contracts, was due when his suit was filed, he could maintain his action, and recover the amount due on them. But, as the amount due on them would be less than the judgment recovered, we would have to reverse, and render the proper judgment on them, should we hold that it was not due on the third, and that it was necessary, under the circumstances, for plaintiff to amend his pleadings in order to recover the entire amount evidenced by it.

This brings us to the question as to whether the entire debt was due on the written contract set forth herein when the suit was filed. It has been seen from said agreement that the property was sold to appellee on a credit; that he agreed to pay a part of the purchase money one month from the date of its execution, and then to execute to appellant his promissory notes, secured by a mortgage on the property. The evidence shows indisputably that appellee failed and refused to perform his agreement, or any part of it. The principle is well settled that when a party purchases goods on a credit, and agrees to execute notes for the purchase money, or execute a mortgage to secure it, his failure and refusal to execute the notes or mortgage at the time agreed upon give the vendor an immediate right of action for the purchase money. *Hays v. Weatherman*, 14 Ind. 341; *Clodfelter v. Hulett*, 72 Ind. 148; *Carnahan v. Hughes*, (Ind. Sup.) 9 N. E. Rep. 79; *Hanna v. Mills*, 21 Wend. 91; *Tied. Sales*, § 331. Under this rule the appellant's debt was due when the suit was filed, and, had the court below acted upon it, the same result would have been reached that was attained; and, if there was error in some of the conclusions arrived at by the court, there was none in the judgment rendered by it.

The appellee also assigns as error the finding of the court below that the contract copied in this opinion showed a complete sale of the property by the plaintiff to the defendant, because it is ambiguous, and the intention of the parties thereto could not be arrived at without resorting to evidence aliunde, and that all the evidence showed that the contract was conditional, and amounted to nothing more than an agreement on the part of Turner to purchase the

cattle. We do not think that there is any ambiguity in the contract. If appellee deemed there was, he should have, by a special plea, indicated it, and have alleged the true intention of the parties. He could not prove this under a general denial, which we have seen was his only pleading. However, it seems from the record that he was allowed to introduce parol evidence to show the intention of the parties, and that the appellant introduced contradictory evidence to show that the construction given by the court to the contract was correct. The appellee had the benefit of all the proof he could have made had his pleadings been sufficient to have admitted it, and we would not disturb the finding of the court on that question even if it had been raised by proper pleadings.

The questions raised by appellee's third and fifth assignments of error could not properly arise under a general denial, and it is not incumbent upon us to consider them.

The court below found in favor of appellant for the sum of \$1,493.75, with interest at 8 per cent. on \$513.75, and 10 per cent. on balance from July 26, 1888. The judgment rendered is for \$1,576.65, with interest on \$571.98 of said sum at 8 per cent. per annum, and with interest on \$1,004.67 at the rate of 10 per cent. per annum from date of judgment. Appellee assigns as error that the finding of the court did not support the judgment. It is evident that the court, in arriving at the sum of \$1,576.65, for which it entered judgment, intended to compute the interest on \$513.75 from the 26th day of July, 1888, at 8 per cent. per annum, and on the difference between it and \$1,493.75, which is \$980, at 10 per cent. per annum from said date to date of judgment, add them together, and give judgment for the sum; and that \$513.75, with 8 per cent. so computed, should bear 8 per cent. interest from judgment; and that \$980, with 10 per cent. interest so computed, should bear like interest at 10 per cent. from the time judgment was rendered. We think this would have been proper if the computation had been correctly made, but it was not. The interest on \$513.75 from the 26th of July, 1888, to January 3, 1890, which is one year, five months, and seven days, would be \$59.02, which, added to \$513.75, would make \$572.77. The interest on \$980 at 10 per cent. for the same time would be \$140.73, which, added to the amount upon which computed, would make \$1,120.73. Add this amount to \$572.77, and we find the sum to be \$1,693.50, for which amount judgment should have been rendered, with interest on \$572.79 thereof at 8 per cent. per annum, and with interest on \$1,120.73 at the rate of 10 per cent. per annum; and we here reform the judgment of the court below, and render it in favor of the appellant, G. W. Morgan, against the appellee, W. E. Turner, for \$1,693.50, with interest from the 3d day of January, 1890, on \$572.77 thereof, at the

rate of 8 per cent. per annum, and with interest on \$1,120.73, the balance, from said date, at 10 per cent. per annum, with a foreclosure of his lien as decreed in the district court against the property described in its judgment as it is here reformed. The error just noticed was in appellee's favor for something over \$100, and would perhaps not have been noticed had he not called it to our attention by his assigning it as error. But he having done so, and the error having been detected, it is our duty to correct it. The judgment of the court below as here reformed is affirmed; and it is ordered that the appellant, G. W. Morgan, pay all costs in the case brought here on appeal, and that the appellee, W. E. Turner, pay all costs in the one brought here by him in error.

BEHRENS v. DIGNOWITY.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

ACTION ON NOTE—PLEADING—ATTORNEY'S FEE—BEST AND SECONDARY EVIDENCE.

1. A petition which alleges that defendant is indebted to plaintiff in a certain sum, "according to the terms of his certain promissory note," setting out a copy of the same, sufficiently avers the execution of the note by defendant, in the absence of any special exception.

2. Where a note provides for the payment of 10 per cent. of its amount as an attorney's fee in case of legal proceedings, an allowance of 10 per cent. on the principal and interest is proper.

3. A note which recites that it is given for the price of described land sold by the payee to the maker, thus showing a vendor's lien, independent of an express acknowledgment contained therein, is original evidence, and as good evidence of the lien as the deed.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by James V. Dignowity against Emil Behrens on a promissory note. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Otto Staffel and L. N. Walthall, for appellant. Peter Shields, for appellee.

NEILL, J. This is an appeal from a judgment in favor of appellee against appellant, in which the latter recovered the principal, interest, and an attorney's fee of 10 per cent. due him on a note given for the purchase money of certain lots situated in the city of San Antonio. A general denial was the only pleading filed by appellant. The appellee alleged in his petition that appellant was indebted to him in the sum of \$175, and interest thereon at the rate of 8 per cent. per annum from May 22, 1889, and 10 per cent. of said amount as attorney's fee, due, owing, and unpaid on and according to the terms of his certain promissory note, of which the following is a substantial copy, viz.: "\$175.00. San Antonio, Texas, May 22nd, 1888. On or before May

22nd, 1889, I promise to pay to the order of James V. Dignowity the sum of one hundred and seventy-five dollars, with interest at the rate of eight per cent. per annum from date hereof until paid, for value received. Payable at the banking house of O'Connor and Sullivan, San Antonio, Texas. This note is given in part payment of the purchase money for lots numbers (9) nine and (10) ten, in block K, in original city lot No. 10, R. 4, D. 1, about one mile east of Alamo plaza of the city of San Antonio, county of Bexar, state of Texas, they being the same two lots this day deeded to me by James V. Dignowity; and for the payment hereof, together with the interest thereon, according to the tenor and reading hereof, a vendor's lien is hereby acknowledged; and in case of legal proceedings on this note I agree to pay ten per cent. on the amount as attorney's fees. [Signed] Emil Behrens." Appellant objected to the introduction of the note in evidence, because (1) it was not alleged that the note was executed by him; (2) it was not the best evidence to show a reserved lien; and (3) it showed that the deed of appellant to appellee was the best evidence of such lien. The petition, in the absence of an exception, sufficiently averred the execution of the note, and, there being no sworn plea denying its execution, it was properly admitted in evidence. The note showed upon its face that it was given for the purchase money of the lots described in it, purchased by appellant from appellee; thus showing a vendor's lien independent of the acknowledgment of it contained therein. It was original evidence, and as good evidence of the vendor's lien as the deed. It is only when the note does not in and of itself show all the facts constituting the lien, and that are necessary to a decree of foreclosure, that it is necessary to introduce the deed as the best evidence of the facts constituting the lien.

The allowance of 10 per cent. as attorney's fee on the principal and interest due on the note was proper. *Morrill v. Hoyt*, 83 Tex. 59, 18 S. W. Rep. 424. There being no error in the case, the judgment of the court below is affirmed.

SOUTHERN PAC. CO. v. BURNS.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

APPEAL—FROM JUSTICE OF THE PEACE—JURISDICTION.

1. On appeal from a justice of the peace to the district court, taken by the "Southern Pacific Railroad Company," the district court has no jurisdiction to render judgment against the "Southern Pacific Company," since the presumption from the difference in names is that the two companies are separate and distinct entities.

2. The fact that the "Southern Pacific Company" filed an answer in the district court

does not confer jurisdiction over it, where the amount in controversy is not within the original jurisdiction of the district court.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by Henry Burns against the Southern Pacific Company for killing and injuring live stock during transportation. From a judgment in plaintiff's favor, defendant appeals. Reversed.

John Sehorn, for appellant.

NEILL, J. The appellee sued the Southern Pacific Railroad Company in the justice's court of precinct No. 1 of Bexar county for \$129 damages for killing and injuring his sheep in shipment over its railroad. The case was tried in that court on the 23d day of October, 1889, and judgment rendered in appellee's favor against said railroad company for the full amount sued for, from which judgment the Southern Pacific Railroad Company appealed to the district court, executing in its name an appeal bond conditioned as required by law. The transcript of the judgment and entries on the justice's docket, together with the appeal bond, were filed in the district court of Bexar county on November 25, 1889. The Southern Pacific Company filed an answer in said court on June 4, 1890, after which time no further attention seems to have been given to the Southern Pacific Railroad Company. The cause then proceeded to trial under the style of Henry Burns v. The Southern Pacific Company, and resulted in a judgment in favor of appellee against the appellant for \$129. The Southern Pacific Company appealed from this judgment to our supreme court, which, upon the organization of the courts of civil appeals, transferred it to the one for the third supreme judicial district; from thence it was sent to this court.

The amount in controversy in this case being less than \$200, the district court of Bexar county—at having no jurisdiction in civil matters, save in a class of cases to which this does not belong, where the amount in controversy is \$200 or less, exclusive of interest—did not have original jurisdiction of it. It could only acquire jurisdiction of the case on an appeal from an inferior court. The question, then, is, did the appeal of a case by the Southern Pacific Railroad Company, to which the Southern Pacific Company was in no wise a party, confer upon the district court jurisdiction to render a judgment against the appellant? As was said by our commission of appeals: "The Southern Pacific Railway Company and the Southern Pacific Company cannot be regarded as identical. The names indicate different and distinct entities." Railroad Co. v. Block, 84 Tex. 21, 19 S. W. Rep. 300. There is nothing in the record to show that they are not separate and distinct corporations, as indicated by the names, nor tending to show that the Southern Pacific Railroad Company was

known by the name of the Southern Pacific Company, or vice versa. If there was, and we could apply the rule that a person may be sued in a name by which he is generally known, the jurisdiction of the district court over appellant might be sustained. But we hardly think that the rule can be applied to corporations. They must sue and be sued by their corporate names.

If the amount in controversy had been within the original jurisdiction of the district court, the answer of appellant would have given it jurisdiction over it; but, as it was not, such effect could not be given the answer. Where a court has no jurisdiction of the subject-matter in controversy, consent of parties cannot confer it. The district court not having had jurisdiction to render the judgment appealed from, such judgment is reversed, and the cause remanded, and the court below directed to dismiss the case as to the Southern Pacific Company.

HALL et al. v. GWYNNE et al.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

COMMUNITY PROPERTY—BONA FIDE PURCHASER.

H. bought land in 1860, paying for it with community property. His wife died the same year, and he married again in 1861. In 1864 he sold the land to S., who in 1873 sold it for a fair cash price to K. K. had no actual knowledge that H. had ever been married before he acquired the land, though he knew both H. and one of his sons. Held, that as against H.'s sons by the first marriage, who had never before asserted claim to the land as heirs of their mother, K. was not charged with notice that the land was community of the first marriage.

Appeal from district court, Mitchell county; William Kennedy, Judge.

Trespass to try title to land by Blanch H. Gwynne and John V. Hall against W. C. Hall, John S. Long, and Charles Cobb. Judgment for plaintiffs. Defendants appeal. Reversed.

Smallwood & Smith, for appellants. R. H. Looney, for appellees.

HEAD, J. Appellees instituted this suit to recover of appellants an undivided one-half interest as heirs of their deceased mother in the section of land in controversy. The deed to the land was to M. J. Hall, the father of appellees, and contained no recital as to whether or not he had a wife or children interested with him. It is not certain from the record whether the wife of M. J. Hall was living at the time this land was acquired or not, but the evidence is undisputed that it was paid for entirely with community property. This was in 1860. In 1864 M. J. Hall conveyed the land to one Schuartz. In 1873, Schuartz, joined by his wife, conveyed by warranty deed to Howard Keys, who paid full value in cash, and appellants claim under him. At the time of

the death of his wife, which occurred some time in 1860, M. J. Hall owed no community debts, and the sale to Schuartz in 1864 was not to discharge any community obligation. The evidence is undisputed that appellees are the only heirs of Mrs. Hall. The court found that while Keys, at the time of his purchase, had no actual notice that Hall had a deceased wife, whose heirs were interested in the land, he did have notice of such facts as were sufficient to put a reasonably prudent man on inquiry as to this, and he was therefore chargeable with notice, and gave judgment in favor of appellees for one-half the land, and ordered partition thereof. The evidence upon this issue was confined to that of Keys himself, as follows: "I am 58 years old, and reside in Dallas, Tex., and my occupation is that of bookkeeper. On the 28th of August, 1873, I resided in Quitman, Wood county, Tex. At said time I was acquainted with E. Schuartz and wife. They then resided at Marshall, Tex. I am the grantee in the deed from Schuartz and wife to Howard Keys for 8 sections of land, * * * said deed reciting a cash consideration of \$2,560, paid by said Keys. I paid said grantors the sum of \$2,560 for said 8 sections. I paid it in cash. * * * Said amount was a fair consideration for said land at that time. I had no knowledge at the time I purchased said land from said Schuartz that M. J. Hall, under whom he claimed, had ever been married prior to the time that he (Hall) acquired said lands, or that his wife was dead. At the time I purchased said lands from the said Schuartz I knew young Mont Hall was reputed to be the son of M. J. Hall, but I knew nothing of any of the rest of the family. Did not know whether said Hall's first wife was dead or living, or whether he had a second wife. Said young Mont Hall was the only one of the family I knew. I did not know positively that he was a son of M. J. Hall. I was under that impression. At the time I purchased said land from Schuartz I had no knowledge or notice that there were any children of the said M. J. Hall by any wife he may have married before he acquired said lands, who claimed or owned any interest in same." Cross-examined: "About the year 1873, prior thereto, and afterwards, I was frequently in Marshall, Tex. I knew M. J. Hall, Sr., very well by reputation, and may have met him, but do not remember. I knew young M. J. Hall. I first met him in Marshall some time prior to the time I purchased said land. I made the trade for the land in Marshall. I supposed M. J. Hall, Sr., was a married man, but knew nothing further of his family affairs. I did not make any inquiry into said Hall's family history. I paid for said land in cash money. I was very well acquainted in Marshall about that time. I have never seen the wife of M. J. Hall, Sr., to my knowledge." In addition to this evidence, it appears from the statement

of facts that M. J. Hall was a man of considerable prominence and wealth, and had lived near Marshall since 1854; also that he married a second time about one year after the death of his first wife, and was living with the second wife at the time of the sale to Schuartz, and that he died in 1871, prior to the purchase by Keys, leaving his said wife still living. We think the court below erred in holding that Keys was, under this evidence, chargeable with notice of the interest of appellees in the land at the time he purchased it. The facts are strikingly similar to those held not sufficient for this purpose in case of Pouncey v. May, 76 Tex. 565, 13 S. W. Rep. 383. In the case of Hill v. Moore, 85 Tex. 335, 19 S. W. Rep. 162, so strenuously insisted on by appellees, the purchaser of the certificate was held chargeable with notice that it was community property, because it was one that could only have been issued to the head of a family. There was nothing to prevent a single man from acquiring this land as Hall did in this case; or, if it be held that Keys had notice that Hall was a married man, there is nothing indicating that he had notice that he was twice married, and that his first wife was the one interested in this land. It should be remembered that Keys did not purchase from Hall, but from Hall's vendee, nine years after he had made the sale, during which appellees had asserted no claim in right of their mother. We think the judgment of the court below should be reversed, and here rendered for appellants for all the land in controversy.

MARTIN v. ANDERSON et al.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

RELIEF AGAINST EXECUTION—IRREGULARITIES—INADEQUATE PRICE.

December 3d suit for \$41.50 was begun in justice's court, and citation issued for defendant to B. county, returnable January 6th, but was never returned. December 17th the justice issued another to M. county, returnable January 6th, and it was served there on defendant December 21st. Both purported to be original citations. Defendant at once wrote to his customary attorney to represent him, but January 6th the latter declined to act, and handed to plaintiff's attorney certain pleadings which defendant had sent him, and he gave them to the justice. Judgment was rendered for plaintiff that day, apparently on a new cause of action, and on the 17th execution was issued, without the certified bill of costs annexed, as required by statute. Although defendant had \$600 worth of personality in the county, the constable levied on land worth over \$3,000. March 4th the land was sold for \$85. Defendant returned home about April 1st, and April 17th began suit to set aside the sale. Held, that the irregularities were calculated to prevent a sale for an adequate price, and that defendant, having tendered full reimbursement to the purchaser, was entitled to relief.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by M. Martin against T. O. Anderson and W. J. Thompson to set aside an execution sale of real estate. Judgment for plaintiff as to one parcel. Plaintiff appeals. Reversed as to the other parcels.

Martin & Jones, for appellant. Cockrell & Cockrell and John Bowyer, for appellees.

STEPHENS, J. This suit was brought by appellant to set aside an execution sale of 660 acres of land, on the ground that the sale had been made under a void judgment, and at a grossly inadequate price, attended with certain alleged irregularities. The issues are stated with substantial accuracy in appellant's brief as follows: "On the 3d day of December, 1889, suit was begun in the justice's court of precinct No. 1, Taylor county, by the Keller Medicine Co. against appellant upon an account for the sum of \$41.50. On the day that this suit was filed, to wit, the 3d day of December, 1889, at the instance of the plaintiff's attorney, the justice issued a citation for the defendant to Burnet county, Tex. This citation was made returnable on the 6th day of January, 1890, that being the next regular term. This citation was received by the sheriff of Burnet county in due course of mail. This citation was never returned to the justice's court whence it was issued. On the 17th day of December, 1889, the justice of the peace issued another citation in the same suit for the defendant M. Martin, to Mills county, Texas. This last citation was served upon the defendant Martin, in Mills county, on the 21st day of December, 1889. This citation was also made returnable on the 6th day of January, 1890. Both these citations purported to be original citations. Immediately upon being served, the defendant M. Martin had a letter written to H. L. Bently, an attorney in Abilene, to represent him on the trial of the said case. On the 6th day of January, 1890, the case was tried in the justice's court. H. L. Bently declined to represent defendant. T. M. Daugherty appeared for the plaintiff. The defendant was not present, nor was he represented by counsel. Just prior to the trial Bently informed Daugherty that he would not appear for the defendant, but gave him some written pleadings for defendant, comprising exceptions to the citation, and a plea of the statute of limitations. T. M. Daugherty gave these written pleadings to the justice of the peace, and on the trial of the case appeared for the plaintiff in the suit. Judgment was rendered on said day by the justice against defendant and in favor of the Keller Medicine Co. for the sum of \$41.55, with interest at the rate of 8 per cent. per annum. On the 17th day of January, 1890, the justice of the peace issued an execution directed to the sheriff or any constable of Taylor county. No certified copy of the bill of costs

was attached to the execution. This execution was received by R. E. Burch, constable of precinct No. 1, and on the same day—the 17th day of January—was by him levied upon three several tracts of land belonging to appellant in Taylor county: (1) A tract of 280 acres; (2) a tract of 160 acres; (3) a tract of 220 acres. These lands were advertised for sale by the constable, but the character of the notice of sale was the subject of some controversy on the trial. On the 4th day of March, 1890, these three tracts were exposed to sale at the courthouse in Abilene. The two defendants in the suit were present, but as to the number of persons present, and as to what occurred during the sale, was also the subject of controversy on the trial. The first tract—280 acres—was sold for the sum of \$20, the second tract—160 acres—was sold for \$30, and the third tract—220 acres—was sold for the sum of \$35. T. O. Anderson was the purchaser of all the lands for the aggregate sum of \$85. On the 26th day of March, 1890, he executed a deed to W. J. Thompson to an undivided half interest in these three tracts. Prior to the execution sale of these lands the appellant, Martin, had mortgaged them to the Texas Loan Agency for about \$5,500, which sum was borrowed on five years time. At the time of levy and sale appellant, Martin, owned about \$600 worth of personal property in Taylor county. Martin returned to Taylor county about the 1st day of April, 1890, from which he had been absent for nearly one year. This suit was begun in the district court of Taylor county on the 17th day of April, 1890. On the 18th day of October, 1890, the case was tried before the court, the jury being waived. The result of the trial was a judgment in favor of the appellant, Martin, for the third tract sold, to wit, the 220-acre tract, and a judgment in favor of appellee for the other two tracts."

Conclusions.

After a thorough consideration of the record in this case, we have come to the conclusion that justice demands that the execution sale in question should be set aside in toto. The lands are situated near the town of Abilene, and, according to the preponderance of the evidence, were at the date of the sale (4th March, 1890) very valuable. From the widely differing estimates of the witnesses the learned judge trying the case found the reasonable market value to be, for the 280-acre tract, \$2,240; for the 160-acre tract, \$800; for the 220-acre tract, \$5,500,—aggregating \$8,540; the whole being incumbered with a mortgage for \$5,500, on 5 years time. This conclusion we approve as a reasonable and fair deduction from the evidence. The property, therefore, sold for less than 3 per cent. of its net value. That this was a grossly inadequate price does not admit of question. The court further found that the 220-acre

tract, at the time of the trial, was worth from \$75 to \$100 per acre, and as to it set the sale aside. The sale in other respects was sustained, it seems, because the judgment under which it was had was deemed conclusive against appellant, and the irregularities complained of were found not to conduce to the inadequacy of price. It may be that this judgment was not void. It is not copied in the record, and there is a degree of uncertainty as to its recitals. If the issuance of a second citation before the return of the first be deemed only an irregularity, it is left in doubt whether the judgment was rendered on the attested account sued on or on some written promise of appellant subsequently made, with the preponderance of the evidence in favor of the latter theory. The following testimony of T. W. Daugherty, who obtained the judgment for the Keller Medicine Company, contains the facts: "I am a lawyer. Been practicing for two years. Live here in Abilene. During the fall of the year 1889, Mr. H. L. Bently, an attorney, and myself officed together. We were not partners, but sometimes divided fees, and his justice court practice was generally turned over to me. In October, 1889, Mr. Bently turned over to me an account in favor of the Keller Medicine Co., of Ft. Wayne, Ind., against M. Martin, the plaintiff in the suit, for \$41.55. At the time this account was delivered to me Mr. Bently stated that he could or would not bring suit, because he was satisfied that Mr. Martin expected him to represent him in all cases that would come up in his absence, although he had not paid him any fee; therefore he would prefer to have nothing to do with the suit. I took the claim, and saw that the authentication of it was insufficient under our statutes, and I prepared an affidavit, and attached it to the account, and forwarded same to Keller Medicine Co., which was sworn to by J. O. Keller, and returned to me. I filed this account for suit on the 3d day of December, 1889, with W. A. Minter, justice of the peace in precinct No. 1. Prior to this I had written a letter to Dr. M. Martin, plaintiff in this suit, at Burnet, Texas, to ascertain where his residence was. The envelope was properly addressed to M. Martin, but the inside was addressed to Dr. M. Smith. This was simply a clerical error on my part, as the letter was intended for Dr. Martin. I signed Bently's name and my own to the letter. (Witness here identifies envelope and letter shown him.) On the 3d day of December, 1889, the day this suit was filed, the justice issued a citation to the defendant directed to Burnet county, returnable on the 6th day of January, 1890, which was the next return day of justice's court. This citation was delivered to me by the justice on the day of its issuance, and I immediately inclosed it in an envelope, and directed it to the sheriff of Burnet county. I stamped it, and put it in the post office. I never

saw this citation afterwards. I learned afterwards that M. Martin was not in Burnet county, but was in Mills county. On the 17th of same month (December) I procured another citation from the justice to Mills county, also returnable on the 6th day of January. This citation was duly served on M. Martin. No other citation was issued in the case that I know of. On the 6th day of January, 1890, as I was starting to the courthouse, Bently handed me some pleas of Martin, and asked me to give them to the justice of the peace; that he would not represent him in that case. I took these pleas, and among them was a plea of the statute of limitation, and handed them to the justice, and stated what Mr. Bently had told me. Some jocular remark was made by the justice about my representing both sides, but he filed the pleas. He then intimated that the law was with the defendant Martin, and I showed him some letters from Martin, indicating a subsequent promise, and he rendered judgment against the defendant for the amount of the account. Mr. Martin was not present when the judgment was rendered."

If the judgment was rendered on the written promise, it was on a new cause of action, for which no citation had issued. *Coles v. Kelsey*, 2 Tex. 542; *Leigh v. Linthecum*, 30 Tex. 101. While it has been held several times that recitals in the judgment entry as to service and appearance are conclusive when collaterally questioned, (*Williams v. Haynes*, 77 Tex. 283, 13 S. W. Rep. 1029, and cases there cited,) in the absence of such recitals a distinction has been taken between the conclusiveness of a justice's court judgment and that of a court where the pleadings are required to be written. *Wilkinson v. Schoonmaker*, 77 Tex. 615, 14 S. W. Rep. 223. It is clear from this record that Martin did not appear before the justice's court, and that no appearance was made for him. The filing of the pleas by plaintiff's attorney was, under the circumstances, unauthorized. Appellant had no knowledge of the judgment or execution till after the sale; nor was this entirely the result of negligence on his part. In view of what had passed between him and H. L. Bently before he left Taylor county, there was nothing unreasonable in his relying on the latter to represent him in the suit. The pleas were prepared by a lawyer in Mills county at the instance of Martin, and sent to Mr. Bently, to be used by him in representing Martin as his attorney, and not to be filed by plaintiff's attorney to bind Martin by an appearance, *inops consilii*. Without a copy of the judgment containing all its recitals, we cannot well determine the conclusive force of any of them, and hence are not prepared to decide that the doctrine of absolute verity has application to this judgment.

On the assumption, however, that the judg-

ment was not void, we think the sale should still be set aside for irregularity and gross inadequacy of price. Our conclusion is that the irregularities (or at least some of them) complained of were calculated, under the circumstances of this case, to prevent the property from bringing something like its value, and that the court below was in error in concluding that they did not conduce to the inadequacy. Take, for instance, the irregularity of issuing the execution by the justice of the peace to collect costs without a certified copy of the taxed costs. Here a plain and positive requirement of the statute was disregarded. Rev. St. art. 1623. Would a prudent purchaser of real estate bid anything like its value when it is sold under an execution from a justice's court to collect the costs of that court in the absence of the certified bill of costs required by the statute to accompany such an execution as its support and the authentic evidence of its validity? If not, how can it be declared that such irregularity does not have a depressing effect on an execution sale? In this case why did these valuable lands, situated so near an important and growing town, sell for so little? Why were the bidders so few? The record furnishes no answer to these questions, unless it be found in the suspicion of invalidity arising naturally out of the irregular and improper legal proceedings which culminated in the sale. The judgment was obtained, the execution issued, and the sale made, without the knowledge or fault of defendant therein, and within the shortest possible time. No effort was made to find personal property, though it seems the execution might by proper diligence have been satisfied in that way. Appellant moved promptly to set aside the sale upon its coming to his knowledge, tendering and depositing in court the money paid by appellees at and after the sale. Without discussing in detail the several irregularities and other circumstances attending the sale, we are of opinion that they were calculated, under the circumstances of this case, to produce the result complained of, and, as the gross inadequacy, amounting to confiscation, cannot otherwise be accounted for, they must be held to have at least contributed to that result.

The disposition of this case in the court below was doubtless influenced by the opinion of Watta, J., in *Allen v. Pierson*, 60 Tex. 601, which does not seem to us to be a correct statement of the rule on this subject, especially in view of some of the later decisions of our supreme court, as well as some rendered prior to that decision. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. Rep. 820; *Weaver v. Nugent*, 72 Tex. 280, 10 S. W. Rep. 458; *Pearson v. Flanagan*, 52 Tex. 280; *Taul v. Wright*, 45 Tex. 394; *Chamblee v. Tarbox*, 27 Tex. 140. Where the defendant in execution is without fault, and moves promptly to set aside the sale, tendering to

the purchaser the money paid by him for the land, and shows a gross inadequacy of price, coupled with irregularities or other circumstances calculated to produce the result complained of, we think he is entitled to the equitable relief sought, unless it is further made to appear that in fact the alleged irregularities or other circumstances did not conduce to the alleged inadequacy. But if the inadequacy in this sale stood alone, except as it was affected by the fraudulent judgment under which the sale was made, and that judgment, on account of its recitals, be held conclusive in this proceeding, we are not prepared to hold that the sale should not still be set aside. After it has come to the knowledge of a purchaser at execution sale that the property of the defendant in execution has been sacrificed by means of a sale under a judgment fraudulently obtained in his absence, and with this knowledge he holds on to the property thus acquired for a grossly inadequate sum, and refuses a prompt tender of full reimbursement, would it not be unconscionable in him to thus profit by another's fraud, having no other defense to plead than the rule of public policy which upholds execution sales? Would not equity apply a still higher rule of public policy, and do justice in such case? Upon the whole record we think the sale should be set aside, and that the judgment should be reversed, and here rendered for appellant, as prayed for in his petition, and that the money deposited in the court below be paid to appellees.

PATTERSON v. O'DOCHERTY.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

SCHOOL LANDS — CONTRACT TO PURCHASE — FORFEITURE.

A provision in a contract to purchase school lands from the state that the contract shall be forfeited on failure of the purchaser to pay interest on the purchase money is not enforceable unless such provision is authorized by law.

Appeal from district court, Bee county; S. F. Grimes, Judge.

Action by G. W. Patterson against Charles O'Docherty to determine adverse claims to a section of school land. There was a judgment for defendant, and plaintiff appeals. Affirmed.

West & Cochran and Barnard & McGown, for appellant. W. S. Dugat and Beasley & Flournoy, for appellee.

JAMES, C. J. In this cause this court herewith filed conclusions of fact and of law as follows:

Conclusions of Fact.

(1) The section of land in controversy is a portion of the public domain of Texas set

spart for the benefit of the public free schools. (2) Geo. W. Patterson (appellant) applied for said section under the provisions of the act of April 1, 1887, and the amendatory acts of April 8, 1889, and April 16, 1890, and same was awarded him by the commissioner of the general land office on April 16, 1890, and he (Patterson) complied in all things with the provisions thereof. (3) On July 21, 1885, D. Odem, regularly in every respect, had applied for the purchase of said section, and the same was duly awarded to him, and he made the annual payments regularly up to the time he sold the land to appellee, O'Docherty, and O'Docherty, on April 1, 1887, made default in the payment of the interest under the act of 1883 to the state, and because of this default the commissioner of the general land office declared the land forfeited, caused an entry to that effect to be made upon the account kept with Charles O'Docherty as the vendee of D. Odem, notified him to that effect, and declared the land had reverted to the particular fund to which it originally belonged. (4) That thereafter, on January 1, 1890, the commissioner placed the land upon the market for sale, under the act of April 1, 1887, as amended by the act of 1889, and sold the same to appellant. (5) The case is submitted to this court with agreement of counsel that there was only one issue of law to be determined upon the above facts, viz.: Was there any law in force on August 1, 1887, under which the commissioner of the general land office could legally forfeit the purchase of D. Odem under the act of 1883 for nonpayment of interest due August 1, 1887? (6) The judgment of the district court was in favor of O'Docherty.

Conclusions of Law.

1. That at the time of Odem's contract of purchase, the act of February 23, 1885, was in force, and this act had repealed the provision of the act of 1883, authorizing a forfeiture for nonpayment of interest; and, consequently, Odem's right under this contract of purchase was not subject to such forfeiture, nor was it in the power of the legislature by subsequent acts to subject the land to forfeiture. *Stock Co. v. McCarty*, 85 Tex. 412, 21 S. W. Rep. 593.

2. Although it seems from the third finding of fact, viz. that O'Docherty "made default in the payment of interest under the act of 1883," that the contract of sale between Odem and the state was in the terms of said act, and therefore contained a provision by which the nonpayment of interest worked a forfeiture, still it is our conclusion that the officers of the state had no authority to add to the contract terms not permitted by the statutes in force at the time, or to make better terms with intending purchasers than the laws prescribed, and such provision in the contract, not supported by the statutes then in force, must be treated

as nugatory, and remained so notwithstanding subsequent legislation.

3. That the summary declaration of forfeiture is of no effect, and therefore the judgment is affirmed.

HUNSTOCK v. PALMER.

(Court of Civil Appeals of Texas Oct. 4, 1893.)

LEASE—IMMORAL CONSIDERATION.

A lease made with the knowledge of the lessor that the premises are to be used for purposes of prostitution is contrary to public policy, and no rent can be recovered.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by Robert H. Hunstock against Ion Palmer for rent. There was a judgment in favor of defendant, and plaintiff appeals. Affirmed.

Perry J. Lewis, for appellant.

FLY, J. This suit is founded upon an account for rent of a house in San Antonio, owned by appellant. Appellee rented it to use for the purpose of a house of prostitution, and did use it all the time for that purpose. Appellant, who was plaintiff in the court below, knew to what purpose it would be put when he made the contract, and was cognizant of the fact that it was all the time being used for immoral and improper purposes. The case was tried by the judge of the trial court without the intervention of a jury, and he gave judgment for the defendant, for the reason, as stated in his conclusions of law, "that the contract of lease was against public policy, and therefore void." In this action of the lower court we conclude there was no error. At the time the contract of lease was made there was no statute making it a penal offense to rent a house for the purposes of prostitution, the amendment including the owner with the keeper in the criminal act having been passed on April 4, 1889; but this will have no importance in shaping the opinion to which we arrive in this cause. In every civilized community, and among all civilized peoples, the crime of prostitution is looked upon as one of the most prolific of depravity and subversive of the public morals. Statutes have been passed against it, the social ban has been placed upon it, and every moral influence has been exerted to check its evil influences. Under the statute of 1889 the owner of the house that is rented by him knowingly for purposes of prostitution is made just as criminal as the keeper. This is referred to, not because it will affect this decision, but it shows the trend of opinion of the lawmakers of the state. In the case of *Conner v. Mackey*, 20 Tex. 750, Judge Wheeler holds that a gambling consideration was void, whether the game was prohibited by law or not; the ground of the

decision being that the contract was contrary to good morals and public policy. In the case of *Monroe v. Smelly*, 25 Tex. 587, it is held that money due on a wager at ten-pins, a game licensed at that time, could not be recovered, on the ground of public policy.

Appellant's counsel, in his ingenious brief, holds that, although appellant knew full well the purposes to which the house would be put, yet this merely existed in his mind, had no bearing on the contract of lease, and there was no connivance at the prostitution of the lessee. In support of this position we are cited to a number of Texas decisions, which, in deference to counsel, we will briefly review. The case of *Bishop v. Honey*, 34 Tex. 246, is founded upon a contract to build a house to be used as a bawdyhouse, and the court rightly held that the builder should recover, because he was in no way interested in the business to be afterwards conducted in the house. "If," says the court in that decision, "the plaintiff is in any way the gainer by or the partner in an alleged contract,—one which is *contra bonos mores*,—he cannot recover upon such contract; he cannot recover upon it if it be shown that he is *particeps criminis*." Again, in the same case, it is said: "In the case at bar the house was not to be paid for out of the proceeds of an illegal vocation. It was to be paid for as the work progressed upon it." The other case cited from 34 Tex. is not in point. In the case of *McKinney v. Andrews*, 41 Tex. 366, the judge is undecided in that part of his opinion quoted by counsel, and rests the reversal of the case on other points. The point in that case was the illegality of the purpose for which the property was to be used, and not upon the ground of *contra bonos mores*. The case of *Labbe v. Corbett*, 69 Tex. 504, 6 S. W. Rep. 806, is not in point. We are referred by counsel to *Greenh. Pub. Pol.* p. 537, rule 460, where the author is treating of considerations involving the violation of laws, and one of his illustrations of a rule that "a contract which is in itself legitimate is not void because the beneficiary thereof knows that the other party intends to use the subject-matter to aid him in violating a law is: A. lets lodgings to B., a prostitute, who carried on her business elsewhere. A. can recover rent." The property was not used by her for plying her vicious vocation, and of course she was responsible for the rent. The same author, under the head of "Crime, Prostitution, etc.," lays down the rule that any promise "calculated to encourage immorality is void," and gives as illustrations of the rule: "A. assigned to B. his lease of a house, knowing that he intended to use it as a brothel, receiving from him an excessive rent, which was to be paid out of the profits of the place. B. covenanted to indemnify A. against any liability on the covenant in the lease to him. He

failed to do so, and A. sued him. He cannot recover." "And where the landlord permitted the prostitute to carry on her business in the rooms after ascertaining the use to which the premises were being put, the tenancy being weekly, rent was thereafter not recoverable." See footnote 8, p. 202, *Greenh. Pub. Pol.* The question we are considering is directly passed on in a case decided by the supreme court of Colorado in 1891, in which it is held that rent for a house, known by the owner to be used as a bawdyhouse, cannot be recovered. *Dougherty v. Seymour*, 26 Pac. Rep. 823. This question is reviewed at some length by the United States supreme court, and it is held: "The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that the goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society, or to any of its members." *Hanauer v. Doane*, 12 Wall. 342. "Any contract encouraging prostitution, or auxiliary to the keeping of a bawdyhouse, is void." *Bish. Cont.* § 496; *Smith, Cont.* 195, 196. It was perhaps unnecessary to fortify this opinion with authorities, although there may be some obscurity in decisions on the question at issue, and perchance may be some variance as to what circumstances will vitiate a contract on the grounds of public policy. However that may be, it is the opinion of this court that rent should not be recovered for a house knowingly let to a person who will use it, or who does use it, for the depraved and immoral purposes of prostitution. It is not a question of whether women of this unfortunate class should be deprived of the shelter of a roof, as counsel puts it, but a question of whether a court will enforce a contract founded upon a vicious and degraded occupation, and from which must spring the consideration of the contract. The judgment is affirmed.

EXTENCE v. STEWART et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

COSTS—EXECUTION.

Rev. St. art. 1420, provides that "each party to a suit shall be responsible to the officers of the court for the costs incurred by himself." Article 1420a provides that clerks may demand payment of costs in cases pending in their courts up to the adjournment of each term. Article 1420b provides that, if costs are not paid within 10 days after demand therefor, the clerk may issue execution, and that the taking of an appeal shall not prevent the issuance of such execution. *Held* that, after an appeal bond has been filed, execution for costs against appellant can be issued only for such costs as appellant has incurred.

Appeal from Wilson county court; A. D. Evans, Judge.

Application by F. W. Extence for mandamus to compel E. D. Mayes, county clerk, to incorporate two bills of exceptions in the record of a cause in which said Extence was appellant and J. H. Stewart was appellee. Granted.

A. J. Williams, for appellant. J. B. Polley and B. F. Ballard, for appellee and respondent.

JAMES, C. J. This is an application for mandamus to the county clerk of Wilson county to require him to incorporate in the record of an appeal two certain bills of exception, which applicant (appellant) alleges were signed by the judge during the term, but which were, after the term had adjourned, amended by the judge striking out his signature thereto. The clerk has refused to insert these bills in the transcript of the record. The evidence before us is conflicting as to whether this act of the judge was done before or after the term, and, after considering the answer of respondent and the affidavit submitted, we believe the applicant is entitled to have them included in the transcript. In same application we are asked to mandamus the clerk to issue a writ of supersedeas in the same cause, on the allegation that the clerk had issued an execution for the costs of the suit in favor of the officers, subsequently to the filing of a supersedeas appeal bond. These allegations have been sustained, and the question is, should the supersedeas be required to issue? It appears, clearly, that the execution is for all the costs accrued in the cause,—those incurred by appellee as well as his own. We interpret articles 1420, 1420a, 1420b, Rev. St.,¹ to allow the clerk, after judgment and after appeal bond filed, to nevertheless issue execution against a party for the costs incurred by him. If the execution now extant were only for the costs incurred by appellant, he would not be entitled to have it

superseded. As it includes the other costs as well, and is a process upon which all the costs can colorably be demanded, we hold that to that extent it is an interference with jurisdiction of this court, not authorized, and the writ of supersedeas should issue as prayed for. That writ is hereby made peremptory as to both the supersedeas and the bills of exception. Costs of the proceedings are adjudged against the respondent.

GALLAGHER et ux. v. KELLER.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

HOMESTEAD—ENFORCEMENT OF RIGHT—PLEADING.

1. In a petition to enforce a homestead right in a lot, allegations that plaintiff purchased the lot for the purpose of a homestead, and that he immediately took possession thereof, and inclosed it with a good and substantial fence, and planted shade trees, cleared the lot preparatory to building a house thereon, and caused the plans and specifications to be made by an architect, are sufficient, as against a demurrer, to show that the lot was plaintiff's homestead, the facts, if true, not being insufficient as a matter of law to show intention to occupy the same as a homestead.

2. A petition to enforce a homestead right in a lot as against a purchaser at an execution sale is not fatally defective because it does not allege that its value did not exceed \$5,000.

3. A petition to remove a cloud on the title to land claimed by plaintiff as a homestead, created by a sheriff's deed to a purchaser at an execution sale, is not demurrable on the ground that it fails to disclose in what manner the existence and record of the deed constitute a cloud.

Appeal from district court, Bexar county: W. W. King, Judge.

Action by Thomas R. Gallagher and wife against Theodore Keller to remove a cloud from the title to land claimed by plaintiffs as their homestead. From a judgment for defendant, plaintiffs appeal. Reversed.

Upson & Bergstrom, for appellants. William Aubrey, for appellee.

NEILL, J. This suit was brought by appellants to remove cloud from the title of a certain lot of land situated in the city of San Antonio, and cancel a sheriff's deed by virtue of which it was alleged appellee claimed the property. The court below sustained exceptions to plaintiffs' original and trial amended petitions, and, upon their failure to amend, proceeded to hear evidence offered by appellee under his plea in reconvention, and rendered judgment in his favor for the land with a writ of possession. The allegations in plaintiffs' petition are substantially as follows: That on the 31st day of July, 1884, Thomas R. Gallagher purchased and became the owner in fee simple of the following property situated in the state of Texas, county of Bexar, and within the corporate limits of the city of San Antonio, being lot No. 1, in block No. 4, in original out lot No. 125, lying west of Alazan creek,

¹ The articles here referred to are as follows: "Art. 1420. Each party to any suit shall be responsible to the officers of the court for the costs incurred by himself. Art. 1420a. It shall be lawful for the clerks of the district and county courts and justices of the peace to demand payment of all costs due in each and every case pending in their respective courts, up to the adjournment of each term of said courts. Art. 1420b. Should any party, against whom costs have been taxed under the provisions of this act, fail or refuse to pay the same within ten days after demand for payment, it shall be lawful for the clerk or justice of the peace to make out a certified copy of the bill of costs then due, as herein provided for, and place the same in the hands of the sheriff or constable for collection, and such certified bill of costs shall have the force and effect of an execution. The removal of a case by appeal shall not prevent the district clerk, county clerk, or justice of the peace from issuing his execution for costs at the end of the term at which the appeal is taken."

etc; that plaintiff is and was at the time of the purchase of said lot a married man, and is the head of a family composed of himself, his wife and children, and at the time of his purchase he acquired the same for the purpose of a home for himself and family, and immediately took possession thereof, and inclosed the same with a good and substantial fence, and planted shade trees, and cleared the said lot preparatory to building a house thereon, and caused plans and specifications for such house to be prepared by an architect; that he did not at the time of the purchase of said lot own any other home or property, nor has he since said time acquired any other home or property; that on the 20th day of August, 1889, the sheriff of Bexar county, Tex., levied upon said property by virtue of a writ of execution issued out of the district court of Harris county, Tex., in favor of the defendant, Theodore Keller, and against plaintiff, and sold the same at public outcry, at which sale the defendant, Keller, became the purchaser, and deed for said property was made to him by the sheriff, and that said deed was placed on the records of Bexar county. By a trial amendment, he alleged that after the purchase, as set out in the original petition, and the preparation of plans for building his house, he was unable to continue said improvements and construct a residence building thereon, because he had not sufficient money to proceed therewith, and was unable to obtain the same, as he had expected to do, and thereafter, as soon as he could obtain the money with which to build a house thereon, to wit, about the month of April, 1890, he constructed a dwelling house thereon, and is now (the date of filing his petition) occupying the same with his family in accordance with his original intention, which purpose and intention have never been abandoned from the time of purchase. The exceptions of appellee to the petition are substantially that it fails to show that, after the alleged dedication and the erection of the improvements specified, appellants occupied or used, or have since that time used, the premises as a homestead, and that the petition fails to disclose in what manner the existence and record of appellee's deed to the property constituted a cloud upon appellants' title.

In the case of *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. Rep. 1033, the facts as stated in the opinion are that Mary Gebhard owned a lot in Waco as her separate property, which was the homestead of herself and husband. They sold the homestead, and purchased the lots upon which appellants sought to foreclose a material man's lien with a part of the proceeds of such sale. At the time of the purchase, and at all times, they declared that they intended to make the lot so purchased their homestead. Gebhard made with Turntine a contract to build a house upon the lot; Turntine to fur-

nish the lumber and erect the building for a given price. He was unable to purchase the lumber, and Gebhard entered into a contract with Cameron & Co. to furnish to Turntine the lumber necessary for the building, the costs of the lumber to be deducted from the price agreed to be paid to Turntine. Cameron & Co. knew at the time they agreed to furnish the lumber that the Gebhards had sold their former homestead, and purchased the lot with the intention of making it their future homestead; that they had contracted with Turntine to build a residence on the lot; and that the lumber to be furnished by them was to be placed in that residence. They furnished the lumber which was used in erecting a residence on the lot, and the amount sued for was an unpaid balance on the lumber so furnished. There was no improvement on the lot in question, and Gebhard had taken no steps to establish his homestead on it, other than the making of the contract with Turntine to build the house thereon. No contract in writing was made, but in all other respects the requirements of the law to fix the lien on the property were complied with by Cameron & Co. The court then said: "The only question presented for consideration is, was the lot in question the homestead of defendant at the time the contract for the purchase of the lumber from plaintiff was made?" The contention of appellants in the case was that the facts did not show any such physical preparation or act of any kind as was necessary to fix a homestead as against them who furnished the lumber and material for the erection of a building thereon; that the declaration at or subsequent to the time of purchase of an intention to make the property a homestead, it having no improvements upon it of any kind, there being no physical preparations to make any improvements on it, could not of itself make a homestead exempt from the claim of the material man. Judge Brown, delivering the opinion of the court, after reviewing most of the cases in this state in which there was no homestead dedication by actual occupancy, says: "Intention alone cannot give a homestead right; but it is at the same time equally true that all other things combined cannot give it, without the intention to dedicate it to the uses of a home. Valuable and costly improvements, coupled with long and continued possession, without a bona fide intention to make it a home, will not make it such. But the placing upon the premises unhewn logs for the purpose of erecting thereon the humblest cabin, with a bona fide intention to occupy as soon as the cabin can be built, secures the right." "From this decision it is apparent that the intention is almost the only thing that may be dispensed with in some state of cases; and it follows that this intention in good faith to occupy is the prime factor in securing the benefits of the exemption. Preparation—that is, such acts that

manifest this intention—is but the corroborating witness to the declaration of intention, and an assurance of the bona fides of the party." In that case there was not a single act done on the ground by Gebhard or anything there to indicate his intention to occupy it as a homestead at the time Cameron & Co. claimed they acquired a lien on it. True, they knew at the time they agreed to furnish the lumber that the Gebhards had sold their former homestead, and purchased the lot with the intention to make it their homestead. But, if it was their homestead, it must have been so independent of this knowledge on the part of Cameron & Co. It could not be a homestead as between them and Gebhard, and a homestead as to no one else. If a homestead, it was such against the world, and the right to it could have been asserted against any one else, as well as against Cameron & Co. The decision in that case must, after all, rest upon the intention of the parties to occupy the land as a homestead, independent of any act done on the premises to manifest that intention. In this case the allegations that appellant, at the time he purchased the property, acquired it for the purpose of a homestead, and that he immediately took possession thereof, and inclosed the same with a good and substantial fence, and planted shade trees, cleared the lot preparatory to building a house thereon, and caused plans and specifications for such house to be prepared by an architect, must, for the purpose of the demurrer, be taken as true, as well as the other allegations in his petition; and, in view of the decision quoted from, we are not prepared to hold as a matter of law that these allegations, if true, were insufficient to constitute the property a homestead. Here, in addition to the purpose and intention of appellant to make it his home at the time of his purchase, we have the facts that he inclosed it with a good, substantial fence, planted shade trees, etc. As to whether his intention was sufficiently manifested by these as acts of preparation is a question of fact, to be determined by all the facts and attending circumstances, as well as by the subsequent acts, conduct, and declarations of the appellant relating to or affecting the property. Fencing the lot and planting shade trees thereon are not inconsistent with the intention to occupy it as a homestead, and might, in connection with other facts and circumstances, if not alone, be evidence of such intention; or such acts might, in the light of other facts and circumstances, be insufficient to manifest such intention. As to what intention these acts may demonstrate is not a question of law to be determined by the court, but one of fact to be found by a jury.

The petition of plaintiff failed to allege that the value of the property at the time of its designation did not exceed \$5,000, exclusive of improvements, and no exception

to the petition was taken on that ground by the defendant. It was alleged to be his homestead, and, if other facts constituted it such, it would be to the extent in valuation of \$5,000, and, if its value exceeded that sum, only the excess in value would have been subject to the execution under which it was sold. We think the petition was good as against the objection, as it was not specially excepted to on that ground.

The exception that the petition fails to disclose in what manner the existence and record of defendant's deed to the property constituted a cloud on plaintiffs' title was not well taken. It has been repeatedly held that an injunction is proper to restrain the sale of a homestead under execution upon the ground that it would cloud the title. If a sale had been made which could have been restrained by injunction on the ground it would cast a cloud upon title, a deed under such a sale is such a cloud as could be removed by a decree of cancellation.

As the case was tried after appellants' petition was dismissed on appellee's plea in reconvention, appellee now contends that the judgment rendered in his favor should not be disturbed. We think that appellants had as much right to have the case tried on their pleadings as the appellee had to a trial on his, and, as this right was denied them by the court below, its judgment is reversed, and the cause remanded.

GALVESTON, H. & S. A. RY. CO. v. SILEGMAN et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

CARRIERS OF GOODS—STIPULATIONS OF CONTRACT—INJURY TO GOODS—DAMAGES—PARTIES—EVIDENCE—INSTRUCTIONS—ARGUMENT OF COUNSEL.

1. A stipulation in the bill of lading that a shipper of cattle accepts the cars furnished cannot prevent his showing that the cars were not suitable, as this would be an attempt to limit the carrier's duty.

2. A stipulation in a carrier's contract of shipment requiring any action to recover a claim against it by virtue of the contract to be commenced within 40 days after the damage shall occur is reasonable, and binding on the shipper.

3. Where a shipper, having a claim for damages against a carrier, which by the contract of shipment was required to be sued upon within 40 days, presented his claim before the expiration of that time to the carrier's agent, who forwarded it to the general offices, and afterwards, within the 40 days, when asking the agent about the claim, was requested to wait, and told that the carrier had written that it would pay the claim, the court properly refused to charge that the fact that the agent received the claim to be forwarded to the general offices would not be a waiver or estoppel on the part of the carrier, but that the shipper must have been deprived of his right to sue by the willful acts and promises of the carrier.

4. In a suit for injury to property by fault of a carrier, the measure of damages is the difference between its value when delivered at its destination and what its value would have

been if it had not been damaged in course of transportation, and not between its value when received and its value when delivered; and, in the absence of evidence of what its value would have been at its destination had it been properly transported, a verdict cannot stand.

5. In an action for damages to cattle shipped over defendant's railroad, testimony that a person told witness before the shipment that he would give a certain amount for the cattle is no evidence of their value, and is inadmissible.

6. Except in the recital of the receipt of the goods, and of their quantity and condition, bills of lading are strictly written contracts, within the rule prohibiting parol evidence to contradict or vary such contracts.

7. Not only is parol evidence inadmissible to vary the express terms of the contract contained in a bill of lading, but it is inadmissible to vary the obligations as to which the contract is silent, but which are implied from its nature; and therefore, as a bill of lading for shipment of cattle raises an implied obligation to furnish suitable cars, and to transport the cattle within a reasonable time, parol evidence is inadmissible to show a parol agreement prior to the bill of lading to furnish "bedded" cars, and to make close connection with another line of carriers, though it could be shown that bedded cars were the only suitable cars to be used, and that transportation with reasonable dispatch would have made the close connection.

8. Though the husband can sue in his own name for damages to his wife's separate property, and the wife is not a necessary party, a suit by her when joined by her husband is not such a defect in pleading as can be reached by a general demurrer.

9. It is error to submit in the charge to the jury an issue not raised by the pleadings, or an issue which, though raised, is wholly unsupported by the evidence.

10. In an action against a railroad company, it is improper for counsel to say in argument to the jury: "This railroad is a monster, wealthy and powerful, more powerful than any individual in the state, and is not on equality with any private citizen."

Appeal from Guadalupe county court; James Greenwood, Judge.

Action by E. Silegman and her husband against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Fly & McNeal, for appellant. Ireland, Burges & Dibrell, for appellees.

NEILL, J. This appeal is from a judgment of the county court of Guadalupe county in favor of appellee and her husband against appellant for \$600 for alleged injuries to 68 head of beef cattle shipped over appellant's road from Marion to La Grange, Tex. The appellant assigns as error the failure of the court to sustain its general demurrer to plaintiffs' original petition, for the reason that it showed upon its face that E. Silegman was a married woman, and that her husband was the only necessary party to the suit. It is true that the husband can sue in his own name for damages sustained to his wife's separate property, and the wife is not a necessary party; yet a suit by her, when joined by her hus-

band, is not such a defect in pleading as can be reached by general demurrer.

The cattle were shipped under a written contract between the parties, which is in the nature of a bill of lading, and is in itself a full and complete agreement between them as to the shipment. Upon the trial the plaintiffs were permitted to prove, over defendant's objections, that its agent, prior to the time of shipment, agreed to furnish plaintiffs "bedded cars" in which to ship the animals, and make close connection at La Grange with the Missouri, Kansas & Texas Railway. The action of the court in permitting the introduction of such testimony is assigned as error, upon the ground that there was a written contract, and all parol antecedent and contemporaneous agreements were merged in it. Except in the recital or acknowledgment of the receipt of the goods and of their quantity and condition when received, bills of lading are strictly written contracts between the parties, and come within the general rule which prohibits the introduction of parol evidence to contradict or vary such contracts. Not only is such evidence inadmissible to change or vary in any particular the express terms of the contract, but in these instruments, as in all other written contracts, there may be implied obligations as to which the contract may be entirely silent, but which result by necessary implication or by construction from the very nature of the contract itself; and such implied obligations can no more be varied by verbal evidence than the express written stipulations of the parties. Hutch. Carr. § 126. The appellant, as a common carrier, was bound to furnish suitable and safe cars for transporting appellees' cattle. This duty devolved upon it as a common carrier, and was implied from the contract itself; and, if bedded cars were the only suitable and safe kind, it should have been proved under the allegation that appellant failed to furnish them; and appellees would not have been prevented from making such proof by the stipulation in the written contract that they accepted the cars, etc., for this would be an attempt to limit its duty as a common carrier. It was also the duty of appellant to transport the cattle to La Grange within a reasonable time, and if it could, within a reasonable time after the cattle were received, have made connection with the train of the Missouri, Kansas & Texas Railway train, it was its duty to do so, for appellant knew that the cattle were destined to East St. Louis via said railroad, and that a failure to make connection with its train en route to said place might reasonably result in damages to the animals. But this duty arose by implication from the written contract of shipment, and not from a previous parol agreement between appellees and appellant's agent. The evidence complained of was not introduced for the purpose of showing that, under the contract, bedded

cars were the only safe and suitable kind for the shipment of such live stock, nor for the purpose of proving that, if the journey had been made with reasonable dispatch, connection, as a consequence, would have been made with the Missouri, Kansas & Texas train, but to show a prior parol agreement between the parties as to the subject-matter of the written contract. The admission of the testimony complained of was an infraction of the rule quoted, and should not have been permitted.

The admission of the testimony of a witness to the effect that a party had told him some time before the shipment he would give \$17 per head for the cattle if he could get them was error, as such testimony was not evidence of value, nor admissible for any purpose.

It is urged as an objection to the charge of the court that it failed to charge the law applicable to the facts, or inform the jury of the rule as to the measure of damages in the case. In the fifth paragraph the jury were instructed "that a common carrier of live stock for pay must complete the journey within a reasonable time, and if it does not do so, and the stock is injured by the delay, the carrier will be liable to the owner for all damage caused by such delay." In the next paragraph the principle enunciated was applied to the case. This part of the charge, if given in a case to which it was applicable, would be correct. In this one no delay was alleged, and none proven. It was alleged that appellant's train failed to arrive at La Grange until about 20 minutes after the Missouri, Kansas & Texas train "had pulled out," but the allegation of the cause of its failure to make such connection is not delay, but appellant's failure to "send a telegram, and have said train wait, so that said connection could be made." There was no evidence to prove what would have been a reasonable time for appellant to have carried the animals from Marion to La Grange. It is error for the court to submit in its charge to the jury an issue not raised by the pleadings, (*Dodd v. Arnold*, 28 Tex. 97; *Loving v. Dixon*, 56 Tex. 75; *Mitchell v. Zimmerman*, 4 Tex. 75,) or one, though raised by the pleadings, wholly unsupported by the evidence, (*Railroad Co. v. Lyde*, 57 Tex. 505; *Willis v. Whitsitt*, [Tex. Sup.] 4 S. W. Rep. 253.) In this case, there being neither pleading nor evidence to support the charge, it was erroneous.

The only instruction given on the subject of damages is as follows: "If the jury believe from the evidence under the foregoing instructions that plaintiffs are entitled to recover in this suit you should say so by your verdict, and find for plaintiffs in any sum you think they are entitled to under the proof, not to exceed the amount claimed in their petition." The contract of shipment, as well as the uncontroverted testimony, shows that the destination of the shipment was

East St. Louis, and that appellant's agent at the time of shipment knew that fact, and contracted in behalf of his principal to carry the cattle as far as La Grange, en route to their destination. In a suit for injury to property by a carrier's fault, the measure of damages is the difference between the value of the goods as or in the condition when delivered at their destination and what their value would have been if they had not been damaged in the course of transportation. 3 Suth. Dam. 273; Hutch. Carr. § 770a. There was no evidence to show what would have been the value of the cattle at their destination if they had not been injured in transportation. It was shown that their net value in their injured condition when they arrived there was \$579.92, but this, without information as to what would have been the value there if they had not been injured, would not aid the jury in arriving at their verdict. There was evidence to prove their value at Marion when shipped, and their value there when injured, but the proper rule for the measure of damages in the case could not be applied to this evidence. It may be that the jury considered it in connection with their value in their injured condition at East St. Louis, or considered it alone in arriving at their verdict. But, however considered, the evidence did not furnish the jury the proper data, under a correct rule of law, upon which a proper verdict could be rendered. Had the measure of damages been properly charged and applied to the case, it is evident that the verdict of the jury would have been different, for the reason that the evidence failed to show what would have been the value of the stock at their destination if they had not been injured in transportation.

The contract of shipment between the parties contains the following stipulation: "It is further mutually agreed and herein expressly provided that no suit or action against the party of the first part [appellant] for the recovery of any claim by virtue of this contract shall be sustained in any court of law or equity, unless such suit or action be commenced within forty days next after the damages shall occur; and, should any action be commenced against the said party of the first part after the expiration of the aforesaid forty days, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." The appellant asked the court to instruct the jury "that, if it appeared from the evidence that the suit was filed more than forty days after the alleged damages accrued, to find for defendant, unless the evidence showed that defendant waived the forty days stipulated in the contract." This much of the charge asked was correct, and so much of it should have been given, for it has been frequently held that such a stipulation in contracts of shipment is reasonable, and binding on the parties. *Railway Co. v. Trawick*, 68

Tex. 314, 4 S. W. Rep. 567; *Railway Co. v. Gatewood*, 79 Tex. 89, 14 S. W. Rep. 913; *Railway Co. v. Trawick*, 80 Tex. 270, 15 S. W. Rep. 568, and 18 S. W. Rep. 948. The special charge went further, and asked the court to instruct the jury that "If the evidence shows that the defendant's agent received plaintiffs' claim, to be forwarded to the general office for investigation, this would not be sufficient evidence to constitute a waiver or estoppel on defendant's part. You must find from the evidence that plaintiffs were deprived of their right to sue, and their position changed by the willful acts and promises of defendant." The evidence was not only that the appellant's agent received and forwarded the claim to the general office for investigation before the lapse of the 40 days, but was to the effect that on the 6th day of August, 1889, appellant's agent told one of appellees that he would write and have the claim attended to; that in a few days he went back to the agent, and that he then informed him that he was instructed by the "head man" to tell plaintiff to be patient and wait, that his claim would be paid; that within the 40 days he went back to see about his claim, and told the agent if it was not settled he would sue, and the agent told him he had a request from headquarters for him not to sue the company, but to be patient and wait a while longer, as all the papers had not come in from the Missouri, Kansas & Texas Railway Company, and that he did not sue sooner because the defendant put him off from day to day, promising to settle the claim, and asking him not to sue. This evidence was uncontradicted, and, in view of it, we do not think the part of the special charge last quoted should have been given. The conduct of appellant was pleaded by appellees as a waiver of the stipulation that the suit should not be sustained unless brought within 40 days after the occurrence of the damages. The rule in such a case is that "If the course of conduct pursued by the appellant was such as to induce the appellee to believe that his claim for damages would be paid without suit, and for this reason suit was not brought within the time prescribed, then the action could be maintained after the expiration of the time." *Railway Co. v. Trawick*, 80 Tex. 273, 15 S. W. Rep. 568, and 18 S. W. Rep. 948. It was not error to refuse the special charge asked for as a whole; it was not applicable to the facts.

In his closing address to the jury, one of the counsel for appellees used this language: "This railroad is a monster, wealthy and powerful, more powerful than any individual in the state, and is not on equality with any private citizen." It was objected to by appellant. The court did not notice the objection, nor was the language withdrawn by counsel. As to whether such language would alone be sufficient to require a reversal of a case would depend upon the particular case under consideration. If apparent that a jury

was probably influenced by it in rendering their verdict, it would be; but, as this case is reversed on other grounds, it is sufficient for us to say that the remark was improper. For the errors indicated, this cause is reversed and remanded.

FLY, J., did not sit in this case.

GALVESTON, H. & S. A. RY. CO. v. DAVIS.¹

(Court of Civil Appeals of Texas. Oct. 4, 1896.)

RAILROAD COMPANIES—LEASE OR PARTNERSHIP—MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—INSTRUCTIONS—DAMAGES.

1. A contract by which a number of railroad companies "lease" their roads and other property to one company for 99 years, the latter company agreeing to operate and maintain the lines and pay to each of the other companies a certain proportion of 93 per cent. of the net profits from such operation, is a contract of partnership and not a lease.

2. Under the statute in force October 10, 1886, a railroad company was liable in damages only for the gross negligence of its servants, but was liable to its servants for injuries inflicted through the negligence of an incompetent fellow servant, where it had retained him in its employ with knowledge of his incompetency, or where, by the exercise of ordinary care and inquiry, it could have known of his incompetency; and where a servant seeks to recover under the latter circumstances a charge on gross negligence is not called for.

3. In an action by a father for the death of his minor son, where there is evidence to support it, it is not error to charge that the jury shall assess plaintiff's damages "at such sum as may be calculated from plaintiff's expectation of pecuniary aid from his son after arriving at 21 years of age, considering his disposition and ability to contribute to his wants and necessities during the father's probable duration of life, at the same time taking into consideration the father's age, occupation, health, and pecuniary condition, and probable wants."

4. An instruction that the jury are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony is proper, and not objectionable on the ground that it may lead the jury to think some of the witnesses unworthy of belief.

5. Though the incompetency of an employee cannot be proven by specific acts of carelessness, yet where these acts have been brought to the employer's knowledge they can be proven to establish that knowledge.

6. A question as to what a locomotive engineer's general reputation as to care and competency while running his engine was, is improper where it is not confined to his reputation among those persons engaged in the same kind of occupation, as the general public could not be acquainted with his reputation.

7. An instruction that a railroad company is liable if it failed to furnish a safe and suitable car, with the necessary appliances, for the use of its employees, and an employee was killed by reason thereof, is erroneous, as it makes it the duty of the company to absolutely and infallibly furnish a safe and suitable car, no matter what care and diligence may have been exercised in selecting and inspecting the same.

8. The error is not rendered harmless by construing the instruction together with an instruction immediately preceding it, to the effect that it is the duty of a railroad company to use all reasonable care in furnishing safe and suit-

¹For opinion on rehearing, see 23 S. W. Rep. 1019.

able cars, as it is equivalent to saying that if the company failed to furnish a safe car it did not exercise proper care.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by William Davis against the Galveston, Harrisburg & San Antonio Railway Company for the death of plaintiff's son. From a judgment for plaintiff, defendant appeals. Reversed.

Upson & Bergstrom, for appellant. Chas. W. Ogden, for appellee.

FLY, J. This suit was instituted by petition to recover actual damages in the sum of \$50,000, which appellee, who was plaintiff below, claims to have sustained in the death of his son, Edward Davis, which resulted from one train of defendant's cars being negligently run into by another of its trains October 10, 1886. The plaintiff, in his petition, charges that the defendant, as was its duty to do, failed to furnish the usual and customary caboose car having end doors with glass panes, and an outlook on top, but in its stead attached an empty freight car, with sliding side doors, but with no end doors, or outlook on top of said car, from which an approaching train could be seen, wherein plaintiff's son, in the performance of his duty as rear brakeman, was riding at the time of the accident, and could not see and avoid an approaching train. That said trains were negligently run from their starting points, only 10 minutes apart. That the train which ran into the train upon which plaintiff's son received his fatal injuries was in charge and under the control of a reckless, careless, and intemperate and utterly incompetent conductor, one Samuel Greene, and an inexperienced and incompetent engineer, one Thomas Henry, which defendant well knew, and of which plaintiff's son had no knowledge; and that by reason of the carelessness, intemperance, and incompetency of said conductor, and the inexperience and incompetency of said engineer, said train under their control was by them negligently run into the train upon which plaintiff's son was employed as brakeman with such force and violence as to inflict upon him, said son, injuries from which he died the same day.

Defendant answered by its first amended original answer by general denial, and specially denying that the death of plaintiff's son was caused by a collision of any trains of cars owned or operated by it, or by reason of the carelessness, negligence, or intemperance or incompetency of an employee of defendant, or any person under its control, or that plaintiff's said son or any one was in its employ on the line of said railroad at the time of the injury complained of. Defendant denies that plaintiff's son was a minor at the time of his employment, or that plaintiff was entitled to his son's services, but avers that he entered into the service of the Southern Pacific Company, wherein his death re-

sulted, representing himself, and the plaintiff also representing him to be, 21 years of age, and fully competent to contract and act for himself, and receive the proceeds of his labor, and that he appeared to be of full age. Defendant avers that the collision set out in plaintiff's petition was an unavoidable accident, caused by a dense fog, rendering the lights on the colliding cars undiscernible, and was one of the risks assumed by plaintiff's son, and incident to his employment, for which the employer was in no manner responsible. Plaintiff filed his exceptions to the denial in defendant's answer that plaintiff's son was a minor, and to the averments in said answer as to plaintiff's son entering into the service of the Southern Pacific Company representing himself to be 21 years of age, and as to the accident being unavoidable, on the ground that the same purported to set up a defense for the Southern Pacific Company, which defendant had no right to make; which exceptions were overruled by the court. The case was tried by a jury, and resulted in a verdict and judgment in favor of the plaintiff, January 31, 1891, for \$11,000.

A considerable portion of the evidence in the lower court was as to whether appellant or some one else was responsible, and a large part of the brief of appellant in this court is devoted to the discussion of the nature, purpose, and intent of a certain instrument of writing which was, without objection on the part of appellee, introduced in evidence by appellant. It is as follows, leaving out the preamble, which sets out the names of the contracting corporations, appellant being one of the number: "That the said Southern Pacific Railroad Company, organized and existing under the laws of the United States and the state of California, hereby leases to the said Southern Pacific Company, for the term of ninety-nine years from the date hereof, all of its railroad situated in the state of California, known and designated as the 'Southern Pacific Railroad of California,' with all its branches and all railroads now leased by it, together with the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in use upon or in connection with said railroads, and together with all of the appurtenances thereunto belonging, with the right to possess, maintain, use, and operate the said property, and to receive the rents, issues, and profits thereof. That the said Southern Pacific Railroad Company, organized and existing under the laws of the territory of Arizona, hereby leases to the said Southern Pacific Company, for the term of ninety-nine years from the date hereof, all of its railroad situated in the territory of Arizona, and known and designated as the 'Southern Pacific Railroad of Arizona,' together with all its branches, and all the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in

use upon or in connection with said railroad or branches, and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use, and operate the said property, and to receive the rents, issues, and profits thereof. That the said Southern Pacific Railroad Company, organized and existing under the laws of the territory of New Mexico, hereby leases to the Southern Pacific Company, for the term of ninety-nine years from the date hereof, all of its railroad situated in the territory of New Mexico, and known and designated as the 'Southern Pacific Railroad of New Mexico,' together with all its branches, and all the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in use upon and in connection with said railroad or its branches, and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use, and operate the said property, and to receive the rents, issues, and profits thereof. That the said Galveston, Harrisburg and San Antonio Railway Company hereby leases to the said Southern Pacific Company, for the term of ninety-nine years from the date hereof, all its railroads situated in the state of Texas, and known and designated as the 'Galveston, Harrisburg and San Antonio Railway Company,' with all its branches, and all the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever, now in use upon or in connection with said railroad or its branches, and together with all appurtenances thereunto belonging, and all other property now owned, held, and possessed by it, with the right to possess, maintain, use, and operate the said property, and receive the rents, issues, and profits thereof. That the said Texas and New Orleans Railroad Company of 1874 hereby leases to the said Southern Pacific Railroad Company, for the term of ninety-nine years from the date hereof, all of its railroad situated in the state of Texas, and known and designated as the 'Texas and New Orleans Railroad of 1874,' together with all of its branches, and all the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in use upon or in connection with said railroad or branches, and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use, and operate the said property, and to receive the rents, issues, and profits thereof. That the said Louisiana Western Railroad Company hereby leases to the said Southern Pacific Company, for the term of ninety-nine years from the date hereof, all of its railroad situated in the states of Texas and Louisiana, and known and designated as the 'Louisiana Western Railroad,' together with all its branches, and all the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in use upon or in connection with said railroad or branches, and together with all the appur-

tenances thereunto belonging, with the right to possess, maintain, use, and operate the said property, and to receive the rents, issues, and profits thereof. That the Morgan's Louisiana and Texas Railroad and Steamship Company hereby leases to the said Southern Pacific Company, for the term of ninety-nine years from the date hereof, its railroad situated in the state of Louisiana, and known and designated as the 'Morgan's Louisiana and Texas Railroad,' all the branches thereof, and the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in use upon or in connection with said railroad and branches, and together with all the appurtenances thereunto belonging; also all the steamships, steamboats, tugs, piers, landings, depots, buildings, and all other property, real and personal, now owned, held, or possessed by the said Morgan's Louisiana and Texas Railroad and Steamship Company, with right to possess, maintain, use, and operate the said property, and to receive the rents, issues, and profits thereof. That the said Mexican International Railroad Company hereby leases to the said Southern Pacific Company, for the term of ninety-nine years from the date hereof, all of its railroad, and the branches thereof, situated in the republic of Mexico, known and designated as the 'Mexican International Railroad,' together with all its branches, and the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever now in use upon or in connection with the said railroad, and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use, and operate the said property, and to receive rents, issues, and the profits thereof. In consideration of the leases aforesaid, the Southern Pacific Company agrees to and with the other corporations, parties hereto, that it will keep the said leased property in good order, condition, and repair; operate, maintain, add to, and better the same at its own expense; pay all taxes legally assessed against or levied thereon; and will, upon the termination of this lease, return the same to the respective parties from which it was leased, or to their successors, with additions and betterments, in as good condition and repair as the same was at the date hereof. That it hereby assumes and will discharge all the liabilities and obligations of every kind of the said railroad companies, and each of them, except the obligations to pay the principal of their indebtedness, known as the 'bonded indebtedness,' now outstanding, and secured by mortgage or deed of trust, or which may hereafter be incurred by either of said companies under the provisions of any existing mortgage or deed of trust, or any mortgage or deed of trust hereafter, with the consent of this company made. That as to such bonded indebtedness it will pay off and discharge at maturity the interest upon the

same, and will, upon demand of either of said railroad companies, guaranty in such form as said company may require the payment of the principal and interest thereof. That said Southern Pacific Company will annually on the first day of May pay the following named railroad companies as rental a sum equal to ninety-three and one-twelfth (93 1-12) per cent. of its net profits—if any net profits there be—for the year ending on the 31st day of December next preceding that date, as follows: To the said Southern Pacific Railroad Company, existing under the laws of the United States and the state of California, twenty-six and one-half (26½) per cent. of said net profits; to the said Southern Pacific Railroad Company, existing under the laws of the territory of Arizona, twelve (12) per cent. of said net profits; to the said Southern Pacific Railroad Company, existing under the laws of the territory of New Mexico, four (4) per cent. of said net profits; to the Galveston, Harrisburg and San Antonio Railway Company, sixteen and one-quarter per cent. (16¼) of said net profits; to the said Texas and New Orleans Railroad Company of 1874, seven and one-half (7½) per cent. of said net profits; to the said Louisiana Western Railroad Company, three and one-third (3⅓) per cent. of said net profits; to the said Morgan's Louisiana and Texas Railroad and Steamship Company, twenty-two and one-half (22½) per cent. of said net profits; to the said Mexican International Railroad Company, one (1) per cent. of said net profits. The term 'net profits,' as used herein, shall be construed to mean the moneys on hand available for dividends after all expenses, payments, and disbursements of every nature and kind of the said Southern Pacific Company, except for the rental of railroads now or hereafter leased by said company, have been deducted."

Appellant contends that this instrument is a lease, and, being a lease, appellant was not liable in damages for any tort occurring on its line by those operating its cars and other property. The court below rightly held that it was not a lease, but a contract of partnership. By every test that can be applied to this paper it makes the parties to it partners. Each of the contracting parties is bound to put into the common business its rolling stock and other property, all to be under the management of the Southern Pacific Company, each one to receive its proportionate share of the net profits. There is a union of services and property and a division of profits. Partnership is a voluntary contract between two or more competent persons to place their money, property, labor, and skill, or some one or all of them, into some lawful enterprise or business, with an understanding that there shall be a community of interest in the loss; then the case is one of actual partnership. It is not essential that all these ingredients should occur to

establish the relation of partners. *Berthold v. Goldsmith*, 24 How. 536-544. It seems that the Southern Pacific Company did not put any property or capital in the business, but it put its skill and ability and management of the partnership, for which it was to receive 6 11-12 per cent. of the net profits. All the elements of partnership are contained in this agreement, and, so construed, the appellant would be liable for a tort committed by the agents or employees of the partnership, if done within the scope of their business. This construction of the instrument disposes of the 1st, 2d, 3d, 4th, 5th, 6th, 27th, 28th, 30th, and 31st assignments of error.

Under the statute in force at the time of the death of Edward Davis, to wit, October 10, 1886, in cases of this character the railroad company was liable in damages only for the gross negligence of its servants or employees, and not ordinary negligence. In this case the question of the negligence of the fellow servants of deceased, as well as a failure to furnish a suitable caboose car, was submitted to the jury. The testimony in the record concerning the car in which Edward Davis was riding at the time is rather unsatisfactory, and alone would not furnish sufficient proof upon which to predicate the verdict in this case; and the jury must have considered the question of the negligence of defendant's servants or employees as they should have done under the charge given. The fifth clause of the charge is as follows: "(5) It is also the duty of a railway to use all reasonable care and caution in the employment of careful and competent employees,—that is, persons of ordinary skill and experience, who are capable of efficiently discharging the duties which they are directed to perform,—so that no unnecessary risk shall be incurred by any of the other servants. However, when a person enters the service of a railway company, he thereby assumes and undertakes all the ordinary risks and hazards incident to that employment, including the negligence of his fellow servants, provided the railway company has taken reasonable care and precaution in selecting careful and competent employees. But, should the railway company retain in its service a reckless and incompetent employee, after it has discovered his recklessness or incompetency, and an employee is thereby injured through his negligence, then the company is liable, although the person injured be a fellow servant of the person inflicting the injury." The giving of this charge is assigned as error, one reason being, "because the same instructed the jury that the defendant would be liable for injury to plaintiff's son resulting from the ordinary negligence of defendant's servants, viz. its conductor, Greene, and engineer, Henry, or either of them, when, under the law as it existed at that time, defendant could only

be made liable for the gross negligence or carelessness of its servants; and the court failed to so charge the jury, or to give any instruction as to gross negligence." Under the law as it existed at the time of the death of Edward Davis the railroad company was not liable or responsible for any damage done or injury inflicted upon an employe by his fellow servants, either by gross or ordinary negligence, unless the company had not exercised care in the selection of such fellow servants, or had kept the same in its employment when it knew, or could have known by the exercise of ordinary precaution and inquiry, of the recklessness, carelessness, or incompetency of such employes. In the case under consideration it is alleged (and there is some proof to sustain it) that the death of Edward Davis was caused through the recklessness and negligence of his fellow servants, who were incompetent, inexperienced, and intemperate, and that the character of these employes was known to the railroad company. We are of the opinion that the only issues in this case were, did the accident which resulted in the death of plaintiff's son occur from the negligence of incompetent, reckless, or inexperienced employes who were fellow servants of deceased, and did the railroad company know, or could it have known by reasonable diligence and inquiry, of the character of such employes, and did it exercise proper care in furnishing a suitable and safe caboose car? The question of the degree of negligence cannot be of any importance in the determination of the case. All the cases to which we have had access, or to which we have been referred by counsel for appellant, in which it has been held that under the last clause of article 2399, previous to its amendment in 1887, it was incumbent upon the trial judge to instruct the jury as to gross negligence, were suits brought against railroad companies by passengers or other parties, not connected by employment with the railroads. *Railway Co. v. Kutac*, 76 Tex. 478, 13 S. W. Rep. 327; *Railway Co. v. Hanks*, 73 Tex. 323, 11 S. W. Rep. 377; *Railway Co. v. Hill*, 71 Tex. 451, 9 S. W. Rep. 351.

The section of the charge complained of in the fifteenth assignment of error is as follows: "(14) Should you find for the plaintiff under this charge, then you will assess the damage at such sum as may be calculated from plaintiff's reasonable expectation of pecuniary aid from his son after arriving at 21 years of age, considering his disposition and ability to contribute to his wants and necessities during the father's probable duration of life, at the same time taking into consideration the father's age, occupation, health, and pecuniary condition, and probable wants. In estimating the damage you must exercise a sound discretion, although you may find for a greater or less sum than that formerly furnished by

the son to the father, while you may also consider the prospective wants of the father, and the probable increasing ability of the son to administer to his necessities; but you must not allow plaintiff anything for the bodily pain and suffering of the son, or the mental pain and anguish undergone by the father by the death of the son and the loss of his society." Appellant objects to this charge, because there is no evidence to support it; because the measure of damages should have been limited to the son's probable earnings during his minority, less his expenses; and also because it was a charge upon the weight of evidence, in assuming that deceased had furnished plaintiff sums of money. There is ample evidence to justify the court in submitting the question to the jury, and the charge was not upon the weight of testimony in assuming that deceased had given sums of money, because it was an uncontroverted fact sworn to by plaintiff. The measure of damages is properly stated by the court in the charge, as the jury are plainly told, among other things, that they must take into consideration the disposition and ability of the son to give to his father, and this was not to be confined to his minority. *Railway Co. v. Lester*, 75 Tex. 56, 12 S. W. Rep. 955; *Railway Co. v. Cowser*, 57 Tex. 294.

The sixteenth assignment of error complains because the court instructs the jury that they are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony, and seems to think it might lead the jury to believe some of the witnesses unworthy of belief. The charge was eminently correct and proper, and might be given in any case. It embodies a truism of the law.

While the competency or incompetency of an employe cannot be proved by specific acts of carelessness, yet, where these acts have been brought to the knowledge of the master, they can be proved to establish that knowledge on the part of the master. The witness Barker testified as to an act of negligence, at Gonzales, of Conductor Greene, while he was a brakeman, and some time before the death of young Davis; and that he notified Van Vleck and McQueeney, high officials of the road, of the conduct of the brakeman. It would have been better had the court instructed the jury of the object in the admission of the testimony, confining it to the subject of notice; but appellant does not object on this ground, and it should have asked a charge embodying this idea. The objection to Nicely's testimony as to the competency of the engineer goes to the weight, and not the competency, of the evidence, and we do not see that he narrates any specific instance of neglect on the part of the engineer. The declaration set forth in the bill of exceptions, "I have seen him running a train recklessly and carelessly," when taken in connection with the rest of

this witness' testimony, shows that he was not speaking of a particular instance, but the whole time he worked with him. The question put to B. A. Pickren, a witness for the defense, on the cross-examination, as to Henry being an experienced engineer with five or six months' experience, was on the cross-examination, and, in view of what the witness had sworn to, a proper question. The court properly refused to allow witness Van Vleck to testify as to what Davidson, Toonsey, and Pickren told him, it being clearly hearsay of the worst character. Defendant introduced Van Vleck, division superintendent, and asked him the question: "Do you know what Thomas Henry's general reputation was, and how he was generally regarded as to care and competency while running his engine on the road? If so, what was it?" The engineer, Henry, was engaged in a class of business with which the general public is not acquainted. Even those who, as passengers, are in the habit of traveling on railroad trains, would not and could not become acquainted with the general reputation of the engineers who stood at the throttle as to their efficiency. Then, would it be proper to address a question to a witness as to the general reputation of one engaged in such class of occupation, without confining it to those engaged in the same or similar business? We think not. Every one in a community is capable of contributing to the general opinion which makes up general reputation as to truth and veracity, of chastity or violence; and doubtless the opinion of the public generally as to the competency of a doctor or lawyer, as they are brought so closely into contact with the public, might go to show general reputation; but where a man is engaged in an occupation which throws him into contact with a certain class only, inquiry as to his reputation must be confined to that class. We think the question was too general, and the answer given does not show where or how the information was gained.

The fourth clause of the charge of the court is assigned as error by the appellant, and is as follows: "If you believe from the testimony that the defendant company failed to furnish a safe and suitable car, with the necessary appliances, for the use of its employees, and you further believe that the death of plaintiff's son was caused by reason thereof, or that by the use of a safe and suitable car the injury would have been avoided, then you will find for the plaintiff." The proof was meager as to the unsuitableness or unsafeness of the car in which deceased was riding. It was not a regular caboose car, with a cupola on top, with glass windows all around, and the other ordinary appliances. The charge complained of makes it the duty of the railroad company to absolutely and infallibly furnish a safe and suitable car, and, no matter what care and

diligence may have been exercised in selecting or in inspecting the same from time to time, it would still be liable. It is the duty of the master, in the first instance, to use reasonable care and precaution in the selection of the machinery, tools, and appliances to be used by his servants, and then to exercise reasonable care and diligence in detecting defects and remedying them. The master is not absolutely required to furnish safe and suitable machinery and appliances, but to exercise reasonable and proper foresight, knowledge, care, and discretion in furnishing the same. This is the highest plane to which human responsibility can be required to ascend. The question of what reasonable care may be depends upon the relation of the parties, the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the circumstances under which it is exerted. Wood, Mast. & S. § 329, p. 685. Actual notice of defective, unsuitable, or dangerous appliances need not be brought home to the master, but it is enough to show that he ought to have known it, and might have known it by the exercise of reasonable and proper care in selecting or examining and inspecting the appliances. In the latter part of the third clause of the charge the jury is instructed that "the law makes it the duty of a railway company to use all reasonable care and precaution in furnishing for the use of its employees safe and suitable cars, well adapted for the purposes for which they are intended to be used, with such appliances as are necessary to the safety of its trainmen." This immediately precedes the objectionable charge, and it is insisted by appellee that they be construed together, and we will do so. Taken together, the charge, in effect, instructs the jury that the law requires the defendant to use all reasonable care and precaution to furnish safe and suitable cars; therefore, if you find that defendant failed to furnish a safe and suitable car, you will take it for granted that they did not exercise proper care and precaution, and knew, or could have known by ordinary diligence, that the car was unsafe, and you should find for plaintiff. This is the legitimate construction to be placed upon the two clauses of the charge taken together. The minds of the jury are not directed to the question of reasonable care and diligence of defendant in furnishing the car, but rests solely on the question of whether the car was safe or unsafe. This defect in the charge was brought to the notice of the trial court in the motion for new trial. We think the charge of the court erroneous, and calculated to lead the jury to the conclusion that, if the defendant failed to furnish a suitable car, then it was liable in damages, regardless of any care or caution exercised by defendant in connection with the car. There are

31 assignments of error, many of them hypercritical and immaterial, and it is unnecessary to discuss them. For the error indicated in the charge the judgment of the lower court is reversed, and the cause remanded.

CITY OF SAN ANTONIO v. SULLIVAN et al.
(Court of Civil Appeals of Texas. Oct. 4, 1898.)

DEDICATION OF STREET—ACCEPTANCE—USER AND PRESCRIPTION.

1. The mere fact that, after a fence dividing a strip of land from the street disappeared, a private individual, not the owner of the land, for his own purposes, laid a sidewalk thereon, which was used by the public, is not sufficient to show an acceptance by the city of the strip as part of the street, assuming that there had been a dedication.

2. Nor does it show adverse user, so that the city can claim by prescription where it never made any claim to the property, and exercised no control or management of it.

Appeal from district court, Bexar county; W. W. King, Judge.

Suit by Dan Sullivan and others against the city of San Antonio for an injunction. From a judgment for plaintiffs, defendant appeals. Affirmed.

Upson & Bergstrom, for appellant. C. W. Ogden, for appellees.

FLY, J. This suit was instituted by appellees to enjoin the appellant from interfering with them in the construction of a certain fence on a strip of land on West Nueva street. A preliminary writ of injunction was granted, and on final hearing was perpetuated. The city admitted title to the strip of land in the plaintiffs, but claimed the same by prescription. The only assignment of error is: "The court erred in rendering judgment for the plaintiffs, because it appears from the evidence that the property in controversy, as set out in defendant's answer, had been dedicated to and used by the public as a part and portion of West Nueva street for more than 10 years before the institution of this suit, and therefore, as to the strip in controversy, judgment should have been rendered for the defendant establishing its right to a right of way." The contention is in regard to a narrow strip of land lying along the north of plaintiffs' land, and south of West Nueva street. It is admitted that the title is in plaintiffs. It was proved that 11 or 12 years before the institution of this suit the then owner of the property had, and for many years theretofore had maintained, a cedar post thicket fence along the original line, but that at said time, to wit, 11 or 12 years before the institution of this suit, the fence had been neglected, and not kept in repair, and it gradually disappeared, until it was all gone except some of the cedar posts. Portions were found on original line when present owners built their fence. Posts were to surface only, and were in that

condition about 11 or 12 years before the institution of this suit, with the exception of two or three posts which were still standing until five or six years ago; and at that time sheds with a solid board back were constructed on the line contended for by the city, leaving outside of the sheds the strip in controversy. That such strip of land is a little higher than the remainder of the street, and same has been used by the public as a sidewalk; and that about one year ago a plank walk about three feet wide had been constructed by the owner of the livery business, carrying on such business on the lot, called "Hick's Stable," immediately along and on the outside of said sheds; the strip in controversy and walk being for his use. Said walk was paid for with his own money, and was built without any person's consent, but was used as a sidewalk for the public. That the improvements on the lot, called "Hick's Stable," ran out to within a few feet of the original line of such lots. That there was nothing to prevent the public using the strip in controversy as a part of Nueva street, except that it is somewhat elevated over and above the remaining portion of said Nueva street. That when the street line was demanded by the present owners of the lot in controversy from the city engineer, he surveyed and gave them the original line of the lots, and immediately thereafter the present owners of said lot began building their fence on said line, which fence defendant's police prevented plaintiffs from building at the time this suit was filed and writ of injunction issued. The city never in any manner improved the strip in controversy, and did not improve any other property on that block along Nueva street. The former owner of the property claimed that the lot ran to the line claimed by plaintiffs, and no dedication of the strip to the city was shown except that the same was not used by the owner. That the public had used the strip to walk on since the old fence was taken away. No claim or right of title to the strip was shown to have been made by the city until present owners began construction of the fence, except as aforesaid. This testimony fails to show adverse use or possession of the land in question for a period of 10 years. This was a strip of land lying along the street, and there was no claim of any kind to it on the part of the city, and no right of control or management exercised in regard to it. In order to claim by prescription, if it could be done by that alone, a setting apart of the land by proper authority must be presumed; but in this case that cannot be done, because it is affirmatively shown that there never was any authority setting apart this strip for street purposes. The testimony fails to show continuous use by the public for 10 years, even if it could be held that such use would give right by prescription. In considering the question of a dedication of the land, the question of the time the land

has been used by the public does not necessarily become material; but in cases of implied dedication time may become important, in connection with other circumstances, to show an intention on the part of the owner of the soil to dedicate the way to the public. There is no express dedication shown by the owner in this case, and an implied dedication must be relied on by the city to show its right to the use of the land. An implied dedication is one arising by operation of law from the acts of the owner. It is not founded on any written or oral evidence, but upon the doctrine of equitable estoppel. Elliott, Roads & S. p. 91. The same author says: "If the owner throws open a way to the public, and so conducts himself as to induce a well-founded and reasonable belief that he has a correct knowledge of all the facts, and that, having the knowledge, he intends to dedicate the way to public use, he will be held to have made a dedication, in case it appears that others, influenced by his conduct, and acting in good faith, and without negligence, have acquired rights in the belief that a dedication had been made, even though it should afterwards turn out that the owner acted under a mistake." Id. p. 93. In order to render a dedication of a street complete, there must be an acceptance on the part of the public; and this carries with it the duty of repairing the street, and becoming liable for any injuries arising from the unsafe or defective condition of the way. As before stated, the city exercised no visible control over the land in controversy, never in any manner working it, and the only evidence of an acceptance of a dedication, if any at all, is the use by the public of the strip of land. In a similar case the supreme court of Texas says: "The strip in controversy was never worked or repaired by the city, and was not delineated upon the city map made by its authority. There being no inclosure for a long time on one side of it, it was passed over by the public in part by roads or paths crossing it diagonally in different directions. There is no evidence of any use of the property that might not have been made if no dedication had ever been intended." And they hold there was no acceptance, although there had been a dedication, and the case was decided against the claims of the city. *Gilder v. City of Brenham*, 67 Tex. 346, 3 S. W. Rep. 309. It is held in the above case that mere user for a long time should not, as a general rule, in this state, be presumptive evidence of an acceptance on the part of municipal authorities of a dedication of land for public uses. The testimony fails to show any act or declaration on the part of the owners of the land evincing an intention to dedicate the land to street purposes; and where the situation of the land is such as to indicate that it does not form a part of the highway, although it may be alongside of the way, and be used by the public, no dedication can be presumed

without strong evidence of an intent on the part of the owner to devote the land to public use. Elliott, Roads & S. p. 131. There is no evidence that any person will have a single right impaired by closing the strip of land, or that it will interfere with the comfort or convenience of any one. There is no error in the judgment of the court below, and it is affirmed.

JAMES, C. J., being disqualified, did not sit in this case.

SAN ANTONIO & A. P. RY. CO. v. BUSCH.
(Court of Civil Appeals of Texas. Sept. 13, 1893.)

INTEREST—DAMAGES FOR BREACH OF CONTRACT.

On a subscription to mortgage bonds of a railroad extension to be built, the measure of damages for a breach of contract to deliver said bonds is their highest market value at any time from the completion of the extension to the time of trial, with interest. The fact that such bonds do not bear interest for three years does not warrant a deduction of three years' interest from the damages, since to that extent the market value must have been impaired already. 21 S. W. Rep. 164, modified.

On rehearing. Reversed, with modification.

FLY, J. On the 25th day of January, 1893, the court of civil appeals of the third supreme judicial district rendered an opinion in the above-styled cause reversing and remanding the same for a new trial. 21 S. W. Rep. 164. Appellee desires a rehearing and affirmation of the case, on the ground that the court "erred in its judgment in rendering the same as though the facts set out in appellee's petition in the court below entitled him to a recovery of the amount sued for upon a rescission of the contract in accordance with which the same was paid to appellant." Appellee claims that this is not the position or ground upon which he seeks to recover, but on the proposition that when one person loans to another a sum of money, for which sum the borrower, at a future date, agrees to execute a note or mortgage, the lender, upon failure of the borrower to execute the note and mortgage, has a right to sue for the money loaned. The appellee in this case declared upon a contract between him and appellant, in which appellee agreed to pay a certain sum of money, in installments, to appellant, to assist it in constructing a railroad from San Antonio northwestwardly, the consideration for the payment of said sum being set forth in said contract as follows: "Whereas, the San Antonio & Aransas Pass Ry. Co. proposes to build an extension of the main line northwestwardly from San Antonio; and whereas, in order to do so, it is necessary for said company to market a portion of the bonds upon said extension; and whereas, we consider that we will be greatly benefited by said extension, and it is desirable to the undersigned that such ex-

tension to be built: Therefore, we, the undersigned, in order to secure the construction of the proposed extension of the San Antonio & Aransas Pass Railway northwestwardly from San Antonio, hereby agree and bind ourselves to pay to the San Antonio & Aransas Pass Railway Co., at their office in San Antonio, Texas, as subscription to first mortgage bonds at par, the sums of money set opposite our names, respectively," etc. It was further stipulated to deliver bonds for the amounts subscribed, not to bear any interest for three years after delivery. A failure to comply with this contract is alleged by appellee, and there is a prayer for judgment for \$2,000, the full amount subscribed and paid, with interest at 8 per cent. per annum from date of payment of last installment. The trial court gave judgment for appellee, as prayed for. This judgment was reversed and remanded by the court of civil appeals of the third supreme judicial district, and we concur with that opinion, except as to the matter of interest. The court says: "The breach complained of is the failure to deliver the bonds. The damage resulting from this failure determines the measure of relief that appellee is entitled to. This should be the highest market value of the bonds, as found by the evidence to be, from the time they should have been delivered to the time of trial of the cause." This is the correct rule in cases of this class for estimating damages. "Where the contract is one by which the plaintiff is to receive, not money, but the transfer of certain property or services, then the value of the original compensation is not to be inquired into, but the value of the property or services is the measure of damages, because this is the remuneration fixed by agreement." 1 Sedg. Dam. (7th Ed.) 437; *Calvit v. McFadden*, 13 Tex. 324; *Railway Co. v. Jackson*, 62 Tex. 212. The only difficulty that arises in this case is as to the question of interest, and it is only on this point that we differ from the court of the third district. There is a stipulation in the contract that the bonds should not bear interest for three years, and no doubt the market value of the bonds would be affected by that stipulation; so that if we follow Judge Fisher's decision, and take the highest market value of the bonds from the time of the completion of the extension until the date of the trial, with 8 per cent. interest thereon, less the three-years interest, as the measure of damages, we may deprive the appellee of the three-years interest twice. The true measure of damages in all cases is that which will completely indemnify the plaintiff for breach of contract. In this case the appellee is entitled to recover the highest market value of the bonds at any time from the completion of the extension of the railway until the time of the trial, with interest at 8 per cent. thereon, so computed that appellee shall not be deprived of the three-years interest, or any part

of the same, more than once. If this court could ascertain from the record when the highest market value of the bonds was reached, and what it was, we would reverse and render the proper judgment here; but, not being able to do this, we will grant the motion for rehearing, and reverse and remand the cause.

KNEELAND v. McLACHLEN.¹

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

PARTNERSHIP—SETTLEMENTS—IMPEACHMENT—FINDINGS OF FACT.

1. A partner who has knowledge of entries in the partnership books by his copartner, charging him with items for which he is not liable, is guilty of laches in settling up the partnership business on the showing made by the books, without examining them to see whether they have been corrected to conform to his contention, and he cannot thereafter impeach the settlement on the ground that the books were not correct.

2. When two findings of fact by the trial court lead to contradictory conclusions, the appellate court will examine the evidence to ascertain which is correct.

Appeal from district court, El Paso county; T. A. Falvey, Judge.

Action by W. B. McLachlen against W. E. Kneeland on a promissory note. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Edwards & Neff, for appellant. Davis, Beall & Kemp, for appellee.

JAMES, C. J. Appellant and appellee were partners in the insurance and real-estate business at El Paso, Tex., under the firm name of Kneeland & Co. On or about January 11, 1887, Kneeland bought out McLachlen's interest in the firm, assuming its indebtedness, for the sum of \$2,000; paying \$1,400 in cash, and giving the \$600 note upon which this suit is brought. Defendant pleaded that at that time McLachlen was so much indebted to the firm that a fair adjustment between the partners would have left his interest of no value whatever; on the contrary, he was largely indebted to the firm and to defendant. That, all during the partnership, McLachlen had kept its books and accounts, and knew that his attitude to the firm was as above stated. That defendant had full confidence in McLachlen's integrity and accuracy, and in making the settlement relied on his representations with respect to the condition of the business. That, at the time of the settlement, McLachlen, at defendant's request, made a statement of the financial condition of the firm, and in such statement made it appear that he (McLachlen) was indebted to the firm in the sum of \$1,941.16, that defendant was indebted to the firm in the sum of \$704, and that the firm owed other persons \$1,236.04. Then defendant proceeds to allege that the statement was false, and so

¹ Rehearing denied.

known to be by McLachlen at the time. That the true condition of said accounts should have been that McLachlen's debit to the firm on January 11, 1887, was \$6,531.26, and the total debit against appellant on same date \$3,214.81, so that appellee (McLachlen) was indebted to the firm, in excess of the amount owed by appellant, \$3,316.45, and not the sum of \$1,237.18, as shown by the statement, and that this was not shown by the books because of incorrect entries made therein by McLachlen in regard to the sum of \$5,647.32 received by Kneeland & Co., (of which sum the firm of Kneeland & Harrison owned \$3,764.88, and the firm of Kneeland & Co., \$1,882.44;) he (McLachlen) having credited same on the books,—one-half, \$2,823.66, to himself, and one-half, \$2,823.66, to Kneeland; and that he (Kneeland) drew out of the firm the sum of \$4,000, with which to pay \$3,764.88 to Kneeland & Harrison, and McLachlen charged appellant with all of this \$4,000, when the \$3,764.88 which went to Kneeland & Harrison should not have been charged to Kneeland. Defendant also alleged that McLachlen, by his said statement, misrepresented the indebtedness of the firm to be \$1,238.04, and that defendant relied upon this statement, also, in making the settlement, and assuming the debts of the firm; that this indebtedness was much larger than \$1,238.04,—but defendant does not state how much larger,—and alleges his belief that it was in excess of \$2,000, and prays for general relief.

There is nothing presented to us for reversal of this judgment, based on that portion of the answer alleging misrepresentation by McLachlen concerning the firm's indebtedness to other persons. The findings of the judge do not seem to relate to it, nor do the assignments of error or the briefs. Hence, we need not notice it in our disposition of the case. This leaves the answer with no claim of incorrectness or misrepresentation touching the accounts between these parties, except that alleged to result from the erroneous entries concerning the \$5,647.32. The case was tried without a jury, and the findings of fact and conclusions of law by the judge are in the record. The findings pertinent to the judgment are as follows: "Second, that Kneeland was improperly charged with \$3,764.88 included in an entry of \$4,000 on March 1, 1884, but was informed of that fact some year or more before the dissolution, and did not use sufficient diligence in ascertaining whether same had been corrected; third, that Kneeland, on January 11th, purchased the interest of McLachlen for \$2,000, and gave the note sued on in part payment of same; fourth, that, during the continuation of the copartnership, McLachlen kept the books of the firm, and made all entries, and that Kneeland was not in fact familiar with the entries or state of the accounts." The con-

clusion of law is as follows: "I therefore find, as a matter of law, that as defendant, Kneeland, had knowledge of the erroneous charge of \$3,764.88, as stated in the second finding above, that said defendant, Kneeland, is precluded from going behind the settlement of the partnership between plaintiff and defendant by defendant purchasing plaintiff's interest therein, and therefore give judgment for said note and interest." In his first finding of fact, the judge ascertained "that on a correct adjustment of the accounts between the partners the plaintiff would be indebted to the firm on January 11, 1887, in the sum of \$1,081.06 in excess of the amount acknowledged to be against him at said time, and therefore would be indebted to Kneeland in one-half that amount, to wit, \$540.53. In ascertaining this amount the plaintiff is credited with \$1,000 not shown on the books of the firm, as money advanced by him."

It is questionable whether the pleadings in this cause were sufficient to require the court to open and adjust the partnership business generally, but what was done by the court in this respect seems to have been done without exception on the trial. The first and second findings of fact by the court would lead to different conclusions, and it becomes necessary for us to consider the evidence, in order to determine whether or not the judge erred in founding the judgment upon the second finding. The judge finds, in connection with his second finding, that appellant was informed of the fact that the erroneous entries had been made, and this long before the settlement or dissolution, and that "he did not use sufficient diligence in ascertaining whether the same had been corrected." The testimony shows with reasonable certainty the following facts: That Kneeland knew of these entries a few months after they were made, and long before the purchase of McLachlen's interest; that, when he became informed of them, he and appellee disputed as to the correctness of the entries,—one contending that they were not in accordance with the truth, and the other that they were. Appellant says that after the quarrel he was under the impression that McLachlen had subsequently corrected the entry, but does not state how he obtained this impression. He also stated that McLachlen had made no direct statement to him that said entry had been corrected, and that he had never looked at the books, or had any one else examine them, to see if they had been corrected to conform to his contention. It appears, also, that the books had been open to appellant at all times. While it is true that a partner having nothing to do with the books of a firm, and who relies upon statements rendered him by the one who is peculiarly cognizant of them, may set aside transactions had with his partner, based upon such statements, upon less proof than would be required where

their relations are different, he is not wholly excused from diligence. *Merriweather v. Hardeman*, 51 Tex. 442. We believe the appellant was guilty of such laches and indifference as should preclude him from availing himself of the incorrectness of the items complained of as a defense to the note he had given in the settlement. He had positive knowledge of the condition of these items on the books. We see no evidence of any statement or act of McLachlen whereon Kneeland could reasonably have founded the impression that the books had been corrected in this particular. The second finding of fact was sustained by the evidence, and the court properly gave judgment for the plaintiff. The judgment is affirmed.

NEILL, J., having been of counsel for appellant, did not sit in this case.

FRANK v. TATUM.¹

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

DISMISSAL—RECORD ON APPEAL—AMENDMENT NUNC PRO TUNC.

1. A dismissal of an action as to all the individual members of a partnership, except the one through which it had by service been brought into court, is not a dismissal as to the partnership.

2. A recital in a judgment and in a bill of exceptions that the court dismissed an action as to all the members of a firm except the one through which it had been served, and that a motion to dismiss as to the firm itself had been denied, will control a statement in the charge to the jury that the action had been dismissed as to all parties except the individual partner served; and it is improper to permit the record on appeal, which contains no final disposition of the action as to the firm itself, to be amended nunc pro tunc so as to show that the court at the trial term dismissed as to the firm itself.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by E. C. Tatum against A. B. Frank and others. From a judgment in plaintiff's favor, defendant Frank appeals. Dismissed.

C. Upson and Denman & Franklin, for appellant. Tarleton & Keller and John A. & N. O. Green, for appellee.

JAMES, C. J. This appeal was dismissed by the court of civil appeals at Austin of its own motion, for the reason that the record showed no final judgment in the cause. The suit was brought against certain partnerships, and thereafter plaintiff amended so as to include as defendants the individuals composing the firms. Since that disposition of the appeal, the court of civil appeals at Austin has reinstated the cause, and a transcript of proceedings had in the district court after the term at which the trial was had (which proceedings are claimed to have the effect nunc pro tunc of supplying what was necessary to make the judg-

ment from which the appeal was taken final) has been duly filed in said court of civil appeals and transferred here with the cause, and the question now before us is the jurisdictional one of whether or not the subsequent action of the district court supplies omissions of what occurred on the trial, so as to have the effect of constituting the judgment a final one. Unless it can be given this effect, it is apparent that it cannot vitalize this particular appeal. The proceedings had at the trial term of the district court in reference to what was judicially done by that tribunal appear as follows: In 1882 the suit was filed by E. C. Tatum against the partnership firms of Goldfrank, Frank & Co., Cohen & Koenigheim, and B. Oppenheimer & Co., F. J. Hamer, and F. H. Coleman, giving the names and residence of each member of the respective firms, asking service upon A. B. Frank for the firm of Goldfrank, Frank & Co., and asking that the other firms be cited by any of their respective members. That in 1885 plaintiff filed an amended original petition, (upon which the cause was afterwards tried,) with prayer substantially the same. Service was had on Goldfrank, Frank & Co. through A. B. Frank, one of its members, and the other partnerships appear to have been similarly brought into court. The court, in its charge to the jury, stated "that, the plaintiff having dismissed his suit against all of the defendants except A. B. Frank and Frank H. Coleman, the issues in the pleadings relate solely and exclusively to the acts and doings of the said A. B. Frank and F. H. Coleman," and then proceeded to limit their inquiry to the acts and doings of said Frank and said Coleman.

The judgment entered by the court after the verdict contains the following recitals: "In this cause comes now the plaintiff, and because Simon Lavenburg, Louis Lavenburg, Max Goldfrank, defendants to this action, are nonresidents of this state, and have not been personally served with process, and because of the insolvency of B. Oppenheimer and A. M. Cohen and Alexander Koenigheim, does hereby dismiss this cause as to said defendants. Tarleton & Keller, Jno. A. & N. O. Green, Attys. for Pltff.' And said motion being then and there heard by the court, it is considered that the same be granted, adjudged, and so ordered that plaintiff take nothing by this suit against said Simon Lavenburg, Louis Lavenburg, Max Goldfrank, B. Oppenheimer, and Alexander Koenigheim; that said defendants go hence without costs; and that plaintiff pay all costs incurred against said named defendants for which execution may issue. Whereupon the defendants Goldfrank, Frank & Co. and A. B. Frank moved in open court that an order be entered of record dismissing this cause as to A. B. Frank, on the ground that he had not been served, made, or answered as a party in this suit,

¹ Rehearing denied.

which motion was overruled by the court, to which ruling defendants then and there excepted. And thereupon came a jury of good and lawful men," etc.

On the 6th day of September, 1888, manifestly during the trial, which the judgment shows to have begun September 5th, defendants Goldfrank, Frank & Co. made a motion, which, and the action by the court thereon, is made to appear by the following bill of exceptions: "Defendants' Bill of Exceptions No. 2: E. C. Tatum vs. Goldfrank, Frank & Co. et al. No. 1,075. Be it remembered that on the trial of this cause, after both parties had announced themselves ready for trial, and after all the pleadings had been read, the plaintiff, by leave of the court, made the following motion in writing, which was granted, viz.: 'E. C. Tatum vs. Goldfrank, Frank & Co. et al. In this cause comes now the plaintiff, and because Simon Lavenburg, Louis Lavenburg, Max Goldfrank, defendants to this action, are nonresidents of this state, and have not been personally served with process, and because of the insolvency of B. Oppenheimer and A. M. Cohen and Alexander Koenigheim does hereby dismiss this cause as to the said defendants. Tarleton & Keller, Jno. A. & N. O. Green, Attys. for Plaintiff.' Whereupon the defendant Goldfrank, Frank & Co. made the following motion in writing, which was by the court overruled, viz.: 'E. C. Tatum vs. Goldfrank, Frank & Co. et al. No. 1,075. Upon the motion of the plaintiff, this cause having been just now dismissed as to the defendant the firm of Goldfrank, Frank & Co., by a dismissal asked by plaintiff, and granted by the court, of Simon Lavenburg, Louis Lavenburg, and Max Goldfrank, composing, with one A. B. Frank, said firm defendant, now comes the said defendant Goldfrank, Frank & Co. and asks the court that the dismissal of said defendant Goldfrank, Frank & Co. from this cause be entered of record in the minutes of this court. And there being no cause of action against said A. B. Frank or any of the members of said firm, as none is set forth in plaintiff's petition, and also by reason of the dismissal aforesaid, the defendant Goldfrank, Frank & Co. asks the court to enter an order of dismissal in this cause as to said A. B. Frank, as well as to each and all of the members of said firm. C. Upson, Atty. for Goldfrank, Frank & Co.' To which ruling of the court, as well as the allowing of plaintiff's motion, the said Goldfrank, Frank & Co. thereupon, in open court, duly excepted, and now, on this 21st day of September, 1888, presents this bill of exceptions, and prays that the same be allowed, signed, and made a part of the record, which is accordingly done, on this 21st day of September, 1888. G. H. Noonan, Dis. Judge."

We agree with the court of civil appeals at Austin that the judgment rendered in 1888 in the district court was not a final judgment

for purposes of appeal, inasmuch as it fails to show a disposition of the partnership of Goldfrank, Frank & Co. A. Michael and B. Oppenheimer, the persons composing the firm of B. Oppenheimer & Co., were both dismissed. Likewise, A. M. Cohen and Alexander Koenigheim, the persons composing the firm of Cohen & Koenigheim, were dismissed. A dismissal of all the individual members, except the one through which the partnership had by service been brought into court, was not a dismissal as to the firm. It is now proposed by the supplemental proceedings had in the district court in this cause to supply an order of dismissal broad enough to include therein said partnership of Goldfrank, Frank & Co., and in this to amend the record of the judgment. Article 1354, Rev. St., provides for the amendment in term time of judgments and decrees where there has been a mistake in the records thereof. Article 1355, Id., provides for amendment of judgments and decrees in term time or vacation where in the record there shall be a mistake, miscalculation, misrecital of any sum or sums of money. This latter article has no application to the matter before us. On the 30th day of January, 1893, the district court, in term time, on hearing, entered an order reciting in substance that a motion was made by plaintiff to correct the entry of the judgment in this cause by showing that on the trial the cause was dismissed by the plaintiff against the firms of Goldfrank, Frank & Co., Cohen & Koenigheim, and B. Oppenheimer & Co.; and that, "it appearing to the court that the trial of said cause began September 5, 1888, and was concluded September 12, 1888, on which last-named date a verdict and judgment were rendered; * * * and it further appearing that on the trial the jury were instructed by the thirteenth clause of the court's general charge, duly filed among the papers in said cause, as follows, to wit: 'The plaintiff having dismissed his suit against all of the defendants except A. B. Frank and Frank H. Coleman, the issues in the pleadings relate solely and exclusively to the acts and doings of the said A. B. Frank and Frank H. Coleman; and in considering the facts and circumstances of this case you will scrutinize the acts of said Frank and the said Coleman in order to ascertain and to determine which of the allegations in the plaintiff's petition contained charging them with wrongful acts regarding the property of plaintiff have been sustained by proof,'—it is now, upon the motion of said plaintiff, ordered and adjudged that the entry of said judgment be corrected nunc pro tunc as follows: 'E. C. Tatum vs. Goldfrank, Frank & Co. No. 1,075. This cause coming on for trial on 5th September, 1888, whereupon, during the progress of said trial, the said plaintiff dismissed his cause of action as against all of the defendants in said cause with the exception of defendants A. B. Frank and F. H. Coleman, and proceeded alone against the

defendants A. B. Frank and F. H. Coleman, it is therefore considered, ordered, and adjudged this 12th day of September, 1888, that the said cause of the plaintiff be dismissed as against all of the defendants thereto, with the exception of the defendants A. B. Frank and F. H. Coleman, and that said defendants so dismissed recover their costs against the plaintiff." The law on this subject is that where a judicial act, such as a judgment, decree, or order, was made at a particular term, which failed of entry in the minutes, the court has power at a subsequent term to ascertain the fact of such act and such omission by proper evidence, and make the entry *nunc pro tunc*, and the effect of the subsequent entry, for all purposes, is as if it had been entered when the act was done. *Blum v. Neilson*, 50 Tex. 880; *Chestnutt v. Polard*, 77 Tex. 86, 13 S. W. Rep. 852; *Camoron v. Thurmond*, 56 Tex. 28; *Ximenes v. Ximenes*, 43 Tex. 463. If the proceeding of January 30, 1893, amended the judgment in a proper subject-matter and upon proper evidence, we are required to give effect to it as an amendment *nunc pro tunc*, and proceed with the appeal; but, if it is not an amendment of the judgment from which the appeal is taken, it does not relate back to the time of the rendition of the judgment, and can only have effect from the time it was made as an independent order. It is claimed that in the district court, at the term of the trial, plaintiff dismissed as to the partnership firms, and that the court granted the order of dismissal as to said firms, and that, by inadvertence, the order was not entered. We find from the inspection of the record that, although the court charged the jury that plaintiff had dismissed as to all the defendants except A. B. Frank and Frank H. Coleman, the judgment that followed the charge limits the dismissal to individuals, naming them, and naming all those that composed the firm of Goldfrank, Frank & Co. except A. B. Frank. If, as a matter of fact, the dismissal contemplated all defendants, as the charge states, except Frank and Coleman, the judgment entry omits to record it; and to supply this omission or oversight an amendment at a later term would have been proper, provided, always, that the amendment was allowed on competent testimony. If there were nothing else in the record as made at the trial term than the charge of the court to indicate what the action of a court actually was in reference to dismissing the partnerships, we could not, under the decisions above cited, regard the proceeding had on January 30, 1893, otherwise than as an authorized amendment of the judgment. We find, however, in the record, the dismissal filed by plaintiff as to defendants, which is copied in the decree itself as the predicate for the judgment of dismissal, and this states as the dismissed parties the same individuals dismissed in terms by the judgment. It also appears from an act of the

court itself, done at the trial term, and preserved in the bill of exceptions taken at the time, and consequently a part of the record, that, in connection with plaintiff's dismissal of parties, the court was asked upon the trial to enter of record the dismissal of the firm of Goldfrank, Frank & Co. from the cause, which was denied. This bill of exceptions was signed and filed on September 21st, after the trial and during the term, and the fact that this bill of exceptions was given by the judge without an amendment then and there of the judgment, or without qualification, is not compatible with the idea that a dismissal of the firm had taken place. It is evident that the plaintiff did not intend, and that the court refused, to dismiss the said partnership from the cause at that term. It was not a case where the court failed to enter the dismissal because of an oversight, but the court refrained from doing this very thing when urged by counsel to make the entry. The ruling may or may not have been erroneous; still the ruling cannot be remedied by a judgment to the contrary *nunc pro tunc*. *Perkins v. Dunlavy*, 61 Tex. 241. In our opinion, the written dismissal, the recital in the judgment, and the bill of exceptions will control the statement in the charge of the court in showing what the action of the court really was. The matter appearing in the record in this form, we do not believe it was competent, by any extrinsic evidence to show a different state of facts, viz. that the court did at the trial term make the order of dismissal. This would not be supplying omitted record evidence of what was done; it would be gainsaying what the record shows was done. The conclusion we have reached is that the order entered on January 30, 1893, is not properly an amendment of the judgment, and cannot be given effect as such, and the judgment is not thereby rendered final for the purposes of this appeal. What its effect is as an ultimate disposition of the cause in the district court we are not called on to say at this time. It is enough for the present purposes to determine that, as an amendment having a *nunc pro tunc* relation to the judgment appealed from, it is not effectual. We conclude that the judgment appealed from has not been made to appear as a final judgment, and the appeal is dismissed.

STRINGFELLOW et al. v. POWERS.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

REAL-ESTATE AGENTS—EXCLUSIVE CONTRACT—COMPENSATION.

1. A written contract by which a landowner places land in the hands of real-estate agents for sale for eight months, and agrees to send to the agents any purchaser who might apply to him, vests the agents with exclusive authority to make the sale, and the landowner has no right to personally make a sale within the period.

2. Where a landowner vests real-estate agents with exclusive authority to sell his land during a specified period, and agrees to pay them all over \$1,000 realized on the sale, the agents are entitled to recover, on a sale by the owner personally, any sum over \$1,000 which they prove they could have realized for the land but for the owner's breach of contract.

Appeal from Guadalupe county court; James Greenwood, Judge.

Action by Stringfellow & Wilson against W. R. Powers to recover a commission as real-estate agents. From a judgment in defendant's favor, plaintiffs appeal. Reversed.

M. R. Stringfellow, for appellants.

FLY, J. Appellants, as plaintiffs in the lower court, brought suit on a contract alleged to have been made with defendants, which placed in their hands for eight months for sale certain land, one tract, being a $4\frac{1}{2}$ -acre lot or block in the town of Lockhart. Plaintiffs allege that the contract was shown by a memorandum in writing, inscribed in their land register, and signed by defendant. By the terms of the contract, plaintiffs were to have the land for sale for eight months from the first part of January, 1889, and defendant agreed to send any purchaser who might come to him to plaintiffs; and as a remuneration for their services plaintiffs were to receive all that they might sell the property for over and above \$1,000. Plaintiffs allege that they advertised the property, and that some two or three months after it was placed in their hands, defendant, without their knowledge or consent, sold the property for \$1,200, which they allege was worth on the market the sum of \$1,800, and they pray for judgment for \$800, being the amount over \$1,000, as agreed. Defendant answered by general demurrer and general denial, and specially answered that there was no consideration expressed or implied in the contract; that the property sold by him was not worth \$1,000; that while \$1,200 was the consideration set forth in the deed, yet in truth and in fact the land was exchanged for property not worth more than \$800, etc. A trial was had, and resulted in a verdict for defendant.

It is unnecessary for us to review the testimony, except as it may become necessary to elucidate the law of the case. The contract was proved as laid, and the consideration, being the bringing about of a sale, was clearly a valid one. Under the terms of the contract, plaintiffs for eight months had exclusive authority to sell the land, and the defendant could not deprive them of their rights under the contract by a sale of the land. Under the contract the plaintiffs had proceeded to advertise the land, and were doing what they could to sell the land, and had shown the land to the man who

afterwards bought from defendant, and were endeavoring to negotiate a sale with him. There being an express contract, to it we must look for the rights of the parties. As a general rule, where the contract is an entire one, the question of quantum meruit cannot arise, but the whole amount agreed on must be recovered or nothing. Ewell's Evans, Ag. p. 448. This is a case in which the authority conferred by the agency had not been executed. There was a time limited in which it was to be executed, and that time had not expired. "If the vendor voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of the sale as proposed to the broker, so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, in either case the broker will be entitled to his commission at the rate specified in his agreement with his principal." Whart. Ag. § 329; Stewart v. Mather, 32 Wis. 344. Under the terms of the contract proved up in this case the plaintiffs were entitled to what they might sell the land for above \$1,000, and defendant could not deprive them of this right during the eight months contemplated by the contract, and it was error in the court to instruct the jury that Powers did not deprive himself of the right of disposition of said property during the eight months, and that plaintiffs could not recover a quantum meruit for their services. The court also charged the jury that Powers had in the contract only "obligated himself to send any proposed purchaser that might come to him within eight months to the plaintiffs. That, after having complied with this agreement, if defendant did comply, and plaintiffs having failed to effect a sale with such person, Powers would have the right to sell to such person himself," etc. This was erroneous. Plaintiffs had the right, under the contract, to eight months in which to perfect a sale of the property in question, and defendant had no authority to resume control of the sale of his property in violation of the terms of his contract. The court gave no charge of its own, both of the charges given having been requested by the defendant. The three charges requested by the plaintiffs embody the law as enunciated in this opinion, and should have been given by the trial court. We hold in this case that the contract sued upon was not revocable at the pleasure of the defendant, and upon a breach of the contract by him as pleaded the plaintiffs would be entitled to recover any amount over and above \$1,000 which they prove they could have sold the land for but for the breach. The other errors are not likely to occur on another trial, and need not be noticed. For the errors indicated the cause is reversed and remanded.

ELMENDORF v. BEIRNE.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

VENDOR'S LIEN—FORECLOSURE—PURCHASER PENDENTS LITE.

1. Where a vendor of land reserves a lien, a transfer of the purchase-money notes carries with it the lien, and the transferee has the right to foreclose it, and have the land sold to satisfy his claim.

2. A subvendee of land subject, with a larger tract, to a vendor's lien, who has not been made a party to an action to foreclose the lien, is entitled, in a subsequent action to remedy the defect, to have the land remaining in the hands of the original vendee sold before his parcel is subjected to the payment of the debt; and it is error to render a money judgment against the subvendee for the difference between the value of the parcel still owned by the original vendee and the amount of the unpaid price, without ordering a sale of either parcel.

3. Where, pending suit to foreclose a vendor's lien, the plaintiff sells his interest in the land, the purchasers need not be made parties to the suit, as they will be bound by the judgment rendered.

Appeal from district court, Wilson county; George McCormick, Judge.

Action by Amella Elmendorf against Michael Beirne to foreclose a vendor's lien. From a judgment in defendant's favor, plaintiff appeals. Reversed.

John A. & N. O. Green and Wm. H. Burgess, for appellant. L. S. Lawhon, for appellee.

FLY, J. This was a suit by appellant to recover from appellee, in trespass to try title, 300 acres of land, a part of a 1,000-acre tract that had been sold by A. B. Frank to John H. Daine by deed retaining a vendor's lien to secure the payment of two promissory notes, each for the sum of \$1,375, payable in one and two years, with interest at 10 per cent. per annum, payable semiannually; notes to become due if there was default in payment of interest. The notes were purchased from Frank by appellant. There was a default by Daine in the payment of the notes and interest, and suit was instituted against Daine, judgment was obtained, the vendor's lien foreclosed on the 1,000 acres of land, and, the same being sold at sheriff's sale, appellant became the purchaser, at \$500. Prior to the institution of the suit by appellant against Daine, the latter had sold 300 acres off the 1,000 acres to Michael Beirne, the appellee, and he had gone into immediate possession, and made improvements on the same. Beirne was not made a party to the foreclosure proceedings against Daine. This suit was then brought against Beirne, appellee, the prayer of the amended petition being: "That the said deed from J. H. Daine to the defendant, Michael Beirne, may be canceled, held for naught, and of no force and effect, as far as this plaintiff's rights are concerned; that she recover of the defendant, Michael Beirne, the 300 acres of land in controversy,

and the possession of the same; that she recover her damages, and all costs in this behalf expended. But if, from any cause whatever, your honor should hold that any equities of defendant, Michael Beirne, have not been heretofore extinguished, then the plaintiff prays that the vendor's lien set out and retained in the deed from A. B. Frank to J. H. Daine, and held by your petitioner by reason of the transfer set out, be declared a valid and subsisting lien, from the date thereof, on the entire tract of land, of one thousand acres, heretofore described; that said vendor's lien on the whole of said land be foreclosed; that an order of sale issue out of your honor's court, directing the sheriff of Wilson county to sell said land after giving due notice as the law requires,—selling first the said seven hundred acres of land, and should said seven hundred acres not bring a sufficient amount to pay and satisfy the balance of the purchase money still due, all interest thereon accrued, attorneys' fees, and costs, then the sheriff aforesaid proceed to sell the remaining three hundred acres in controversy to satisfy whatever balance may still be due on said purchase money." The only errors assigned by appellant are that the verdict of the jury is not responsive to the charge, because it does not find what proportion of the debt the 300 acres was to bear in payment of plaintiff's debt; the court erred in the judgment rendered, the same not being supported by the charge, the verdict, or the facts; that the judgment is erroneous in not ordering the sale of the 700 acres first to satisfy the debt of plaintiff, and, if insufficient, then to have the 300 acres sold. It will be seen that no error is assigned, except as to the verdict, and the judgment on the verdict.

It has been definitely settled by an unbroken train of decisions of the supreme court of Texas that where the vendor retains in his deed a lien for the unpaid purchase money, so long as the purchase money remains unpaid, he has the superior title to the land against the vendee, or those in privity with him, and he has the option at any time before the debt is barred by limitation, upon default of its payment, to bring a suit for foreclosure of his lien, or one in trespass to try title for the recovery of the land itself. He has not parted with his title until the purchase money is paid. *Peters v. Clements*, 46 Tex. 114. After the debt is barred by limitation, the vendor has no choice as to what kind of suit he will bring, but is confined to his action for the land itself. This is well-settled law, and it is scarcely necessary for it to be reiterated. The transfer by the vendor of a note given for the purchase money of land does not carry with it the superior title of the vendor, except where the assignee receives from the vendor a transfer of his superior title, but only bears with it

the lien upon the land to secure the payment of the purchase money. *Hamblen v. Folts*, 70 Tex. 133, 7 S. W. Rep. 834. Until the purchase money is paid, the vendee, or those in privity with him, would hold only an equitable title to the land, and the recitals in the deed of the original vendee would be sufficient notice that the purchase money was unpaid, and that the land was bound for it. *Peters v. Clements*, 48 Tex. 115; *Jackson v. Elliott*, 49 Tex. 68; *Robertson v. Guerin*, 50 Tex. 317; *Porterfield v. Taylor*, 60 Tex. 265.

The transfer of the notes by A. B. Frank to appellant carried with it a lien on the whole of the land in controversy, and she had the right to foreclose her lien, and have the land sold to satisfy her claim. She did bring suit in the district court of Bexar county against Daine, and as to him got judgment, foreclosed her lien, and had the land sold, and bought it in. But, prior to the institution of her suit, Daine had sold 300 acres of the land to appellee, and notice of this fact had been given to appellant by the record of the deed from Daine to appellee in the county in which the land is situated. Appellee was not made a party to this suit against Daine, and of course his equities could not be adjudicated. Had he been a party to that suit, the proper judgment would have been a foreclosure of the lien on the 1,000 acres of land; that the 700 acres be sold first; and then, if anything still remained due on the debt, that the 300 acres sold to appellee be subjected to the payment of the balance due. This, however was not done. Michael Belrne had gone into possession of the 300 acres sold to him by Daine, and had made valuable improvements on it, and had equities that should be protected. Authorities above cited. Appellee had the equity of redemption of the land, and also had a right to demand that the 700 acres be first sold before his land would be subjected to the payment of the debt. This was not done in the suit against Daine, and the suit brought in Wilson county was instituted to remedy the defect in the first suit.

Upon the trial of the cause, the jury returned the following verdict: "We, the jury, find for the defendant. We find the value of the 300 acres to be \$1,800 at present, and of the 700 acres to be \$4,200 at present. We find the interest on the two notes, \$2,750, to amount to \$1,726.39, at 10 per cent. interest to date." Upon this verdict the court below rendered judgment quieting defendant in his title, and gave judgment in favor of plaintiff for \$276.39, being the difference between the value of the 700 acres of land and the total amount of the debt. We are of the opinion that this judgment is erroneous. The value of the respective tracts of land was not in issue, and could cut no figure in the decision of the case. All that the defendant had a

right to demand, as hereinbefore indicated, was that the 700 acres of land be first sold, and the proceeds applied to the liquidation of the debt for purchase money, and the 300 acres he had bought from Daine be subjected to sale only for any sum remaining unpaid after the sale of the 700 acres. The defendant pleads that, prior to the institution of the suit, plaintiff had sold the 1,000 acres of land to the Coughrans; but, while the proof shows that the plaintiff had sold the land, yet there is no time shown as to when the sale took place, and the legitimate inference from the testimony of Coughran would be that it was sold during the pendency of the suit. If the land was sold before the suit was instituted, then there might be some question as to the right of plaintiff to recover without at least having the Coughrans made parties to the suit; but if the land was purchased by the Coughrans pendente lite, as it appears from the record, the fact of the sale would cut no figure in this suit, as they would be bound by any judgment rendered. *Dwyer v. Ripetoe*, 72 Tex. 520, 10 S. W. Rep. 668. For the errors indicated in the judgment of the lower court, the cause is reversed and remanded.

SOUTHERN PAC. R. CO. et al. v. ROYAL.
(Court of Civil Appeals of Texas. Sept. 27, 1893.)

DEPOSITION—MOTION TO SUPPRESS—APPEAL—RECORD.

1. Where neither the caption nor certificate of a deposition contains the title of the cause, a reference in the caption to the "annexed commission" is not sufficient to identify the case in which the deposition was taken.

2. Where a motion to suppress a deposition for formal defects is made, and notice thereof given, before trial commences, the court may act on it either before or after trial begins.

3. A recital in a bill of exceptions that objection to the introduction of a deposition in evidence was made because "neither the caption nor certificate disclose in what case it was taken," and that "written notice of the objection was served on the adverse counsel before trial," sufficiently shows the nature of the objection made, and the service of written notice thereof on the adverse counsel before trial.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by S. H. Royal against the Southern Pacific Railroad Company and another. From a judgment in plaintiff's favor, defendants appeal. Reversed.

John Sehorn, for appellants. E. R. Guenther and McLeary & Fleming, for appellee.

FLY, J. There is but one assignment of error in this case, and that as to the action of the trial court in admitting in evidence the depositions of the appellee, which were taken before a notary public in Virginia. Neither the caption nor the certificate of the notary disclose in what case the

depositions were taken. The caption is as follows: "State of Virginia, county of Nottoway. I, Joseph E. Leath, a notary public in and for the county of Nottoway, and state of Virginia, in obedience to the annexed commission, caused the witness Sam'l H. Royal to appear before me, and the said witness being by me first duly sworn," etc. In the certificate of the officer there is no reference whatever to the case in which the depositions were taken. The commission is not in the record, and, even if it were, it has been held that the reference to the "annexed commission" would not be sufficient to identify the case in which the depositions were taken, (*Slaughter v. Rivenbark*, 35 Tex. 68,) and we do not feel disposed to relax the rule on this subject.

It is contended by counsel for appellee, in their brief, that, after the announcement of "ready for trial" by both parties, any objection going to the form of the depositions, or the manner of taking, would come too late, even though the objections were in writing, and the notice given to the opposite party before the announcement of "ready for trial." This question has been directly settled by our supreme court adversely to the positions taken by appellee. The law requires that the motion to suppress must be made, and notice of it given to the adverse party, before the trial commences. "When the notice is given before the trial commences, the court will act on it either before the trial commences, or after. The law does not prescribe that the motion shall be acted on before the trial begins, but that notice of it be given before." *Coleman v. Colgate*, 69 Tex. 89, 6 S. W. Rep. 553.

Again, the appellee contends that the "objections made by the appellants' attorney do not appear in writing, as required by law, and neither the objections nor the legal notice appear anywhere in the transcript." We find, however, in the caption of the bill of exceptions taken to the introduction of the depositions, that the objection was made "for the reason that it does not appear from the caption or the certificate of the officer taking said deposition that said deposition was taken in this cause, or in what case the same was taken, written notice of which said objection to said deposition was served on plaintiff's counsel before the trial of this cause was begun." The bill of exceptions is signed and approved by the judge without any modification of the facts set forth in the caption, and there is nothing in the record to show that the facts are not as stated. We hold that nothing more is required to show the truth of the assertion, in the caption of bill of exceptions, that plaintiff was served with written notice of the objections to the depositions before the trial, and those objections are clearly set forth in the bill. While the objection to the deposition was a technical one, yet the proper practice in

the courts can only be enforced by a compliance with well-established rules, and we are of the opinion that the trial court erred in admitting in evidence the deposition of S. H. Royal.

We have carefully examined the testimony of the other witnesses in order to ascertain if a judgment could be sustained against the appellants on the same, and we are of the opinion that the judgment of the lower court cannot be upheld by the remaining depositions. For the error in admitting in evidence the depositions of S. H. Royal, the cause is reversed and remanded.

BONNER et al. v. FRANKLIN CO-OP. ASS'N.

(Court of Civil Appeals of Texas. Sept. 27, 1896.)

RAILROAD RECEIVER—PENALTY FOR OVERCHARGES.

Receivers operating a railroad under judicial appointment are not within Sayles' Civil St. art. 4258b, § 7, which prescribes a penalty for unjust discrimination in freight rates by "railroad companies." *Turner v. Cross*, 18 S. W. Rep. 578, 83 Tex. 218, followed. *Clark v. Dyer*, 16 S. W. Rep. 1061, 81 Tex. 339, distinguished.

Appeal from Robertson county court; O. D. Cannon, Judge.

Action by the Franklin Co-operative Association (Patrons of Husbandry) against T. R. Bonner and J. M. Eddy, receivers of the International & Great Northern Railroad Company, for the penalty prescribed for unjust discrimination in freight rates. From a judgment in plaintiff's favor, defendants appeal. Reversed.

Simmon & Crawford, for appellants. J. D. Gann and T. N. Graham, for appellee.

KEY, J. It is stated in the briefs of both appellants and appellee that this is an action to recover of Bonner and Eddy, as receivers of the International & Great Northern Railroad Company, the \$500 penalty prescribed for unjust discrimination in freight rates by article 4258b, § 7, Sayles' Civil St. Judgment for the amount sued for was rendered against appellants in the court below. The penalty prescribed by the statute referred to is denounced against, and limited to, "railroad companies." The doctrine announced in the case of *Turner v. Cross*, 83 Tex. 218, 18 S. W. Rep. 578, is decisive of this case; and, following that case, it must be held that receivers operating a railroad under judicial appointment are not "railroad companies," within the purview of the statute under which it is sought to maintain this action. Furthermore, this being an action to recover a statutory penalty, a stricter rule of construction applies, and, unless the language of the statute is broad enough to include railroad receivers, they are not liable to its penalties. The statute cannot be extended by implication. *Schloss v. Railway Co.*, 85 Tex.

601, 22 S. W. Rep. 1014. Appellee may have a cause of action under the doctrine announced in *Railway Co. v. Rust*, 58 Tex. 98, but it is not entitled to recover the penalty prescribed by the statute under which this suit was brought. This case is distinguishable from *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061. In that case the receivers were appointed by a federal court, and a federal statute requires such receivers to operate the railroad according to the requirements of the state in which the property may be situated; and, besides, that was a damage suit, and not an action to recover a penalty. The judgment of the court below is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. PITTMAN et al.
(Court of Civil Appeals of Texas. Sept. 27, 1893.)

**PAROL EVIDENCE—RATIFICATION OF AGENT'S ACTS
—ESTOPPEL.**

1. In an action to cancel a note conditioned that the payee shall construct "a railroad" to a town by a specified date, parol evidence is admissible to show that the payee, as part of the consideration, had agreed to build its main road into the town, and that it had constructed only a branch connecting with the main road four miles away, since such evidence is not inconsistent with the written instrument, but merely explains what is incomplete and uncertain.

2. Representations and declarations made by the director of a railroad company, while acting in the performance of his duty to procure a bonus from the citizens of a town, are ratified by the acceptance of the bonus by the company, though he may have exceeded his authority in making the declarations and representations.

3. The makers of a note conditioned that the payee shall construct a railroad into a town are not estopped from canceling the same because they did not sue immediately after knowledge that the payee would not comply with its agreement, or because they suffered the payee to build the road several miles from the town without protest.

Appeal from Coleman county court; H. A. Orr, Judge.

Action by B. H. Pittman and others against the Gulf, Colorado & Santa Fe Railroad Company to cancel a promissory note. From a judgment in plaintiffs' favor, defendant appeals. Affirmed.

J. W. Terry, for appellant. Sims & Snodgrass, for appellees.

ORR, J. This is a suit by B. H. Pittman, J. F. Gordon, and C. A. Childs to rescind and cancel their subscription note executed and delivered to the appellant railway company. The note is as follows, viz: "\$250.00. Coleman, Texas, August 21st, 1885. In consideration that the Gulf, Colorado & Santa Fe Railway Company shall agree to build a railroad to the town of Coleman, in Coleman county, Texas, we, as one of the inducements for said company to build said road, jointly and severally prom-

ise and bind ourselves to pay, on demand, to the order of the Gulf, Colorado & Santa Fe Railway Company, at its office in Galveston, Texas, on or before the first day of September, 1886, the sum of two hundred and fifty dollars. In witness whereof, we hereunto set our hands this the 21st day of August, 1885. The condition of this obligation is such that if the Gulf, Colorado & Santa Fe Railway Company does not build, or cause to be built, a railroad to the town of Coleman by the first day of September, 1886, then this obligation to become void; otherwise, to remain in full force or effect. [Signed] B. H. Pittman. J. F. Gordon. C. A. Childs." The court below overruled a general demurrer and a special exception to the petition. The special exception is that the petition shows that, after the alleged fraudulent representations are claimed to have been made by the company, the agreement between the parties was reduced to writing, from which it appears that the plaintiffs have no cause of action. Judgment was rendered for plaintiffs. Defendant has appealed, and assigns as error the ruling on the demurrer and special exception.

We think the petition states a good cause of action. It shows that the note sought to be canceled is only a part of an entire and more comprehensive contract, in which there were certain other undertakings on the part of the company and of citizens of the town of Coleman, the faithful performance of which on the part of the company constituted the consideration for performance on the part of the citizens, and that the entire contract on the part of the company was necessarily the consideration of the note, which is of itself only a part of the undertakings of the citizens of the town. The citizens were to raise, and secure by notes acceptable to the company, a bonus of \$20,000, of which the note in suit is a part. They were to secure right of way for the company through the county and the town, depot grounds, sidings in the town, etc., all free to the company; and the company was to abandon its proposed line, four miles south of the town, and build its road to Coleman, and on west to an objective point on the Colorado river, which lines were already surveyed. The citizens, including plaintiffs, performed and tendered performance of their part of the contract. Defendant built a tap road out from its main line to Coleman, run mixed trains thereto, furnishing imperfect and incomplete accommodations, and built its main road on through the county four miles south of Coleman, on the line it had agreed to abandon, to the injury of contracting citizens, their property and business in the town. The note is but a part of, and is dependent upon, the whole contract. The undertakings of the company, not stated in the instrument, are alleged to have been fraudulently made to induce the citizens and plaintiffs to raise the subsidy, and to make

the note in suit, which undertakings were not performed. These undertakings on the part of the company are not inconsistent with the written instrument, would not change its terms, but would serve to explain what is left incomplete and uncertain. It would not be contended that a strict compliance with the letter of the written part of the contract would be a compliance on the part of the company, and entitle it to the benefit stated. A strict compliance would be to build a railroad to Coleman by the 1st day of September, 1886, whether cars were ever to be run on the road or not. Does "a railroad" mean any railroad from any point, or does it mean, as the surroundings will show, defendant's road,—its main road from Galveston,—fully equipped and in operation to Coleman by the time mentioned? Proof of the entire contract with the citizens of the town, as alleged, would answer these queries not inconsistently with the written terms; but, in explanation thereof, when read in the light of surrounding circumstances, the real undertakings, indefinitely and partially expressed in the writing, become apparent, and it is seen that the company has not complied with its contract, and is not in a condition to ask payment of the note, without defrauding the plaintiffs. The petition stated a good cause of action. *Railway Co. v. Jones*, 82 Tex. 161, 17 S. W. Rep. 534; *Thomas v. Hammond*, 47 Tex. 52; 1 Greenl. Ev. 284, 285; 2 Willson, Civil Cas. §§ 326-531; 2 Pars. Cont. p. 430; *Miller v. Railway Co.*, 65 Tex. 659-664. The instruction to the jury, requested by defendant, to the effect that defendant had complied with its contract, and directing a verdict for it, was not the law applicable to the case, and it was not error to refuse it. Nor was it error to refuse a requested charge to the effect that the jury should disregard alleged false representations made by defendant before the written contract sued on was executed. If the company made false representations that it would build the main road to and through the town of Coleman, as alleged and proved, and not on the line running four miles south of the town, as an inducement to the contract as made by the citizens of Coleman and plaintiffs, such facts would be a proper consideration for the jury, as we have before shown, in determining whether defendant could claim payment of the note. Such representations, as we have seen, were a part of the entire contract, not inconsistent with the written part of it. What has been said disposes of the assignment that it was error to admit the proof sustaining the allegations of the petition.

It was not error to refuse the charge asked by the defendant to the effect that it would not be bound by representations of Director Gresham unless it was first shown that he was authorized by defendant to make such representations. It is true that the

mere fact that he was a director would not authorize him to bind the company by contracts and representations, but he was authorized to represent the company, and make the contract to secure the bonus for the company. His representations and declarations in procuring the same were part of the *res gestae*. The company could not ask an enforcement of the contract without accepting its obligations. An agent may make fraudulent representations for his principal, and secure a contract based upon them, and in such case, ordinarily, the principal will be bound, if he accept the benefits of the contract. If he accept the contract, he must accept the obligations it imposes upon him. *Henderson v. Railroad Co.*, 17 Tex. 560 et seq. It is not correct, as insisted by the appellant, to say that authority of the principal must first be shown, to make the representations, in order to admit false representations of the agent, made in and about his employment. If he be authorized to act in the matter,—to consummate a trade,—his acts, conduct, and representations within the scope of his employment are the acts and declarations of his principal; and when such representations of the principal, in parol, would be admissible, those of the agent, in the scope of his employment, are also admissible. "The representations of the agent, acting within the scope of his authority and employment, are treated as the representations of the principal himself, and are binding upon him, whether he knew them or not. And though he has exceeded his authority in making the contract, yet, as the company, by accepting a conveyance, taking the benefit of the contract, have ratified and adopted his acts, and made them their own, they are liable in like manner as if they had personally done the acts." The above quotation is the language of Justice Wheeler in *Henderson v. Railroad Co.*, *supra*, and presents, as we understand it, the law in cases where an agent's acts and representations are *res gestae* in the business about which he is employed. The case of *Railroad Co. v. Garrett*, 52 Tex. 137, is not similar to the one at bar, on the question before us, as in that case it was not shown that persons making promises for the company were in the performance of any acts authorized by the company, so as to make them a part of the *res gestae*. Of course, declarations and promises of strangers, or directors not in the performance of their functions as such, could not bind the company, but such was not the relation of Gresham to the transaction under consideration. He was acting for the company in an act authorized by it and accepted by it. He negotiated the bonus for the company. His declarations and representations while so doing were a part of the *res gestae*. The charge of the court is in agreement with our views of the law of the case, as above expressed, and therefore we cannot sustain the assignments of error upon them.

We do not think plaintiffs are estopped from seeking to vacate their obligation upon the ground that they did not sue immediately after knowledge that defendant would not comply with its contract, or upon the ground that it suffered defendant to build its road on from Santa Anna westward without protest. We do not see that the principle of estoppel applies to the case. Defendant was constructing its own road, not for the benefit of plaintiffs, but in continued violation of the contract, (if plaintiffs' case is made out,) in disregard of the rights of plaintiffs thereunder. The contract was broken. It was annulled for the benefit of defendant, and plaintiffs were discharged of their obligation, which could be set up in defense of its enforcement, or in seeking to vacate it, unless their delay misled the defendant, to its injury, or to the advantage of plaintiffs. The contract and its obligations were at an end when defendant abandoned it, without fault on the part of plaintiffs. We do not think the circumstances justify any shorter period as a bar than is usual in equitable actions.

Appellant asks a reversal upon the ground that plaintiffs obtained an extension of the time of payment upon application to defendant, and are therefore estopped from denying the validity of the note. It is unnecessary to discuss the merits of the question raised by this assignment, because, upon objection of plaintiffs, the petition asking delay was excluded by the court from the jury upon the issue of ratification set up by defendant, and was only permitted to be read to and considered by the jury upon the question as to whether the note was procured by fraudulent representations, and for no other purpose. The question raised by the assignment is, then, not before us. We find no error in the judgment of the court below, and it is affirmed.

GULF, C. & S. F. RY. CO. v. GILBERT.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

CARRIERS—DELAY IN TRANSPORTATION—SPECIAL DAMAGES.

1. In order to charge a carrier with such special damages for delay in transportation as the rental value of machinery intended for immediate use, special notice of the intention must be given at the time of shipment, and not afterwards. 22 S. W. Rep. 760, reversed.

2. The ordinary measure of damages for delay in transporting goods is the depreciation suffered; and, to charge the carrier with the rental value of the goods for the time of the delay, these damages must be specially pleaded and proven. 22 S. W. Rep. 760, reversed.

On rehearing.

FISHER, C. J. A re-examination of this case, on motion for rehearing, leads to the conclusion that the judgment heretofore ren-

dered by this court, affirming the judgment of the court below, should be set aside, and the judgment of the lower court reversed, and the cause remanded. The gist of the plaintiff's action against the appellant was for damages in the nature of rents, or the value of the use of certain gin machinery that was delayed en route in shipment by the appellant and its alleged partnership carrier. The measure of damages submitted to the jury by the charge of the court was the reasonable rental value of the machine during the time of the delay in its delivery occurring after the time when it should have been delivered. It is urged that this charge is erroneous, for the reason that it is not the measure of damages made by the pleadings and the evidence. The amended petition, upon which the case went to trial, asks for a recovery of the value of the use or rental value of the machine during the time of the delay, but states no facts showing that the appellee is entitled to such damages. It appears from the facts alleged, as well as those proven, that the machine was purchased and shipped by Hurlbut & Semple, merchants, who were dealing in such machinery, and that the carrier received the machine for shipment, consigned to them at Brownwood, Tex. In shipments of this character to merchants, of the class of goods in which they deal, the ordinary measure of damages resulting from delay in the shipment or delivery of the article shipped is the difference between the value of the property at the time it did arrive and the time when it should have arrived. Any sum sought to be recovered beyond this amount is necessarily special damages, and the pleadings must allege the facts that entitle the plaintiff to so recover such damages, and these allegations must be proven, in order to warrant a recovery by the plaintiff. It appears from the evidence that the machinery was purchased by Hurlbut & Semple for the appellee, Gilbert, to be used by him in ginning cotton, and the rental value of such machinery during the period of the delay is also shown. But do the pleadings aver, and does the evidence show, that the appellant, or its alleged copartnership carrier, at the time the contract of shipment was entered into, knew of the purposes for which said machine was to be used, or had knowledge of facts sufficient to put them upon contemplation of the intended uses and purposes to which the machine was to be devoted? There is no allegation to this effect, beyond that asking a recovery for rents. But, if the facts in this respect had been fully alleged, the evidence upon this issue falls far short of making a case showing that such damages or rents or such intended use of the machine were within the contemplation of the carrier and the shipper at the time the contract of shipment was entered into. The only evidence bearing upon this question is that Hurlbut, one of the consignees, several days after the contract of

shipment was entered into, and presumably after the goods were en route, notified the appellant of the purpose for which said machine was intended, and requested it to expedite the shipment. There is no pretense that the carrier knew of such purpose at the time of making the contract of shipment. The special damages for the value of the use or rent of the machine sought to be recovered in this case can only be allowed when they ensue as a result of the breach of the contract entered into at the time of the shipment. These damages are either recoverable only as the result of an express contract with the carrier that it should be so bound, or from an implied liability resting upon the carrier by reason of the facts and circumstances surrounding the parties at the time the contract of shipment was made. There is no pretense in this case that the carrier is liable for the value of rent of the machine by reason of an express contract to that effect. If the facts and circumstances put the carrier upon notice, or conveyed to it knowledge of the purpose and intended use of the machine, then it would become liable for the damages that may result to the shipper as a consequence of the delay; this being upon the theory that, the special circumstances and purpose of the shipment being known to the carrier, it must use such reasonable diligence in the performance of its contract of carriage as would place the shipper in a position to reap the profits or enjoy the use that the parties contemplated and considered, at the time of shipment, would result to him if the goods had been delivered within a reasonable time.

In order to make the carrier liable for the damages that result by reason of the special circumstances known to it, those circumstances and the knowledge resulting therefrom, must be made known to the carrier at the time that the contract of shipment is entered into; this, upon the principle that the carrier, by reason of the additional risk and the increased liability, may enter into suitable stipulations looking to its protection. It is not enough to give notice to the carrier after the contract is made, and the shipment has started in its transportation, because the liability of the carrier cannot be increased by the subsequent knowledge of facts that did not exist in the contemplation of the parties at the time the engagement was entered into. It then became an effort upon the part of one of the contracting parties to inject a stipulation into the contract after it was entered into, that increases the liability of the other, that was not mutually considered when the engagement was made. The information of the intended purpose of the shipment conveyed by Hurlbut subsequent to the engagement was not sufficient to increase the liability of the appellant to the loss of the use or the value of the rent of the machine. The judgment of the court below is reversed, and the cause remanded.

GALVESTON, H. & S. A. RY. CO. v.
IVEY.¹

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

LIVE-STOCK SHIPMENTS—FEEDING AND WATERING
—CONNECTING LINES.

A railroad company which transfers a car of live stock to a connecting line, without affording any opportunity for feeding or watering the stock, though requested by the shipper, is liable for any damage to the stock by reason of failure to do so.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Ed. Ivey against the Galveston, Harrisburg & San Antonio Railway Company for damages to a shipment of live stock. Judgment for plaintiff. Defendant appeals. Affirmed.

Upson & Bergstrom, for appellant. Barnard & Green, for appellee.

Conclusions of Fact.

JAMES, C. J. (1) Plaintiff, Ed. Ivey, shipped a car load of 26 mares and 6 colts over defendant's road from San Antonio to New Orleans. Same arrived in Houston in good condition, but required to be unloaded and watered and fed at that place before proceeding further, having been fed and watered before leaving San Antonio. (2) That Ivey, who went with the shipment, several hours before reaching Houston told the conductor that he wanted to feed and water the stock at the pens in Houston, and had him telegraph that fact ahead, 4½ hours before reaching Houston. Upon arrival at Houston, Ivey asked the yardman if he would have time to feed and water the stock, and was informed that he had not, as the other train was getting ready to pull out. Then he went to the defendant's freight agent, and told him that he wanted the car stopped there for the purpose of feeding and watering the stock, and was told that it would not be done, as the other train had been held, and was waiting to pull out. Then he went to the man who had charge of defendant's stockyards, whom he knew to be the company's agent, and told him the stock must be fed there, because to carry it to Orange without feed or water would ruin it, and was informed that the stock would reach Orange in time, and had to go on that train. Ivey protested, but they would not stop the stock, and sent him and the stock towards Orange, having stopped in Houston about a half hour, and arriving in Orange about 10:45 P. M., November 30th. The car arrived in Houston about 22 hours after loading at San Antonio. That after leaving Houston it required about 10 hours to reach Orange; and that when stock is kept in the cars 26 or 30 hours on the first run it injures them more than if carried that long or longer on the second or third day's run, as they get more used to it. If, on the first run, they are confined

¹ Rehearing denied.

for such length of time without food or water, it takes them months to get over it. That when this shipment reached Orange the stock were unloaded, to be fed and watered. They were very much drawn, seemed to be almost crazy for the want of water and food, and were with great difficulty gotten out of the car, and when unloaded would scarcely eat anything. In a few hours they were loaded again, and carried to New Orleans, where they arrived about midnight, December 1st. The stock was then in a bad and emaciated condition, and, although Ivey tried, he could not sell them for more than about \$22 per head, while, if they had reached there in the condition they otherwise would have done, they would have sold for from \$35 to \$50 per head. He then took the stock on to Montgomery, where, after herding it for some time, he realized \$22 per head on it. That the damage to the stock was caused by their being carried from San Antonio to Orange in one run without food or water. (3) That the railway company, in the contract of shipment, provided that it should not be held liable for anything beyond its own lines except to protect the through rate of freight; and in said contract the railway company was released from liability of every kind after said live stock had left its lines. And it appeared that defendant's line terminated at Houston, Tex., where the car was transferred to a connecting line. (4) It was also in evidence that a month previous plaintiff had made a similar shipment of stock over the same route, and on its arrival at Houston it was unloaded and fed and watered, and reloaded and carried on to Orange. (5) The cause was tried without a jury, and judgment rendered for plaintiff for \$260, with 8 per cent. interest from date of judgment, and for costs. (6) There is but one assignment of error, to the effect that the evidence showed the damage to have occurred after the stock had been delivered to the connecting carrier in good order and condition.

Conclusions of Law.

1. This court concludes from the foregoing conclusions of fact that defendant was liable for any act of negligence or misconduct as a common carrier committed on its own line, although the resulting injury done may not appear until after delivery to the connecting line.

2. That it was the duty of the carrier to afford the plaintiff the means of properly feeding and watering the stock in Houston, when requested to do so by plaintiff, and the fact that they went on from there without being fed and watered was due to the act of defendant, and in this defendant was derelict in his obligation as a common carrier, and was liable to plaintiff for the damage that resulted therefrom. *Hutch. Carr.* §§ 322-324; *Railway Co. v. Montgomery*, (Tex. App.) 16 S. W. Rep. 178. Wherefore the judgment is affirmed.

STILLSON v. STEVENS et al.
(Court of Civil Appeals of Texas. Oct. 4, 1893.)

ASSIGNMENT.

One R., who was indebted to plaintiff, executed to him the following instrument: "I have in trust for [plaintiff] \$325, which money I have left at Messrs. C. & B." At that time, C. & B. owed R. \$332. *Held*, that the instrument operated as an equitable assignment to the extent of \$325 of R.'s claim against C. & B., though not accepted by them, and plaintiff was not affected by a garnishee process afterwards served by a judgment creditor of R.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by W. C. Stillson against J. J. Stevens and others for money had and received. There was a judgment rendered in favor of defendants, and plaintiff appeals. Reversed.

Simpson & James, for appellant.

NEILL, J. The appellant sued J. J. Stevens, as assignee of Colton & Bolton, in the district court of Bexar county, for \$332, alleging that on the 6th of April, 1887, he filed with said assignee his claim in writing, duly verified, for said sum of money; that it was for money deposited with Colton & Bolton prior to their assignment, by J. G. Rosenfield, for appellant; that the money so left on deposit belonged to him, and was his, at the time of filing his suit; that the assignee had paid off all the creditors of his assignors, except him; that the assignee refused to pay his claim, alleging as a reason therefor that the firm of Mayer, Kahn & Freiberg claimed also to have an assignment of some kind from J. G. Rosenfield for said sum of money, and, until it was judicially determined who was entitled to the money, Stevens would not pay him. The appellee Stevens answered that he was the assignee, as charged by appellant, and that all the claims against the assignors, except the one sued on, had been settled by him; that he had sufficient funds on hand to pay it, and was anxious to do so, but that the money was deposited with Colton & Bolton by J. G. Rosenfield, and that, after Stillson's claim was received and filed by him as a claim against his assignors, he was served with a writ of garnishment issued out of the district court of Galveston county in a suit brought by Mayer, Kahn & Freiberg against J. G. Rosenfield, by which writ it was sought to subject the money so deposited to a debt due them by said Rosenfield, and that a judgment had been entered in the said cause in Galveston county against him, as garnishee, so far as Rosenfield was concerned, but saving the rights of Stillson to said claim, if any he may have; that said judgment did not affect Stillson, as he was not a party to it. Stevens then avers his readiness and willingness to pay the money to appellant, if he is entitled to it, but prays

the court to protect him from having to pay it twice, in any event. Mayer, Kahn & Freiberg answered that on the 10th day of December, 1886, they obtained a judgment in the district court of Galveston county against J. G. Rosenfield for \$579.35; that on the 28th day of March, 1887, they caused a writ of garnishment to be issued upon said judgment, and had it served on Bolton on the 4th day of April, 1887, and upon Colton and John J. Stevens, as assignee of Colton & Bolton, on the 5th of April, 1887; that thereafter the district court of Galveston county rendered judgment against Stevens, assignee, as garnishee, in their favor, commanding him to pay them the pro rata due Rosenfield under the assignment; that, after the service of the writs of garnishment, Stillson filed a pretended transfer of said sum of money; that he is not the owner of the claim Rosenfield had against Colton & Bolton; that Stillson and Rosenfield had combined to defeat them in the collection of the debt Rosenfield owed Colton & Bolton; that Stillson had not notified said assignee of his willingness to accept his share of the assets of Colton & Bolton for distribution among their creditors under their assignment, or prove up his right in the manner required by law. They then deny all the allegations in plaintiff's petition, and pray that the assignee be directed to pay them the money in his hands. The case was tried by the court without a jury, and judgment rendered in favor of John J. Stevens and Mayer, Kahn & Freiberg against the appellant for costs, and in favor of Mayer, Kahn & Freiberg against Stevens, as assignee, for \$332.61. No conclusions of law or fact appear in the record, and we are therefore not informed upon what the court based its judgment.

Conclusions of Facts.

We find from the testimony that the following facts were established: (1) On March 5, 1887, the firm of Colton & Bolton assigned to John J. Stevens. (2) At the time of the assignment, Colton & Bolton were indebted to J. G. Rosenfield in the sum of \$332. (3) Prior to the assignment, Rosenfield obtained from W. C. Stillson, the appellant, the sum of \$325. (4) On February 17, 1887, Rosenfield executed to Stillson the following instrument: "\$325.00. I have in trust for W. C. Stillson three hundred and twenty-five dollars, which money I have left at Messrs. Colton & Bolton. J. G. Rosenfield. San Antonio, 2-17, 1887." Neither Stevens nor Colton & Bolton had notice of the instrument until after the garnishment was served on them. (5) Mayer, Kahn & Freiberg, having a judgment in the district court of Galveston county against Rosenfield, on the 4th of April, 1887, had a writ of garnishment which had been issued on said judgment served on Colton & Bolton, and served on Stevens, as their assignee, on

the 5th of April, 1887. (6) On April 6, 1887, Stillson filed a claim with said assignee in terms as follows: "San Antonio, Texas, March 22, 1887. Messrs. Colton & Bolton: To W. C. Stillson: To cash left with you by J. G. Rosenfield, in trust, \$332.00. W. C. Stillson,"—which claim was verified by Stillson. (7) J. J. Stevens having answered to the garnishment that the \$332 was claimed by Stillson, judgment was rendered against him in the district court of Galveston county, Tex., for said amount, without prejudice to the rights of Stillson.

Conclusions of Law.

1. The instrument of writing dated February 17, 1887, operated as an equitable assignment of the debt due from Colton & Bolton, to the extent of \$325, although not accepted by Colton & Bolton nor by Stevens; and Stillson, upon its execution, became the creditor of Colton & Bolton to that amount. 1 Amer. & Eng. Enc. Law, 834, and note 2; Bank v. McLoon, 73 Me. 498; James v. City of Newton, (Mass.) 8 N. E. Rep. 122.

2. The assignment secured the money assigned against the garnishment for the debt of the assignor, though no notice had been given prior to the garnishment to the person holding the property, it being given in time to enable him to bring it to the attention of the court before judgment was rendered against him as garnishee. Drake, Attachm. § 527; 2 Pom. Eq. Jur. § 697; Greentree v. Rosenstock, 61 N. Y. 583; 8 Amer. & Eng. Enc. Law, 1180. Applying this principle to the facts in this case, judgment should have been rendered in the district court in favor of appellant, Stillson, against John J. Stevens, as assignee of Colton & Bolton, for \$325, and in favor of Mayer, Kahn & Freiberg for \$7, against said assignee. The judgment of the district court is reversed, and is here rendered as just stated it should have been in the district court, and in favor of appellant for all costs in the court below, as well as in this court.

JAMES, C. J., did not sit in this case.

INTERNATIONAL & G. N. R. CO. v. LEWIS et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)
CARRIERS — INJURIES TO CATTLE IN TRANSIT — INTEREST ON DAMAGES.

1. In an action against a railroad company for damages to cattle in transit on defendant's road by delaying them at certain places, and not unloading and feeding and watering them properly, evidence as to the number of cars on defendant's tracks at and before the time plaintiff's cattle were in transit, for the purpose of showing an unprecedented rush of business, is irrelevant, as the action was not brought on account of anything occurring along the line.

2. The fact that defendant had a great rush of business at the points where the delay occurred will not relieve defendant of liability, unless it also shows that it exhausted its resources for providing for the cattle.

3. Interest may be allowed on the amount of damages sustained, though it is not asked for in the pleadings.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Dan Lewis and Nat Lewis against the International & Great Northern Railroad Company for damages to cattle shipped by plaintiffs on defendant's road. There was a judgment in favor of plaintiffs, and defendant appeals. Affirmed.

Barnard & Green, for appellant. Simpson & James, for appellees.

FLY, J. Appellees sued appellant for damages to cattle shipped over its line from Pearsall, and billed to Chicago, by delaying them at Taylor, San Antonio, and other places, and not unloading and feeding and watering them properly. The damages were laid at \$3,174, and there was also prayer for \$500 penalty for failure to provide water and food for the cattle. Defendant pleaded general denial, and that two written contracts had been signed by the parties that, in consideration of a reduced rate of freight, appellees had agreed, at their own risk and expense, to feed and water the cattle; that the penalty of \$500 could not be recovered, because, it being an interstate shipment, the federal courts had jurisdiction; that plaintiff Nat Lewis, in said contracts, had agreed, in case of total loss of any of the cattle, to take their cash value at place of shipment in full payment for the same; that it was agreed that defendant's liability should cease at the end of its line; and that the damage, if any, did not occur on defendant's line. There was a verdict for \$1,733, but plaintiffs remitted it down to \$1,300, for which amount, with interest at 8 per cent. per annum from May 18, 1888, time of sale of cattle in Chicago, judgment was rendered.

The third assignment of error relied on by appellant, the first and second having been abandoned, is to the exclusion of the testimony of witness Hume as to the number of cars there were on the railroad track between San Antonio and Taylor on the day of shipment, and on each day, prior to that date, for 30 days, for the purpose of showing an unprecedented rush of business. This testimony was clearly irrelevant, the ground of action not being on account of anything occurring along the line, but in the negligence of defendant in delaying the cattle, and not taking proper care of them while delayed. The testimony was inadmissible, and was properly excluded. The defense to the action seems to have proceeded on the ground that defendant was not liable because it had a great rush of business at Taylor, where it was shown that the damage occurred, so that defendant could not take proper care of the cattle while detained. There is no effort made by defendant to show that it exhausted its resources in getting a proper place for the cattle, even if its own stock

pens were crowded; and there is no attempt to justify the keeping of these cattle confined for 25 or 30 hours, without water and food, in the cars. The railroad company, by reason of the rush of business, was not relieved of exercising proper care and diligence in seeing to the needs of animals on its train. It could have released the cattle from the cars, even if it had been compelled to hire persons to herd them, or have rented a pasture or pens in which to keep them. It should at least have shown that it made some effort to take care of the cattle. Hutch. Carr. § 335. The cattle were placed in the hands of the common carrier to be transported to their destination, and it was responsible for their safe delivery, and, if the rush of business was such that the cattle were unavoidably detained, it was certainly its duty to properly care for them during the detention. 2 Harris, Dam. Corp. p. 919, § 800.

The declarations of the train dispatcher and brakeman, employees of defendant, at San Antonio, as to the cause of the delay at that place, were properly admitted. It was not a mere narration of a past event, but was about something then transpiring, and does not come within the prohibition laid down in the cases cited by appellant. Railway Co. v. Ivy, 71 Tex. 417, 9 S. W. Rep. 346. We can see no error in admitting the deposition of witnesses named in the fifth assignment of error. The plaintiffs were entitled to recover for the damages which they showed they sustained, with interest at 8 per cent. from the time that the cattle were sold in Chicago, and it was not error to allow the interest, although not prayed for in the petition. This point is directly settled in the case of Railway Co. v. Greathouse, 82 Tex. 104, 17 S. W. Rep. 834. We have noticed all the errors assigned by appellant. There being no error in the judgment of the lower court, it is affirmed.

JAMES, C. J., being disqualified, did not sit in this case.

IRWIN v. HUEY.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

ACTION—COMPROMISE—JUDGMENT.

Where the undisputed evidence in a case shows that while it was pending in justice's court the parties agreed on a compromise, it is error not to render judgment according to the terms of such compromise.

Appeal from Lamar county court; Charles S. Neathery, Judge.

Action by John Irwin against P. A. Huey, commenced before a justice of the peace. From a judgment of the county court reversing the judgment of the justice in his favor, plaintiff appeals. Reversed.

Scales & Allen, for appellant.

RAINEY, J. After this suit was brought in the justice's court, and before a trial had, the evidence shows there was a compromise made between plaintiff and defendant, by which defendant was to deliver to plaintiff three bales of cotton, and plaintiff was to dismiss the suit, and the officers were so instructed. On the day set for trial, plaintiff tried to dismiss the suit as per compromise, but same was resisted by the defendant. The court refused to dismiss, and at a subsequent term tried the cause, and judgment was rendered in favor of plaintiff, from which defendant appealed to the county court, where a different judgment was rendered, from which the plaintiff appeals. The undisputed evidence shows that a compromise had been consummated, and the court below erred in not so holding. After hearing the testimony, the justice court should have rendered judgment according to the terms of the compromise, and the county court erred in not rendering judgment for plaintiff upon the same basis. The cause is reversed and remanded, with instructions that the county court render judgment for plaintiff accordingly, and adjust the matters between the parties on the basis above indicated.

GULF, C. & S. F. RY. CO. v. POWERS et ux.
(Court of Civil Appeals of Texas. Sept. 5, 1893.)

CARRIERS—NEGLIGENCE—STARTING TRAIN BEFORE PASSENGER IS SEATED.

A railroad train must stop, at stations where passengers get on the cars, a sufficient length of time to enable them to get on, and get seats in the cars. *Railway Co. v. Copeland*, 60 Tex. 328, followed.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by J. B. Powers and S. J. Powers, his wife, against the Gulf, Colorado & Santa Fe Railway Company, for personal injuries sustained by plaintiff S. J. Powers while a passenger on defendant's train, and caused by defendant's negligence. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. W. Terry, for appellant. Poindexter & Padelford, for appellees.

LIGHTFOOT, O. J. This suit was brought by appellees for \$10,000 damages for an alleged injury to Mrs. S. J. Powers on the line of appellant's road at Joshua, Tex., under the following circumstances: It is claimed by appellees that Mrs. Powers bought a first-class ticket from Joshua to Cleburne on August 27, 1888; that, when the train arrived, it did not stop long enough for her to get on board, and get a seat; that there were a number of persons at the station, some of whom got on the train ahead of Mrs. Powers, and that, just as they stepped out of the way, she got on the train from

a little box used by the brakeman for assisting passengers to get on and off the train; that as she got on the platform the train started off, and before she had time to get to a seat the cars gave a sudden jolt, jar, or jerk, by which she was thrown upon an upright piece which breaks the heat of the stove from the seats, and injured; that two of her ribs were broken loose from the breastbone; and that her injuries are permanent. There was a verdict and judgment in favor of the plaintiffs for \$1,500, from which the railway company appeals.

It is unnecessary for us to examine in detail all the assignments of error presented by appellant. The principal questions presented are embraced in objections to the charge of the court upon the points (1) whether trains are required to stop, at stations where passengers get on the cars, a sufficient length of time for them to get on, and get seats; (2) whether the question of contributory negligence on the part of the plaintiff S. J. Powers, in failing to use proper diligence in getting on the cars and getting a seat, was fairly presented to the jury. The first question is fully answered by our own supreme court in the case of *Railway Co. v. Copeland*, 60 Tex. 328. The court says: "The train should stop a reasonable length of time to allow all passengers to enter the cars, and if, after all passengers have entered the cars, a reasonable time has elapsed to permit them to secure seats, the carrier may start." We think that both questions were clearly presented to the jury in the charge of the court, and that the charges asked by appellant were properly refused. The case relied upon by appellant in its brief is the case of *Railway Co. v. Williams*, 70 Tex. 159, 8 S. W. Rep. 78. In that case the passenger was injured in attempting to leave the cars. The court reversed the judgment on the ground that the court, in its charge to the jury, held that the appellant, after stopping its train, "was required to give signal of starting again, by whistle or bell," when the law imposed no such specific duty. It is further held in that case that "it would ordinarily be negligence in a railway company, when reaching a place at which passengers are to leave its train, to put the train in motion again before passengers would have sufficient and reasonable time to alight." 70 Tex. 161, 8 S. W. Rep. 79. The judgment is affirmed.

McCORMICK HARVESTING MACH. CO. v. GILKEY.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

REVIEW ON APPEAL—RIGHT TO COSTS.

1. In the absence of a statement of facts, the charge of the court cannot be reviewed.

2. Where, in an action, defendant pleads a larger claim as a set-off, and recovers judgment for the excess, he is entitled to costs, un-

der Rev. St. art. 648, providing that where a counterclaim is pleaded the party in whose favor final judgment is rendered shall recover costs.

Appeal from Johnson county court; F. E. Adams, Judge.

Action by J. S. Gilkey against the McCormick Harvesting Machine Company. Judgment for defendant on its set-off, and for a division of costs. Defendant appeals. Reversed and reformed.

Crane v. Ramsey, for appellant.

LIGHTFOOT, O. J. This suit was brought by appellee, J. S. Gilkey, in the county court of Johnson county, to recover \$100 for the purchase price of a horse, \$94.50 for 189 days' feed, care, and pasturage of a horse, and \$40 for care and attention to another horse. The appellant (defendant below) answered, setting up as a counterclaim two certain notes executed by appellee with one John M. Williams on May 26, 1885,—one for \$67, due October 1, 1886, and the other for \$66, due October 1, 1887, with interest at 10 per cent. per annum until maturity, and 12 per cent. per annum after maturity, and 10 per cent. attorneys' fees on the principal and interest; and averred that the notes were unpaid, except \$20.80 paid by John M. Williams on December 8, 1888, and praying that, if plaintiff shall be held to be entitled to recover any sum against it, these notes be decreed to be an offset, and for judgment on the notes. By supplemental petition the plaintiff claimed that the horse and other items sued for were, at the time such indebtedness accrued, understood and agreed to be payments on the notes of the defendant. Upon the trial, judgment was rendered by the court below upon the verdict of a jury in favor of the defendant against the plaintiff for the amount of the excess of its counterclaim, with interest. A judgment was rendered in favor of plaintiff against defendant for all costs incurred by plaintiff in the matter of his claim against defendant, and in favor of defendant against plaintiff for the costs incurred by it in the matter of its set-off or counterclaim, as pleaded by it. There is no statement of facts in the record.

The first assignment of error presented by appellant in his brief is upon the admission of the testimony of the appellee, J. S. Gilkey. We think the testimony was directly applicable to the issues involved, and was properly admitted.

The second assignment presented is upon the charge of the court. In the absence of a statement of facts, this court cannot consider the errors assigned, attacking the charge of the court. *Stonebraker v. Friar*, 70 Tex. 204, 7 S. W. Rep. 799; *Devore v. Crowder*, 66 Tex. 206, 18 S. W. Rep. 501; *Freiberg v. Lowe*, 61 Tex. 436; *Raleigh v. Cook*, 60 Tex. 440; *Lockett v. Schurenberg*, Id. 610.

The last and most serious question presented by appellant is upon the rendition of judgment for costs against the defendant below,—for all the costs incurred by plaintiff in the matter of his claim against defendant,—when defendant had established a larger claim against plaintiff, and recovered judgment for the excess. Under Rev. St. art. 648, whenever a counterclaim is pleaded, the party in whose favor final judgment is rendered shall also recover his costs. The judgment against appellant for costs was erroneous, and the judgment below is reversed, and reformed so as to strike out all that portion which allows appellee to recover costs against appellant, and judgment for all costs is rendered against appellee.

STREEPER v. THOMPSON et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

RECONVENTION—ACTION ON NOTE—DAMAGES FOR CONVERSION.

Where a chattel mortgagee takes possession of the mortgaged property, and, after using it for several months, sells it without notice to the mortgagors, the latter, in an action on the notes, can plead the damages for the conversion in reconvention.

Appeal from district court, Grayson county; H. O. Head, Judge.

Action by J. E. Streeper against A. H. Thompson & Son on certain notes. From a judgment for defendants, plaintiff appeals. Affirmed.

Standifer & Moseley and *Brown & Blas*, for appellant. *Decker & Harris* and *T. W. Stratton*, for appellees.

Conclusions of Fact.

FINLEY, J. (1) September 15, 1886, appellees bought from appellant a lot of hotel furniture for \$6,000, paying \$150 in cash, and for the balance, on same date, executed 39 notes for \$150 each, due at intervals of 30 days. To secure these notes, appellees gave a mortgage upon the property bought, which empowered appellant, in case of default in the payment of any of the notes, to take possession of the property conveyed, and sell the same for the best price obtainable, and with the proceeds of the sale to pay off said notes. The property at the time of the sale was in the *Colonade Hotel*, in the city of *Denison, Tex.*, owned by appellant, which appellees leased and operated, retaining the said furniture therein. (2) Appellees paid off six of said notes first falling due, and then made default in the payment of the others. Appellant, without resistance from appellees, entered into and took possession of the property conveyed by the mortgage. Appellees had put \$1,000 worth of additional furniture into the hotel, but they were allowed to and did move this furniture from the hotel. When appellant took possession, the

lease having been canceled, he permitted appellees to remain in the house with appellant's agent, and set meals, a few days longer, to give them an opportunity to collect some bills from railroad employes when the pay car should arrive, after which they agreed to get out of the house. (3) About the time for appellees, under this agreement, to get out of the house, they attempted to interrupt the possession of appellant, when he sued out an injunction in the district court of Grayson county, restraining them from interfering with appellant's possession. On hearing, this injunction was perpetuated until the right of the parties under the mortgage contract should be settled. The papers in this injunction proceeding were shown to be lost, except the decree, which was read in evidence, and the issues involved were not intelligently shown. (4) Appellant used the property taken possession of by him under the mortgage for 10 months or more, as his own, in operating the Colonade Hotel, when he sold it at private sale for \$3,950, (this sale was made without notice to appellees, and the proceeds of sale were not credited on the notes,) and by these acts unlawfully converted the property. (5) The property, when converted, was worth \$6,000.

Conclusions of Law.

1. Appellees had the right to plead in reconvention damages occasioned by the unlawful conversion in appellant's suit brought upon the notes. The cause of action set out in reconvention arose out of, was incident to, and connected with appellant's cause of action, namely, his notes; and it was not error for the court to refuse to strike out the plea on exception, as complained of in the first assignment of error. Rev. St. art. 650.

2. It was proper for the court to charge the jury what would constitute conversion, and we think he did so correctly, and without violating article 1317, Rev. St., as is urged by the second assignment of error.

3. We think the finding of the jury fully sustained by the evidence, and the court did not err in overruling the motion for new trial upon the ground that the verdict was contrary to the evidence.

4. There being no other errors assigned, and none apparent in the record, of a fundamental character, we are of opinion that the judgment should be affirmed.

HISTORY CO. v. DURHAM.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

SALE—MISREPRESENTATIONS.

Defendant signed an order for certain historical works, whose scope was not described in said order, nor in any accompanying prospectus. *Held*, that the agent's misdescription of

their scope and character, on which defendant relied, was a complete defense to an action for the price.

Appeal from Johnson county court; F. E. Adams, Judge.

Action by the History Company against B. L. Durham for the price of certain books sold and delivered. Judgment for defendant. Plaintiff appeals. Affirmed.

Bledsoe, Patton & Brown, for appellant. Poindexter & Padelford, for appellee.

LIGHTFOOT, C. J. This suit was brought by appellant to recover from appellee the sum of \$170.50 upon a contract for the sale of certain books, on the following order: "Cleburne, Texas, Sep't 30, 1887. To the History Company, publishers of the literary works of Hubert Howe Bancroft—Gentlemen: In token of my high appreciation of the value to the west & south, and to the world, of the literary works of Hubert Howe Bancroft, and of your efforts in placing them before the public, I hereby subscribe for one complete set of said literary works, in thirty-nine volumes, in number and style of binding as designated below, payment to be made at the regular published prices as the volumes are issued. Bound in sheep, at \$5.50 per volume. The 25 volumes now published to be delivered at once, and paid for, —one fourth on delivery, the other three fourths at three, six, and nine months thereafter; the remaining volumes of the series to be paid for as issued and delivered. [Signed] B. L. Durham." The defendant sets up, under oath, as a defense, that, at the time this order was procured by the agent of the company, he represented that the books contracted for contained a complete history of the world; that defendant did not know the contents of the books, and that he told the agent he did not want to buy them unless they did contain a complete history of the world; that he saw no copy of any of the books, and no prospectus, and relied wholly on the agent's word; that afterwards, when the plaintiff sent the books, he declined to receive them, because they did not contain a complete history of the world. Judgment below was rendered for defendant, from which plaintiff appeals.

The appellant has assigned a number of errors growing out of the admission of evidence, the charges of the court, and sufficiency of testimony, but the only material inquiry we find is this: Does this written contract embrace all the subject-matter, and is it wholly unambiguous in its terms, so as to prevent an inquiry into the character of the works ordered? The contract is silent as to the character or subject-matter of the works of Hubert Howe Bancroft, and the subscriber was compelled to rely wholly upon the representations of the agent upon that subject. Suppose a student of geology should order the works of an author from an agent, who represented them to be full

and complete works upon that subject, but, when delivered, they should turn out to be works upon astronomy. Would it be said that he would be bound to accept them? If the agent represented the works to be a complete history of the world, when they were only a history of the western states, would the principle be different? We think not. These questions are exhaustively discussed in the light of the authorities by Judge Davidson in the case of *History Co. v. Flint*, (Tex. App.) 15 S. W. Rep. 912, to which we beg to refer. In this case the questions were all fairly submitted to the jury, and the verdict is sustained by the evidence. The judgment is affirmed.

BUCHANAN v. THOMPSON'S HEIRS.¹

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

DESCENT—HEIRS SUED FOR ANCESTOR'S DEBT.

1. Sayles' Civil St. art. 2035, provides that the owner of a claim against a decedent's estate may, after partition and distribution, sue the heirs and devisees, who shall be bound only to the amount received by each from the estate. *Held*, that the estate being solvent, and plaintiff's the only claim, administration was needless, and he could sue the heirs directly.

2. A claim against the ancestor of minor heirs need not be verified and presented to the guardian as a precedent to suit against him.

Appeal from district court, Marion county; John L. Shepard, Judge.

Action by William Buchanan against Samuel, Mary E., Maggie, and Allen Thompson, minors, and L. S. Schutler, guardian of the three latter, on a debt due from S. A. Thompson, father of said minors, deceased, for services rendered. Judgment for defendants. Plaintiff appeals. Reversed.

R. R. Taylor, for appellant. Schutler & Allday, for appellees.

LIGHTFOOT, C. J. This is a suit by appellant to recover of the heirs of S. A. Thompson, deceased, on an account for indebtedness of the decedent in his lifetime, alleging that there has never been a permanent administration upon the estate, but that the assets were more than sufficient to pay the debt, after taking out all prior claims; that this is the only debt; that there was a temporary administration, and the assets sold, and proceeds returned into the probate court; that the said funds of the estate had been apportioned by the court among the minors, and the portion of all except Samuel Thompson, who has no guardian, had been paid over to their guardian, L. S. Schutler; but that the portion of Samuel Thompson is still held by the probate court. There is no allegation that the claim was ever presented for allowance to the guardian of the minors. It was alleged that there was no permanent administration upon the decedent's estate, and none necessary, because this is the only debt, and the assets had been

divided out among the heirs. The appellees filed demurrers and exceptions to the petition, which were sustained by the court below. The plaintiff declined to amend. Final judgment was rendered against him on demurrer, from which he has taken an appeal to this court.

The right of a creditor to bring suit against the heirs of a decedent, who have received portions of the estate under an order of distribution, has been fully settled by statute since the act of 1876, (Sayles' Civil St. art. 2085.) Before the enactment of that statute, a creditor holding a valid claim against the estate of a decedent, upon which no administration was had, and none necessary, could bring suit directly against the heirs, and recover personal judgment against them, but not exceeding the amount of such estate received by them. This was considered an exception to the general rule, which required that the creditor should first proceed in the usual way against the estate, by administration. The older decisions were mainly upon that exception, where four years had elapsed, and an administration was barred. But in the case of *Patterson v. Allen*, 50 Tex. 26, Judge Gould held that where four years had not elapsed, and where there was only one debt against the estate, and no necessity for administration, and the heirs had divided the property among themselves, the creditor could bring suit directly against them, and that each heir was liable to the extent of the estate received by him. This doctrine has been so often maintained in our courts since that it may be considered as settled in this state. *Low v. Felton*, 84 Tex. 378, 19 S. W. Rep. 693; *Webster v. Willis*, 56 Tex. 468; *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. Rep. 638; *McCampbell v. Henderson*, 50 Tex. 601; *Mayes v. Jones*, 62 Tex. 365.

Upon the question raised by appellees, that no such suit can be maintained against a guardian unless the claim is first verified and presented for allowance, Judge Stayton, in a recent opinion, has held that the law does not require such presentation. *Low v. Felton*, 84 Tex. 378, 19 S. W. Rep. 693.

The court below erred in sustaining the demurrer and exceptions of the defendants to plaintiff's petition, and upon this ground the judgment must be reversed. Any of the heirs who may be of age are proper parties defendant; otherwise, they should be represented by guardian. Reversed and remanded.

TEXAS & P. RY. CO. v. NIX.²

(Court of Civil Appeals of Texas. June 22, 1893.)

INJURY TO EMPLOYE—DEGREE OF CARE—NEGLIGENCE OF VICE PRINCIPAL.

1. In an action against a master for negligence, an instruction that he was bound to ex-

¹ Rehearing denied September 13, 1893.

² Rehearing denied.

ercise all the care which prudence required, in providing the servant with machinery and instrumentalities adequately safe for his use, while exacting too high a degree of care, is cured by a further instruction that he was bound only to use ordinary care in furnishing machinery.

2. Where a vice principal in charge of certain machinery negligently starts it, whereby a servant is injured, the master is liable, though the character of the act may have been that of a fellow servant.

3. Where an employe is injured by a defective flange in a belt, an instruction that it is the duty of a master to take reasonable care to keep the machinery in a reasonably safe condition, by proper repairs, is correct.

4. Where a case is reversed for failure of the court to give a requested instruction, on a second trial the refused instruction is the law of the case.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Action by John A. Nix against the Texas & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

F. H. Prendergast, for appellant. Jas. Turner and Pope, Wilson & Lane, for appellee.

GARRETT, C. J. Appellee brought this suit to recover damages for personal injuries received by him while in the employment of the appellant, boring a well by means of steam power. He alleged that owing to the negligence of the foreman in charge of the work, in starting the machinery without warning him, he was struck by a defective flange or fastening on the belt on the driving pulley of the engine, and his left leg badly cut and injured. Defendant pleaded a general denial, and not guilty; also, that, if there was any negligence that contributed to or caused the injury to plaintiff, it was the negligence of a fellow servant with plaintiff, and defendant was not liable. Trial was had by jury March 9, 1892, which resulted in a verdict and judgment in favor of the plaintiff for \$2,500. The case has been before the supreme court on appeal from a former judgment. 82 Tex. 473, 18 S. W. Rep. 571.

Conclusions of Fact.

(1) On November 24, 1888, John A. Nix, the plaintiff, and one Rapp, were engaged at work for the defendant at Sierra Blanco, on the line of its railway, boring an artesian well. No other men were employed at the work. A drill was used, which was operated by steam power. The engine furnishing the power was about 100 feet away from the drill, and the belt running from the engine to the countershaft connecting with the drilling machinery was about 70 feet long, and 12 or 14 inches wide. It was fastened together at the ends with iron flanges or clamps, and the lower part of it ran about 6 inches above the ground. There was a supply hose running under the belt from a water car on the track to the engine. (2) One GMI was foreman of defendant's water

service for the Rio Grande Division, and Rapp was an assistant foreman in charge of the boring of the well at Sierra Blanco, at the time plaintiff was injured. Plaintiff worked under Rapp, and it was his duty to get up steam, dress the tools, and oil the machinery, and to assist generally. Rapp controlled the movement of the machinery. On the morning of the accident he told plaintiff to oil the machinery, while both were near the engine. Plaintiff had to go into the pulley room, and from there some distance from the engine. Rapp started the machinery without warning him, and on his return from oiling one side to oil the other, just as he got to where the supply hose was, the flange on the belt caught up the hose, which threw plaintiff's leg against the pulley, and the corner of the flange struck his leg, and hurt it. (3) There is evidence to support the finding by the jury that Rapp was a foreman in charge of the work, with power to employ and discharge the plaintiff; that plaintiff was working under his direction. Hence we find such to be the facts. (4) The flanges or clamps used to fasten the ends of the belt together were iron bars, the width of the belt in length, and about 2 inches wide, riveted together, with the ends of the belt between them. Plaintiff testified that they were fishbars, which are used to fasten the ends of the iron rails together in the railroad track; that they weighed about 2½ pounds each, and were dangerous for the use to which they were applied. Other evidence showed that an iron clamp was not suitable for fastening belts together, but belts should be laced; that an iron clamp would be dangerous to those who came around, unless closed in; that it would be likely to hurt anything that touched it, and would break most anything, and would be likely to catch anything that came near it, but would not hurt anything 1 or 1½ inches from the belt. There was also other evidence,—that iron clamps were generally used because they held the belt together all the way across, making the pull equal; that lacing would tear out the ends of the belt; that usually the edges of the clamps were round next to the belt, to keep from wearing it, but sometimes they were square. (5) There was evidence to the effect that the belt swagged so that it caught up the supply hose running from the water car to the engine; that the flange would prevent the use of an idler, because it would come in contact with it; that the idler is something that presses down upon the belt, and keeps it tight.

Conclusions of Law.

1. The charge of the court to the jury, that "It is the duty of the railway company to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for the use

of the servant," is objected to, as imposing too high a degree of care on the defendant. The language of the charge was substantially used by the court in the opinion in the case of *Hough v. Railway Co.*, 100 U. S. 213, but it is probably obnoxious to the objection made to it, if it is taken alone. Looking, however, to the entire charge, we find in the tenth paragraph that the jury are instructed that the defendant was only bound to use ordinary care in furnishing machinery for the use of its employees; and, although the word "instrumentalities" is omitted in the latter portion of the charge, we hardly think the jury were misled as to what the charge referred to, and could have considered it only as applying to the alleged defective fastening.

2. Defendant requested a special instruction to the effect that the act of Rapp in starting the machinery was the act of a fellow servant, for which defendant would not be liable, although, as to some of his duties, he may have been a vice principal, and the refusal of the court to give this instruction has been assigned as error. On the former appeal in this case the court said that the power of the servant or agent to employ and discharge servants engaged with him in the same work would not alone constitute him the master, but where he has such power, as foreman of the work being done, over the servants working under him, and subject to his direction, his position is that of master, and the master would be liable for his negligence causing injury to such servants. 82 Tex. 475, 18 S. W. Rep. 571. As we construe this language, the defendant is liable for the negligent act of Rapp in starting the machinery, although the character of the act may have been that of a fellow servant. The case was submitted to the jury on a charge embracing the law as thus announced, and as we have found that there was testimony sufficient to support the finding of the jury of the facts necessary to render the defendant liable, as pointed out by the court on the former trial. There was no error in refusing the requested instruction. What we have said disposes, also, of the sixth assignment of error.

3. Appellant's fifth assignment of error is: "The court erred in charging the jury that the defendant would not be protected by using fastenings with square corners, if they are more dangerous than fastenings with round corners. This was error, because the law does not require defendant to use the safest appliances, and because there was no evidence that defendant knew that the fastenings with the round corners were the safest." The charge here complained of is embraced in the tenth paragraph of the charge of the court, which is framed in exact accordance with the direction of the court on the former appeal; being composed in part of a charge given and approved, and

in part of a requested instruction, which the court said should have been given, together with further instructions suggested in the opinion. The part here complained of is embraced in the instruction which the court held was erroneously refused on the former trial. It is the settled law of the case.

4. We think that the charge that "it is also the duty of a railroad company to make reasonable efforts to keep the same [machinery] in a reasonably safe condition, by proper and suitable repairs," was authorized by the evidence about the swagging of the belt.

The case was tried below in accordance with the views expressed in the opinion on the former trial, and the judgment will be affirmed.

FINK et al. v. GULF, C. & S. F. R. CO.
(Court of Civil Appeals of Texas. Oct. 5, 1893.)

VERDICT—SUFFICIENCY—INSTRUCTIONS.

1. A verdict in an action for damages, assigning the same at "\$50.00," is sufficiently definite on which to render a judgment for \$350.

2. Where, in an action for damages, the court fails to instruct as to interest thereon, and no such instruction is asked, the omission cannot be urged as error.

Appeal from district court, Harris county; James Masterson, Judge.

Action by Emily Fink for herself and as next friend of her minor children against the Gulf, Colorado & Santa Fe Railroad Company. Judgment for plaintiffs, and they appeal. Affirmed.

G. Cook and O. L. Allen, for appellants.

WILLIAMS, J. This suit was brought by appellant for herself and as next friend of her minor children to recover of appellee damages caused by the construction of its track and switches along a street in the city of Houston, contiguous to the two improved lots belonging to appellant and the children for whose use she sues. The defendant pleaded general denial and the statute of limitations. It appeared from the evidence that the main track was constructed more than two years before the institution of this suit; also that there had been a switch track built and a switch stand erected about 800 yards from plaintiffs' property more than two years before the suit was brought; and that within two years before suit this switch had been extended, and another built, so that both passed in front of the lots. Whether or not additional injury to the property, and, if so, the extent of the same, resulted from these changes, was the main point of controversy. The facts affecting the question raised by appellants will be stated in connection with the assignments.

The first assignment asserts that the ver-

dict was too uncertain to authorize the rendition of a judgment. The verdict was as follows: "We, the jury, find for plaintiffs, and assess the damages at \$350.00; one-half in favor of the minors, Cornelia and Charles, and one-half for Emily Fink." On this a judgment was rendered for \$350, dividing that amount between the parties in accordance with the verdict. The point made is that the verdict does not specify what it is that is found,—whether dollars or something else. The suit was for money; the charge authorized the recovery of nothing else; and the jury say they "assess the damages," and use figures with the decimal sign, as is ordinarily done in stating a sum of money. The word "dollars" and the character by which dollars are indicated are omitted, but we think there can be no doubt that the jury found as the damages the sum adjudged. In *Hopkins v. Orr*, 124 U. S. 510, 8 Sup. Ct. Rep. 590, the verdict of the jury was that they "find for the plaintiff in the sum of thirteen hundred and ninety-nine and 48-100." The court says: "The omission of the word 'dollars' in the verdict was not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury, although it might have been more regular to amend the verdict before judgment."

The second assignment is that the verdict is for a less sum than was warranted by any evidence, if plaintiffs were entitled to recover anything. The lowest estimate of the damage done to the premises was that of the witness Settegast, who estimated the injury at one-third of the value of the property at the least. The lowest valuation put upon the property was in the statement of plaintiffs that the lots were worth \$500, and that of Williams that the houses were worth \$1,050, making the total \$1,550. If the evidence of Settegast was that the whole damage was caused by the switches built and extended within two years before the suit was brought, appellants' contention would seem to be well grounded. But Settegast mentions the main track, the old switch, and the putting in of new ones, and says: "I should say that the depreciation by reason of the tracks being there and the operation of the road in switching depreciates the value of the property fifty per cent., or certainly, at the least figure, thirty-three and a third per cent., by all the tracks being there." In another place he says: "Down along Walker street an additional track for switching purposes was put down about the nineteenth of November, 1888, which made the damages about one-half or one-third." We understand the witness to mean that the damages caused by all of the tracks amounted to the percentage of the value which he stated. The cause of action for

injuries resulting from the main track and the original switch was barred by limitation, and the court in effect so instructed the jury. If, therefore, they took Settegast's estimate of the extent of the depreciation, and the plaintiffs' and Williams' valuation of the property, as they were justified in doing, their verdict is warranted by the evidence. There was a conflict of evidence as to whether or not the new switches added anything to the injury inflicted on the property, but the jury allowed considerably the larger portion of the injury, upon the above estimate, as the result of the new switches.

The plaintiffs may have been entitled to a verdict for interest upon the damages found by the jury, but the court omitted to so instruct them, and no special charge was asked for. This was simply an omission on the part of the court, and the appellants, having failed to ask a special charge to supply it, cannot, we think, now take advantage of it. Affirmed.

CASWELL et al. v. GREER et al.¹
(Court of Civil Appeals of Texas. Oct. 5, 1893.)

APPEAL—INSUFFICIENT RECORD—AFFIRMANCE.

Where the assignments of errors are all as to the admission or exclusion of evidence, and the statement of facts is not signed or approved by the trial judge, the judgment will be affirmed.

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Action by W. H. Caswell and others against Hal W. Greer and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

O'Brien & O'Brien, for appellants. Greer & Greer and D. P. Wheat, for appellees.

WILLIAMS, J. This suit was brought by appellants against appellees to set aside a deed for land made by W. H. Caswell during his minority to appellee Greer. The case was tried by a jury, and verdict and judgment rendered against appellants. The assignments of error presented in this appeal all attack rulings of the court in admitting and excluding evidence, and in giving and refusing instructions. What purports to be a statement of facts in the record is not signed or approved by the district judge. Following the long-established and uniform practice established by the supreme court, we feel bound to ignore the statement. *Johnson v. Blount*, 48 Tex. 40; *Farley v. Deslonde*, 58 Tex. 588; *Witten v. Poindexter*, 25 Tex. Supp. 378, and numerous decisions cited in those cases. The assigned errors all belong to that class which cannot be reviewed without a statement of facts, and we have no course open but to affirm the judgment.

¹For opinion on rehearing, see 23 S. W. Rep. 1012.

TEXAS & N. O. RY. CO. v. CUNNINGHAM.

(Court of Civil Appeals of Texas. Oct. 5, 1893.)

STOCK KILLED ON TRACK—INTEREST.

1. The omission to give statutory signals at a railroad crossing renders a railroad company liable where injury to stock results.

2. The allowance of interest on the value of a mule killed on a railroad track is error.

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Action by P. H. Cunningham against the Texas & New Orleans Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

O'Brien & O'Brien, for appellant. Tom J. Russell, for appellee.

WILLIAMS, J. Appellee brought this suit to recover the value of a mule killed by one of appellant's engines at a road crossing in Jefferson county. It is assumed by both parties in the presentation of the case in this court that the crossing was such as appellant had the right to leave open and unfenced, and we shall assume such to be the case, though the statement of facts leaves it somewhat open to question. There is a conflict of evidence as to whether the whistle was blown by the engineer in approaching the crossing. The engineer does not claim that he rang the bell. The omission to give the signals required by statute is negligence which makes the company liable where injury to stock results. *Turner v. Railroad Co.*, 78 Mo. 578; *Railroad Co. v. Reid*, 24 Ill. 144. The evidence supports the verdict. The allowance of interest on the value of the mule was error. *Railroad Co. v. Muldrow*, 54 Tex. 233. The judgment will be reversed, and here rendered for \$100, found by the jury as to the value of the mule, as appellee asks that be done if the allowance of interest is held to be error. The costs of the appeal are adjudged against appellee.

GALVESTON, H. & S. A. RY. CO. et al. v. HOUSE.

(Court of Civil Appeals of Texas. Oct. 5, 1893.)

AMENDMENT OF PLEADING—PAROL EVIDENCE—WAIVER BY AGENT.

1. A shipper of cattle, which he consigns to himself, has a right to sue the railroad company for overcharge on the freight, though others are interested in the shipment, and an amendment making the other parties plaintiffs is proper, it neither changing the cause of action nor the character in which plaintiff sues.

2. Where plaintiff claims that he entered into a verbal agreement with a railroad company for the shipment of cattle at a fixed rate, parol evidence is admissible to show what that agreement was, though plaintiff signed a bill of lading showing a different rate, both parties testifying that plaintiff received the bill of lading just as the train with the cattle, which

he was to accompany, was leaving, and that he signed it on the assurance of defendant that it was all right.

3. Where an agent of a railroad company is generally intrusted with the settlement of claims for overcharges of freight, a waiver by him of a clause in a bill of lading that suit for overcharges must be brought within 40 days is binding on the company, though such waiver was contrary to his instructions.

Appeal from Colorado county court; W. S. Delany, Judge.

Action by S. C. House against the Galveston, Harrisburg & San Antonio Railway Company and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Brown, Lane & Jackson, for appellants. Foard, Thompson & Townsend, for appellee.

WILLIAMS, J. On the 26th day of December, 1890, S. C. House, appellee, filed his demand with J. W. Holt, justice of the peace of precinct No. 4, Colorado county, claiming that the appellant the Galveston, Harrisburg & San Antonio Railway Company, was indebted to him in the sum of \$191.58 for overcharges on seven car loads of cattle shipped by him from Weimar to Chicago in February, 1890. Appellant answered (1) by general denial; and (2) by special plea that the shipment was made under a written contract, which provided, among other things, that no suit growing out of the transaction should be instituted or maintained after the expiration of 40 days from its accrual, and that, when instituted, this action was conclusively barred under said provision. To this answer the appellee replied that, both before and after the expiration of said 40 days, the Galveston, Harrisburg & San Antonio Railway Company persuaded and induced appellee not to sue, promising to settle the claim as soon as it could be investigated, and that appellant by this conduct had waived said 40 days' limitation, and was estopped to plead same; that the contract of shipment was signed by appellee through mistake, etc. The cause was tried in the justice's court, and judgment was rendered for appellee for \$161.58. From this judgment the railway company appealed to the county court. In the county court, on July 19, 1892, appellee filed additional pleadings, by which it was alleged that the cattle which were shipped belonged to S. C. House, (appellee,) T. M. Insall, and T. L. Townsend, and recovery was sought for their joint use and benefit. The railway company thereupon filed its motion to strike out said additional pleadings, and to dismiss the suit, which motions were by the court overruled. On July 19, 1892, there was trial in the county court before a jury, and the verdict was returned July 20th, in favor of appellee, S. C. House, for \$191.58, with 6 per cent. interest from January 1, 1891; and judgment was entered for \$209.75, against appellants, from which this appeal is brought.

The first and tenth assignments of error

complain of the refusal of the county court to strike out the amended plea filed in that court, and to adjudge the costs accrued up to that time against appellee. We think the ruling of the court was correct. Appellee had the right to sue, being the party, both as consignor and consignee, with whom appellant contracted for the shipment of the cattle, notwithstanding other parties may have owned part of the property. The contract established a privity between appellee and appellant, which gave the former the legal right to sue for its breach, and to recover, not only for damage sustained by himself, but that sustained by the other beneficiaries. The amendment filed changed neither the cause of action nor the character in which plaintiff sued. The same recovery sought by it could have been had without it.

The second, third, and ninth assignments claim that there was error in the admission of evidence, and in the charge of the court allowing the written contract to be varied by parol, and in the verdict of the jury in finding for plaintiff an amount larger than he would have been entitled to under the written instrument. The facts affecting this point are as follows: The plaintiff introduced evidence to show that, when he and his associates were preparing to ship the cattle, Mr. Insall, one of them, caused a third party to make a rate for the shipment to Chicago with appellant's station agent at Welmar at \$106.87 per car load. The agent denied that he agreed to such rate for the cars furnished, which were Street's stable cars, stating that he quoted that rate for standard cars, which were of less capacity than the others, and that, upon being informed that Street's cars were wanted, he ordered and furnished them, without stipulating any rate per car; that the established charge for these cars was higher than for standard cars, because of their greater capacity. There was a decided conflict upon this point, plaintiff's witness stating very positively that the agreement was for the rate stated for the Street cars. While the cattle were being loaded upon the cars, appellant's agent filled out the contract for their shipment, to be signed by himself and plaintiff, in which plaintiff was named as both consignor and consignee, and in which the rate of freight was stipulated at 56¼ cents per hundred pounds. About the circumstances under which this was signed there is no conflict in evidence. They are thus stated by appellee: "I accompanied, with others, the cars to Chicago. I was in charge of the cattle. The evening we loaded the cattle on the cars, the engine and crew to carry the train reached Welmar. It was after dark when we finished loading, and the engineer and employes of defendant were hurrying to get ready to start. The depot was about two hundred yards from the stock pen. I had to go up to the depot to sign the contract, in which was the pass for

myself and employes to accompany the cattle. I hurried up to the depot, and, when I got there, the agent handed me the contract, and told me he had fixed it out all right, and it was only necessary to sign my name, which, being in a hurry that the train might go, I signed without reading, as did the others at the same time, relying upon the agent's representations to me that it was all right. Most of the contract was in fine print, and it would have taken me quite a while to read it. I put the duplicate handed me by the agent in my pocket, and rushed down to the train, which left immediately, and did not discover the overcharge until I got to Chicago." The station agent, as far as he testifies upon the subject, corroborates these statements of plaintiff, the only conflict as to what the contract was being as to the rate of freight to be charged. The charge complained of is as follows: "If you believe from the evidence that defendant's freight agent in Welmar, upon a demand of plaintiff, or those acting for him, for Street's stable cars to ship cattle from Welmar to Chicago, agreed to furnish him cars at the rate of \$106.87 per car for said purposes, and that a verbal contract was entered into by and between the parties at the time and to that effect, and that subsequently said agent furnished Street's stable cars to plaintiff, which he accepted, and in which he then shipped his cattle, and you further believe from the evidence nothing was said by the agent at the time or before said shipment was made to change or vary the above contract, then plaintiff will be entitled to recover the difference between said contract price, \$106.87, and the amount demanded and collected of him for said cars. You are also charged that, if you find from the evidence that one thousand pounds excess was collected for on each of the seven cars in question, then you are instructed that the plaintiff would be entitled to recover the amount paid for said excess." Under his plea that the written contract was signed by mistake, etc., we think the plaintiff was entitled to introduce evidence as to what the real contract was, and how the writing came to misrepresent it, and that the objection to evidence of the verbal agreement preceding the writing was not well taken. Of course, the writing merged into itself and superseded all previous verbal understandings on the subject, unless plaintiff succeeded in showing that he was entitled to have it corrected on the ground of mistake or fraud. But we think it plain that, upon the uncontradicted statement above quoted, there was either a mistake or a fraud in the drawing up of the contract if the agreement was as appellee contends. Complaint is made that the charge allows a recovery upon a precedent verbal agreement, without requiring the jury to first find facts entitling plaintiff to get behind the writing. This objection would obviously be well taken if the facts

were not such as to authorize the court to assume that there existed a fraud or mistake in the execution of the instrument. We have just seen that all of those facts were virtually conceded, except as to what the rate agreed upon was, and that the charge submitted to the jury. Another contention is that inasmuch as plaintiff did not own all of the cattle, and the verbal contract was not made with him, he can only recover upon the writing; and, if that be disregarded, he cannot maintain his suit. The answer is that the writing stands as the contract of the parties in all particulars except that in which it may be avoided. The writing is not claimed to be other than that which was finally made between the parties except in the freight rate of charges stated in it. It may be corrected in that, and stand in all other respects.

The charge of the court as to the measure of damages was unquestionably erroneous. If the contract was as plaintiff claimed it to be, he was entitled to recover the difference between what he paid and the amount agreed on, at \$106.87 per car load. If the contract was as defendant asserted it, plaintiff was entitled to recover only for the overcharge in weights and the charges for feeding and watering stock. But he could not in either event recover for both of these, as the court in effect charged. The verdict, however, shows plainly that the jury did not adopt defendant's version of the contract, on the one hand, and did not, on the other, find for plaintiff upon the instruction which authorized a double recovery. They found for plaintiff the amount he sued for, which was the amount of the difference between the charges at \$106.87 per car and what he paid, except there was a mistake of computation of \$2.58 in making out the account, which the jury followed.

The court submitted to the jury the question as to what the contract was. It is evident that they found it as plaintiff contended for it, and the rest is simply matter of computation. The exact amount to which the plaintiff is entitled is \$189, with interest from January 1, 1891. Appellee having remitted the sum of \$2.58, the judgment will be affirmed, with costs, inasmuch as this excess was not called to the attention to the court below. The evidence of the waiver of the clause of the contract requiring the suit to be brought within 40 days we hold to be sufficient. As to the authority of the agent to waive that provision, we hold that the evidence was sufficient to authorize the jury to infer that it was within the scope of his apparent authority to do so. The fact that he was generally intrusted with the settlement of such claims justified the public in acting upon such promises as he made to plaintiff. That his act was contrary to his instructions, or was without real authority, is not an answer to this view. *Hull v. Railway Co.*, 66 Tex. 621, 2 S. W. Rep. 831;

Hutch. Carr. § 269; *Lawson, Carr.* § 229. In the case of *Railway Co. v. Trawick*, 80 Tex. 273, 15 S. W. Rep. 568, and 18 S. W. Rep. 948, there was no such evidence, as there is in this case, that the local agent generally settles such claims. Affirmed.

CAMERON et al. v. FIRST NAT. BANK OF DECATUR.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)
PARTNERSHIP—BANK AS MEMBER—MONEY LOANED.

1. A national bank, having joined with other persons in a partnership to operate a mill owned among them, cannot be prevented from recovering moneys loaned to the firm, on the ground that it has no power to become a partner in a mill.

2. In an action by a bank for money loaned to a partnership of which the bank is a member and its vice president the manager, the latter's mismanagement of the firm business is not chargeable to the bank.

3. Where a partnership exists between a joint-stock company and a bank, it is a defense to an action on overdrafts made by the manager of the company that there was a rule of the company that no money should be borrowed except by its board of directors.

4. An auditor's report, being good against the exceptions urged, is conclusive of the matters within its scope, and makes immaterial any errors in admitting or rejecting evidence bearing on those matters.

Appeal from district court, Wise county;
J. W. Patterson, Judge.

Action by the First National Bank of Decatur against Wm. Cameron & Co. and others, partners in a firm known as the Decatur Roller Mill Company, for money loaned said firm. Judgment for plaintiffs. Wm. Cameron & Co. appeal. Reversed.

J. H. Cobb, for appellants. Carswell, Fuller & Terrell, for appellee.

Conclusions—Facts.

STEPHENS, J. The parties to this appeal, being co-owners of a certain mill at Decatur, Tex., on the 25th day of May, 1888, formed a joint-stock company to operate the mill for one year from that date, under the firm name of the Decatur Roller Mill Company. The partnership agreement lodged the management of the business in a board of directors, consisting of the following four members: Henry Greathouse, who was also vice president and general manager of appellee bank, D. Waggoner, president of said bank, George W. Trenchard, and C. More. The power to borrow money and create debts against the concern, with the restriction that the rate of interest should not exceed 12 per cent. per annum, was lodged exclusively in this board of directors. Greathouse was made treasurer and Waggoner president of the mill company. The plant was valued at \$10,000, but there were no other assets, and in order to operate it the board of directors met and determined to borrow \$2,000 of appellee bank, which was accordingly done, and the

amount evidenced by the promissory notes of the mill company. Upon these notes, or renewals thereof, and an open account for moneys afterwards advanced by said bank in the nature of loans to cover overdrafts drawn by certain officers of the mill company, this suit was instituted by appellee bank against the several stockholders, to recover from them their pro rata parts of the alleged debt, the mill venture having proven a failure. The bank recovered the amount both of the original loan and of the overdrafts, from which judgment Cameron & Co. alone appeal.

About the 1st of December, 1888, Trenchard moved to a distant part of the state, and had no further connection with the board, and soon thereafter More dropped out, and ceased to act as a director, having being deprived of the position of service assigned him in the beginning at the mill, to wit, grain-buyer, which left the management entirely in the hands of Greathouse, then general manager still of the bank, and Waggoner, president of the bank, who acquiesced in the management of Greathouse. During this time the mill was supplied with money by the bank to buy grain, and pay operating expenses, as shown by the overdrafts of the officers of the mill company, upon which recovery was in part had, without any affirmative action on the part of the board of directors in relation thereto. The mill deposits were all kept at the bank, and interest at the rate of 1 per cent. per month was charged on these overdrafts. One Dwyer, as part owner of the mill, was made a defendant in order to have partition of the real estate, but, as he did not sign the partnership contract, no recovery was sought against him, and he was not included in the appeal.

Law.

1. Appellants' first defense—that a national bank is without power to become a partner in the milling business—was properly held inapplicable in this case. The bank certainly had the power to lend money, and this suit was brought to recover in the capacity of creditor, and not as a partner to recover a share of profits, of which there were none. Other reasons might be assigned for the insufficiency of the ultra vires defense in this case. This disposes of the first assignment of error.

2. The exceptions to the auditor's report were properly overruled. The report should have contained a statement of the several items of debit and credit allowed, and not merely the total sums, but no objection was taken to it on this ground. The report, being good against the exceptions urged, was conclusive of the matters within its scope, and rendered immaterial the alleged errors in admitting and rejecting evidence bearing upon those matters. This conclusion disposes of the third, fourth, and sev-

enth assignments of error. The seventh is also bad because the bill of exceptions does not show what the testimony excluded would have been.

3. All the other assignments, except the eleventh, relate to an immaterial issue,—that of the alleged gross negligence of the bank in operating the mill. The evidence failed to develop such an issue. The fact that Greathouse was the common agent of the bank and the mill did not make his acts in operating the mill the acts of the bank. The bank, as such, had no more to do with the operations of the mill than any other member of the joint-stock company; and, if Greathouse was guilty of negligence of which appellants can complain, it was as agent of their own selection, and not as agent of the bank. The authority cited by appellants in support of their position, if applicable here, is against their contention, to wit, 2 Bates, Partn. p. 809, at bottom, where the rule is thus stated: "Where a firm is a member of another firm, negligence of one of its partners in his capacity of agent of the larger firm, and mismanagement, is not chargeable to the other members of the former firm."

4. The eleventh assignment raises the question, whether appellants are liable to the bank for their pro rata part of the alleged debt of the mill company arising out of the payments by the bank of the overdrafts made by the officers of the mill company after Trenchard and More ceased to act with the other two directors. That which distinguishes a corporation from an unchartered joint-stock company is the difference in the extent of liability of the shareholders for the debts of the concern; in the latter the liability being that of a partner in an ordinary partnership. In other respects, joint-stock companies are analogous to corporations. 11 Amer. & Eng. Enc. Law, p. 1039; 1 Bates, Partn. c. 3, § 72. Upon this subject, Mr. Bates, in the section above cited, says: "If the concern is composed of numerous members, and is governed by managers, there is no implied power in the other members to act. And if the managers are to act as a board the individual assent of each is, as in the case of directors of a corporation, not equivalent to the act of the board." Tayl. Priv. Corp. §§ 258, 259. The analogy between a corporation and a joint-stock company in their methods of operation being so close, it would seem to be but a reasonable construction of the articles of association in question to hold that the several parties thereto intended to confer upon the directors named the power to act only as the directors of a corporation would be empowered to act under like circumstances. Such seems to have been the practical construction given the contract at the time, as manifested by the prompt meeting and action of the directors as a board. By these articles they were "empowered to borrow

money on the faith and credit of said business and property;" and, lest there should be any misapprehension on this subject, it was further expressly provided: "The board of directors alone shall have power to contract debts against the concern." Of these limitations the bank had notice. That a considerable part of the debt sued upon and recovered was created without any action of the board of directors authorizing or ratifying it seems clear from the record. Of this the bank must have had notice, because it was its own manager who both paid and drew the overdrafts, or authorized the same to be done. He acted for both concerns at the same time, with full knowledge of the situation. The admitted fact that appellants acquiesced in the non-action of Trenchard did not deprive them of the right to insist that the other three members should act jointly as a board, or at least concur, without acting as a board, in creating a debt against the concern for which they should be held personally liable, it being expressly stipulated in the contract, to which the bank was a party, that only the board of directors could create such a debt. The shareholders but exercised prudence in thus guarding expressly against personal liability for unauthorized debts; and where no profit has been derived from the venture there is nothing inequitable in any one or more of them insisting upon his rights under the contract as against another party thereto. The written instrument was the power of attorney under which the debt was created, and empowered its creation only by a majority of a quorum of the directors acting together as a board, or at most by a concurrence of a majority of the whole without action as a board. We are therefore of opinion that the charge complained of in this assignment was misleading, and damaging to appellants, and that the judgment must be reversed for that reason. We are also of opinion that these conclusions, if correct, practically settle the issues involved, which seem to have been fully developed on the trial below without any material conflict in the evidence; but the cause must be remanded for a new trial in accordance with this opinion. If interest at a greater rate than 12 per cent. per annum was recovered, as seems probable, it was not justified under the contract. Reversed and remanded.

PATTY et al. v. HILLSBORO ROLLER-MILL CO.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

POWER OF PARTNER TO BIND FIRM—SUBSCRIPTION TO CORPORATE STOCK.

1. A partner in a mercantile firm cannot bind the firm by a subscription to the capital stock of a corporation for the establishment of a mill, without the consent or ratification of the other member of the firm.

2. A subscriber to the stock of a corporation to be formed can withdraw his subscription before the organization thereof, and before its acceptance, and before the expenditure of any money, and with the consent of the payee.

Appeal from Hill county court; J. G. Abney, Judge.

Action by the Hillsboro Roller-Mill Company against Patty & Brockington. Judgment for plaintiff. Defendants appeal. Reversed.

Upshaw & Jordan, for appellants. Tarlton & Morrow and McKinnon & Carlton, for appellee.

LIGHTFOOT, C. J. In October, 1889, appellants, with a number of others, signed the following subscription paper: "Hillsboro, Texas, October 23, '89. The state of Texas, county of Hill. Articles of agreement. We, the undersigned subscribers, agree to form an incorporated company for the purpose of building and operating a roller flour mill, of 100 barrels of flour and 25 barrels of meal per day of 24 hours, in the city of Hillsboro, Hill county, state of Texas; and we each contract and agree to subscribe and pay for, in cash, the amounts set opposite our respective names, as follows, viz.: One-third payable when the building material is delivered on the ground; one-third when the machinery is placed in position; and one-third, or the balance, when the mill is started; the respective payments, as herein provided, to be made to J. H. Knox & Co.: provided, however, if stock to the amount of \$20,000.00 is not subscribed within 90 days from date, this contract shall become null and void: provided, however, that the plans, specifications, bond, and contracts of J. H. Knox & Co. are accepted by a board of directors to be elected by the stockholders." The subscription of Patty & Brockington was \$500, and the Hillsboro Roller-Mill Company having become organized under the statutes as a corporation, and having constructed the mill, and put it into operation, brought suit in the court below to recover the amount of such subscription and interest. Patty & Brockington, in their second amended original answer, set up, among other defenses, that they were partners as merchants doing a general dry-goods and grocery business in Hillsboro; that the subscription was made without the knowledge or consent of J. R. Patty, one of the partners, and was beyond the scope of the partnership business, and that he had never, in any manner, ratified it; that on December 18, 1889, before there was an organization of the roller-mill company, J. R. Patty, a member of the firm of Patty & Brockington, representing himself and his partner, called upon several of the subscribers, and notified them that they would not be bound by the subscription, and on that evening attended a meeting of the subscribers, who had assembled for the purpose of organizing

the company, and notified a number of them that they would not pay the subscription, and called upon J. H. Knox, the senior member of the firm of J. H. Knox & Co., to whom such subscription was made payable, and demanded that the subscription be erased, which he promised should be done, and that they should be released from any liability on account of such subscription,—all of which was done before the organization of the company, and before any expense or liability was incurred by reason of such subscription; and that, if said roller-mill company had since incurred any liability by reason thereof, it had been done with full notice that they refused to be bound thereby. This special answer was stricken out, on exception filed by plaintiff below, and judgment was rendered for plaintiff in the court below against Patty & Brockington for the amount of the subscription and interest. The only two assignments of error which we deem it material to notice are upon the ruling of the court in striking out the special answer, and in rendering judgment against appellants, when they had withdrawn their subscription before the company had organized, and before any debts had been contracted, or liability incurred.

1. Did a partner of a mercantile firm have the right to bind the partnership upon a subscription to the capital stock of an incorporated corporation for the establishment of a roller mill, which was beyond the scope of the partnership business, and which was not consented to or ratified by the other? The question is elementary, and authorities seem unnecessary. In the case of *Fore v. Hitson*, 70 Tex. 522, 8 S. W. Rep. 292, the supreme court says: "It is a well-recognized rule that when one member of the firm uses the firm name outside the business of the firm, and it is so shown, it then devolves upon the holder of such obligation to show authority for such use, which may be by direct or circumstantial evidence; or a subsequent ratification will supply authority." See, also, *Nolan Co. v. Simpson*, 74 Tex. 218, 11 S. W. Rep. 1098; *Cook, Stock & S. § 64*.

2. The second question involves more difficulty. Has a promoter of an intended corporation the right to withdraw his subscription before the organization, and before any expense or liability has been incurred? In this case the agreement of the subscribers was substantially this: To form an incorporated company to build a roller flour mill, and to subscribe and pay the amounts set opposite their respective names, at stated periods,—payments to be made to J. H. Knox & Co.,—provided that \$20,000 should be subscribed within 90 days, and that the plans, specifications, bond, and contracts to be made with J. H. Knox & Co. should be accepted by a board of directors to be selected by the stockholders. In the case of *Williams v. Rogan*, 59 Tex. 438, the subscription was made by

the inhabitants of a county to assist in the erection of buildings for a high school, on a proposition made by a church to establish such a school on a designated sum being contributed by the inhabitants. Judge Stayton, in an able opinion, held, in effect, that the subscribers had the right to withdraw until the subscription was accepted by the church, but, when accepted, it then became a contract between the parties, and was binding. He says: "The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it." 1 Pars. Cont. § 450. In the cases of *Doyle v. Glasscock*, 24 Tex. 200; *Hopkins v. Upshur*, 20 Tex. 89; *McCrimmin v. Cooper*, 27 Tex. 113,—it was held that it was necessary, before a recovery could be had upon a subscription, to show that some act had been done by the promisee,—either an acceptance of the terms of the subscription, or an expenditure of money or labor. One party cannot be bound to a contract without binding both. At the time appellants withdrew their names from the subscription, they gave notice to J. H. Knox, whose firm was to build the mill; also, to a number of the other subscribers, at a regular meeting, including a party who was afterwards elected secretary of the corporation. It does not seem that the subscription had yet been completed up to \$20,000. Certainly, no organization had been perfected, and no subscription books of the intended corporation had been opened, no directors appointed, and no contract with J. H. Knox & Co. for the construction of the building had been made. See *Hotel Co. v. Bolton*, 46 Tex. 633. Also, *Same Plaintiff v. Tiernan*, Id. 636. Chief Justice Gray, of Massachusetts, thus lays down the rule: "A promise to pay money to promote the objects for which a corporation is established falls within the general rule. In every case in which this court has allowed a recovery upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money or erecting a building in accordance with the terms of the contract, and upon the faith of the defendant's promise." *Church v. Kendall*, 121 Mass. 530; *Music Hall Co. v. Carey*, 116 Mass. 473; 1 Story, Cont. 556; 1 Pars. Cont. 378; *Cook, Stock & S. § 84*. In this case the appellants, according to the statements of their answer, not only withdrew their subscription before the organization and before any acceptance, and before the expenditure of any money, but with the consent of J. H. Knox, (a member of the

firm of J. H. Knox & Co., the payees,) who promised to erase their name from the list of subscribers, and their name does not appear to have been enrolled among the stockholders of the corporation, when formed. The court below erred in striking out the second amended original answer of defendants, and in rendering judgment against them under the facts proved. The judgment is reversed, and the cause remanded.

LEWIS v. HILLSBORO ROLLER-MILL CO.
(Court of Civil Appeals of Texas. Sept. 5, 1893.)

JUDGE—DISQUALIFICATION—SUBSCRIPTION TO PRIVATE ENTERPRISE—RIGHT TO WITHDRAW SUBSCRIPTION.

1. Under Rev. St. art. 1138, which provides that a judge is disqualified when a relative "within the third degree" is a party to the suit, a judge who is the brother-in-law of a stockholder and president of a corporation is not disqualified to try an action to which such corporation is a party.

2. A person who subscribes money to assist a proposed corporation to erect a roller mill may, before the whole amount necessary is subscribed, or any liabilities or expenses have been incurred, or any organization has been perfected, withdraw his subscription, by notifying the person having charge of such matter.

Appeal from Hill county court; J. G. Abney, Judge.

Action by the Hillsboro Roller-Mill Company against M. Lewis on a subscription made by defendant for the purpose of erecting a roller mill in the city of Hillsboro. From a judgment for plaintiff, defendant appeals. Reversed.

Upshaw & Jordan, for appellant. Tarlton & Morrow and McKinnon & Carlton, for appellee.

RAINEY, J. This suit was brought by appellee against appellant to recover \$500, alleged to be due by appellant on a subscription for the purpose of erecting a roller mill in the city of Hillsboro. Appellant (defendant below) admitted that he signed the subscription list, but said that, before the amount (\$20,000) necessary to be raised had been subscribed, he notified J. R. Thompson, who had the subscription in charge, that he would withdraw his subscription, to which Thompson consented. Thompson referred him to his bookkeeper, where defendant went, and erased his name from a list handed him by said bookkeeper, which he supposed was the original subscription list, but which was in fact a copy. At that time no expenses had been incurred, nor had there been an organization of the corporation. The judge who tried the case is a brother-in-law of J. R. Thompson, who is a stockholder in, and president of, the appellee company.

The first error assigned by appellant is, in substance, that the presiding judge was disqualified to try the case, because of his

relation to J. R. Thompson, a stockholder. A judge is disqualified on account of relationship only when a relative "within the third degree" is a party to the suit. Rev. St. art. 1138. When a corporation sues or is sued, a stockholder is in no sense a party to the suit. We therefore conclude that this assignment is not well taken. *Coal Co. v. Carter*, 3 Civil Cas. Ct. App. 306; *In re Dodge & Stevenson Manufg Co.*, 77 N. Y. 101.

The next assignment that requires consideration is that the court erred in holding that the defendant could not withdraw his subscription after having signed the subscription list. In the case of *Williams v. Rogan*, 59 Tex. 438, where the party signed a subscription to erect a building for a high school at the instance of the Methodist Church, the court held that "until the acceptance by the church of the subscription, or the beginning of work on the building, the subscriber may withdraw his promise to pay the amount subscribed by him, but he cannot afterwards." This doctrine is affirmed in *Railway Co. v. Neely*, 64 Tex. 344. See, also, *Church v. Kendall*, 121 Mass. 528; *Patty v. Roller-Mill Co.*, 23 S. W. Rep. 336, (decided this term.) This case is not dissimilar to those above quoted. Before the amount necessary was subscribed, before any expenses or liabilities had been incurred, and before any organization had been perfected, the defendant, if his testimony be true, notified J. R. Thompson, who had charge of the subscription list, that he would not longer be bound by his subscription. Thompson, having charge of the matter, was the agent of all the parties, and there was no one else necessary for appellant to notify. The signing of the subscription list was not a binding contract until there was an organization perfected, or some liability incurred by reason thereof. There is nothing to show that, before defendant withdrew his subscription, any one was induced to take stock in the enterprise, or in any way changed their position, by reason of his subscription. We think there was error in the court's finding on this proposition. The court failed to find whether or not there was a withdrawal by defendant of his subscription, and as there was some conflict of testimony on this point, this case will be reversed and remanded for a further determination of this question.

VIOKERS v. OARNOHAN et al.
(Court of Civil Appeals of Texas. Oct. 4, 1893.)

CHATTEL MORTGAGES—REGISTRATION.

1. Rev. St. art. 4341, requires a mortgagee of chattels who after registration permits the removal of the chattels to another county to record his mortgage in the latter county within four months, or lose his lien as against creditors and bona fide purchasers. Held not to apply in case of a removal without the mortgagee's consent.

2. Sayles' Civil St. art. 3190b, § 1, provides that a chattel mortgage without change of possession shall be void against subsequent purchasers in good faith, unless the instrument or a true copy "be forthwith deposited" in the office of the county clerk. *Held*, that purchasers are charged with notice of a mortgage filed before their purchase, though more than three months after it was given.

Appeal from Parker county court; I. N. Roach, Judge.

Action by John P. Vickers against J. B. Carnohan and W. J. Carnohan for possession of a hay press or for its value. The justice of the peace gave judgment for defendants. Plaintiff appealed to the county court. Judgment for defendants. Plaintiff appeals. Reversed.

The other facts fully appear in the following statement by TARLTON, C. J.:

Appellant, on May, 1891, brought this suit in a justice's court in Parker county to recover from appellees the possession of a certain Scott hay press, or its value, \$200. Appellant's claim rests upon a chattel mortgage executed in his favor by one J. R. Brown. Appellees, on appeal to the county court of Parker county, prevailed on the ground that they had purchased the press from Brown for value, and without notice of the mortgage.

Statement of Facts.

August 13, 1890, the plaintiff and appellant sold to J. R. Brown the hay press in question, for the sum of \$280, in consideration of which Brown at the time executed his note, secured by the chattel mortgage above referred to. Both Vickers and Brown were then residents of Johnson county, and Vickers continued to reside there. The appellees were residents of Parker county, about three miles from the line of Johnson county. In September, or October, 1890, Brown, without the knowledge or consent of the mortgagee, Vickers, removed the hay press into Parker county. It does not appear whether or not he changed his residence to Parker county, nor whether or not, after his removal to Parker county, the press was kept continuously there, or carried to and from Parker county to Johnson, according to the requirements of the business (that of baling hay) for which it was used. On November 25, 1890, Vickers, the mortgagee, caused the mortgage to be registered in the office of the county clerk of Johnson county. On April 7, 1891, he caused it to be similarly registered in Parker county. About December 25, 1890, Brown moved the press to the premises of the appellees, in Parker county. After there using it for a few days, he sold it to the appellees for the sum of \$157.25, its fair and reasonable value. Appellees purchased in good faith, believing that Brown was the owner, and having no actual knowledge of the plaintiff's mortgage.

Martin & Littleton, for appellant. E. P. Nicholson and R. J. McKenzie, for appellees.

TARLTON, C. J., (after stating the facts.) The trial court, upon the foregoing facts, concluded that, in the absence of actual notice of the mortgage on the part of the defendants, the plaintiff had lost his lien; that it was the duty of the plaintiff, even if the mortgage was properly recorded in Johnson county, to follow the property on its removal to Parker county, and there to register the mortgage within four months from the date of removal. In reaching this conclusion, the court applied the provisions of article 4341 of our Revised Statutes. By the terms of this article, which was in force before the adoption of the act of 1879, (article 3190b, Sayles' Civil St.) with reference to chattel mortgages, it was provided that if, after the registration of a mortgage upon personalty in the county where it was situate, the mortgagee "shall permit any other person in whose possession such property may be to remove with the same * * * out of the county in which the same shall be recorded, and shall not within four months after such removal cause the same to be recorded in the county to which such property shall be removed, such mortgage for so long as it shall not be recorded in such last-mentioned county, and for so much of the property aforesaid as shall have been removed, shall be void as to all creditors and purchasers thereof for valuable consideration without notice." It has been held by our court of appeals (correctly, we think) that the foregoing article has not been repealed by the chattel-mortgage act of 1879, in so far as there may be question of the removal of the mortgaged property with the permission of the mortgagee. *Reed v. Spikes*, 15 S. W. Rep. 122. The provisions of this article will not, however, be extended beyond its terms, and be made to apply to a case like the present, where it affirmatively appears that the removal of the mortgaged property was without the consent of the mortgagee. The rights of the parties should therefore have been determined under the provisions of article 3190b, the chattel-mortgage act referred to. We deem it proper to insert sections 1 and 6 of that act, as follows: "Section 1. Every chattel mortgage * * * upon personal property which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged * * * shall be absolutely void as against the creditors of the mortgagor, * * * and as against subsequent purchasers and mortgagees or lienholders in good faith, unless such instrument or a true copy thereof shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or the person making the same be a resident of this state, then of the county of which he shall at the time be a resident." "Sec. 6. The person making any such in-

strument shall not remove the property pledged from the county nor otherwise sell or dispose of the same without the consent of the mortgagee; and in case of any violation of the provision of this section the mortgagee shall be entitled to the possession of the property, and to have the same then sold for the payment of his debt, whether the same has become due or not." If, at the time of the sale by Brown to the appellees, the mortgage was properly on the registry of Johnson county, it was not necessary in order to affect appellees with notice to have it again registered in Parker county, whither the hay press had been carried without the knowledge or consent of the mortgagee. *Griffith v. Morrison*, 58 Tex. 42. We therefore consider whether at the date of appellee's purchase from Brown, about December 25, 1890, the mortgage was duly recorded in Johnson county. To this due registration, two conditions are requisite: (1) The instrument must have been deposited and filed within the proper time; and (2) at the proper place.

1. It is contended that the mortgage, having been executed August 30, 1890, must have been "forthwith" registered, in order to serve as constructive notice to appellees, who purchased for value and without actual notice. We do not approve this contention, provided the mortgage was otherwise properly registered at the date of appellees' purchase. The mere omission to deposit and file the instrument "forthwith" will not impair the effect of the registration as to persons acquiring rights in the mortgaged property at a date subsequent to the registration. The supreme court of Ohio, construing a statute similar in its provisions to our chattel-mortgage act, uses the following language: "Until placed in the proper office, a mortgage of chattels in our state would be void as against other creditors of the mortgagor and subsequent purchasers and mortgagees whose rights then attach; but, when filed with the clerk or recorder, the instrument becomes valid and effective against all men except those whose rights have thus previously attached." *Wilson v. Leslie*, 20 Ohio, 168. This view, adopted by the supreme court of Kansas, (*McVay v. English*, 30 Kan. 368, 1 Pac. Rep. 795,) and evidently approved by the supreme court of the United States, (*Gibson v. Warden*, 14 Wall. 244,) is regarded by us as sound.

2. We therefore consider whether this instrument was registered at the proper place. To be thus registered, it is necessary that it should have been "deposited with and filed in the office of the county clerk of the county of which" Brown, the mortgagor, was at the time of the registration a resident. The facts herein do not disclose whether Brown was a resident of Johnson or of Parker county when this instrument was deposited in Johnson county. The evidence on the trial below was not developed with

reference to a solution of this question of fact. The case was, on the contrary, disposed of on what we adjudge to be an erroneous theory. For these reasons we are not disposed to apply the presumption of fact that Brown's residence, having been shown to be in Johnson county when the mortgage was executed, must be held to have there continued. 2 Whart. Ev. § 1285. It appears that, before the registry of the mortgage in Johnson county, he was in Parker county, using the hay press. The question of his residence was left in doubt. We therefore conclude that a proper disposition of this cause is to remand it for a new trial, to be had according to the views here announced. The condition of the record indicates the pertinency of the additional suggestion that the appellees, to establish their defense of a bona fide purchase, must not only prove such a purchase, but must plead it. Reversed and remanded.

TEXAS & P. RY. CO. v. RANEY.

(Court of Civil Appeals of Texas. Oct. 4, 1896.)

WITNESS—SHOWING REPUTATION FOR VERACITY—
EVIDENCE—INSTRUCTIONS—REMARK OF COUNSEL
—ASSIGNMENT OF ERROR.

1. To entitle a party to introduce witnesses in support of his character for truth it is not necessary that his general character be first impeached, but it is sufficient that his veracity as a witness has been fairly challenged, especially where he is a stranger at the place of trial.

2. Special requested charges are properly refused where the principles of law therein have been fairly covered by the general charge.

3. Evidence that while a freight train was passing an employee of the road, standing close to the track, a nut such as was used on freight cars, the threads of which were freshly broken, struck him, being seen by him when a foot away, coming from the direction of the train, was sufficient to authorize the submission to the jury of the theory that the nut flew off of one of the cars.

4. In an action against a railroad company for personal injuries, a remark of counsel to the jury that defendant was a corporation, which had neither soul nor feeling, and could be reached only through its pocket, is not ground for reversing the denial of a new trial where the amount of the verdict is not complained of, and it cannot be said from the record that the remark probably influenced the jury to defendant's prejudice.

5. An assignment of error, merely stating that the verdict is not supported by evidence, is insufficient to be considered on appeal.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by Calvin Raney against the Texas & Pacific Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals.

The other facts fully appear in the following statement by HEAD, J.:

Appellee, while at work for appellant as section foreman in a deep cut along its track, on seeing an approaching freight train, stepped to one side as far therefrom as he

could on account of the embankment, and while the train was passing him at a rapid rate a nut flew from some part of one of the cars, and struck his left arm, breaking one of the bones. Appellee did not by any negligence on his part contribute to the injury. The verdict finds negligence on the part of appellant, and the sufficiency of the evidence to sustain this finding is not so assigned as that we can consider it. Appellee brought this suit to recover damages for the injury thus sustained, and was given a verdict and judgment in the court below for \$1,433.33, from which this appeal is prosecuted.

B. G. Bidwell, for appellant. Lanham & Stephens, for appellee.

HEAD, J., (after stating the facts.) During the trial in the court below appellee offered evidence to show his general reputation for truth to be good, to which appellant objected, because his character had not been attacked; but the court admitted the evidence. Prior to the admission of this evidence, appellee had been subjected by appellant to a severe cross-examination in an attempt to break down his evidence, and a number of witnesses had been introduced to contradict statements he had made. For instance, appellant attempted to show that there was no such doctor as the one appellee testified first treated his injury, and that the receipt introduced by appellee as having been given him by his doctor was really in his own handwriting. Also, appellee had testified that while working for the witness Frank Young he had not been able to use his injured hand, and this witness was introduced to prove this untrue. Appellee had also testified that the nut which struck him fitted the bolt which holds the brake beam of the car, and appellant had introduced several witnesses who testified they had tested the nut, and it was entirely too large for this bolt, and would only fit another bolt at a different place on the car. In fact appellant's defense consisted principally in an attempt to show the falsity of the statements of appellee. In addition to this, it appears that appellee resided in another county, and, it may be inferred, was a stranger at the place of trial, testifying to isolated facts to which there was no other witness. Under these circumstances, we think it clear the court committed no error in permitting appellee to prove that his general character for truth was good, although no witness had said it was bad. *Burrell v. State*, 18 Tex. 730; *Phillips v. State*, 19 Tex. App. 164; 1 Greenl. Ev. 469; 1 Whart. Ev. 569. To entitle a party to introduce witnesses in support of his character for truth it is not necessary that his general character be first impeached, but it is sufficient that his veracity as a witness has been fairly challenged by the opposite party before the jury, especially where the witness is a stranger in the coun-

ty where the trial is being conducted. See authorities supra.

The court did not err in refusing to give the first and fourth special charges requested by appellant. In the first the court was requested to instruct the jury that "it was incumbent on plaintiff to prove that the defect in the car, if any, had come to the knowledge of defendant, or had existed for such a length of time that knowledge should be presumed;" and in the fourth that "the master is not the insurer of the safety of the servant, and is only required to use reasonable care in furnishing the servant instrumentalities or appliances." We think the charge of the court fully conveyed to the jury the idea that appellant would only be liable in case they found ordinary negligence on its part to have been the cause of the injury, and that it was incumbent on appellee not only to prove such negligence, but also to prove that he was himself free from negligence. The court, having thus fairly given to the jury the principles of law embraced in these charges, correctly refused to reiterate them.

Appellant's fifth assignment is: "The court erred in the first paragraph of its charge in instructing the jury as to the liability of defendant for injury to plaintiff caused by a nut flying from defendant's train and hitting him, as there is no evidence in the record that even tends to prove such a thing to have occurred." We are of opinion the circumstances in evidence required the submission of this theory of the case to the jury. Appellee testified positively that, while the train was rapidly passing, the nut struck his arm, and that he saw it when about one foot from him. It is true no one saw it leave the car, but the evidence was undisputed that it was a kind of nut used on freight cars. It was also in evidence that the threads in the nut were freshly broken. We think the jury might as well have concluded that this nut was forced from the end of the bolt by the heavy strain upon it as that it was maliciously thrown by some one on the train, which seems to be the only other theory that can be advanced with any plausibility. At any rate, we believe there was sufficient evidence to authorize the submission of this theory to the jury, which is all that is necessary for us to decide to require the overruling of this assignment.

In his closing argument counsel for appellee used this language: "The defendant is a corporation, that has neither soul nor feeling, and the only way you can reach it is through the pocket,"—to which appellant duly excepted at the time, and assigns as error the refusal of the court below to grant it a new trial on account thereof. The amount of the verdict rendered is not complained of as being excessive, and we are unable to say from the record that these remarks probably influenced the jury to the prejudice of appellant. While we do not

approve this language, and see nothing in the record to justify its use, yet it will not do to set aside verdicts for every extravagant remark made by counsel in the heat of argument. The jury must be presumed to be men of discretion, and when the trial judge, who is in the best position to decide, concludes they have not been improperly influenced by remarks of this kind, we will not overrule his judgment unless the record makes it appear reasonably probable that an erroneous result has been thereby produced. *Radford v. Lyon*, 65 Tex. 477.

The only remaining assignment of error is as follows: "The court erred in not granting defendant a new trial because there is no evidence to support the verdict, and it could not have been rendered by an impartial jury, which is one of the grounds for a new trial in defendant's motion therefor." Appellee objects to our considering this assignment, on account of its generality, and we are of opinion this objection must be sustained. In the case of *Yoe v. Montgomery*, 68 Tex. 342, 4 S. W. Rep. 622, it is said: "This court has uniformly refused to enter into the investigation of testimony upon an assignment which goes no further than to state that the verdict is not supported by sufficient evidence. The assignment should state in what respect the evidence does not support the verdict,—the particulars in which it is insufficient,—and not require the court to examine the whole statement of facts to see if it can not discover some defect which the party complaining has not thought proper to call to its attention. Also see *City of Galveston v. Devlin*, 84 Tex. 826, 19 S. W. Rep. 395. In this case there were several issues to which the assignment might relate, and we are not informed by it as to which of these appellant intended it to apply. We are of opinion that the judgment of the court below must be affirmed, and it is so ordered.

STEPHENS, J., disqualified, and not sitting.

MAXWELL v. FIRST NAT. BANK OF CISCO et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

SPECIAL VERDICT—JUDGMENT—DAMAGES.

1. A judgment which the court could not have entered without looking to the evidence as well as the special verdict, for the reason that one of the material issues was not submitted to the jury, will be set aside.

2. Where pleadings will warrant a judgment for the damages found, but the evidence will not warrant more than nominal damages, the finding should not be ignored, and judgment entered for nominal damages, but the verdict should be set aside, and a new trial granted.

Appeal from district court, Eastland county; T. H. Conner, Judge.

Action by the First National Bank of Cisco against O. T. Maxwell and J. J. Martin. Maxwell also asked for damages against plaintiff and Martin. There was judgment for plaintiff, and a judgment for Maxwell for nominal damages against Martin. Maxwell appeals. Reversed.

R. B. Truly and J. H. Davenport, for appellant. E. A. Hill, for appellee First Nat. Bank. J. H. Calhoun, for appellee J. J. Martin.

STEPHENS, J. This suit was instituted by the First National Bank of Cisco against O. T. Maxwell, as maker, and J. J. Martin, as indorser, of certain promissory notes set out in the petition. Appellant, Maxwell, answered with a general denial, and set up specially that the notes had been canceled and satisfied by a partnership contract between him and appellee Martin, of which the bank had full notice; claiming damages against the bank for appropriating other promissory notes alleged to have been satisfied by the same agreement, and against Martin for a breach of the partnership contract. The court submitted special issues to the jury, and upon their response to these several issues, and upon the facts developed, entered judgment in favor of the bank for the amount of the notes, with interest, sued upon, and in favor of Maxwell for one dollar, nominal damages, against Martin, ignoring the finding of the jury of several hundred dollars damages for breach of the partnership contract. The issue made by the general denial of the cause of action sued on was not submitted to the jury. The amount due the bank, therefore, was not found by them. Without such a finding, the court, in entering the judgment, had to look to the evidence as well as the verdict. The rigid rule applied to special verdicts in this state requires us, therefore, to set aside this judgment, and remand the cause for a new trial. *Newbolt v. Lancaster*, 83 Tex. 271, 18 S. W. Rep. 740.

In relation to the verdict for damages, if, under the pleadings, such verdict would not warrant a judgment therefor, the court was right in ignoring that part of the verdict, but we are not prepared to hold that a case of damages might not have been proven under appellant's plea; and, if so, the court should not have ignored the verdict, but should have granted a new trial, on account of the insufficiency of the evidence to support the verdict. We concur with the trial court in the conclusion that the evidence in this case warranted nothing more than nominal damages, but it could not be looked to, except to set aside the verdict and grant a new trial, if, under the pleadings, had the proof warranted it, a verdict might have been sustained. We also concur with the view entertained by the court below, that the partnership contract did not exclude the

inquiry whether or not, at the time it was executed, the notes in suit, with others, were intended at that time to be paid and satisfied. This was a controverted issue, to be determined by the contract and the concurrent acts and declarations of the parties, under the circumstances surrounding them. For the errors indicated the judgment will be reversed, and the cause remanded for a new trial.

LONG v. BOWEN.

(Court of Appeals of Kentucky. Sept. 14, 1893.)

OFFICE AND OFFICER—VACANCY IN OFFICE.

Gen. St. c. 33, art. 6, § 1, defines the term "vacancy in office" to mean such as exists when there is an unexpired term without a lawful incumbent, whether by death, resignation, removal, or otherwise. *Held*, that an adjudication that one holding the office of assessor is a lunatic, and that he should be confined in the asylum, creates a vacancy in his office.

Appeal from circuit court, Nicholas county. "To be officially reported."

Action by John K. Bowen against James B. Long for official fees. Judgment for plaintiff. Defendant appeals. Reversed.

Kennedy & Son, for appellant. Ross & Owens and Hanson Kennedy, for appellee.

BENNETT, C. J. The appellee, in August, 1886, was elected assessor of Nicholas county, and qualified and entered upon the duties of the office, and continued to discharge the duties of the office, until, the 27th of April, 1889, he was, by proper proceedings, and by a court of competent jurisdiction, adjudged a lunatic, and committed to the Eastern Kentucky Lunatic Asylum, where he remained a lunatic until the 27th of August, 1889, when, as it is presumed, he was discharged as cured. In the mean time, by proper proceedings, the office of assessor was, by the county court, declared to be vacant, and an election to fill the vacancy was ordered, and held on the first Monday in August, 1889, which resulted in the election and qualification of the appellant, who entered upon the duties of the office. After appellee returned from the asylum, he demanded the books of the office from the appellant, but he refused to deliver them, and made the assessment of the county for that year. The appellee, by this action, charges that the appellant had usurped the office, and asks judgment against him for the fees of the office that he had received. The lower court sustained his contention, and the appellant has appealed.

The question to be decided is, was there a vacancy in the office, at the time it was so declared by the county court, in the sense of chapter 33, art. 6, § 1, which is as follows: "The term 'vacancy in office,' or equivalent phrase, as used in this article means

such as exists when there is an unexpired part of a term of office without a lawful incumbent therein, or when the person elected or appointed to an office fails to qualify according to law, or when there has been no election to fill the office at the time appointed by law. It applies whether the vacancy is occasioned by death, resignation, removal from the state, county, or district, or otherwise." The 5th section provides that the county court shall have power, in case of vacancy in the office of assessor, sheriff, etc., to fill it until the next August election, at which time there shall be an election to fill the vacancy. The question is, did the judicial finding that the appellee was a lunatic, and his confinement in the insane asylum in accordance with such finding, and while the finding was in force, create a vacancy in the office of assessor, and authorize an election to be held to fill the vacancy? The judgment of the court, that the appellant was a lunatic, and that he should be confined in the lunatic asylum, was, in effect, that the confinement should be that of physical restraint, and that he should be deprived of the right to transact any business, or to take charge of and control his estate, but the management and control of same should be confided to some prudent person to be appointed by the court; also, that he should have no standing in court, except through a committee, etc.; also, that he should be deprived of the power to contract or be contracted with; also, to deprive him of the power to control his own family, or to do other things that a sane person has the legal right to do. The appellee's status was thus judicially determined, which was in force at the time of the election and qualification of the appellant. The appellee, so far as these things were concerned, or of discharging the duties of the office, or of performing any other civil duties, was civilly dead,—not in the sense of a punishment, but as protection. It seems from what has been said that the statute, *supra*, should be construed to mean, not only resignation, removal from the state, county, or district, whereby he abandons his official duties, and the county loses control over him, but death, natural or civil. The latter, by the judgment of the court, depriving him of the right and power to execute the duties of the office, as well as the former, creates a vacancy in the office. It seems that the expression "or otherwise" has reference to such other things as by judicial determination, at least, deprive the incumbent of the right and power to discharge the duties of the office. The confinement of the appellant in the insane asylum under the writ of lunacy certainly deprived him of the power to execute the duties of the office. The judgment is reversed, with directions to dismiss the petition.

COMMONWEALTH v. CARTER.

(Court of Appeals of Kentucky. Sept. 14, 1893.)

STATUTORY OFFENSES—AIDERS AND ABETTORS.

Except where it is plain from the nature of an offense made a felony by statute that the provisions of the statute were intended to affect only the party actually committing the offense, aiders and abettors of statutory offenses are punishable as principals. *Stamper v. Com.*, 7 Bush, 612, overruled.

Appeal from circuit court, Graves county.
"To be officially reported."

Ed Carter was tried for breaking into a store, and acquitted. The commonwealth appeals. Reversed.

W. J. Hendrick, for the Commonwealth.

PRYOR, J. An indictment was returned in the Graves circuit court against Mark Hubbard and two others, charging them with breaking into the storehouse of one Boaz. The testimony showed that Hubbard took the window of the house out, and his confederates stood watch a short distance from the storeroom, and, when the goods were removed by Hubbard, Carter and James, his confederates, took charge of them. There was a separate trial demanded, and Ed Carter, being first tried, was acquitted upon a peremptory instruction, based upon the case of *Stamper v. Com.*, 7 Bush, 612. There can be no doubt of the correctness of the rule that in statutory offenses, where the plain intent of the statute is to inflict punishment only on the person actually committing the offense, others cannot be brought within its provisions as principals upon proof that they were aiders and abettors. The case of *Frey v. Com.*, 83 Ky. 191, was an indictment under a statute enacted to prevent the destruction of bastard children by the mother. The statute reads: "If any woman be delivered of any issue of her body which if born alive would be a bastard shall endeavor to conceal the birth by drowning," etc., "she shall be confined in the state prison," etc. This statute was intended to apply alone to the mother, and illustrates the distinction between the cases. In *Evans v. Com.*, (Ky.) 12 S. W. Rep. 769, the statute provided "that, if any one shall willfully and unlawfully burn," etc., "he shall be confined." This statute was held to apply to aiders and abettors. Those who were present aiding and abetting in such cases are as much principals as the one applying the torch or entering the building; and the doctrine of *Stamper v. Com.* makes the rule too broad when saying that, where the offense is created by statute against one actually committing the offense, those aiding and abetting are not amenable as principals to its provisions. There is as much reason for punishing those aiding and abetting in a felony created by statute as there is in a felony at common law. So the doctrine of *Stamper*

v. Com. is overruled, but, where in cases it is plain from the nature of the offense made a felony by statute that its provisions were only intended to affect the party actually committing, the doctrine of *Stamper v. Com.* should apply. As this is an appeal by the commonwealth, the clerk is directed to certify the opinion to the court below.

FERRILL v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 14, 1893.)

HOMICIDE—EVIDENCE—STATEMENTS.

1. In a murder case, where one of the principal questions is whether deceased was attempting to draw a pistol on accused when he fired, the statements of all the persons engaged in the quarrel during which the shooting occurred, made while it was going on, are competent as showing the nature of the difficulty, and the attitude of the parties towards each other.

2. On a trial for murder, committed while the parties were engaged in a game of cards, evidence of the conduct of deceased and his partner while engaged in another game of cards on the same day, with another person, is incompetent.

Appeal from circuit court, Lincoln county.
"Not to be officially reported."

Mack Ferrill was convicted of murder, and appeals. Affirmed.

W. G. Welch, Hill & McRoberts, and W. H. Miller, for appellant. W. J. Hendrick, John S. Owsley, Joseph B. Paxton, and B. C. Warren, for the Commonwealth.

PRYOR, J. The appellant was indicted for the murder of Samuel Engleman, and sentenced to the state prison for life. It is sufficient to say that the parties were engaged in a game of cards. All but the accused were under the influence of liquor, and armed with pistols, ready to take human life for the most trivial offense. It is useless to recite the facts with a view of determining whether any provocation or cause existed excusing this appellant for taking the life of the deceased. The plea was self-defense, but the testimony of such character as to authorize the conclusion that the facts relied on as sustaining this view was an afterthought by the deceased. There are but few, if any, palliating circumstances in the case, and the verdict of the jury is fully sustained by the testimony. One of the principal questions of fact was as to whether or not the deceased was attempting to draw a pistol on the accused when he fired the fatal shot. It is contended that what Chris Gentry and one Bright said while the quarrel was progressing and pistols drawn was incompetent. Bright, a friend of deceased, it seems was engaged in the game, and he drew a pistol, and was told by deceased to "sit down. I need no pistol. I have no pistol;" and then the son of the deceased remarked, "Papa has no pistol, and has had none for fourteen years." All this took place when the quarrel

was going on, and was competent to show the nature of the difficulty, and the attitude of the parties towards each other. They were all engaged in a quarrel, except perhaps the son, who was endeavoring, doubtless, to convince the accused that he was in no danger. All that took place at the time was competent, but, if not, the fact of the pistol being on the floor under the body of the deceased was before the jury, and must have been considered by them; and the statement of the son, were it regarded in the light of substantive testimony, did not prejudice the accused. Nor did the fact that Bright was a partner with the deceased in the take-out or game throw any light on the case.

The court acted properly in excluding from the jury and in refusing to hear testimony with reference to another and different game of cards played with Hardin on the same day. Neither the conduct of Bright or the deceased when playing cards with Hardin had any connection with the case. That Bright was drunk, a violent man, and ready to shoot in behalf of his friend, the deceased, this proof clearly shows. His conduct and actions on that day, in every way reprehensible, was before the jury, and the greatest latitude given the defense in the prosecution of the case.

As to the testimony of Wickersham, and the attack upon his character, we are not disposed to say that the time he lived in Hardinsburgh was too remote to enable the witnesses who then knew him well to speak of his character or veracity at the date of the trial, or that the court should have told the jury the object of impeaching a witness. This was not necessary, and, besides, the jury had before them witnesses who had known Wickersham in the last two years pending his trial. They spoke well of him, and lived nearer the place of trial than those who knew him at Hardinsburgh. This man has been tried in a county where all the parties and witnesses were known, and doubtless by an intelligent jury, presided over by an able and impartial judge, and to say that the objections raised in this case were sufficient to justify a reversal when guilt is so manifest would be trifling with the administration of justice. Judgment affirmed.

TUTTLE et al. v. BERRYMAN.

(Court of Appeals of Kentucky. Sept. 16, 1893.)

WILLS—MEMORANDUM DESCRIBING PROPERTY— PROBATE—PAROL EVIDENCE.

1. A writing referred to in a will, so as to be made a part of it, need not be probated with the will.

2. Where a will states that land is to go to certain persons according to deeds which testator has made, parol evidence is not admissible to show that by "deeds" were meant certain memoranda made by the draughtsman, and never signed by testator.

Appeal from court of common pleas, Clark county.

"To be officially reported."

Action by Samuel Berryman against J. N. Tuttle and others for partition of land. Judgment for plaintiff. Defendants appeal.

I. N. Cardwell, for appellants. Haggard & Benton, for appellee.

PRYOR, J. James Sheppard, at his death, left a last will and testament, and three children surviving him. This action below was instituted to have his will construed. The provision from which the litigation arises is as follows: "And at my death, and the death of my wife, Susan, this two hundred and forty-five acres of land I have made deeds to my three children, giving courses and lines as the deeds describe, and at our death they are to have peaceable possession of their land described in deeds." The widow of the testator died, and the plaintiff, one of the children, seeks by this petition a partition of the land in equal parts, alleging that no deeds were ever made. The appellants answer, and say that the draughtsman of the will made, at the time it was written, memoranda of the location, quantity, and boundary of each child's portion, and the memoranda were what the deviser termed "deeds;" and, further, that the appellee had entered and cultivated her part as designated by the memoranda for one year. There was a demurrer to the answer, and the demurrer sustained, and a partition ordered.

It is contended in argument for the plaintiff that a writing referred to in the will, so as to be made part of it, must be recorded or probated with the will itself, so as to make it effectual. We do not understand this to be the rule. A paper executed that is signed by the testator, or if unexecuted as in this case, must be so described by the will itself as to leave no doubt in the mind of the chancellor that it is the paper referred to. It must be clearly and certainly identified. The will being properly attested, and admitted to probate, establishes the paper as a part of that instrument. It referred to it, and the probate incorporates it as part of the will. 1 Redf. Wills, p. 264. We must, however, concur with the court below in his ruling, sustaining the demurrer. The memoranda were made by the draughtsman; were never signed by the testator; no deeds were ever executed; and to admit testimony that mere memoranda were intended as a deed would be to contradict the express language of the will itself. Parol testimony that changes the entire character of the instrument referred to in the will would be dangerous in its character, and enable any paper to be substituted as the one referred to by the testator. It is immaterial what the intention of the deviser may have been, for it is often

easy to show by parol, if such testimony was admissible, that the testator intended to do that which is directly the reverse of his intention as expressed in the will itself; and while the testator may have designed to make a division of this land in his lifetime, and perfect the title in his children, still he failed to do so, and proof of the making of mere memoranda by the draughtsman or surveyor as evidence of title in the children when the will says that deeds had been made would be identifying and making a part of testator's will a writing that in no manner corresponds with that referred to in that instrument. It was no doubt the intention of the testator to make deeds, and leave his children with a title to the land referred to in the memoranda. It was something to be executed in the future. He may have changed this purpose, and concluded to let an equal division be made, as he no doubt attempted himself to do. The will is intelligently written. Both the draughtsman and the testator must have known that these memoranda in a paper by one other than the testator, and not signed by him, were not a deed or a bond for title, and it is plain that the probate did not carry with it, and make part of the will, the memoranda made by the draughtsman. Judgment affirmed.

FLINT v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 29, 1883.)

ASSAULT WITH INTENT TO KILL — INDICTMENT — MISCONDUCT OF COUNSEL — STATING INCOMPETENT EVIDENCE.

1. An indictment charging that defendant "did unlawfully, feloniously, and maliciously, with intent to kill him, cut and wound one, Y., is sufficient, under Gen. St. c. 29, art. 6, § 2, making it a felony for any person to "willfully and maliciously cut, strike, or stab another," if the person so injured does not die thereby.

2. It is error for counsel, in the presence of the jury, to state what he expected to prove by a witness, where such evidence is incompetent, and has already been rejected for that reason.

3. On the trial for cutting another with intent to kill, evidence of a difficulty between defendant and another person, which had no connection with the offense charged, is incompetent.

Appeal from circuit court, Daviess county. "Not to be officially reported."

John Flint was convicted of maliciously cutting and wounding another, with intent to kill, and appeals. Reversed.

Defendant was indicted under Gen. St. c. 29, art. 6, § 2, which makes it a felony for any person to "willfully and maliciously cut, strike, or stab another with a knife, sword, or other deadly weapon, with intention to kill, if the person so stabbed, cut, or bruised die not thereby," etc.

J. A. Dean, for appellant. P. W. Hardin, for the Commonwealth.

LEWIS, J. 1. The charge in the indictment in this case, that "the defendant did unlawfully, feloniously, and maliciously, with intent to kill him, cut and wound one Phillip Yeiser," is sufficient, under section 2, art. 6, c. 29, Gen. St., for the words used import an exercise of the will, and convey the same idea as do those contained in the section referred to.

2. It is assigned as an error that the court permitted the attorney for the commonwealth to state, in the presence of the jury, what he expected to prove by the witness Spicer, the evidence offered having been decided incompetent. Witnesses had been introduced and testified in behalf of, and as to the character of, the defendant, when the witness Spicer was called by the commonwealth in rebuttal; and the first question put to him was whether or not he (the witness) and defendant had ever had a difficulty, which the court permitted answered, notwithstanding the objection of the defendant. The witness was then asked what occurred at that difficulty, the objection to which was sustained. But the court permitted the commonwealth's attorney, although the defendant objected, to state, in the presence of the jury, that he expected the witness to state that "on an occasion the defendant attacked witness on the street, and knocked him off the sidewalk with a wagon spoke." If a party desires to reserve the question, a statement of what the witness would testify, if permitted, may be reduced to writing; but it is never proper to permit counsel, against the objection of the opposite party, to state orally, in the presence and hearing of the jury trying the case, what the rejected evidence would be, if permitted by the court to be introduced, for with it the jury have nothing to do, and should not be influenced by it. In this case the court erred, in the first instance, in permitting the witness to state he had ever had a difficulty with the defendant, for there was no connection whatever between that difficulty and the one in which the cutting and wounding were done, for which the defendant was then being tried; and evidence of what occurred at the time of the difficulty with the witness Spicer, which the commonwealth's attorney, with the permission of the court, improperly and irregularly put before the jury, was obviously not competent for any purpose. But the jury did not know it was illegal evidence, and doubtless, believing the statement was made by the officer of the state in good faith, and for a legitimate purpose, may have accepted it as proof of a fact bearing materially upon the character of the defendant, whereby he was prejudiced, and deprived of a fair trial.

3. We perceive no error, to the prejudice or the substantial rights of the defendant, in the instructions given, nor in the refusal of the court to give those asked by him, except

that he was entitled to an instruction to the effect that the intent by him to kill must have existed at the time the cutting and wounding were done, in order to make him guilty of the offense charged. For the error indicated, the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

TOLER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 14, 1893.)

SHOOTING WITH INTENT TO KILL — INDICTMENT — CIRCUIT COURT — SPECIAL TERMS — NOTICES AND ORDERS.

1. Under Gen. St. c. 29, art. 6, § 2, making it a felony when one "willfully and maliciously" shoots at and wounds another with intent to kill, an indictment accusing defendant of the crime of "maliciously" shooting at and wounding R., with intent to kill him, committed as follows: That defendant did on a certain day "willfully, maliciously," and feloniously, shoot at, etc.,—is sufficient, though the word "willfully" is omitted from the accusatory part of the indictment.

2. Under Act June 10, 1893, authorizing special terms of the circuit court on orders of the judges, or on notices signed by the judge and posted, and providing that the order or notice shall specify the day on which the term is to commence, and shall give the style of each case to be heard, compliance with the provisions as to the order and notice is essential to the validity of proceedings at the special term.

Appeal from circuit court, Lee county.

"To be officially reported."

Jacob Toler was convicted of shooting and wounding with intent to kill, and appeals. Affirmed.

Riddle & Riddle and H. O. Lilly, for appellant. Wm. J. Hendrick, for the Commonwealth.

PRYOR, J. The cases of *Flint v. Com.*, 23 S. W. Rep. 346, *Barnard v. Com.*, (Ky.) 22 S. W. Rep. 219, and *Johnson v. Com.*, (Ky.) Id. 335, determine the question made as to the indictment in this case. Section 2, art. 6, c. 29, Gen. St., makes it a felony where one willfully and maliciously shoots at and wounds another, with the intention to kill him. The accusation in the indictment is that the defendant committed the crime of maliciously shooting at and wounding Moses Roberts, with intent to kill him, committed as follows: "That the said Toler did on the — day of January, 1893, unlawfully, willfully, maliciously, and feloniously shoot at and wound Moses Roberts, with a pistol loaded," etc., "with the intention to kill him," etc. These averments, it seems to us, are sufficient to bring the case within the statute making it a felony when one willfully and maliciously shoots at and wounds another, with the intention of killing him. The word "willfully" is omitted in the accusatory part of the indictment, but, as to the mode of committing the

offense, it is charged that the defendant willfully, maliciously, and feloniously shot and wounded, with the intent to take his life; and to say that the offense is not stated with such certainty as to apprise the defendant of what he stands charged would be extremely technical, and nullify a conviction warranted by both the indictment and the proof.

Some objection has been made as to the action of the court in refusing certain testimony to go to the jury, tending to show that the witnesses for the commonwealth were under the influence and control of the prosecuting witness; and, while no harm could have resulted to the commonwealth by the admission of such testimony, it was at least immaterial, when the fact of the shooting was clearly established, and the statutory offense so completely made out as to leave the jury with nothing to consider but the extent of the punishment to be inflicted.

There is one objection made by counsel that would necessitate a reversal, if the present law in regard to calling special terms of circuit courts had been in force when the special term was called to try this case. A part of the act in regard to the organization of circuit courts provides "that a special term may be held in any county either by an order entered of record at the last preceding regular term in the county or by notice signed by the judge and posted at the court house door of the county for ten days before the special term is held. The order or notice shall specify the day when the special term is to commence, and shall give the style of each case to be tried, or in which any motion, order or judgment may be made or entered at the special term, and no other case shall be tried, or motion, order or judgment entered therein, unless by agreement of parties." It is evident, therefore, that, in counties where the circuit court has not a continuous session, the order for a special term, although made at the close or during the regular term, must specify the day when the special term is to commence, and also give the style of each case to be tried, or in which motions, orders, or judgments are to be made or entered. This, also, must be done when the special term is called by a notice posted as the statute requires. Such is the legislative will, and this court must enforce the law as we find it on the statute book; and, however inconvenient it may be to call the attention of litigants to cases to be heard, or those in which motions are to be made, the act is imperative, and must be followed. When looking to this record, however, we find that the special term at which the accused was tried was called before the act reorganizing the circuit court went into effect, and therefore the objections made by counsel cannot avail. The order for a special term was made at the April term of the Lee circuit court held in the year 1893, and the act reorganizing the circuit court, and

under which this objection was taken, was not approved by the governor until the 10th of June, 1893, and by its provisions was to take effect when approved. It was never intended that this statute should have a retroactive effect, and nullify orders made in cases authorized by existing laws; and, while the statute in question has no application to the present case, it is proper, by reason of its peculiar provisions, that the attention of circuit judges should be called to its provisions, and the construction placed upon it by this court, as it involves only a preliminary step in facilitating the administration of the law. The judgment below is affirmed.

NELSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 26, 1893.)

CRIMINAL LAW—APPEAL—MANDATE.

Civil Code, § 760, which provides that no mandate shall issue, nor decision become final, until after 30 days from the day on which the decision was rendered, applies only to civil cases; and under Crim. Code, § 336, subd. 3, which provides that an appeal shall suspend the execution of the judgment only "until the decision of the appeal," the mandate may issue immediately on an affirmance of a judgment of conviction.

Appeal from circuit court, Greene county. "To be officially reported."

On motion of the commonwealth, by the attorney general, to direct a mandate to the lower court to issue immediately; the practice having been to wait until after 30 days, as in civil cases. Motion granted.

The Attorney General, for the motion.

BENNETT, C. J. Section 760, Civil Code, provides "that no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered," etc. Section 336, subd. 3, Crim. Code, provides as follows: "The appeal is taken by lodging in the clerk's office of the court of appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the court of appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal." It will be observed that the Civil Code is peremptory that no mandate in a civil action shall issue, nor decision become final thereon, until after 30 days from the day that the decision was rendered. That this provision applies to civil cases, only, is made manifest by the fact that in criminal cases the clerk's certificate suspends execution of the judgment "until the decision upon the appeal," only. As section 760 of the Civil Code applies to civil cases, only, and as there is no such provision in reference to criminal cases not penal, it follows that in case of an affirmance of a

judgment of conviction the mandate may issue immediately. Let the mandate in this case issue.

NORTHUP v. STANDIFER.

(Court of Appeals of Kentucky. Sept. 26, 1893.)

SPECIFIC PERFORMANCE—CONSIDERATION.

A contract to convey half the mineral in defendant's land to plaintiffs, in consideration of one dollar and the benefits to accrue to defendant from the extension to a point named of a railroad, with which plaintiffs do not appear to have any connection, will not be specifically enforced, as there is only a nominal consideration for the contract; and the fact that plaintiffs did aid in constructing a railroad to the point named does not make a legal consideration, since the construction of the road is not the one mentioned in the contract.

Appeal from circuit court, Johnson county. "Not to be officially reported."

Action by John H. Northup against Y. Standifer for the specific performance of a contract to convey minerals in certain lands. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

The contract in the case of Northup v. Ward, (Ky.) 15 S. W. Rep. 247, of which the one in issue is a facsimile, is as follows: "Know all men by these presents, that I, Marlon Ward, of the county of Johnson, state of Kentucky, for and in consideration of the benefits and advantages which will result to me from the location, construction, and extension of the Chatara Railway in a southerly direction, from or near its present terminus, and the further consideration of one dollar in hand paid by John Carlisle, of Cincinnati, Ohio, and Jay H. Northup, of Louisa, Ky., to me, the receipt of which is acknowledged, do agree and bind myself, heirs, assigns," etc., to give, grant, and convey to said Carlisle and Northup, their heirs or assigns, the following described property, to wit: "The undivided half of all mineral on my lands, being seventy-five acres, more or less. [Here follows description of the land.] The above is given upon the condition that the said railway extension is to be made on or before the first day of October, 1889, to White House creek; otherwise, not to be binding. When said railroad is constructed to White House creek, I hereby bind myself, heirs," etc., "to make said Carlisle and Northup, their heirs or assigns, a deed of general warranty to the above-described property."

Wallace & Lackey, for appellant. Stewart & Stewart, for appellee.

BENNETT, C. J. The contract sued on in this case is a facsimile to that reported in Northup v. Ward, (Ky.) 15 S. W. Rep. 247. It was decided in that case that there was no consideration for the appellee's promise to convey one-half interest in his mineral lands. The fact that the appellant did aid in constructing a railroad from a point to a

point mentioned in the contract does not make a legal consideration, for the construction of said road was not the one mentioned in the contract. The judgment is affirmed.

McHARGUE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 16, 1893.)

CRIMINAL LAW—APPEAL—PRESUMPTION—DYING DECLARATIONS.

1. Where an indictment is found in one county charging the crime to have been committed there, and the trial was had in a different county, the court of appeals will presume, in the absence of anything to the contrary in the record, that all the steps required by statute to obtain a change of venue were taken, and that all the papers, together with a transcript of the record, had been transmitted to the clerk of the court in the trial county.

2. Where a wound is of such a nature as to make it plain that the wounded man believed he would die very soon, and his conversation shows that he believed death inevitable and near at hand, his declarations made within an hour of his decease are admissible, though he did not expressly state that he was bound to die, or that he had no hope of recovery.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Samuel McHargue was indicted for murder. From a conviction of manslaughter, he appeals. Affirmed.

James D. Black, J. Smith Hays, and D. K. Rawlings, for appellant. W. J. Hendrick, for the Commonwealth.

LEWIS, J. The main point attempted to be made by counsel in this case is that because the indictment was found against appellant in Whitley county, and the offense of murder, with which he is charged, appears from the indictment to have been committed there, we are bound to assume the Knox circuit court, in which he was tried and found guilty, was without jurisdiction. The reasonable presumption is that all the steps required by statute in order for appellant to obtain a change of venue were taken, and that, when the trial took place, the original papers, together with a transcript of the record, pertaining to the prosecution, had been transmitted by the clerk of Whitley circuit court, as was his duty, to clerk of Knox circuit court, and were before the latter court as indisputable evidence of the change of venue; otherwise, we have to assume that the Knox circuit court, utterly without right or authority, undertook to try appellant for an offense involving his life, and to finally adjudge his punishment by confinement in the penitentiary. Appellant, having in the Knox circuit court pleaded to the issue, and submitted without objection to trial, cannot require the commonwealth to make proof in this court the change of venue was actually made. But there is, however, enough in the record to thoroughly satisfy us the original papers and transcript of orders made

in the Whitley circuit court, including the proceeding and order for change of venue, were in possession of the clerk of the Knox circuit court, and before that court, when the case was called and tried. But two witnesses seem to have been present when the homicide took place, and their statements do not agree. But the jury, under proper instruction by the court, found from the evidence appellant guilty of manslaughter, and, as there is evidence to support the verdict, it cannot be disturbed.

It is not indispensable, in order to render proof of dying declarations competent, for deceased to have stated he was bound to die, and had no hope of recovery. The fact of impending death, and consciousness of it on part of a wounded person, may be proved by circumstances. The deceased was shot about the lower part of the stomach, and the wound was so large that the attending physician stated he could put all his hand in it, and, besides, the bowels were protruding. It is therefore plain the deceased believed he would die very soon, as he did in less than one hour, and that he was utterly without hope of recovery. Besides, what he said showed he believed his death inevitable and near at hand. His expression was that "it was an awful fix for one to be in without warning." But it seems to us the question of competency is immaterial, for, besides the words just quoted, his only remark was, "I am shot;" so that nothing he said really bears upon the cause or manner of his being shot. We perceive no error of the court in admitting or rejecting evidence, or in any other respect prejudicial to substantial rights of appellant. Judgment affirmed.

TRIBBLE'S EX'RS v. BROADUS.

(Court of Appeals of Kentucky. Sept. 19, 1893.)

MARRIED WOMAN AS EXECUTRIX.

Where the duties of a widow are purely executorial, and not those of a trustee, they are avoided by her marriage, under Gen. St. c. 39, art. 1, § 16.

Appeal from circuit court, Madison county.

"Not to be officially reported."

Action between Alexander Tribble's executors and Nancy Broadus to determine the right of the latter to act as executrix. From a judgment for the latter the former appeals. Reversed.

J. A. Sullivan, for appellants. Smith & Moberly, for appellee.

BENNETT, O. J. Alexander Tribble died testate. He devised a large part of his estate to his wife; also a considerable part to his two nephews. He also made some specific devises. He appointed his wife and two nephews executors of the will, who qualified and entered upon their executorial duties. Afterwards the wife married Mr.

Broadus, and the other executors deny her right to continue longer as executor. She contends that the duties that she was required to perform under the will, at the time of her marriage, were those of trustee merely. The General Statutes (chapter 39, art. 1, § 16) provide, in substance, that a married woman shall not be appointed executor or administrator, and that the marriage of a female executor or administrator shall "avoid the trust." It seems that the marriage of the appellee *eo instante* avoided the trust. Now, the only question is, was she executor or trustee merely at the time of the marriage? It seems that her duties and powers under the will were all purely executorial, and not those of trustee merely. The judgment is reversed, etc.

NELSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 19, 1893.)

HOMICIDE—EVIDENCE—CONTINUANCE.

1. Defendant and another, the only persons present when deceased was killed, swore that deceased was trying to get at defendant around a certain tree, and was cutting at him with a large knife; that defendant did not fire until he had retreated from the tree, followed by deceased. Other witnesses testified that, while they saw tracks on defendant's side of the tree, there were none on the other side between deceased's body and the tree, a space of 15 feet, though the ground was soft. A knife was lying loose in deceased's hand. *Held*, that a verdict of guilty was sustained by the evidence.

2. A continuance because of absent witnesses was properly denied where the facts as to which they would testify were shown by other evidence.

3. Evidence that defendant was engaged in selling liquor, while immaterial, was not prejudicial.

Appeal from circuit court, Green county.

"Not to be officially reported."

J. D. Nelson was indicted for homicide, and convicted, and appeals. Affirmed.

Jeff. Henry, for appellant. W. J. Hendrick, for the Commonwealth.

LEWIS, J. From the testimony, appellant, and Skeggs, jointly indicted with him, were the only persons present when the homicide occurred for which they were indicted. According to their statements, which do not substantially vary, Thompson, the deceased, was, when shot, endeavoring to cut appellant with a large knife at the time he fired the shot, that was followed by others, resulting in death, Skeggs taking no part in the difficulty; so that the jury were, it seems to us, bound to acquit, if this evidence was credited. But their version of the affair was inconsistent with the facts and circumstances proved by other witnesses who went to the place soon after the killing. They both swore deceased was endeavoring to get to appellant around a tree described and identified, and was cutting at him while the tree was between them, and that ap-

pellant did not fire until he had retreated from the tree, followed by deceased. Other witnesses, however, state that, while they saw tracks of a person on the opposite side of the tree from where Thompson lay on his back, dead, and where appellant confesses he was, there were no tracks to be seen between the body of Thompson, about 15 feet off, and the tree, though the ground was soft. It was also found that a large knife was lying in Thompson's hand. It was not grasped at all, and consequently may have been put there after he died. These two circumstances may have been reasonably regarded by the jury as sufficient to show deceased was not at the tree, or near enough to appellant to cut him with the knife, but was, instead, shot by appellant from behind the tree, without any legal excuse. The substantial rights of appellant were not, we think, prejudiced by the refusal of the court to grant a continuance on account of absent witnesses, even if he had exercised diligence in endeavoring to procure their attendance; for threats by deceased to take his life, which he stated he could prove by absent witnesses, were fully shown on the trial to have been made. And, in view of the facts that appellant and deceased had a previous difficulty, during which they shot at each other, and that the general reputation of deceased was that of a dangerous and blood-thirsty man, the jury could have had no doubts of the alleged threats to take appellant's life having been made.

Whether appellant was at the time engaged in selling liquor was immaterial, but we do not see how he was prejudiced by that fact being proved. No attempt was made to prove the general character for veracity of either appellant or Skeggs to be bad. Nevertheless they seem not to have been believed simply because their statements were shown by indisputable facts and circumstances to be untrue. The instructions are, we think, unobjectionable, and, as no error of law occurred during the trial prejudicial to substantial rights of appellant, and there was evidence to support the verdict, the judgment must be affirmed.

RICHARDSON'S ADM'X v. BANTA.

(Court of Appeals of Kentucky. Sept. 21, 1893.)

CLAIMS AGAINST DECEDENTS' ESTATES—INTEREST—DEMAND.

Gen. St. c. 39, art. 2, § 53, forbidding the allowance of interest on claims against estates unless demanded of the administrator within a year of his appointment, does not require such demand where, within said year, the administrator files his bill in equity to settle the estate, and the case is referred to a commissioner to audit claims.

Appeal from circuit court, Shelby county.

"Not to be officially reported."

Petition by administratrix of the estate of E. T. Richardson, deceased, to settle the es-

tate. She appeals from the judgment of the circuit court, allowing the claims of George H. Banta. Affirmed.

Geo. W. Jolly, for appellant. G. G. Gilbert, for appellee.

HAZELRIGG, J. The provisions of the Civil Code as to assignments of error having been repealed, even in cases respecting the settlement of trust estates and estates of deceased persons, and the appeal in this case granted by the lower court having been abandoned, and the one granted by the clerk of this court being within two years from the rendition of the judgment, and the transcript having been filed at least 20 days before the first day of the second term of this court next after this latter appeal, the motion to dismiss the appeal for want of an assignment of errors, and because the transcript was not filed as provided by law, must be overruled. If the dismissal had been asked because the appellant had failed to appear in person or by brief in this court, it might have been sustained. This was an action to settle the estate of E. T. Richardson, brought by his administratrix, the present appellant. The judgment of the lower court allowing the claims of the appellee, with interest accruing thereon after the death of Richardson, is the matter complained of. The appellant qualified as administratrix on March 21, 1888, and instituted this action on January 12, 1889. In March, 1889, an order was entered referring the case to the master commissioner for proof of claims, and directing creditors to appear before him before the 25th March, 1889, and prove their claims. The appellee did so, and his three notes, amounting to some \$6,400, were allowed. No demand was necessary. *Grey's Ex'r v. Lewis*, 79 Ky. 456. The interest was properly allowed. "Where an administrator, within one year after his appointment, files his petition in equity for a settlement of the estate of his intestate, and the case is referred to a commissioner to audit claims against the estate, a demand by a creditor, as required by section 53, art. 2, c. 39, Gen. St., is not necessary in order to entitle him to interest." *Hamilton's Adm'r v. Tarlton*, 3 Ky. Law Rep. 471. That case is conclusive of this. Judgment affirmed.

STEARNS v. CHENAULT et al.

(Court of Appeals of Kentucky. Sept. 21, 1893.)

NOTARY'S SEAL—OHIO STATUTE.

The Ohio statute requires a notary's seal to be $1\frac{1}{4}$ inches in diameter, surrounded by the words, "Notarial Seal — County, Ohio," and to contain of the coat of arms the mountain range, the rising sun, the bundle of arrows, and the sheaf of wheat. A deed recorded more than 11 years showed a very dim impression, but under a magnifying glass the range, sun, and arrows were visible, and the

surrounding words "Notarial Seal Hamilton County, O." Held prima facie sufficient to admit the deed as evidence.

. Appeal from court of common pleas, Powell county.

"Not to be officially reported."

Ejectment by J. W. Stearns against Joel Chenaault and others. Judgment for defendants. Plaintiff appeals. Reversed.

Wood & Day, for appellant. J. B. White, for appellees.

PRYOR, J. This was an action of ejectment, and the court below on the hearing excluded from the jury a deed for the land in controversy, leaving the plaintiff without title. That instrument connected his title with that of the patent under which the plaintiff claimed, and when excluding it as evidence entitled the defendant to a verdict.

The only question arising necessary to be decided, springs from the seal of the notary public annexed to his certificate to the deed made the plaintiff by one Mitchell. The acknowledgment purports to have been made in the state of Ohio before a notary of that state. It is objected that the notarial seal does not show upon it the devices required by the statute of Ohio, and that without such a seal the certificate, although proper in other respects, is defective. The seal is required to be one inch and one-fourth in diameter, surrounded by the words "Notarial Seal — County, Ohio," and shall contain as much of the coat of arms as exhibits the mountain range, the rising sun, the bundle of arrows, and the sheaf of wheat. The original deed, with the seal and certificate, is before us for inspection. It was recorded in the proper county in 1882, and the impression made upon the paper in affixing the seal is dim and scarcely perceptible with the naked eye. With a magnifying glass the mountain range, the rising sun, and the arrows may be seen, and the words, "Notarial Seal Hamilton County, O.," surrounding the seal. Instead of the word "Ohio" we find the letter "O," and this seems to be the only departure. Some of the letters in giving the name of the county are scarcely visible, but at the same time it is evident that the seal was affixed, and in compliance with the law of Ohio. There is nothing in the record showing the certificate or seal to be a forgery, and upon its face it bears the evidence of a genuine certificate. The name of the notary is given, and, if fraudulent, it will be easy for the defense to make it appear. Deeds executed out of the state and within the United States, when certified under his seal of office by a notary to have been acknowledged as required by the statute, may be admitted to record. The deed offered in evidence having been so certified, a certified copy should have gone to the jury as evidence of title. The judgment is reversed, and remanded for a new trial, and for proceedings consistent with this opinion.

MULLIKIN v. MULLIKIN.

(Court of Appeals of Kentucky. Sept. 26, 1893.)

PLEADING—SEPARATE DEFENSE—PARAGRAPHS—
PROOF OF HANDWRITING.

1. In an action on a note, where the answer denies the execution and delivery, another allegation in the same paragraph, setting up want of consideration, is not admitted by failure to reply, since Civil Code, § 113, requires each cause of action or defense to be distinctly stated in a separate numbered paragraph; and, the issue of non est factum having already been made, plaintiff was not required to move that the answer be paragraphed.

2. In an action on a note alleged to have been executed by a deceased person, a finding that the signature is genuine will not be disturbed where 10 or 12 witnesses, who were familiar with the handwriting of deceased, testified that it was his signature, and the only evidence to the contrary was that of four or five experts, based on a mere comparison of the disputed signature with other genuine signatures shown them for the first time at the trial.

3. The admission of incompetent evidence is no ground for reversal where the matter is satisfactorily proved by the competent evidence in the case.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by T. B. Mullikin against Lilly Turner Mullikin, executrix, etc., of A. D. Mullikin, deceased, on a promissory note alleged to have been executed by the deceased. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Hargis & Turner and T. L. Burnett, for appellant. Lane & Burnett, for appellee.

LEWIS, J. T. B. Mullikin brought this action against Lilly T. Mullikin, executrix of the will and widow of A. D. Mullikin, for judgment on a promissory note purporting to have been executed to plaintiff by the testator July 17, 1890, and payable 60 days thereafter. To the petition the following answer was filed: "The defendant denies that her testator, A. D. Mullikin, signed, executed, or delivered to plaintiff or any one for him the note described in plaintiff's petition; or that said note has or had any consideration whatever to support it; or that the plaintiff is the owner of said note; or that it is long or at all past due or owing to the plaintiff." Plaintiff moved the court to strike from the answer the words we have italicized, but that motion being overruled, a reply was filed, but subsequently withdrawn; and then defendant made a motion that so much of her answer be taken for confessed as denied the note has or had any consideration to support it, which was likewise overruled. Upon trial of the action, verdict was rendered for plaintiff, followed by judgment in pursuance of it, although defendant interposed a motion for judgment in her favor, notwithstanding the verdict. Section 386, Civil Code, provides that "judgment shall be given for the party the pleadings entitle thereto, though

there may have been a verdict against him." But that state of a case arises only when a material allegation concerning the cause of controversy has been sufficiently and properly made, and stands either confessed or not sufficiently denied. That part of the answer in this case evidently intended for a general plea of non est factum, and which we will treat as sufficiently stated, made the only issue that was actually tried by the jury, or in respect to which the court gave instructions. Of the two last clauses of the answer, it is not necessary to say more than that the statement in one is a mere legal conclusion, and in the other surplusage. If, then, defendant was entitled to judgment at all in virtue of section 386, it was because the plea of no consideration was properly and sufficiently stated, and, not being controverted by reply, stood confessed. But as a promissory note, if genuine, is prima facie evidence of consideration to support it, the plaintiff need not allege the fact in his petition, nor reply to a plea of no consideration insufficiently stated in the answer. Section 113 provides: "A pleading may contain statements of as many causes of action legal or equitable, and of as many matters of estoppel and of avoidance legal or equitable, total or partial; and may make as many traverses; and may present as many demurrers as there may be grounds for in behalf of the pleader." But it is further provided in the same section that, if there be more than one cause of action or of defense, "each must be distinctly stated in a separate numbered paragraph; and either which is intended to respond to part only of an adverse pleading must show to what part it is responsive." And, as evidence of the importance of these provisions, the court is in terms required, upon or without motion, to enforce them, and for that purpose to dismiss an action without prejudice, or to strike a pleading, or any part thereof, from the case, or to allow a new pleading. This court, it is true, has held that the fact of distinct defenses not being set out in separate paragraphs is not ground for demurrer, but of a motion to paragraph, (*Williams v. Langford*, 15 B. Mon. 566;) and also that an objection to a pleading because not properly paragraphed is waived by answering or replying, (*Noel v. Hudson*, 13 B. Mon. 205.) But, inasmuch as the issue of non est factum had been already made, the plaintiff was not required to make a motion to have the answer paragraphed, nor to reply to another and distinct defense improperly set out in the same paragraph. He cannot therefore be regarded as having, by failing to reply, waived objection that such defense was not set out in another paragraph. So that it seems to us the pleadings did not in the meaning of section 386 entitle defendant to a judgment in spite of the verdict of the jury, nor, having disregarded a plain and peremp-

tory provision of section 113, was she in an attitude to move for judgment; for the court could not, under the circumstances, properly treat the statement that the note was not supported by a consideration as more than a mere argument in support of the plea of non est factum, which had without reply made an issue to be and that was tried and determined.

On the trial, plaintiff was asked by his counsel to state as a witness what the note sued on was given for, and was permitted by the court, over defendant's objection, to answer that it was for natural gas stock he sold to the payor, A. D. Mullikin. Although the question whether there was a consideration for the note was not put in issue by the pleadings, nor was it required to be done in order to complete determination of rights of the parties, still proof of the fact that a consideration existed tended to show it was executed, and was therefore competent. But it was not proper for the plaintiff to state as a witness that the consideration was natural gas stock he sold to A. D. Mullikin, because he thereby, in plain violation of section 606, testified for himself concerning a transaction with and act done by the payor, who was then dead. It, however, was, in our opinion, shown on the trial by other evidence so satisfactorily that the note was executed and delivered by A. D. Mullikin, that the jury were bound to find for the plaintiff, and consequently defendant was not prejudiced by the incompetent testimony referred to. No witness was able to state with certainty he saw A. D. Mullikin execute the note, but one of them testified he saw him sign a paper which looked like, and he believed it to be, the note in question. Ten or twelve witnesses, all of whom had experience in judging of handwriting, were introduced by the plaintiff, who testified they were acquainted with the handwriting and signature of A. D. Mullikin, and that his signature to the note was, in their opinion, genuine. Some of them were cashiers of banks where he transacted a good deal of business; one of them tax assessor, who had seen him write his name often; one his own clerk and bookkeeper; and another, auditor of the city of Louisville, who stated he had seen him write his name a thousand times. The business of A. D. Mullikin seems to have been buying claims against the city, by which he had accumulated a large amount of money, and that business brought him in frequent contact with officers of the city and of various banks, so that his handwriting and signature were unusually well known; yet the defendant did not introduce a single witness who was acquainted with his handwriting, those who did testify in her behalf arriving at the conclusion that the signature to the note was not genuine from a mere comparison of it with other genuine signatures shown to and seen by them for the first time. Be-

sides, these witnesses, four in number, do not satisfactorily show they were experts. There was also evidence, independent of the plaintiff's testimony, showing plaintiff and A. D. Mullikin, who were cousins, had dealings about natural gas stock. There was no circumstance shown by defendant that in our opinion, when properly considered, tended to show the signature was a forgery; certainly none sufficient to break the force of the testimony of so many witnesses who, having the means and ability to judge, gave their unhesitating opinion that the signature was genuine. It seems to us the verdict was fully authorized by the testimony,—in fact inevitable. Judgment affirmed.

EDDY'S EX'R v. NORTHUP et al.

(Court of Appeals of Kentucky. Oct. 5, 1893.)

ARBITRATION AND AWARD—USURY.

1. When arbitrators have made an award according to the terms of the submission, and have afterwards assumed to make a supplemental award not within said terms, the first award is not impaired, though the second be void.

2. In 1879 one side of a mutual account was submitted to arbitration. *Held*, that it was inferred that the parties agreed as to the other side, and it was too late to attack it in 1890, the original parties to that side of the account having died in the mean time.

3. A firm, owning timber trees, contracted with a sawmill firm that the latter should advance them money and merchandise to get the logs out, and buy the logs at the market price, the two firms to divide profits. Later the sawmill firm retransferred their interest in the venture to the others, who agreed to pay back advances already made, with interest at 10 per cent. The sawmill firm was to continue to buy the logs, and to make advances for the work at the same rate of interest. *Held*, that the agreement to pay 10 per cent. on the advances already made was valid, not being "a contract or assurance for the loan or forbearance of money," but merely part of the consideration of the sale of the sawmill firm's interest in the venture; otherwise as to the future advances.

Appeal from circuit court, Boyd county.

"Not to be officially reported."

Action by Hall & Eddy, and later by Irwin Eddy's executor, against J. H. Northup and another, trading as Northup & Goble, for balance of account. Judgment for defendants. Plaintiff appeals. Reversed.

Humphrey & Davie and John F. Hager, for appellant. Wm. Lindsay and Edward W. Hines, for appellees.

LEWIS, J. Northup & Goble, having purchased a large number of timber trees on Blain Fork of Big Sandy river, and needing means to have them cut into saw logs and floated to market, in January, 1876, entered into a contract of partnership with Hall & Eddy, owners of a sawmill in Louisville, by which the latter were to advance money and merchandise, and to receive and pay for at market prices all the saw logs cut and rafted to Louisville; the net profit made on the

logs, after repayment of amount advanced by Hall & Eddy, to be equally divided between the two firms. Under that contract advances were made, and a large number of logs cut and delivered. But May 8, 1877, another contract was made by which the interest of Hall & Eddy in the timber venture was transferred to Northup & Goble, who were to pay back amount of cash and merchandise already advanced, "together with interest thereon, at the rate of ten per cent. per annum." It was further agreed that Hall & Eddy were to take two indicated fleets of logs at prices fixed; to advance three cents per lineal foot for logs thereafter delivered, and also \$500 for each month of work in force in getting the residue of timber out of said creek, and for use of that money Northup & Goble were to pay interest at the rate of 10 per cent. per annum. The latter firm continued to deliver logs under that contract, and the former to make advances of money until a short time prior to April 24, 1879, when, a controversy arising respecting measurement and price to be paid for logs delivered and to be delivered, they agreed to refer the matter in dispute to arbitrators. The particular subjects of arbitration are thus stated in the written agreement: "The said arbitrators are to measure and set price on the aforesaid timber fletted in the Ohio river; also any of said Blain timber that may hereafter come out, and take such proof as they may desire for the purpose of fixing the value of all timber heretofore delivered; in fact, make a full and final settlement as to size and prices between all of the above parties." July 18, 1881, the arbitrators made an award, a copy of which was delivered to the respective parties. By that award the number of feet of logs delivered by Northup & Goble to Hall & Eddy during the years 1877-78-79, and also prices to be paid therefor, were ascertained and determined. But September 26, 1881, the arbitrators made, or attempted to make, an additional award, in which they found the whole amount of money and merchandise advanced, and, by deducting therefrom the value of logs as previously ascertained and fixed by them, to determine and settle a balance in favor of Hall & Eddy of \$6,947.08 against Northup & Goble. This action was brought August 15, 1882, by Hall & Eddy, to recover amount of that assumed balance, and judgment was rendered therefor. But that judgment was reversed by this court; and, upon return of the case, amended pleadings having been filed, and additional evidence offered, the judgment now appealed from was rendered in favor of Northup & Goble for \$1,000, and interest from May 3, 1883.

The first of two main questions presented is whether the award of July, 1881, as well as the attempted one of September, 1881, should be, as seems to have been done by the lower court, entirely disregarded and

held for naught. The first award was clearly within the scope of authority given to the arbitrators in terms and substance of the written agreement of the parties, and, if there had been no further act on part of the arbitrators, would unquestionably have been conclusive and binding on the parties as to the quantity of timber delivered and value thereof; and, such being the case, we do not see how it was or could be impaired by a subsequent attempt of the arbitrators to make an award relative to a distinct and independent subject not even submitted to them; for if their action in September was without authority, and consequently null and void, as seems to be conceded, manifestly it did not have the effect to release the parties from obligation to abide by and perform the award of July, the arbitrators had authority to make, and did regularly and duly make and complete. It is not only entirely reasonable, but well settled by this court and other authority, that, if the portion of an award which exceeds the submission can be separated from the rest without affecting the merits of the award, it may be rejected as surplusage, and the rest will stand; and, that being so, obviously a second award or attempted award, relative to a new and different subject, should not affect the first one, complete in itself, and made in accordance with terms of agreement made by the parties. It is true in the former opinion this court held that the award should have been disregarded by the lower court, because the arbitrators did not confine themselves to subjects submitted for their determination. But the award referred to was that of September, upon which the action was originally brought, and in pursuance of which judgment was given for plaintiffs in the action; the one of July not being referred to or considered in the opinion then delivered. It seems to us, in determining rights of parties in this case, the lower court ought to have assumed the award of July, 1881, as a conclusion and final determination of the amount of timber delivered and value thereof, and rejected any additional pleading or evidence in derogation of that award. As to the amount of money advanced by Hall & Eddy, there does not seem to be much controversy, considering the large sum claimed and numerous items composing it; and, as the parties deemed it in 1879 necessary to submit to arbitration only the questions of amount of timber delivered and prices to be paid therefor, it is a fair and just inference there was then no dispute between them as to amount of money advanced by Hall & Eddy; and, if there was no controversy on that subject in 1879, it was too late in 1890,—date of the judgment now appealed from,—when both Hall & Eddy are dead, to discredit the account rendered of money and merchandise advanced.

The second main question is whether, under the contract of May 8, 1877, Hall & Eddy

are entitled to interest at the rate of 10 per cent. per annum upon money advanced prior to that time. It seems to us the court erred in adjudging that a usurious transaction; for it was not, in language or meaning of the statute, a contract or assurance for the loan or forbearance of money. On the contrary, the agreement to pay interest on the money and merchandise already advanced at a greater than statutory rate formed part of the contract by which Hall & Eddy sold and transferred their interest in the timber venture, and constituted part of the consideration for that sale and transfer; and this court has in many cases upheld such transaction, recognizing a distinction between a simple loan or forbearance of money at a usurious rate of interest and an agreement to pay more than the statutory rate in consideration of sale of property. There is, however, a question of the right of Hall & Eddy to 10 per cent. on the money to be advanced by them on logs thereafter delivered also stipulated for in the same contract; but we are inclined to the opinion that, as the money had not been nor might be advanced on account of logs to be delivered in future, the promise to pay interest in excess of 6 per cent. should be treated as usurious.

Whether Northup & Goble are entitled to recover as counterclaim on account of alleged failure of Hall & Eddy to advance money as agreed was not specially referred to or decided in the judgment of the lower court, and consequently we need not now pass on the question, further than to determine that, if it is made to satisfactorily appear there was such failure, there should be a recovery on the counterclaim for amount of such damages as actually and directly resulted.

The pleadings in this case, it seems to us, authorize and require the chancellor to treat the award of July, 1881, valid and binding as to the subjects submitted to and determined by the arbitrators, and at the same time to consider all other subjects of controversy between the parties, and make a final settlement thereof equitably and justly. Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

HOURIGAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 14, 1893.)

CRIMINAL LAW—CHANGE OF VENUE—REMAND AND TRIAL.

1. Where defendant has had a change of venue, and, after disagreement of the jury, has moved to have the cause remanded to the original county, which is done without objection by the state, and at the next term, in the latter county, has moved to have the order for change of venue set aside, which is done, and he is tried and convicted, he cannot move for arrest of judgment for lack of jurisdiction, un-

der Gen. St. c. 12, which forbids more than one change of venue in each case.

2. Where the order remanding a case for trial to the court from which it had been changed fixes the time for trial, there is no reason why the rule in civil cases, that a cause does not stand for trial in the court to which it is removed unless the record has been filed 10 days before the first day of the next term, should apply by analogy.

Appeal from circuit court, Marion county.

"To be officially reported."

Thomas J. Hourigan, convicted of manslaughter, appeals. Affirmed.

Saml. Avritt, S. A. Russell, and Chas. Pattison, for appellant. W. J. Hendrick and H. W. Rives, for the Commonwealth.

HAZELRIGG, J. In June, 1888, the appellant was indicted in the Marion circuit court for the murder of Samuel Hays. At the following term of that court he obtained, in the regular way, a change of venue to Taylor county, and at his first trial there was found guilty, and his punishment fixed at confinement in the state penitentiary for life. He was granted a new trial by that court. The case was brought to this court by the commonwealth, to have the rulings of the lower court reviewed, and the law of the case settled. See *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. Rep. 550. Subsequently, two other trials were had in the Taylor circuit court. The juries failed to agree each time. Finally, in April, 1893, on the motion of the defendant, the commonwealth not objecting, the case was remanded to the Marion circuit court. At the succeeding term of the latter court the defendant appeared on the calling of the case, and moved to set aside the order entered at a former term, transferring the cause by change of venue to Taylor county, which was done. His motion for a continuance was overruled, and a trial had, which resulted in his conviction for manslaughter, the jury fixing his punishment at confinement in the penitentiary for 10 years. His motion for arrest of judgment for want of jurisdiction in the Marion circuit court, and for a new trial, on various grounds, being overruled, he has appealed to this court.

The first question is whether the Marion circuit court had jurisdiction of the case. Appellant's counsel contend that the case was properly removed from Marion county, after which the Marion circuit court had no more jurisdiction over it than if it had never been there; that there is no way known to the law by which it could ever get back there, as chapter 12 of the General Statutes provides that but one change of venue shall be granted in any case; that the Taylor circuit court had no authority to set aside the order of the Marion circuit court, sending the case to Taylor county, and the Marion circuit court had no power, in 1893, to set aside its order of transfer made in 1888; that, while the indictment shows that the alleged crime was committed in Marion county, the

record also shows that the Marion circuit court, by its order of transfer, has lost all jurisdiction over the case; and that, as consent cannot confer jurisdiction, the consent of the accused to the transfer and trial in Marion does not affect the question. With these views we cannot concur. The motion of the defendant was simply to remand the case to the court of original jurisdiction. We think the Taylor circuit court had jurisdiction over this motion. It had the right to pass on it. The statute has no application, and presents no bar to the jurisdiction of the court in passing on the motion to remand. The object of the law in providing for a change of venue is to afford the accused a trial in a community where the state of public opinion is such as that he can have a fair hearing, or is not such as to prevent it. Ordinarily, he accomplishes this result by filing his petition, and supporting it by the affidavits of others. But he may obtain the same result without observing these forms, the commonwealth consenting. Whatever method is observed, he is but selecting a tribunal in which to be fairly tried. These formalities provided by the statute may be regarded as so many hindrances to the attainment of his purpose. Therefore, if they are waived, and he selects his forum, and submits himself to the jurisdiction, upon what principle can he afterwards complain? No constitutional or inalienable right is parted with, or, indeed, any right. On the contrary, by the overt act of the defendant, he obtains directly what the statute gives him only through the observance of certain forms. In *Lightfoot v. Com.*, 80 Ky. 524, it is said: "He [the accused] will not be allowed, after being tried in the county of his own selection, to say that the verdict against him is void for want of jurisdiction in the court trying him. Consent cannot give jurisdiction. But the purpose of the statute being to secure an impartial trial, and authorizing a removal of the cause by the accused from the vicinage, the spirit, if not the letter, of the statute, will sustain a verdict of guilty, or of an acquittal, where the accused selects the county in which he is to be tried, although it may not be a county adjacent to that in which the offense is committed."

The appellant complains because the record from Taylor county was filed in the Marion circuit court at the April term, where he was at once tried; that, as the statute provides in civil cases that a case does not stand for trial in the court to which it is removed unless the record has been lodged with the clerk of the court 10 days before the first day of the next term of court, such rule should be adopted in criminal cases. It is sufficient to say that there is no such statutory requirement, and no reason for any. The case was fixed for a day certain in the order remanding the case, obtained on motion of the accused.

The motion for a continuance by reason

of the sickness of counsel was also properly overruled. The attorney whose sickness was urged as a ground therefor was present, and participated in the trial. There appears to have been no lack of counsel, either in respect to numbers, or ability to conduct the defense skillfully and zealously.

Some stress is laid on what is charged as misconduct on the part of the attorneys representing the commonwealth, in their argument. But if, as has been repeatedly held, the trial in other respects were fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury,—as we clearly think was the state of case here, from a careful reading of the evidence,—the verdict should not be set aside on such ground. *O'Brien v. Com.*, 80 Ky. 361, 12 S. W. Rep. 471; *Rankin v. Com.*, 82 Ky. 424.

The witnesses on account of whose absence a continuance was asked were all present and testified, save Hughes, Raney, and Pipes, who had repeatedly been absent before, and the case continued for them. It was not shown that by a continuance they could be had at the next term. This was the fourth trial, and the discretion allowed the court, under section 189 of the Criminal Code, in permitting the affidavit for continuance to be read as the deposition of the absent witness, was, we think, not abused in this case.

There was no error in the instructions given, and none committed in refusing those offered by the defendant.

The law of the case was substantially settled on the former appeal. Judgment affirmed.

PEAK et al. v. GORE.

(Court of Appeals of Kentucky. Sept. 14, 1898.)

EQUITY—RESCISSION OF CONTRACT.

1. The fact that land is worth only one-half the amount a purchaser agreed to pay therefor is not, standing alone, a ground for the rescission of the contract of sale.

2. The fact that a vendor of hotel property misrepresented its value and its daily earning capacity to the vendees, who had no experience or knowledge in regard to such property, is no ground for rescission of the sale, where they purchased after having opportunity to ascertain for themselves the value of the property, and did in fact examine it.

3. Where an insolvent vendor of land has broken his contract to convey a good title by accepting the first installment of the price, and notes and mortgages for the deferred payment, without clearing the property of an incumbrance of the existence of which the purchasers are ignorant, the fact that the unpaid price exceeded the outstanding incumbrances will not prevent a rescission of the sale, since the vendor's creditors have a right to enforce their lien against the land at any time, and thus put the purchasers in danger of losing, not only the land, but also the first installment of the purchase money.

Appeal from circuit court, Boyle county.
"To be officially reported."

Action by Amanda F. Peak and another against James Gore for a rescission of a sale of land and hotel property. From a judgment in defendant's favor, plaintiffs appeal. **Reversed.**

Robt. Harding and Geo. Davison, for appellants. Breckinridge & McFerran, for appellee.

LEWIS, J. November 18, 1887, James Gore sold to Amanda Peak and E. C. Montgomery a lot of land in Junction City, on which was the Gore Hotel and furniture, for \$10,000, and as evidence of the sale a written contract was entered into and signed by the parties. By its terms Gore agreed to make to them "a good and legal title" upon payment of one-third of the purchase price and execution of two notes, each for one-half the residue, bearing interest at the rate of 8 per cent. per annum, and payable in one and two years from the last of March, 1888, when the cash payment was to be paid and notes given. It was agreed they were to have possession of the property, and it was delivered in December, 1887, but to pay rent therefor at the rate of \$60 per month until the cash payment was made and notes executed, and also to board Gore and his brother during the same period free of charge. March 20, 1888, Mrs. Peak sold and conveyed to Gore a tract of 50 acres of land for about \$3,700, of which \$3,333.33 was used to make the cash payment for the hotel property, and for the residue Gore gave her his promissory note, which she sold, and proceeds of it were used to buy hotel supplies. This action was brought September 8, 1888, by Mrs. Peak for rescission of the contracts of sale and purchase of the hotel property and the tract of land, for restoration to her of the tract of land, and cancellation of the two notes given for balance of the \$10,000. Montgomery was made defendant to the action, but in his answer, made cross petition against Gore, the same relief was prayed for as asked in the petition. The lower court, however, dismissed both petition and cross petition without giving any relief at all.

The evidence makes it too plain for controversy that the hotel property for which appellants agreed to pay \$10,000 was not at the time, nor is it now, worth half that sum. Indeed, only one of nine witnesses, who, having knowledge on the subject, testify as to its value, says it was or is worth as much as \$5,000; the value as fixed by the others being from \$2,000 to \$4,000. So that, in view of the fact that her son-in-law and copurchaser, E. C. Montgomery, is insolvent, and unable to pay any part of the purchase price, the bargain is a very hard one for Mrs. Peak, who is a widow. But the relief prayed for could not be granted for that reason alone. It is stated in the petition,

and also sworn to by Mrs. Peak and Montgomery as witnesses, that pending negotiation about the trade, and also at the time the contract was reduced to writing, Gore, as an inducement for them to purchase the property, stated it was worth, and he had been offered for it, \$10,000, and that its earning capacity was from \$25 to \$50 per day. He practically admits making the statement as to its value, and, though not as distinctly confessing he made the other alleged statement, it is evident to us from the manner in which his testimony is given that he did do so. And as Mrs. Peak had at the time no experience or knowledge in regard to the value or earning capacity of hotel property, and Montgomery very little, if any, more, it is manifest the representations of Gore unduly influenced them to make the purchase, which they both testify neither had previously any intention to do. This, therefore, seems to us, from all the circumstances, to be the case of persons without practical knowledge or experience of the value or management of particular property being allured to buy and pay an exorbitant price for it by representations of the owner known by him to be untrue; but, as they purchased after having time and opportunity to ascertain for themselves the value of the property, and did in fact examine it, commendation, or even false representation of its value by Gore, cannot, according to a settled rule, afford ground for rescission. There, however, existed when the contract was made mortgage liens upon the hotel property for near, if not quite, \$3,000, which it is alleged in the petition and cross petition Gore fraudulently concealed from them, and of which they continued ignorant until June, 1888, when first informed in regard thereto. Gore denies he concealed the existence of the liens, or stated to them, as they allege, that the property was unincumbered; but it is evident they were misled and deceived on that subject by him, for how could he, as he covenanted in the contract of November, 1887, make them a good and legal title, which is equivalent to and means a title to property clear of claims and liens of others, if there were existing mortgages that he had made no provision to satisfy, and, as now appears, did not design to satisfy, prior to or even when the deed was to be executed and delivered by him; for although he sold the tract of land shortly after Mrs. Peak conveyed it to him in payment of the first installment of purchase price of the hotel property, no part of the proceeds except about \$200 was applied to pay the mortgage debts, and, so far as the record shows, they had not been paid even when the judgment appealed from was rendered. And in view of the alleged and undisputed fact that Gore was insolvent, it is not at all reasonable Mrs. Peak would have conveyed to him her own land, executed the

two notes, and accepted his deed, without an assurance and belief that the hotel property was free of incumbrance.

But waiving the question of fraud, the case seems to us to stand thus: Gore had the right to insist upon complete performance of the contract on the part of Mrs. Peak and Montgomery, which consisted in paying deferred installments when they fell due, and they consequently were without right to a rescission, provided there has been no breach or failure on his part whereby they were materially prejudiced. Ordinarily, a vendee could not be prejudiced by reason of prior liens on property purchased, if for less amount than unpaid purchase money past due by him, nor have a right to complain of the property being subjected and sold on account of his own default. But in this case Mrs. Peak and Montgomery had not defaulted in paying the unpaid installments of purchase money, none of which was due until March, 1889; nor failed to comply with their part of the contract in any respect. But Gore had failed to clear the property of incumbrance before the first installment of purchase money was paid and the deed was made and delivered, as he was bound to do; and as a consequence of such failure there existed when this action was commenced mortgage debts amounting, it is true, to not as much as the unpaid installments of purchase money, but to nearly, if not quite, as much as the evidence shows the hotel property was worth, and, if added to the cash payment made by Mrs. Peak in March, 1888, the aggregate amount would be double the value of the property. So that Gore, being insolvent, and his creditors having the right to enforce their mortgage lien on the hotel property at any time, Mrs. Peak, without fault of herself or Montgomery, but by reason of a breach of the contract by Gore, was put in danger of not only losing by enforced sale the hotel property, but also the tract of land conveyed by her in payment of the first installment of purchase money. The question in this case is therefore not whether the unpaid installments of purchase money equaled in amount the mortgage debts that it was the duty of Gore to pay off before receiving any part of the purchase price or undertaking to convey the property, but it is whether he did in March, 1888, make such conveyance of the property as he had covenanted to then make. The deed made by him certainly did not convey a "good and legal title," nor has he since tendered such deed. Moreover, the evidence shows him to be, by reason of insolvency, unable to discharge the mortgage liens, which is indispensable in order to full compliance with his contract. In our opinion, the purchasers of the hotel property were clearly entitled to a rescission of the contract when this action was commenced, and the lower court erred in dismissing it. Instead a judgment ought to

have been rendered rescinding the contract of sale and purchase of the hotel property, canceling the unpaid purchase-money notes, and restoring the parties in other respects to their original status so far as can be done equitably and without prejudice to the rights of others; and the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

PFINGST et al. v. SENN et al.
(Court of Appeals of Kentucky. Sept. 19, 1893.)

NUISANCE—BEER GARDEN—THREATENED NUISANCE.

A bill by neighboring residents in a large city alleged the former use of premises as a pleasure resort garden, with tenpins, dancing, and band music till early morning; that the noise would keep the neighbors awake, to the detriment of their health and comfort; that crowds of idle, disorderly persons were attracted, and became a nuisance in the streets; that all this was not due to mismanagement, but inhered in the business; that defendants proposed to reopen the place. *Held*, that the nuisance was not clearly made out, and, being only threatened, could not be enjoined.

Appeal from Louisville law and equity court.

"To be officially reported."

Bill by F. J. Pfingst and others against Frank Senn and others to restrain the use of certain premises as a beer garden and pleasure resort. Injunction denied. Plaintiffs appeal. *Affirmed*.

O'Neal, Phelps & Pryor and O. A. Wehle, for appellants. Rogers & Duncan, for appellees.

HAZELRIGG, J. The plaintiffs, some 25 in number, filed their action in the Louisville law and equity court, setting up that they were in the possession, as owners and tenants, of certain premises in proximity to a lot, and the improvements thereon, owned by the defendants, and situated on Main and Rowan streets, between Twenty-Second and Twenty-Fourth streets, in the city of Louisville. That the last-named property had originally been owned by one Nomberger, who resided on it until about 1872, when it became the property of Bloom & Ullman, who had it occupied by tenants for residences until in March, 1879, when they leased it to one Brohm for the term of 10 years, to be used by him as a pleasure resort and beer garden. That Brohm erected certain frame structures on the premises, consisting of a dancing hall, a tenpin alley, barrooms, open-air orchestra stands, and other improvements, at a cost of some \$6,000; but failing, in 1880, to comply with his contract, Brohm surrendered the premises to the former owners, Bloom & Ullman, who thereupon, and continuously up to July, 1890, rented them to various persons for the purpose of conducting therein a pleasure resort and beer garden. That "during the

ten years since the lot has been used as a place of entertainment it has, from the nature of the business conducted therein, become and been a nuisance to the citizens who owned and rented residences in the neighborhood." That crowds gathered there during these years, and "the guests would dance in the dancing hall to the music of string and brass bands, stationed in the hall and in the open orchestra stand in the garden, until the hours of morning, while others would amuse themselves by rolling tenpins in the tenpin alley; and the noise made by the stamping of feet of the dancers, by the directions to the dancers given in loud, stentorian voice, by the instruments of the orchestra, and by the balls of the tenpin alley, would keep the neighbors and their families awake nights in the week so as to endanger and impair the health of the more nervous members of the families, and destroy their comfort and peace, and render impossible the quiet enjoyment of domestic life." That crowds of idle and disorderly spectators were drawn by the music, and their habitual presence in the streets became to the neighbors a source of annoyance and a nuisance; all of which occurred, not by reason of any careless or disorderly management of the place by those in charge, but necessarily out of the character of the business conducted there. That from July, 1890, until June, 1891, the premises were not put to this use. That in June, 1891, the plaintiffs and others in the vicinity, learning that Bloom & Ullman had rented the garden to a certain society for June 24th for a picnic, filed a remonstrance with the common council of the city against the issuance of a license to hold such picnic, in consequence of which no license was granted. That thereupon Ullman and the other owners promised that if the remonstrance were withdrawn they would not in the future use the place as a pleasure resort. That the objection was thus withdrawn, and the picnic held, since which time the premises have not been so used. That, secretly learning that the defendants, who are brewers, were negotiating for the property, they informed them of the agreement as to the use of the property, and warned them not to buy it for the use of a beer garden. That, notwithstanding this, the defendants have bought the lot and improvements, and have given out in speeches and threatening that they would reopen the garden as a pleasure resort and beer garden. That, if permitted to do so, the reopening of the place "as a beer garden and pleasure resort will again disturb the peace, comfort, and happiness of the plaintiffs and of their families, and endanger and impair the health of themselves and their families, and will render their lives, during the spring, summer, and autumn months, miserable." That as long as "the garden and the improvements now standing in the same are used for the purpose of a pleasure resort, for which they are adapted,

or if similar structures are erected and used in similar manner, the said garden is bound to be a continuous annoyance and cause of discomfort to the people residing in the neighborhood within the distance of two squares from the defendants' lot, no matter with how much regard for the comfort of the neighbors the defendants may conduct the place." That irreparable injury will happen to them unless an injunction be granted against the threatened nuisance.

We have thus given in some detail the substantial averments of the petition, because a demurrer thereto, filed by the defendants, was sustained by the court, and the petition dismissed. The sufficiency of this pleading is therefore the only question involved. We observe first that it is not an actual, existing nuisance of which complaint is made; nor are the things about to be done in themselves nuisances. There can be beer gardens, and pleasure resorts, music, and dancing, and yet no nuisance set up. Admittedly, the conduct of such exercises or the running of such a business may result in inconvenience and annoyance to neighbors not participating. It may render the location less eligible as a place of residence for people who pay high rents, or are of "dainty modes and habits of living," (Wood, Nuis. § 800;) but, nevertheless, these places and modes of amusement are not to be condemned or denounced as nuisances in themselves. "Injunctions against threatened nuisances," says Mr. Wood, (section 797,) "will seldom be granted except in extreme cases, where the threatened use of property is clearly shown to be such as leaves no doubt of its injurious results." The learned author, in support of this view, refers to the case of *Dumesnil v. Dupont*, 18 B. Mon. 804, where this court quotes with approval this language of Lord Brougham in the case of the *Earl of Ripon v. Hobart*, 1 Coop. t. Brough. 333: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial. But when the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere. * * * It is also very material to observe that no instance can be produced of the interposition, by injunction in the case, of what we have been regarding as an eventual or contingent nuisance." And the court declined to interfere with the erection of a powder house within a few hundred yards only of the dwelling of complainants, notwithstanding the plaintiffs' case was strongly fortified by the argument that "the electric fluid, the irresistible effects of which are disclosed in every thunder storm, may, in defiance of every precaution, at any moment cause it to explode. It cannot be doubted that, if five hundred kegs were stored in a

magazine in the heart of the city, every thunder storm would awaken a universal alarm and consternation in the minds of the inhabitants." *Cheatham v. Shearon*, 1 Swan, 213. A much stronger appeal was thus presented to the court than we have in this case. It is at best but the fear or apprehension of danger or injury that is being urged. "When the injury complained of is not, per se, a nuisance, but may or may not become so, according to circumstances, and when it is uncertain, indefinite, or contingent or productive of only possible injury, equity will not interfere. Thus the erection of a wharf, a railroad bridge, a planing mill, a stable, a cotton gin, a blacksmith shop, a toll gate, a livery stable, or a turpentine distillery will not be enjoined where the injury is only a possible and contingent one." High, *Inf.* § 743. A bowling alley, billiard room, or like place of amusement kept for gain or hire may or may not be a nuisance, according to the nature of the amusement, the manner in which the place is conducted, and its location. Wood, *Nuis.* § 43. A ten-pin alley kept for public use in a village, in connection with a large beer saloon, was held not a nuisance per se. *State v. Hall*, 32 N. J. Law, 158. A slaughterhouse, tallow factories, and melting houses, soap factories, fat boiling and bone boiling establishments, have been held to be prima facie nuisances. It would seem from the authorities, therefore, that the opening of the grounds under consideration as a pleasure resort and beer garden is not of itself a nuisance. Whether the management may make it such is problematical. The nuisance sought to be restrained is eventual and contingent. That, when opened before, it became a nuisance, is not determinate and satisfactory evidence that it will so become in the future. It is not even alleged that it will be conducted like it was before. In *Hahn v. Thornberry*, 7 Bush, 403, it is held that the chancellor will not interfere by injunction when the nuisance sought to be abated or restrained is eventual or contingent, nor when the evidence is conflicting, and the injury to the public or to the individual complaining doubtful. In *Coffin Co. v. Warren*, 78 Ky. 400, the maintenance of a smokestack, which caused "much annoyance and discomfort by the smoke and soot" issuing therefrom, was held not to be a nuisance. "One living in a city," it was said, "must necessarily submit to the annoyances which are incidental to city life." In *Rhodes v. Dunbar*, 57 Pa. St. 274, it was well said by the learned chief justice: "It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher, and laborer, as well as the wealthy employed or unemployed citizen, to constitute a city. They all have rights, and the only requirements of the law are that each

shall so exercise and enjoy them as to do no injury in that enjoyment to others, or the rights of others." Among the rights to be enjoyed—indeed, we might say, necessary to be enjoyed—by a large class of persons in a crowded city is the right or privilege of attending places of open-air amusement, such as are sought to be condemned in the petition. Undoubtedly, if the operation of these grounds become a nuisance, the chancellor will, if there be no remedy at law obtainable by complainants, interfere in their behalf. We cannot say now that the objectionable floors may not be so deadened as to prevent the noise complained of, or that the voices of the dancing directors may not be "toned down," or the music made less harsh. There is nothing in the state of case set up in the petition rendering this improbable. Of course, the idle and disorderly crowd of "hangers on" may easily and summarily be disposed of on complaint to the municipal authorities. Judgment affirmed.

WEHLE v. UMPFENBACH.

(Court of Appeals of Kentucky. Sept. 21, 1893.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—WILLS.

Testatrix and her husband, being childless, had accumulated a considerable property, mostly from the husband's labor. Testatrix held notes payable to her alone, which she caused to be re-executed payable to her sole and separate use, and took an assignment of a bond and mortgage in like terms. Her husband knew nothing of these arrangements, nor of the will which she made assuming to dispose of the property to his exclusion. *Held*, that testatrix was merely custodian of the common funds, and could not make such a will under the statute empowering a married woman to dispose by will "of any estate secured to her separate use by deed or devise."

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

Probate of the will of Johanna Umpfenbach, deceased, offered by O. A. Wehle, the executor named therein. Christopher Umpfenbach, husband of deceased, objected. Probate refused. Proponent appeals. Affirmed.

Pirtle & Speed, for appellant. Humphrey Marshall and Lieber & Lincoln, for appellee.

PRYOR, J. Johanna Umpfenbach, when a married woman, attempted to make a last will, by which she disposed of what she claimed to be her estate to her collateral kindred, excluding her husband. When offered for probate, the husband appeared and objected because his wife had no power to execute it. It seems that the husband and wife had no children, were frugal and industrious people, and by close economy had accumulated a considerable estate, the most

of it, as the proof conduces to show, the result of the husband's labor. Notes were held by the wife for considerable sums of money, and made payable to her alone, that were afterwards re-executed so as to make them payable to her own sole and separate use. The wife also held by assignment a bond for her separate use for the payment of money secured by mortgage, and her devisees claim that because these choses in action were held in the manner indicated, and made payable as she directed, she could dispose of them by will without her husband's consent, and divest him of his marital rights. It is plain from the proof in this case that the wife was the custodian of the earnings of the husband, and that an estate of the value of many thousand dollars created by his daily labor has been disposed of by her without his knowledge. It by no means follows that, because the wife holds personalty to her separate use, she may dispose of it, or that at her death it passes to her kindred, to the exclusion of the husband. A separate estate in a married woman may be created in this state by gift, by deed, devise, or even by parol of personal property, but it was never contemplated by any legislation to vest in the wife the power to dispose of personal estate, thus held, whether by writing or by parol, by will, to the exclusion of her husband. The statute in regard to wills alone confers upon a married woman the right to make a will, and provides: "A married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will." There must be a deed or a devise creating this separate estate before the wife can dispose of it. This right is not restricted to a deed for real estate, as the ordinary meaning would imply, but there may be a deed of trust securing realty or personalty to the wife made by a third person during or prior to the marriage, or made by the husband and wife during the marriage or by antenuptial contract. The wife assumed in this case to create a separate estate out of what belonged to her husband, without his knowledge, and that had been acquired by him during the marriage; or if, as counsel assumes, the wife had accumulated this property during the existence of the marital relation, she had no right to convert it into separate estate without the consent of the husband, so as to enable her to deprive him of his marital rights. Such was never contemplated by the framers of the statute empowering a married woman to make a will, and the facts of this record indicate very plainly the necessity for such a construction, and afford ample reason for restricting the exercise of such a power by a feme covert, within the legislative intent. As a married woman has no power to make a will except as provided by this statute, it was incumbent on the propounders to show

a state of case that would authorize its probate. The case of *Hickman v. Brown*, 88 Ky. 377, 11 S. W. Rep. 199, settles the question in this case. The judgment below is affirmed.

SIMPSON v. SIMPSON'S EX'RS.

(Court of Appeals of Kentucky. Sept. 23, 1893.)

CANCELLATION OF MARRIAGE SETTLEMENT.

A man of 68 years of age, worth about \$20,000 in money, was engaged to marry an illiterate woman of 50 years. Two days before the appointed marriage day, with a lawyer, he visited in the evening his intended bride, who had about \$100, and had a marriage settlement read to her, which both parties signed. By it she parted with all her marital rights in his estate for the use of a house and lot worth not exceeding \$1,000, her husband relinquishing his interest in her estate. After the contract was signed he insisted on a marriage the next morning at 5 o'clock, giving her no opportunity to see or consult her friends. After the marriage she was compelled to do the work of a menial, and refused many necessary comforts. *Held*, that the settlement would be set aside.

Appeal from circuit court, Spencer county. "Not to be officially reported."

Bill by Mattie S. Simpson against the executors of John R. Simpson, deceased. Decree for defendants. Complainant appeals. Reversed.

G. G. Gilbert, for appellant. Fairleigh & Straus and L. A. Weakley, for appellees.

PRYOR, J. This action in equity was instituted in the Spencer circuit court by Mattie S. Simpson, the appellant, against the executors and devisees of the last will of her husband, John R. Simpson, for the purpose of canceling an antenuptial contract made between the appellant, whose maiden name was Mattie Swope, and John R. Simpson, the testator, on the evening preceding their marriage. The provisions of the will were renounced by the appellant, and she now claims she is entitled to dower and her distributable share of the personalty of her husband's estate, upon the ground that the marriage contract was a nullity. The marriage contract was entered into on the 16th of July, 1888, was signed and acknowledged by both parties, and recorded. The marriage took place the day after the contract was entered into, and the parties lived together as man and wife until his death, in September, 1901, and this action instituted in October of that year. The husband, at the date of the marriage, was possessed of an estate of fifteen or twenty thousand dollars, the wife's estate not exceeding in value \$100. He was about 68 years of age, and was a shrewd business man, and, from the proof in this case, economical to an extent that deprived his wife at least of the comforts and necessities of life; converted his wife into a cook soon after the marriage,

clothed and controlled her as one would the most abject menial in his service. The wife, at the date of marriage, had passed the age of 50, was uneducated, and without any business experience. The testator, (her husband,) at the date of the marriage, had two children, both sons, and each with a family, and in comfortable pecuniary circumstances. The agreement to marry having been entered into, the day fixed for its consummation was Thursday, the 17th of July, 1888. The friends of the appellant, who lived in Louisville, were invited to the wedding, and were having such clothing made for the appellant as suited the occasion. On the Tuesday preceding the day the marriage was to take place, in the evening, the testator called on the appellant, and suggested the making of a marriage contract, to which the appellant, it seems, assented. He left the house, and in a short time returned with his lawyer, who had prepared the contract in his office, as directed by the testator, and had it read over once to the appellant, and, being asked if she understood it, and her response being "yes," the parties both signed it, and the clerk, being present, took the acknowledgment, and recorded the instrument. As soon as the contract was signed, and the witnesses to it had returned, the testator insisted on their marriage taking place at 5 o'clock the next morning, (Wednesday,) the day preceding the day to which the friends had been invited. Her wedding outfit had not been sent from Louisville, but still the testator was persistent, and the woman compelled to marry, as the testimony shows, with such scanty clothing as would doubtless have proved distasteful to those of less mature years than the parties to this alleged agreement. At the time this contract was signed, or before, there was no explanation made to the appellant as to the nature of the marital rights she was about to surrender, or the character and extent of the estate of the testator. He was reported by some to be a man of wealth, and known by all business men in his town to have been at the time in independent circumstances, but still his estate was invisible, or composed mostly of cash and cash notes, and when dealing with this inexperienced and uneducated woman it was his duty not only to have explained to her what rights she was surrendering, but to develop to her, approximately, at least, the value of his estate. His lawyer doubtless supposed that the parties understood each other, and wrote as directed by the testator; and, while no blame is to be attached to him, still here was a shrewd business man, with his counsel on the one side, and an illiterate, uneducated woman on the other, the latter parting with all of her marital rights in an estate worth fifteen or twenty thousand dollars, for the use of a house and lot worth not exceeding one thousand dollars, for her life only, and the relinquishment by the husband of his interest in her estate that

had no value to it; no one of her friends present to advise with her on the subject, and the wedding hastened before friends could arrive to witness the ceremony, and bring with them the wedding garments. Why such haste? Was it the fear that those of her friends more intelligent than the appellant should arrive, and give to the appellant the advice she was entitled to have in the first place? The parties were not dealing at arm's length; and while marriage contracts, when entered into in good faith, and without fraud or imposition, will be upheld in equity, however inadequate the pecuniary consideration, as said by the court in *Pierce v. Pierce*, "the authorities go very far in holding that the courts require strong proof of fairness when called upon to enforce an antenuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust, and unreasonably disproportionate to the means of the husband." "The rule undoubtedly is that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a subsisting agreement." 71 N. Y. 157. In *Blerer's Appeal*, reported in 92 Pa. St., 266, the contention was as to the validity of an antenuptial contract between Everhart Blerer and Ruth Shaw. The court said: "It is a sound rule that parties to an antenuptial contract do not, like buyer and seller, deal at arm's length, but stand in a confidential relation, requiring the exercise of the greatest good faith. There must be a full disclosure of the circumstances and property of each. If the provision secured to the wife is manifestly unreasonable, and disproportionate to the means of the intended husband, it raises a presumption of intended concealment, and throws upon him the burden of disproving that presumption." Blerer, in that case, was worth about \$60,000, and Ruth without property of any value. It was agreed that in 30 days after his death she was to be paid \$5, and that whatever property she had or might acquire should remain hers. In consideration of this she released her marital rights. It was shown in that case that the parties lived in the same neighborhood for many years, and the circumstances of each were known to some extent to the other, but the court held that this general information was insufficient to prove knowledge approaching correctness of the value of his property, and that it was not such a contract as a court of equity should enforce. The case before us presents as strong facts and circumstances, (regardless of the testimony of the appellant,) much of which is incompetent, for refusing to enforce this agreement as the case of *Blerer's Appeal*. In each case the evidence of fair dealing that must characterize all such contracts is wanting, and here it is manifest that this woman, if

advised by friends, or if of sufficient intelligence to have known her marital rights, would never have entered into a contract that reduced her to a mere menial, and left her, at the death of her husband, in the possession of a little cottage, disrobed of its furniture, and she penniless for the means of support and maintenance. On the evening of the execution of the contract, with her wedding day fixed, and her friends invited, she was powerless to resist the will of one so vastly her superior, and to whom she had pledged her affections upon the promise that he would protect and care for her during life; as powerless at that time as she was to resist, after the contract was signed, his importunities to marry him, in the absence of her friends, at 5 o'clock the next morning. She was subordinated to his will, as the facts show, both before and after marriage. She surrendered to him in a short time, on his demand, the keys of the pantry and the meat house, and was supplanted in everything that pertained to her domestic duties, and even handed over to him, at his instance, the small sums of money that were derived from the sale of her vegetables in the garden. It is a case of the exercise of an unlimited and tyrannical control by the husband over the wife's actions from the date of the marriage contract until his death. The case of *Forwood v. Forwood*, reported in 83 Ky. 114, 5 S. W. Rep. 361, is relied on by both sides as authority in this case. In that case the answer of the allegations made by the wife were denied, and no proof whatever taken, and this court said: "If it appeared the appellant was inveigled into making this contract by unfair means, such as taking advantage of her ignorance, her affections, or concealing the truth from her, we would not hesitate to set the contract aside. But such a case does not appear. She fails to allege she did not know the nature and legal effect of the contract, nor does she allege she did not make it freely and voluntarily. It is clear," the court further said, "that she understood its meaning, for the proof is clear she was a woman of intelligence, and possessed a clear and cool judgment, and she knew that her intended husband was a man of reputed wealth; and three years after her marriage she stipulated in writing, drawn by herself, that she was not entitled to dower in her husband's realty because she had relinquished it by the antenuptial contract." The cases are entirely dissimilar, with the exception that each purports to be an antenuptial contract. After a most careful reading of the record, we have no hesitation in concluding that the appellant was imposed on by her intended husband, and that with promises of relieving her from the burden of a daily labor that was necessary by reason of her poverty she was induced to become his wife, and to execute a contract that is full of fraud, as shown from the facts connected with its

execution. There are some averments in the petition as to moneys or property the testator had advanced his children with a view of defeating the claim of the wife for dower and distribution. We think a man of his means had the right to give to his children the sums alleged, and that this was no fraud on the wife. As to the property, including lands, choses in action, money, etc., belonging to him at his death, the widow is entitled to dower, and her distributable share as widow. The antenuptial contract is directed to be canceled, and the marital rights of the appellant enforced. The judgment is reversed, and the case remanded for proceedings as herein indicated.

CURTIS v. LOUISVILLE CITY RY. CO.
(Court of Appeals of Kentucky. Sept. 23, 1893.)

CARRIERS—EJECTION OF PASSENGERS—EVIDENCE.

1. Plaintiff, a passenger on a street car, not having the exact change, gave the driver a 50-cent piece. The driver returned to him a package of nickels marked "50 cents." The fare was 5 cents. The package only contained 45 cents. The driver refused to give plaintiff another 5 cents, referring him to the office from which he had received the package as containing 50 cents. The plaintiff refused to pay his fare, and was ejected. *Held*, that the street-railway company was liable.

2. The request of the driver to adjust the matter at the office is competent in mitigation of damages.

Appeal from Louisville law and equity court.

"To be officially reported."

Action by Patrick Curtis against the Louisville City Railway Company. Judgment for defendant. Plaintiff appeals. Reversed.

W. O. Harris and Thomas Lawson, for appellant. Humphrey & Davis, for appellee.

BENNETT, C. J. The appellant took passage on the defendant's street car to be conveyed from his house to his law office in the city of Louisville. The fare was 5 cents. The appellant, not having the exact change, handed the driver a 50-cent piece in coin, and requested the change for it. The driver gave him a package of nickels marked "50 cents." The appellant immediately, and in the presence of the driver, though his attention at the time might have been directed to the front, counted the nickels, and they were short 5 cents, and while still in the driver's presence, and with the nickels in his hand, he called his attention to the shortage, and demanded the correct change. The driver, not denying the shortage, refused to give the appellant the correct change, saying that he had received it at the appellee's office just as it was, at 50 cents, and that if there was a shortage the company must correct it, not he. He then requested the appellant to put 5 cents fare in the box, and when the car reached the next station, which was but

a few minutes run, the office would correct the mistake, and that he, the driver, would go with him to the office, and make a statement in reference to the mistake. The appellant declined to put the 5 cents in the box, or to pay in any way an additional sum, saying that the driver, having refused to give him back the correct change, had retained the fare, and that he would not pay it again. Therefore the driver called a policeman, and caused him to eject the appellant from the car. The appellant brought this suit to recover damages. The first trial resulted in a verdict for \$1,000 in damages, which was set aside by the court, and on the second trial the court instructed the jury peremptorily to find for the appellee. The appellant appeals.

By the rules of the appellee, a passenger that gets on a street car must deposit his fare in the box within one week. The driver must not receive the fare, etc. When it is necessary to enforce the rules or to preserve order, the driver may call to his assistance a policeman. These rules are reasonable, and the appellant was aware of them. The question is, was he, under the circumstances, excusable for not putting the nickel in the box as required, and was the driver excusable for ejecting him on account of his refusal? The appellee furnishes the drivers with change, fixed up in small sums in packages, for the accommodation of passengers in the payment of their fare. The drivers are charged with the change, and any shortage in the sum with which they are charged falls upon them, unless corrected by the company. It seems that the fear of the driver that the company would not make good to him the shortage, and that the loss would fall upon him if he made up the shortage, caused him to prefer that the company should make the correction. It admits of no doubt from the evidence that the package contained a shortage of five cents. Now, as said, the appellee's rules were reasonable, and if a passenger refused to comply with them the appellee would have the right to expel him for non-compliance. But the question is, could the driver, who was authorized to make change on behalf of the appellee, and for its benefit, as well as that of the appellant, retain a nickel by mistake belonging to him, and then compel him to put the fare, another nickel, in the box, because the rule of the company required the appellant to put his fare in the box? Now, the appellant had placed the nickel in the hands of the driver, and he was authorized, under the rules, to put it in the box. He received the half dollar, and retained five cents too much,—the amount of the fare,—and he would not give it to the appellant, but required him to pay his fare in addition. The retention of the five cents was, under the circumstances, a payment of the fare, which the driver could have put in the box had he desired.

But whether he put it in the box or not did not concern the appellant, because he had paid his fare, and was entitled to his ride. The mistake as to the amount that was in the package was that of the appellee, and not that of the appellant, and this court adheres to the rule intimated in *Wilsey v. Railroad Co.*, 83 Ky. 511, which is sustained by other cases,—that if a passenger has paid his fare, and the company fails to furnish him with proper evidence of the fact, he is nevertheless entitled to his ride, because the mistake is that of the company, and the passenger ought not to be prejudiced by it, and that the company is responsible for any damages that the passenger sustains in consequence of being ejected by the company. The request of the driver to adjust the matter is competent to go to the jury in mitigation of damages, and what occurred after the appellant got off the car should not go to the jury unless it was done by the appellee's authority. The judgment is reversed, etc.

SCHMIDT v. CARTER'S ADM'R.

(Court of Appeals of Kentucky. Oct. 5, 1893.)
MORTGAGES—WHAT CONSTITUTE—CREDITORS WITH NOTICE.

A note for \$2,000, "being money advanced to me to help pay for a house and lot on Jefferson, between 22 and 23 streets, and on which she [the payee] holds a lien until paid," creates no present lien on the property, within Gen. St. c. 24, § 10, providing that no deed of trust or mortgage shall be valid against creditors without notice until recorded, and may be disregarded by an attaching creditor with notice of it.

Appeal from Louisville law and equity court.

"To be officially reported."

Bill by Adella Schmidt against James G. Carter's administrator to subject certain property attached by defendant, and ordered sold for his benefit, to prior payment of her lien. Judgment for defendant. Plaintiff appeals. Affirmed.

W. O. Harris, for appellant. Muir, Hayman & Muir, for appellee.

PRYOR, J. The executor of James G. Carter, holding a claim against one Charles E. Landrum originating from a partnership between Landrum and his testator, had an attachment issued, and levied on a lot of ground in Louisville that Landrum had conveyed to his wife. The conveyance was held to be fraudulent, and the lot ordered to be sold to satisfy the judgment for \$7,000. After the attachment had been sustained and the sale ordered, the appellant, Adella Schmidt, claiming an equitable lien on the lot, instituted this action, alleging that her lien existed prior to the attachment lien, and asking that the property or its proceeds be first applied to the payment of her debt. The lien asserted by the appellant is claimed

to exist by reason of the following obligation executed prior to the issuance of the attachment: "Louisville, Ky., 3 June, 1889. One day after date I promise to pay to Adella Schmidt, or order, two thousand dollars, being money advanced to me to help pay for a house and lot on Jefferson, between 22 and 23 streets, and on which she holds a lien until paid; interest to be paid monthly at the rate of 6 per cent. per annum. C. E. Landrum and Wife, Leow Landrum." In the petition of the appellant it is alleged that she loaned the money to be used in the purchase of the house and lot, and in consideration of the loan the defendants, Landrum and wife, agreed to give to the plaintiff a note due as the paper above shows, and to secure the same by mortgage on the property; that the money was used in the purchase of the lot, and a mortgage executed on the 22d of October, 1890, in accordance with the agreement, and recorded in the proper office. This mortgage was executed and recorded after the attachment had been issued and levied, and it is conceded that the mortgage created no lien or equity in favor of the appellant unless it is made to relate back to some agreement prior in date to the attachment by which the mortgage was to be executed. The only written evidence of any such agreement is the note evidencing the loan of the \$2,000, in which it is recited "that it is for money advanced to help pay for the house and lot on Jefferson, between 22 and 23 streets, and on which she holds a lien until paid." This verbiage in the note, it is claimed, creates an equity older in date to that created by the attachment, and under the familiar doctrine that, in a contest between equities, the elder equity must prevail, it is contended the proceeds of sale should be applied first to the payment of appellant's debt, the attachment lien being made to yield to the equitable mortgage lien. The statute provides: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record." Section 10, c. 24, Gen. St. It is insisted that before the equity of the appellee was enforced by a sale of the property he had notice of the agreement to mortgage, and therefore the statute referred to cannot affect appellant's equity.

This court has adjudged, in several cases, that a mortgage not recorded, or a bond for title, has precedence over a lien created by an execution or attachment where actual notice has been given the creditor before the sale under the attachment or execution, the statute being construed as meaning (and in fact such is its language) that the purchaser holds unless he has actual notice of the outstanding equity, and there is no

reason why a creditor is not affected with notice in the same manner that a purchaser would be. The deed or mortgage unrecorded is not good against a purchaser for value without notice, and the decisions giving priority to unrecorded liens seem to follow the language of the statute, and carry out the legislative intent. Valid liens, however, must actually exist, and not such liens as are established alone by parol proof, or where upon the face of the instrument it is manifest that the lien is to be created by some subsequent agreement. Courts of equity cannot be too careful in guarding the rights of bona fide purchasers and creditors against hidden liens, or such as exist only in the contemplation of the parties, and it should be made to appear from the terms of the instrument itself that a lien has in fact been created. A mere recital on the face of a note for borrowed money that this is a lien on the land owned by the debtor, or that the debtor will thereafter execute a mortgage, creates no lien as against third parties, and to adopt a rule that would permit such lien to be enforced against other than the parties to it would open the door wide to fraud, and destroy entirely the salutary effect of our registration laws. The parties never intended the note to evidence any lien on the property as against creditors, because it is distinctly alleged that it was agreed the debtor should thereafter execute a mortgage to secure the note, and this was in fact done, but not until the attachment lien existed. If the recital, in every note given for borrowed money or for property, that the obligee holds a lien on the property of the obligor, or that the obligor is thereafter to create a lien to secure the paper, creates an equity as against all other liens after notice, our registration laws should be dispensed with, and the priority of liens determined by the antiquity of the paper evidencing the agreement to pay. The case of Trimble v. Puckett, (decided in May, 1892,) 19 S. W. Rep. 591, is relied on as authority for the appellant. In that case Brenner, the vendee of a tract of land, owed a part of the purchase money. Puckett advanced the money, and by an agreement with Brenner, the vendee, was substituted to the rights of the vendor. The lien had not been released, but was satisfied upon the payment by Puckett, and the execution of a note by Brenner to Puckett, by which Puckett was made the vendor, and the land described "as the farm I now live on." Of this note and its contents the creditor had actual notice, and, although unrecorded, a lien was held to exist. There was enough in that note to show the entire agreement, and the substitution of Puckett to the rights of the vendor, or, rather, Puckett was made the vendor by the contract, and of this fact the creditor had notice. It was not an agreement to create a lien, but a lien aris-

ing from the discharge of a valid lien by Puckett, and of that the creditor was fully informed before he purchased. In the one case the lien was created, and in the case before us the parties only agreed to create a lien. Hidden liens, or such as usually arise when the debtor's property is about to pass from him, even if containing all of the requisites of a mortgage, are looked upon with suspicion, and courts of equity should be reluctant to ignore the claims of bona fide creditors unless such liens are clearly established. In this case there is not even a description of the property, or any of the essential elements of a mortgage, and no court of equity should hold that this note is evidence of an agreement to mortgage, or that such an agreement, if established, would supersede the rights of bona fide purchasers and creditors. Judgment affirmed.

NICKELL et al. v. FALLEN et al.
(Court of Appeals of Kentucky. Oct. 5, 1893.)

NEW TRIAL—TIME FOR APPLICATION—FINAL JUDGMENT.

1. Under a statute providing that application for new trial for newly-discovered evidence may be made not later than the second term after the discovery, an application made later than that is properly dismissed.

2. A judgment ordering that the cause be filed away for want of prosecution is not final or a bar to a subsequent action.

Appeal from court of common pleas, Wolfe county.

"Not to be officially reported."

Action by Morrison Nickell and others against Oscar Fallen and others. A judgment was rendered that the cause be filed away for want of prosecution. From a judgment dismissing plaintiffs' application for a new trial, they appeal. Affirmed.

Z. T. Hurst and A. F. Byrd, for appellants. McGuire & Kash, for appellees.

HAZELRIGG, J. This is an application for a new trial made by petition upon grounds discovered after the expiration of the term at which the judgment complained of was rendered. The petition of the appellants was dismissed, and they have appealed. The facts relied on seem sufficient to entitle them to the relief asked, but the judgment sought to be vacated was rendered at the January term, 1889, of the Wolfe circuit court, and their petition for vacation was filed to the August term, 1891, of that court. The petition does not disclose when the grounds were discovered, but this record discloses that the applicants knew of them as early as July, 1889. It is provided in such cases that the application may be made not later than the second term after the discovery. From the record the application appears to have been made too late, and was properly dismissed. Moreover, under the provisions of the Code, the evidence

might have been either by depositions or by witnesses examined in court. In this case the order recites that the case was submitted, and, after proof heard in open court, it was adjudged that the plaintiffs had not shown themselves entitled to the relief sought, and therefore the court dismissed the petition, with costs. There is no bill evidence in the record, and the court presumably did right.

It may be observed that the judgment sought to be vacated, ordering that "the cause be filed away for want of prosecution," is not a final order or a bar to a subsequent action. The judgment dismissing the petition is affirmed.

ELLIS v. DITTEY.

(Court of Appeals of Kentucky. Sept. 26, 1893.)

CURTESY—POSSESSION OF LAND—WHEAT CONSTITUTES.

In 1845 land adjoining a tract belonging to E.'s father was conveyed to her, and in 1847 she married defendant. In 1848 a child was born to them, and a year later E. died. E. and defendant never lived on the land, nor occupied it by tenants, but E.'s father occupied a house on his adjoining tract, and his widow after him, during E.'s coverture, and during such occupancy the two tracts appeared to have been "all in the same field." There was no evidence of an adverse holding to E., and she alone had a deed of record thereto. *Held* to show that the possession of E.'s father and his widow was E.'s possession, and sufficient to entitle defendant to a life estate in the land, within Gen. St. c. 52, art. 4, § 1, providing that, where there is issue of the marriage born alive, the husband shall have a life estate in all land owned and possessed by the wife at the time of her death.

Appeal from chancery court, Kenton county.

"Not to be officially reported."

Action by Arnold Ellis against Thomas Ditty. From a judgment for defendant, plaintiff appeals. Affirmed.

A. C. Ellis, for appellant. Simmons & Simmons, for appellee.

HAZELRIGG, J. The appellant, claiming to be the owner and in possession of about 10 acres of land in Kenton county, brought this action to quiet his title thereto against the appellee, who is alleged to be setting up some kind of claim to the property. The plaintiff's title is derived by deed from one Joseph Marshall, who, through his mother, inherited the land from the infant child of the defendant, Ditty. The defendant by his answer puts in issue the plaintiff's possession, and sets up ownership in himself as heir of his infant child. Afterwards, convinced of his error as to this claim, he amends his answer, and claims as tenant by the curtesy. As to the possession of the property at the time the suit was instituted, we think the proof is sufficient on plaintiff's behalf to show possession in him, and this, combined with the legal title, authorized him to sue.

The real question in the case is whether the appellee, by himself or wife, had such possession of the land during coverture as entitles him to curtesy. In August, 1845, one James Dedman conveyed the land in controversy to Elizabeth McCollough, for the recited consideration of \$200. This tract appears to have been bounded on one of its sides by a tract of some 10 acres, owned by the grantee's father. In 1847, Elizabeth, then living in Cincinnati, Ohio, intermarried with Dittey, the appellee, who lived in the same city. To them a child was born in December, 1848. Thereafter, in March, 1849, Elizabeth died, and in about August of the same year the child died. Just who, if any one, occupied or used this land in 1845, '46, '47, and '48 is not clearly shown. There was no house on it, but there was one on the adjoining tract belonging to the father of Mrs. Dittey, and this is shown to have been occupied by him during his lifetime, and by his widow afterwards. The latter died some 30 years ago. The two tracts then appear to have been "all in the same field," though at one time the tract in dispute was under fence, which, however, had rotted away some 20 odd years ago. The appellee never occupied the land, or used it in person or by tenants; but if the wife was the owner, and had possession of it during her marriage, it is sufficient to entitle the appellee to curtesy. The statute giving curtesy reads as follows: "Where there is issue of the marriage born alive, the husband shall have an estate for his own life in all the real estate owned and possessed by the wife at the time of her death, or of which another may be then seised to her use." Section 1, art. 4, c. 52, Gen. St. The proof as to her possession is scant, but the appellee speaks of the land as that of which "his wife was in possession at the time of her death," though at that time, as appears in proof, she was a resident of Cincinnati, and her father was probably using it, or occupying his own land in the same inclosure with the tract in dispute. There is no hint of any adverse holding. She alone had a deed of record for it, or claimed it. We are therefore inclined to conclude that it was held for the legal title holder by those by whom it was actually occupied, and whose possession was therefore her possession, which satisfies the requirement of the statute. In *Carr v. Givens*, 9 Bush, 680, neither the husband, Givens, who was claiming curtesy, nor the wife, ever lived upon the land, or exercised any acts of ownership over it; but, on the death of the wife, "her mother entered on the land, or retained the possession after the death of her husband, recognizing the right of the children as the owners in fee simple. Her possession was not adverse to the children, but only strengthened the common estate, and her possession and seisin were the possession and seisin of all." Possession by some coparceners, amicable to the others, was thus held

to be a sufficient seisin in fact to invest and sustain an estate by the curtesy in the husbands of certain others, not in the actual possession. Still later, in the case of *Yankey v. Sweeney*, (1887,) 85 Ky. 64, 2 S. W. Rep. 550, it was said that, the reason of the rule requiring actual possession on the part of the husband being for the purpose of strengthening the wife's title, whenever its equivalent is complied with then the rule is complied with. "For instance," say the court, "if the guardian of the wife holds possession of her land at the time of her death, then the reason of the rule is complied with, and the husband is entitled to curtesy in the land; and, if a joint tenant with the wife holds the friendly possession of the land at the time of her death, here his possession is her possession, and the reason of the rule is complied with. So, if a trustee of the wife holds possession," etc. "Indeed," say the court, "if any person at the death of the wife is seised of her land for her use, the reason of the rule is complied with, and the husband is entitled to curtesy." Here the proof is the wife was in possession at the time of her death. The proof that she resided in Cincinnati at the time does not disprove the fact of her possession under the deed by her father or other person for her. If she died in possession, it was all the statute requires to entitle the husband to curtesy. The amended answer asserts that the wife died owning and possessing this land, and we think this is a sufficient allegation to meet the demands of the statute, and in fact is substantially in its language. Judgment affirmed.

STUART v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1893.)

TAXABLE PROPERTY — MINERAL ESTATE IN LAND.

Since the mineral interest in land may be severed from the surface interest thereof by conveyance, thereby becoming separate real estate, it may be taxed as other real estate.

Appeal from circuit court, Pike county.

"To be officially reported."

Proceeding by the commonwealth of Kentucky against John J. Stuart to collect a tax on a mineral interest owned by defendant in certain land. From a judgment for plaintiff, defendant appeals. Affirmed.

C. M. Parsons and J. M. Roberson, for appellant. W. J. Hendrick and Connolly & Connolly, for the Commonwealth.

BENNETT, C. J. By this proceeding the estate proposed to be taxed is the mineral estate of the appellant, which he holds by separate title, another holding the surface title. It is settled by this court that an estate in fee carries with it all metals and minerals thereunder, but the surface and the mineral interests may be conveyed to different persons, and become separate property, and each

interest conveyed, if the minerals are conveyed in place, will be land; in other words, the minerals and the surface interests may, by separate conveyance, become separate pieces of real estate, and held by different persons, and each estate may be separately seized and sold by execution, or each may be defeated by the statute of limitations, as any other real estate. See *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. Rep. 802, where the matter is fully discussed. The mineral estate, when severed by conveyance, being separate real estate, may be taxed as other real estate. The judgment is affirmed.

CASKEY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1893.)

HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. On a trial for murder, where the evidence tends to show that deceased and a person who was with defendant at the time of the shooting were unfriendly, by reason of an alleged assault of such person on a son of deceased, whether such assault occurred, and, if so, the circumstances connected with it, are immaterial, the shooting having been some time after the assault.

2. An instruction may be refused where a similar instruction has been given.

Appeal from circuit court, Morgan county.
"Not to be officially reported."

Jefferson Caskey was convicted under an indictment for murder, and appeals. Affirmed.

W. W. McGuire, for appellant. Wm. J. Hendrick, for the Commonwealth.

PRYOR, J. The indictment in this case charged the defendant Jefferson Caskey and one Jesse Caskey with the murder of Samuel Caskey. The accused did the shooting, and Jesse Caskey was present, aiding in the commission of the offense. The testimony conduces to show that Jesse Caskey and the deceased were unfriendly, caused by an alleged assault of Jesse Caskey on a son of the deceased. Whether such an assault was made or not, or the circumstances connected with it, is immaterial, the shooting resulting in the killing of the deceased taking place some time after the assault. The defense is that the deceased had threatened the life of Jesse, and that, at the time of the shooting by the accused, he killed his brother to save his own life and that of Jesse Caskey. The parties were all armed at the time, and ready for the conflict. The shooting took place in the house of Thomas Caskey, and the latter's wife, when the quarrel began, was invited to leave by the accused, the latter saying to her, "You had better get out of here, you will get hurt." There is testimony to the effect that the deceased fired the first shot at Jesse, and then the accused shot the deceased, both the defendant and the deceased

firing at each other about the same time. The deceased was at the house of Thomas Caskey, for the purpose of borrowing his saw, and evidently had not contemplated any trouble, or gone there for the purpose of meeting the accused and Jesse. They both came after the deceased had entered, and, when they found the deceased there, left the room, Jesse going outside with Billy Caskey, and the accused with Thomas Caskey. When the accused re-entered the room the deceased remarked that "he must be going," and the accused then stated that he (the deceased) "wanted to stand and watch him." Jesse, about that time, returned with his hands on his hips, and remarked, "Sam has a pistol." This Sam denied, and said Jesse had told a damned lie. Jesse turned his face to Sam with his right hand in his pocket, and then the deceased fired, hitting Jesse, and in a moment the accused and the deceased were firing at each other, and which fired first is left uncertain from the testimony. It is plain from the proof that the accused and Jesse provoked the difficulty, and with a view of taking the life of the deceased, who, up to the time of the shooting, had said nothing, or by any act of his induced either the defendant or Jesse to believe he had any murderous intent.

The law of murder and manslaughter was properly given the jury, and they were further told that if, at the time of the killing, the accused had reasonable grounds to believe, and did believe, that the deceased was then and there about to kill or inflict great bodily harm on either the accused or Jesse, the accused had the right to shoot and kill the deceased, if there was no other apparent means of escape. The jury, having heard the testimony, returned a verdict of 21 years in the state prison, and this verdict was certainly as lenient as could well be returned under the testimony.

Instructions were asked by the defense based upon the right of the accused to take the life of the deceased in defense of Jesse, and were refused, for the reason that a similar instruction had already been given. There may be in the defense a coloring of excuse for this unnatural crime, but, when the testimony is carefully scrutinized, it becomes apparent, as the jury doubtless believed, that even the witnesses for the state were attempting, when detailing the facts, to so color them as to relieve the accused from a punishment he so justly deserved for taking the life of his brother. Judgment affirmed.

WEST v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1893.)

JUSTIFIABLE HOMICIDE.

Defendant having had a difficulty with B., a warrant was given deceased, a constable,

for defendant's arrest, and, stepping into a store where defendant was, deceased threw up his hands, exclaiming, "Don't do that," and was immediately shot and killed by defendant. Defendant claimed that he thought that deceased was B., who he had been informed was going to kill him. *Held*, on a trial of defendant for the homicide, that a charge that if defendant believed, at the time he fired, that deceased was B., and that B. was seeking him to kill him, and if, believing this, he shot to save his own life, he was excusable, was as favorable to defendant as he had a right to expect.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Johnson West was convicted of crime, and appeals. Affirmed.

Stewart & Stewart, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. The appellant had a difficulty with the Blackburns, and a warrant for the arrest of the appellant was placed in the hands of Jake Runyon, the constable of that precinct, who, in company with a posse summoned for the purpose, went to the store of Harvey Williamson for the purpose of arresting the appellant. As Runyon stepped into the storehouse, he threw up his hands, and said, "Don't do that," and then, as quick as he could speak, he said to the appellant to consider himself under arrest, and immediately he was shot with a gun in the hands of the appellant. The appellant says that at the time the gun was fired he did not know that the person was Jake Runyon, but he believed he was one of the Blackburns, who, as he had been just informed, were seeking him to take his life. The court instructed the jury that if they believed, at the time the appellant shot, he believed that Runyon was one of the Blackburns, who were then seeking the appellant for the purpose of taking his life, and were, as he believed, about to take it unless prevented, and he shot the deceased believing that he was one of the Blackburns, for the purpose of saving his own life, then he was excusable. The appellant says that it was the Blackburns that he apprehended the danger from, and the instruction confining the apprehended danger to them simply repeated the evidence upon that subject. It is said that Runyon ought to have proclaimed that he had a warrant for the arrest of the appellant, and to have shown it, etc. It is sufficient to say that he did not have time to do that, for the reason that he was shot down instantly. Besides, he was not shot on account of any action of his as Jake Runyon, for the appellant had not a word of complaint against him, either as constable or otherwise, but because the appellant mistook him to be an enemy who was about to kill him. The appellant has reason to congratulate himself on the fact of having received said instructions. There is no error in the record. The jury passed upon the question of the appellant's guilt. The judgment is affirmed.

WHITLEY COUNTY LAND CO. v. LAWSON.

(Court of Appeals of Kentucky. Sept. 30, 1893.)

ADVERSE POSSESSION—CONFLICTING PATENTS.

Where a junior patent interferes with a senior, and the senior patentee is not in possession, the junior patentee's actual possession of a part of the interference, and claim to the extent of his patent boundary, is an adverse possession of the whole interference.

Appeal from court of common pleas of Whitley county.

"To be officially reported."

Ejectment by the Whitley County Land Company against James Lawson. Judgment for defendant. Plaintiff appeals. Affirmed.

Hill & Denham, for appellant. Lester & King, for appellee.

BENNETT, C. J. The appellant claims the land in controversy under a patent granted by the commonwealth in 1876 for 48,040 acres of land. The patent boundary includes about 160,000 acres, but the quantity above named is all that is patented. The other is excluded because previously patented. The boundary calls to run with county lines, etc. The appellee claims a small piece of land by patent, which is junior in date to that of appellant's, and by adverse possession for 15 years. The patent covers the appellee's said land. The appellee has only occupied a small strip of the land claimed by him for 15 years. The appellant was not in the actual possession of any part of its survey at the time the appellee's occupancy commenced, nor has it entered upon any part of the interference since then, and taken possession of it. The question is, does the appellee's actual possession of a part of the interference, and claiming to the extent of his patent boundary, give him an actual possession of the whole, and oust the appellant's constructive possession. The court instructed the jury that if the appellee's patent covered the land claimed by the appellant, and the appellee had, for 15 years before the bringing of this suit, been in the actual occupancy of a part of said land within his patent boundary, claiming to the extent of said boundary, they ought to find for the appellee, which the jury did. When there are conflicting patents for land, and the junior patentee enters upon and holds the actual possession of a part of the interference, claiming the interference to the extent of his patent boundary, and the owner of the senior patent is not in the actual possession of his land at the time of such entry and occupancy by the junior patentee, then the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and occupancy of his land outside of the interference does not give him the actual or

constructive possession of any part of the interference, nor does his entry upon and occupancy of the interference give him the possession of it, except to the extent of his inclosure. See *Fox v. Hinton*, 4 Bibb, 559, and *Ware v. Bryant*, (Ky.) 21 S. W. Rep. 873. There was no actual possession of any part of the appellant's survey at the time the appellee entered upon and took the possession of the interference. But, if we are mistaken as to the appellant being in the actual possession of some one of the pieces of land covered by its patent,—for the patent covers many pieces that are not only separate, but many miles apart,—it is certain that the appellant, or those under whom it claims, held no actual possession of any part of that piece now the subject of controversy at the time the appellee entered upon a part of the interference; and we think that no one will dispute the proposition that an entry upon one piece of land in the name of the whole under a conveyance that covers several distinct pieces that are distant from each other as in this case does not give the owner the actual possession of the whole. We have treated the patent as valid in passing upon this case, because the parties have treated it as valid, but we do not wish to be understood as passing upon its validity; that matter is not passed upon. The instruction quoted, according to the undisputed facts of this case, is correct. The judgment is affirmed.

SMITH et al. v. NORMENT et al.

(Court of Appeals of Kentucky. Sept. 30, 1893.)

PARTITION—WHAT IRREGULARITIES INVALIDATE—EJECTMENT.

In 1797 a grant of land patented to a company of which H. was a member was partitioned, H.'s heirs taking his share, and all of them except plaintiffs' ancestress, one of the heirs, entered into possession. In 1811 partition was had between H.'s heirs, plaintiffs' ancestress receiving a deed to her share. *Held*, in ejectment to recover such share against persons holding it by adverse possession, that the court will not hold the original deeds of partition to the patentees invalid because the statute under which the partition was made required the appointment of six commissioners, instead of two, the number actually appointed; it being improper to inquire into such irregularity after the lapse of such a time, in order to aid the claims of persons having no paper title, and holding by adverse possession only.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action to try title to land by Kate Norment and others against E. T. Smith and another. There was judgment for plaintiffs, and defendants appeal. Affirmed.

S. B. & R. D. Vance, for appellants. Montgomery Merritt, for appellees.

PRYOR, J. This action was originally instituted in equity by the heirs of Mary Hill-

yer for a division of the land descending to them from and through her. Henderson & Co., of which firm one David Hart was a member, obtained from the state of Virginia a large grant of land, that in the year 1797 was divided between them, and the heirs of David Hart obtained their interest in the allotment. In the year 1811 that part of the grant allotted to Hart's heirs was divided between them, and deeds made by the commissioners making the partition. Mary Hillyer, being one of the heirs, obtained her deed, (made to husband and wife,) and it is this land the present appellees are seeking to have divided in the present action. They had made previous attempts to have the land divided, but, by reason of some irregularities, the partition was not sanctioned or approved by the heirs. When the division of the land was made in the year 1797 between the original patentees, they all took actual possession, except Hillyer and wife, and have sold their respective interests until divested of title. The appellants Steinbridge and Smith, being in possession of a part of the land, were made defendants to this action, and set up an adversary claim, based alone, as this record shows, on an adverse possession. On their motion the case was transferred to the ordinary docket, that the issue of title might be tried, and resulted in a judgment for the plaintiffs.

It is claimed that the original deeds of partition made to the patentees are invalid, because the statute under which the division was made required that six commissioners should be appointed, instead of two, and therefore no title passed. It is plain that these parties entered on their respective parcels, and have disposed of them, except Hillyer and wife, and a division made nearly a century ago should be sustained, and as evidencing such a title as to enable the partitioner to maintain his ejectment for an entry upon his allotment. The court will not inquire whether these deeds of partition were executed by two or six commissioners after such a lapse of time as against those who enter and claim only by an adverse possession. The appellants were in possession of this land claimed by the appellees, and it was not necessary that separate actions should be instituted in order to a recovery, or that the plaintiffs should be held bound to a division that all repudiated, by seeking another partition. This was an issue out of chancery, sought by the defendants, for the purpose of passing on the title; and as title is shown in the plaintiffs, and none in the defendants, verdict and judgment were proper. Neither of the defendants pretend to have any paper title to the Hillyer land, and, the lines and corners of the Hillyer tract being established by the weight of the testimony, and embracing the land sued for, we see no reason for reversing this case. The deed from

Gayle (Smith's evidence of title) covers no part of the land in dispute, and it is unreasonable to suppose that Smith, as one of the commissioners, when attempting to divide these lands between the Hillyer heirs in 1875, allotted in fact to them land which he claims now to have owned and been in the actual possession of at that date. As to Steinbridge, he never claimed but 427 acres of the land to which title was asserted by Hillyer's heirs, and this he recovered, or was adjudged to be the owner, in a former litigation between Hillyer's heirs and himself. He obtained all he then claimed, and has no title to any of the land in dispute by reason of the former litigation, and the title asserted by adverse possession he failed to sustain, as was adjudged by the verdict and judgment below. It is apparent from the record that these appellants have attempted to acquire title by actual possession, and whether that possession ripened into a title before this action was instituted was for the jury. We perceive no error of which the appellants can complain, and, the title having been established, all the court is now required to do is to order a division between the heirs, as asked for in the original action. Judgment affirmed.

COE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 30, 1893.)

MANSLAUGHTER—INDICTMENT.

In an indictment for manslaughter alleged to have been committed "unlawfully, willfully, maliciously, feloniously, in a sudden affray," the word "maliciously" is mere surplusage, and the offense is sufficiently charged.

Appeal from circuit court, Cumberland county.

"To be officially reported."

John Coe, Sr., convicted of manslaughter, appeals. Affirmed.

Allen & Allen, for appellant. W. J. Hendrick, for the Commonwealth.

LEWIS, J. The offense charged in the indictment in this case is manslaughter, alleged to have been committed by the accused unlawfully, willfully, maliciously, feloniously, in a sudden affray, and not in his self-defense. The defendant filed a demurrer to the indictment, and also, after verdict of the jury, moved in arrest of judgment. The only ground upon which a judgment may be arrested is, as prescribed in section 276, Crim. Code, that the facts stated in the indictment do not constitute a public offense, within the jurisdiction of the court. One of the grounds upon which, according to section 165, a demurrer to an indictment may be sustained, is substantially the same as the one upon which a motion in arrest of judgment may be made, viz. that the facts stated do not constitute a public offense. But, if

the demurrer is proper in this case at all, it is because the indictment does not substantially conform to the requirements of article 2, c. 2, tit. 6, of the Code. Section 124 provides the indictment must be direct and certain as regards (1) the party charged; (2) the offense charged; (3) the county in which the offense was committed, and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. The only cause for demurrer to the indictment in question that counsel urges is that the particular circumstances of the offense are not stated with that directness and certainty required by the Code, for there can be no question but the offense of manslaughter is the one intended to be, and which is in terms, charged. The circumstances of time, place, and manner of the commission of the offense, and also the person slain, are all stated with sufficient directness and certainty to show the court had jurisdiction, to apprise the defendant of the particular homicide which he is called on to answer, and to constitute a bar, in case of conviction, to another prosecution for the same offense. But, although the offense charged is manslaughter, the word "maliciously," used in describing the particular circumstances of the offense, indicates a state of mind under which murder, not manslaughter, is committed. Nevertheless, as the words "in a sudden affray," descriptive of manslaughter, occur in the same sentence and connection, the word "maliciously" is to be regarded as surplusage, and therefore in no wise affecting the indictment, otherwise sufficient, nor the substantial rights of the accused; for while he might have been indicted for murder alone, and, upon failure of proof to sustain the charge, convicted of manslaughter, under the indictment complained of he could not have been possibly convicted of murder, as he was not. So that, as the offense of manslaughter was charged and sufficiently described in the indictment, the word "maliciously" did not nor could either mislead or prejudice the accused, and consequently should not be held to vitiate or impair the indictment. In our opinion, there was no ground for either demurrer or motion in arrest of judgment; and, as we perceive no other error in the record, the judgment is affirmed.

VAUGHN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1893.)

CRIMINAL LAW—CONTINUANCE—HARMLESS ERROR—PRESUMPTION ON APPEAL.

1. Setting a case for a day later in the term instead of continuing it to the succeeding term is, at most, harmless error, the persons whose attendance was wanted having been present at the trial, and it not appearing that defendant was otherwise prejudiced.

2. There being nothing in the record showing that trial was at a special term, it will be

presumed that the action of the court was proper, and that the trial was at a regular term.

Appeal from circuit court, Clay county.

"Not to be officially reported."

Carlo Vaughn, alias Thacker, was convicted of manslaughter, and appeals. Affirmed.

J. D. White, W. P. Bentley, and Geo. Baker, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. The appellant was convicted of the crime of manslaughter, and sentenced to confinement in the penitentiary for the term of 12 years. He made affidavit for a continuance of his case, but the court set the trial at a subsequent day of the term, instead of continuing it to the next term. The case being called for trial on the day that it was set, the persons named in the affidavit were present, and it does not appear that the appellant was otherwise prejudiced by the refusal of the court to continue the case. It is contended that the term at which the appellant was indicted and tried was a special term, and that the appellant's case was not one of the cases specified as provided by the act of June 10, 1893. It is sufficient to state that the record before us fails to show anything about a special term; therefore we must presume that the action of the court in reference to the trial of the appellant was proper. The judgment is affirmed.

HAYS et al. v. BRADLEY.

(Court of Appeals of Kentucky. Oct. 5, 1893.)

SALE OF REMAINDER INTEREST—PETITION OF GUARDIAN—REIMBURSEMENT.

1. One for whom land was devised in trust for life, with remainder for his children, after qualifying as their guardian, with the trustee petitioned for sale of part of the land to obtain means to repair the homestead on the remaining tract, the remainder-men not being made parties to such proceeding. *Held*, that the sale of such part under the judgment of the chancellor was void as to the remainder-men, since the chancellor was authorized by statute to order sale on the petition of a guardian only for purposes of reinvestment.

2. Though the sale was void as to the remainder-men, still, the value of the remainder interest in the remaining tract having been enhanced by the expenditure thereon of the proceeds of the part sold, and they having received the full benefit of this by selling the remaining tract, they should not be allowed to recover the part sold under the void judgment of the chancellor without accounting to the purchaser for the amount his money enhanced the value of their interest.

Appeal from circuit court, Lincoln county.

"Not to be officially reported."

Action by Hugh Hays and others against G. N. Bradley to recover land. From a judgment for recovery but making an allowance to defendant, all parties appeal. Affirmed on both appeals.

W. H. Miller and Robt. H. Tomlinson, for plaintiffs. R. P. Jacobs, W. O. Bradley, R. J. Breckinridge, and B. O. Warren, for defendant.

PRYOR, J. Hugh Hays, in his lifetime, devised a tract of land to Campbell Hays, as trustee for William Hays. The terms of the trust vested in William Hays a life estate, with remainder to his children. Not long after the death of the deviser, William Hays qualified as guardian for his children, (the remainder-men,) and, in conjunction with the trustee, filed a petition in equity asking for a sale of a part of the trust estate to enable them to repair or rebuild the homestead. The infants were not made defendants, but the wife of William Hays, she having no interest, was made a defendant to the proceeding. The land was sold (16 acres) for \$1,200 to the cross appellant, G. N. Bradley, the sale confirmed, and a deed made. William Hays, the life tenant, died, and after his death his children, two of whom were adults, and one at the time an infant, brought this action against Bradley to recover the 16 acres of land. The appellee insists—First, that his title is good by reason of his purchase under the judgment of sale; and, for further defense, sets up an equity by reason of the application of his money to the improvement of the remainder interest, alleging, in substance, that the money paid for the land was actually applied to rebuilding the homestead, by which the value of the remainder interest was enhanced, and to that extent he should be remunerated, etc. We think the evidence shows that the remainder interest was enhanced in value, and the trustee fixes the enhanced value of the entire tract at \$10 per acre. This may be in excess of the increased value, but yet the party who was invested with the legal title, and whose duty it was to protect the infants, and who no doubt sought the sale of the 16 acres in the best of faith, places an estimate upon the value of this land by reason of the expenditure that cannot well be disregarded. Besides, the adult children had the entire tract of land (excepting the 16 acres) sold after their father's death, recognizing the sale and purchase of the 16 acres, and have actually received the benefits resulting from this improvement. They filed a petition in equity in which they sought to have the entire land sold, alleging that 16 acres had been sold off by a judgment of the court to Bradley, and asking that the balance of the tract be sold, because it was indivisible. The land was sold, (except the 16 acres,) and the remainder-men received the purchase money. They have received all the benefits resulting from the improvement made by the appellant on their land, and now claim they are entitled to recover the 16 acres, and the appellant must surrender to them the possession, and lose the benefit of his purchase, because, as they contend, the sale was void. The object of the sale of the 16 acres was to enable the life tenant to erect the building for the benefit of all the parties in interest, and while we are inclined to adjudge the sale void for the reason the chancellor had no jurisdiction to ren-

der such a judgment, as his jurisdiction is conferred by the statute, as the remainder-men received and enjoyed the benefits of the expenditure made by the appellant, they should be required to account to him to the extent his money enhanced the value of the remainder interest. The sum to be allowed the appellee is to be determined by the testimony, and we are not prepared to say that this judgment is not warranted by the testimony. He paid for the land \$1,250; has been made to account for rents; and, deducting rents from the purchase money paid, the appellee has been allowed, as against the remainder-men, the sum of \$725; and this we think is equitable. The attempt to convert this 16 acres into money, so as to erect a building on the remaining tract, was not authorized by the statute; and the chancellor's jurisdiction being statutory, and the guardian, by his petition, seeking to do that which the statute did not permit, we must adjudge the sale not only erroneous, but void. *Association v. Vankirk*, 8 Bush, 459; *Wornock v. Loar*, (Ky.) 11 S. W. Rep. 438. It was not such a reinvestment as was authorized or contemplated by the statute, and to permit the life tenant, although the guardian, to make such investments, would be fraught with much danger to infant remainder-men, who are not in court as defendants, or represented by any one, except the life tenant, who is seeking the relief. Judgment below is affirmed on the original and cross appeals.

CHILDS v. KANSAS CITY, ST. J. & C. B. R. CO.

(Supreme Court of Missouri, Division No. 1.
July 3, 1893.)

APPEAL—PRACTICE—DEFECTS IN PETITION APPARENT ON RECORD—ESTOPPEL—RIGHTS OF TENANTS IN COMMON—WASTE—WHAT CONSTITUTES—PLEADING.

1. Where defendant filed no motion for a new trial, and his motion to set aside the judgment for alleged error in refusing to strike out the amended and supplemental petition was not filed within the time required by statute, the motion to set aside the judgment cannot be treated as a motion for a new trial, and the alleged error is not brought up for review by an appeal from the decision denying the motion.

2. The grounds of the motion to the effect that the petition states no cause of action may, however, be considered on such appeal, since the failure of the petition to state facts constituting a cause of action is an error appearing upon the face of the record proper.

3. A contention that the appeal cannot avail defendant because not allowed until the term after that at which the judgment was rendered, is untenable, since a motion to set aside a judgment impeaches its validity, and, when filed at the term at which the judgment was rendered, and continued to the next term, suspends the judgment, so that the court can act on the motion the same as at the prior term.

4. Where a railroad company builds a road and operates it for 11 years on land to which it has no title, the mere fact that the

owner knew and did not object to such occupation does not show assent on his part, and, in the absence of any proof that he did assent to such occupation, he is entitled not only to the value of the land estimated as of the date of the first entry by the company, but also to its rental value during the time of such occupancy.

5. H. and G. owned land as tenants in common, and on H.'s death one of her four heirs, together with G., conveyed all the land to plaintiff. A year later the four heirs conveyed to G. an undivided half interest in the land, and thereafter G. conveyed to defendant railroad company, which had built and was operating a road across the land without any claim of title, an undivided one-half of a right of way 100 feet wide across the land, subject to plaintiff's rights in the other undivided half of such right of way. *Held*, that by the latter conveyance plaintiff and defendant became tenants in common of the right of way, and that plaintiff was entitled to maintain ejectment for his interest in the land, and recover damages for rents, if defendant's use of the land was such as to preclude plaintiff's use.

6. Defendant excavated large quantities of rock from the property, selling a part and using the rest in the improvement of its road, and the excavation and removal of the rock diminished the value of the land. *Held*, to constitute waste, for which defendant was accountable to plaintiff.

7. Under Rev. St. 1879, § 3573, providing that a party may on motion file an amended supplemental petition, alleging material facts, or praying for different relief, setting up a continuation of the acts complained of since the filing of the original petition, a judgment may be rendered assessing damages down to the date of the filing of such supplemental petition.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by Childs against the Kansas City, St. Joseph & Council Bluffs Railroad Company for an accounting. There was judgment for plaintiff, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by BARCLAY, J.:

Plaintiff had judgment on the circuit, and defendant appealed at a subsequent term, after his motion to set aside the judgment (filed more than a month after the latter was rendered) had been overruled. That motion was as follows, viz.: "Now comes the defendant, and moves the court to set aside the judgment rendered at the present term of this court in the above-entitled cause, and as the grounds of its motion states: (1) That there is no equity in the bill. (2) That the petition herein fails to state facts sufficient to constitute a cause of action. (3) That upon the record the judgment is erroneous. (4) That the petition herein affirmatively shows that the plaintiff and defendant are not tenants in common, in that it shows that the relative rights of the defendant and the owners of said land were of such a nature and character that, if any remedy remained to plaintiff or to his grantors, such remedy was a right of action against the defendant for the value of the easement which had been appropriated. (5) The basis of plaintiff's suit is that Hannah Parsons, or her heirs, were never paid compensation for the

lands belonging to them which had been appropriated. The bill fails to disclose whether the entry and original taking and damage was done during the lifetime of Hannah Parsons or after her death, and hence fails to show that plaintiff has any action against defendant. (6) If it be conceded that Hannah Parsons or that her heirs had a cause of action against the defendant, or against its predecessor, the bill fails to show that plaintiff succeeded to their right of action. (7) The petition fails to state facts sufficient to show that plaintiff has any right of action whatever for the easement taken and appropriated for railroad purposes out of the land described in the petition, during the time that said land was owned by George S. Park and the heirs of Hannah Parsons as tenants in common, or for any damages sustained by either Park or the Parsons during their ownership, by reason of such appropriation or any occupancy subsequent thereto. (8) The petition affirmatively shows that defendant obtained an easement over said land from the party holding the fee-simple title thereof; that the plaintiff took subject thereto; that the only right which Park intended or attempted to transfer by his deed to plaintiff was the right to the compensation which it was claimed was due to the Parsons heirs. This was assigned without recourse by the said Park, and only so far assigned 'as said Park was able to transfer his rights thereto.' The bill shows that the said Park never had any rights thereto. (9) The petition fails to state facts sufficient to constitute a cause of action between plaintiff and defendant as tenants in common, or any grounds for accounting between them as such. (10) The petition shows on its face that plaintiff, if he had any right of action against the defendant, has an adequate remedy at law. The record shows that plaintiff and defendant, if they had ever been tenants in common, had ceased to be such before the filing of the present petition. The assignment by a tenant in common of his right for an accounting makes said right cognizable only in a court of law. Plaintiff therefore should not have been permitted to file a bill in equity for an accounting, as an amendment to the original and first amended petitions herein, each of which stated a cause of action at law. (11) The court erred in overruling defendant's motion to strike out the supplemental bill filed herein. (12) The record shows on its face that the plaintiff recovered upon a cause of action which he did not own or have at the commencement of this suit. (13) The record shows the defendant was charged, and a recovery had against it, as a tenant in common, during a period of time in which the bill affirmatively shows that plaintiff and defendant did not so hold the land. (14) The petition prays that an accounting be had for rents and profits recovered by defendant as a ten-

ant in common from the common property during a specified time; and that there was no tenancy in common during nineteen-twentieths of the time specified. The evidence failed to show that any profits were received during the remaining one-twentieth of the time. Yet the plaintiff recovered for all profits received during the entire time specified. The record shows that the plaintiff recovered as a tenant in common owning one-half of the right of way, while the petition shows that he only owned one-fourth of the interest claimed. (15) The record shows that a recovery was had in this case by plaintiff against the defendant as a tenant in common for the mere taking and appropriation by the defendant of material from the common property. (17) The judgment is not responsive to the issues stated in the pleading, or to the cause of action stated in the petition herein. (18) Because the judgment is against the law. (19) Because the judgment is against the evidence. (20) There was a total failure of proof." The other essential facts are given in the opinions.

Spencer, Burnes & Mosman, for appellant. Wash Adams, Frank Hagerman, Hugh C. Ward, and Warner, Dean & Hagerman, for respondent.

BARCLAY, J., (after stating the facts.) This action was brought to obtain an accounting between plaintiff and defendant as tenants in common, and a recovery from the latter; it being charged that defendant had excluded plaintiff from his rightful interest in the common estate, and had also committed waste thereon to plaintiff's damage in the sum of \$3,994, for which judgment was asked, with other relief. There were several amendments of plaintiff's original statement of the cause of action, and to each of them defendant answered, except to the last. As to that, plaintiff's petition was finally taken as confessed; and, upon further hearing, a judgment against defendant for the sum of \$3,447.77 was rendered, February 20, 1888, at the January term of the circuit court of Jackson county, Mo. At that term no motion of any sort was thereafter filed by defendant until April 4, 1888, when it moved "to set aside the judgment" for reasons appearing in the statement accompanying this opinion. That motion was duly heard, but was carried over to the next term, and ultimately overruled, June 12, 1888. At the latter (the April) term defendant took the now pending appeal, after filing its exceptions.

On this record arises at once a question of a technical nature, but one which a proper regard for the correct administration of law forbids us to ignore. Defendant interposed no motion for new trial or in arrest in the trial court. Its motion to set aside the judgment was filed more than 30 days

after the date of the judgment. That motion is not based on any irregularity of procedure. Its grounds assign only judicial errors in the proceedings, the chief of which being (and on that particular stress is laid here) that the facts of the last petition do not sustain the judgment which the trial court gave. To warrant a review of such errors upon an appeal taken in the circuit court, the statute law requires that such appeal be taken at the term at which the final judgment occurs. Rev. St. 1889, § 2248. An undisposed-of motion for new trial, or in arrest, seasonably filed, will suspend the finality of a judgment (for the purpose of appealing) until such motion be determined. But where no motion of that kind is interposed, and the term of court ends, the pendency of such a late motion as that in question now, to set aside the judgment, will not have the effect to keep the antecedent record open until the next term for a general review, as a matter of right. The trial court, in its discretion, after expiration of time to move for a new trial or in arrest, may set aside a judgment, during the term at which it was rendered, upon any ground that may satisfy the conscience of the court. Whether it may exercise that discretionary power afterwards, by carrying over a motion filed at the term of judgment, we need not decide. It is better to avoid, as far as possible, intimating an opinion on a point not in judgment. The trial court in the present case overruled the motion, so its power to sustain it does not come under review. It is evident that its denial of the motion (in view of the reasons assigned therein) presented no tenable ground for imputing error to the trial court because of that denial. A motion to set aside a judgment for irregularity may be entertained by the trial court within three years after the judgment entry, (Rev. St. 1889, § 2235,) and a ruling upon such a motion may be reviewed upon appeal taken in season with reference to that ruling. But such an appeal at a term subsequent to that at which the original judgment becomes final cannot properly be extended to secure a review of merely judicial errors that may have entered into the judgment. Even giving the motion "to set aside" a standing similar to one based on an irregularity of procedure, it could not rightly be held to open up the same range of review of errors which a writ of error would secure. To accomplish that object, under the law of Missouri, the appeal in the trial court must be made at the term at which the judgment becomes a final one. *Lengle v. Smith*, (1871,) 48 Mo. 276. The present appeal from the decision overruling the "motion to set aside" is groundless, so far as any irregularity is concerned; and, having been taken too late to reach a review of any alleged errors of law with which the original judgment may be

tainted, the only appropriate action to be taken is to affirm the judgment, which is done accordingly. The other judges of this division concur in affirming for reasons given in a separate opinion.

BLACK, C. J. By the opinion just filed it is held that the appeal taken in this case brings nothing before this court for review. To this ruling I do not agree, nor do I agree to any of the reasons assigned therefor. To an understanding of this appeal it is necessary to set out a concise history of the suit. As it now stands, it is an action to require the defendant to account for the use of one undivided half of a strip of land used by the defendant as a right of way, and for the one-half of rock taken therefrom. The plaintiff filed an amended petition, to which defendant filed answer. It was set up in this answer, among other things, that if the plaintiff and defendant were tenants in common, then the plaintiff's remedy was an action of account. Thereupon the plaintiff filed a second amended and supplemental petition, setting out at great length the grounds for an accounting. At the October term, 1887, the defendant moved to strike out this amended and supplemental petition, because it stated an entirely new cause of action, which motion was overruled, and the defendant excepted, and at the same time filed a bill of exceptions. The defendant did not file any other or further answer. The cause came on for trial at the January term, 1888, and, the defendant failing to appear, the plaintiff produced evidence, and obtained judgment for \$3,447. The defendant filed no motion for new trial or in arrest. At the same term, but more than four days after the rendition of the judgment, the defendant filed a motion to set the judgment aside. This motion was argued and submitted at the same term,—the January term,—but the court took the same under advisement until the next term,—it being the April term,—at which term the court overruled the motion, and the defendant then sued out this appeal. Two affidavits were read in evidence on the hearing of the motion to set aside the judgment, showing the reasons why the defendant's counsel failed to appear at the trial; but the fact that the cause was heard when counsel for defendant were absent is not made a ground for setting the judgment aside. Of the 20 grounds assigned in that motion, those now relied upon fall under these heads: First, the court erred in overruling defendant's motion to strike out the supplemental petition; second, the amended and supplemental petition fails to state any cause of action whatever.

1. It is well-settled law in our practice that there is a plain distinction between mere matters of exception and errors appearing upon the face of the record proper. In order to give this court the right to review rulings which are matters of exception,

the exceptions must be taken at the time the rulings are made, and they must be again brought forward in the motion for a new trial as grounds therefor, and they must be made matter of record by a bill of exceptions. The refusal of the court to strike out a pleading is a matter of exception, and nothing more. *Bateson v. Clark*, 37 Mo. 31. The motion to set aside the judgment filed in this case cannot be treated as a motion for a new trial, because it was not filed within four days after judgment, as the statute requires. As the defendant filed no motion for a new trial, it follows that the alleged error in refusing to strike out the amended and supplemental petition is not before us for review.

2. The next question is whether the grounds of the motion to the effect that the petition states no cause of action can be considered on this appeal. Our Code of Civil Procedure is explicit in this: that the objection that the petition does not state facts sufficient to constitute a cause of action is not waived by a failure to make the objection by way of demurrer or answer. Section 3519, Rev. St. 1879. In view of this, and section 3776, it has been held, time and again, that this court will reverse for error appearing on the face of the record proper, though no exceptions were taken in the trial court. The record proper consists of the summons, pleadings, verdict, and judgment. The failure of the petition to state facts constituting a cause of action is an error appearing upon the face of the record proper. And hence it has been held in a long line of cases from an early day down to the present time that this court will reverse a judgment had on a petition which fails to state any cause of action, though no such objection was made by motion in arrest or for new trial, or in any other way, in the trial court, unless the defect is one which is cured by the statute of amendments and joinders. *Burns v. Patrick*, 27 Mo. 434; *Bateson v. Clark*, 37 Mo. 31; *Jones v. Fuller*, 38 Mo. 363; *Miller v. Davis*, 50 Mo. 572; *Peltz v. Eichele*, 62 Mo. 177; *State v. Griffith*, 63 Mo. 548; *McIntire v. McIntire*, 80 Mo. 471; *State v. Scott*, 104 Mo. 26, 15 S. W. Rep. 987, and 17 S. W. Rep. 11; *Smith v. Burrus*, 106 Mo. 96, 16 S. W. Rep. 831. It does not follow that every defect which might be reached by motion in arrest will be available without such motion. As said in *McIntire v. McIntire*, supra, the error must be a material one; and again, in *State v. Scott*, supra, it must be a defect of a fatal character. But it is said this appeal is of no avail to defendant, because not allowed until the term after that at which the judgment was rendered. A motion for new trial, filed at the proper time and term, and continued over to the next term, suspends the judgment, so that a bill of exceptions may be filed and appeal taken at the term when the mo-

tion is overruled. Such a bill and appeal will bring up for review all the exceptions taken during the progress of the trial at the prior term. *Riddlesbarger v. McDaniel*, 38 Mo. 138; *Gray v. Parker*, Id. 160; *Henze v. Railroad Co.*, 71 Mo. 636; *Givens v. Van Studdiford*, 86 Mo. 149; *Randolph v. Mauck*, 78 Mo. 468. And the filing of a motion for rehearing in an appellate court after the adjournment of the term, under an order allowing the motion to be filed in vacation, continues the cause so that the opinion filed does not become the opinion of the court until the motion is disposed of at the next term. *State v. Phillips*, 96 Mo. 570, 10 S. W. Rep. 182. As a general rule, a judgment cannot be set aside by the court rendering it after the term at which it was rendered; but during the term it may be set aside. And a motion filed at that term for that purpose, and continued over to the next term, suspends the judgment, so that the motion may be sustained at the succeeding term. Until the motion is disposed of, the judgment is not a finality. *Memphis v. Brown*, 94 U. S. 715; *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. Rep. 530; *Baker v. Baker*, 51 Wis. 538, 8 N. W. Rep. 289; *Windett v. Hamilton*, 52 Ill. 180. While, under the authorities before cited, this court will, on appeal or writ of error, reverse for errors appearing upon the face of the record proper, though no exception was made in the trial court, still it is proper practice to make the objection in the trial court, even where the alleged defect is a radical one appearing on the face of the record proper; thus giving that court an opportunity to correct the errors. A motion to set aside a judgment strikes at its validity, and, when filed at the term at which the judgment was rendered, and continued to the next term, has the effect to suspend the judgment so that the court can act upon the motion the same as at the prior term. The proceedings remain in the breast of the court until the motion is disposed of, and the appeal taken at the time when the motion is overruled brings up the same matters for review as if taken at the term when judgment was entered. We are therefore in duty bound to examine the petition in the case, and, if it states no cause of action,—if it is radically defective,—reverse the judgment.

3. Guided by the foregoing considerations, we come to the objections urged against the sufficiency of the supplemental petition. This pleading states, in substance, these facts: That one Stevens, being the owner of 102 acres of land, conveyed the same to Hannah Parsons and George S. Park in 1844, and the grantees then took possession; that Hannah Parsons died thereafter, and prior to the 6th July, 1872, leaving four heirs; that on the last-named date Park and one of the four heirs of Hannah Parsons, by their contract in writing, sold the land to the plaintiff, Childs, and he then entered into pos-

session; that on the 15th September, 1873, the said four heirs of Hannah Parsons conveyed the undivided one-half of the 102 acres to George S. Park; that prior to May 17, 1882, the defendant or its predecessor built and operated its road across the 102 acres of land, but did not acquire any title, nor assume to hold adversely to the owners; that on the last-named date George S. Park conveyed to the defendant company the undivided one-half of a right of way 100 feet wide across the tract of land, but the conveyance was made "subject to the rights of the plaintiff in and to the other undivided half of said right of way;" that on the 14th August, 1883, George S. Park, in execution of the before-mentioned contract of date July 6, 1872, conveyed to the plaintiff said land, which conveyance was made subject to the conveyance made by Park to the defendant company of the undivided half of the right of way, and by the express terms of said deed the other undivided half of said right of way through said land was assigned, without recourse, with all rights of action of the same, and all claims for damage against said railroad company, so far as said Park was able to transfer his rights thereto. Several deeds of correction are also set out, which need not be noticed; and it is alleged that plaintiff sold the land to one Darling in June, 1887, which was after the commencement of this suit, but by the terms of the sale he reserved and retained his claim against the defendant for use of the premises, and for stone taken therefrom. It is further alleged that the railroad was built and in operation over said land on and before 6th July, 1872, and has been operated thereon ever since that date; that the "defendant's occupancy of said right of way * * * has been of such a nature as to preclude the use and occupancy of the same by the plaintiff so as to derive any benefit or profit therefrom;" that from 1872 to the date of the deed from plaintiff to Darling the defendant quarried and removed from the strip of land large quantities of stone, and has refused to account for the same, and the use of the land. An account for the one-half of the stone and use of the property is then set out, amounting to \$3,994, with a prayer for accounting and for judgment.

The defendant company, it will be seen, has had possession of the strip of land since July 6, 1872, to the commencement of this suit, in August, 1883, and during that time operated its road thereon, the plaintiff being in the possession of the residue of the tract. These facts, it is urged by the defendant, show such an acquiescence on the part of the landowner as to amount to a waiver of his rights, save the right to be compensated for the value of the land, estimated as of the date of the first entry by the defendant. The case of *Provolt v. Railroad Co.*, 57 Mo. 256, cited in support of the foregoing proposi-

tion, was an action of ejectment. One railroad company commenced proceedings to condemn the property, and while they were pending entered into possession of the land, and constructed a railroad thereon, with the knowledge of the landowner, and without objection from him. The road was then leased to another company. Subsequently the report of the commissioners was confirmed, but the compensation awarded was not paid. The plaintiff, it was held, could not recover. The conclusion reached is placed on the ground that he waived prepayment, because of the fact that he was present all the time, witnessed the progress of the work, and made no objection to the construction of the road before payment of the compensation. *Baker v. Railroad Co.*, 57 Mo. 265, was also an action of ejectment. The plaintiff had agreed to relinquish the right of way on condition that the company should comply with the law in regard to fencing and making cattle guards and farm crossings, and the company took possession, and constructed its road, by the consent of the landowner, but did not perform the conditions upon which it was to receive the deed of relinquishment. In that case there was a clearly proved permission given to the company to construct the road over the land, and because of this consent it was held the plaintiff could not eject the company. By attending to the facts of the cases just cited, it will be seen that they hold the landowner may waive prepayment of the compensation, and when he does this, or permits the company to take possession and construct its road, he cannot treat the company as a wrongdoer, and sue in ejectment or trespass. The permission or license to enter and construct the road may be inferred from attending circumstances. But it is equally well settled that when a railroad company builds its road upon land without having acquired a right of way under the eminent domain law, and without the consent of the owner, the latter may recover in ejectment or trespass. Mere inaction on his part, though he is informed of the fact that the company has entered or constructed its road upon his land, will not deprive him of these remedies. *Walker v. Railroad Co.*, 57 Mo. 275; *Bradley v. Railroad Co.*, 91 Mo. 493, 4 S. W. Rep. 427; *Chicago, M. & St. P. R. Co. v. Randolph Town-Site Co.*, 103 Mo. 452, 15 S. W. Rep. 437. The doctrine that the public has an interest to be protected after the railroad has been constructed has been invoked in some adjudicated cases to protect the company, but such a doctrine cannot justify a wrongful entry and use of private property. The constitution secures the right to have the compensation for the property taken paid to the owner, or into court for his use, before his property rights are disturbed; and this right, guaranteed by the present constitution and former statutes, cannot be nullified by any supposed public

interest. In this state the duty of instituting proceedings to condemn is devolved upon the railroad company, and the company must obtain the assent of the property owner to enter and construct its road, or procure the right so to do by condemning the property; otherwise it will be a wrongdoer, and the property owner has the same remedies that he would have against any other like wrongdoer. The mere fact that he saw the road built upon his land, and did not object, will be no protection to the company, unless such want of objection and the other circumstances justify the inference of consent on his part. Speaking of some of the decided cases, Mr. Lewis says: "So far as regards mere acquiescence as an estoppel, it seems to us the cases are not well founded. There is no law which compels a man to protest against a wrongful entry upon his land at the peril of being held to ratify it. Both parties know their rights. The law provides a mode in which the party seeking to obtain property for public use may do so lawfully. If such party disregards the mode prescribed, and enters upon property without consent, it is a wrongdoer, and can acquire no rights by expending money on the property. Nor does the owner lose any rights by mere delay." Lewis, Em. Dom. § 648. While it appears from the petition that defendant has been in possession of the strip of land from 1872 to the commencement of this suit, in 1883, and during that time operated its road over the same, still it does not necessarily follow that plaintiff or any of his grantors assented to such use and occupancy. Such a conclusion cannot be drawn in the face of the allegation that defendant or its predecessor built its road on the land without having acquired any title thereto or interest therein. The holders of the legal title could have maintained ejectment at any time from 1872 to May 17, 1882, at which date the defendant procured a deed from Park for an undivided one-half of the strip occupied as a right of way. The defendant was also liable for the rental value of the property, and for waste in such an action, or in a suit brought for that purpose only, on the facts stated in the petition in this case. Whether the plaintiff could have maintained such a suit on his equitable title and possession we need not determine, for the deed from Park to him not only vested in him the legal title to the undivided half of the land used as a right of way, but it assigned to him all claims for damages which Park had or held against the defendant. Such a claim for damages may be assigned. *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. Rep. 877. It follows from what has been said that the petition shows a good cause of action in favor of the plaintiff for one-half of the rental value of the strip of land, and for one-half of the value of the stone taken therefrom down to May 17, 1882.

4. When the defendant acquired the deed from Park on the last-named date for the undivided one-half of the land used as a right of way, it and the plaintiff became tenants in common. The point is made that the deed from Park to plaintiff does not convey the undivided half of the right of way. That deed first conveys the entire land, including the right of way, by the use of the words "grant, bargain, and sell," and then says "subject, however, to the conveyance made by said Park of one undivided half of the right of way through said land to" the railroad company. Thus far this deed vested in plaintiff the undivided one-half of the land, including the right of way. For title to this half the plaintiff does not, therefore, stand on the subsequent assignment clause before mentioned. The plaintiff and the defendant being tenants in common, the further question arises whether plaintiff can recover for rents and rock removed while that relation existed. One tenant may recover in ejectment against a cotenant by showing that defendant ousted him, or did some act amounting to a total denial of his rights as such cotenant. 1 Rev. St. 1879, § 2248. Should the plaintiff recover possession, he would, under our statute, be entitled to recover damages for waste and for rents and profits. Another section of the statute (3111) makes one tenant in common liable to a cotenant for waste. Where the land is free to all the tenants in common so that each may enter and enjoy the premises and one of them enters, he cannot be made to pay rent to the other cotenant who neglects or refuses to do the same. But where one tenant occupies the whole of the land and excludes his cotenant from entering and enjoying the property, he will be liable to the tenant thus excluded for the latter's proper share of the rental value of the property, as well as for waste, and this without regard to any statute like that of 4 & 5 Anne. Trespass will lie in favor of an ousted cotenant. *Freem. Coten.* (2d Ed.) § 300; 11 Amer. & Eng. Enc. Law, 1101. An actual ouster or turning out is not necessary; but the act or declaration constituting the ouster must be unequivocal and notorious. *Warfield v. Lindell*, 30 Mo. 272. Ouster is the actual turning out or keeping excluded the party entitled to the possession of any real property. *Bouv. Law Dict.* Any resistance preventing the plaintiff from obtaining effective possession of the land of the cotenancy is an actual ouster. *Freem. Coten.* (2d Ed.) § 301. The petition shows that defendant continued to use the property as and for a railroad right of way. The property being farm land, such a use must, of necessity, have excluded the plaintiff. Besides this, it is in terms alleged that defendant's occupancy of the right of way has been of such a nature as to preclude the use and occupancy of the same by the plain-

tiff, so as to deprive him of any benefit or profit therefrom. An ouster is sufficiently disclosed by the petition. It follows that the plaintiff could have maintained ejectment for his interest in the land, and in that or an independent suit recovered damages for rents and waste.

5. It is alleged that the defendant excavated and removed from the land a large quantity of rock, the amount and value being stated, and sold a part of thereof, and used the residue in the improvement of its road at various places, and has refused to account for the rock so sold and used, and that the removal of the rock diminished the value of the land. Waste on the part of a tenant for life or for years, it has been held, consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. *Proffitt v. Henderson*, 29 Mo. 325. Waste is an injury done or suffered by the owner of the present estate, which tends to destroy or lessen the value of the inheritance. *Cooley, Torts*, (2d Ed.) 392. Accordingly it was held in the *Proffitt Case*, just cited, that the cutting of timber would not be waste if cutting it enhanced the value of the land, but would be waste if the cutting of the timber produced lasting damage to the inheritance, or lessened its value. Applying these principles of law to the averments of the petition, it must be held the defendant committed waste in excavating, removing, selling, and using the rock.

6. The second amended and supplemental petition sets up a continuation of the acts complained of from the date of the filing the first petition down to the date at which plaintiff sold the property, which was subsequent to the commencement of this suit. It appears on the face of the judgment that damages were assessed down to the last-named date, and it is insisted that this is error. Section 3573, Rev. St. 1879, provides: "A party may be allowed, on motion, to file an amended or supplemental petition, answer or reply alleging facts material to the cause, or praying for any other or different relief, order or judgment." This section of the Code, it will be seen, provides for filing a supplemental petition. Such a pleading was well known in equity, and, as many of the sections of our practice act are taken from rules of equity pleading, it is proper to look to such rules for the purpose of ascertaining what the statute means by a supplemental petition. In equity pleading the extent of relief could be enlarged by stating a continuation of the same grievance after the commencement of the suit, and the new matter was brought in by way of a supplemental bill, and this may be done under our Code. *Ward v. Davidson*, 89 Mo. 445, 1 S. W. Rep. 846. That was an equity suit, it is true, but the statute before quoted applies to legal as well as equitable causes of actions. It seems to

be held in other code states that matter showing a continuation of the same wrong may be brought in the record by a supplemental petition, and damages recovered for the continuation of such grievance down to the filing of such pleading. 1 Boone, Code Pl. § 40. The second amended and supplemental petition was framed on the theory that the suit was one in equity for an accounting, and the further contention is that the judgment cannot stand, because, if the petition discloses any cause of action, it is one of law. The first amended petition was framed on the theory that the suit was one at law, and the change seems to have been made because the defendant insisted in its answer to the first amended petition that the suit should be in equity. We pass over the question made by the plaintiff that the defendant is now estopped from questioning his right to sue in equity. If we are right in what has been said, the plaintiff has, on the face of his last pleading, an action at law for all the damages sued for. Nor is it necessary to say whether he may or may not also sue in equity on the facts disclosed. It is enough, for all the purposes of this case, on the present record, to know that the petition sets forth facts sufficient to constitute a cause of action at law or in equity; for the judgment rendered is such as flows from the alleged facts. And if it be true that the petition discloses two causes of action, which should have been separately stated, still that can be of no avail here, for the remedy in such a case is by motion. *Mooney v. Kennett*, 19 Mo. 551; *Otis v. Bank*, 35 Mo. 128; *Christal v. Craig*, 80 Mo. 367. The judgment should therefore be affirmed.

BRACE and MACFARLANE, JJ., concur in this opinion.

DAVIDSON v. IKARD et al.

(Supreme Court of Texas. Oct. 12, 1893.)

WRIT OF ERROR—WHEN LIES—FAILURE TO FILE TRANSCRIPT.

Where appellee is entitled to an affirmance, on a certificate, of the judgment appealed from, because of appellant's failure to file the transcript in time, such right cannot be defeated by appellant bringing error on the judgment after such failure.

Error from court of civil appeals, second supreme judicial district.

Action in trespass to try title by S. Davidson against W. S. Ikard and another. A judgment for defendants was affirmed on a certificate, and plaintiff brings error. Affirmed.

R. D. Welborne, for plaintiff in error. L. C. Barrett, Templeton & Patton, and Stine & Chesnutt, for defendants in error.

STAYTON, C. J. Plaintiff in error perfected an appeal from a judgment rendered

against him, but failed to file the transcript in court of civil appeals, within the time prescribed by statute, and on application supported by affidavit, showing good reason why the transcript was not filed in proper time, the court overruled the motion to file. Appellees then asked affirmance of the judgment on certificate, which was objected to by plaintiff in error on the ground that he had sued out a writ of error after his application to file transcript under his appeal was overruled, but the court of civil appeals affirmed the judgment on certificate. The application for writ of error was accompanied by a transcript of the application to file the transcript, a part of which was an affidavit filed for appellant, showing facts that would excuse the failure to file the transcript in proper time, but it did not contain the affidavits controverting the facts contained in that affidavit. The latter have been brought up by certiorari, and are in direct conflict with the affidavit showing excuse for failure to file the transcript in proper time. The affidavits filed by the respective parties must be presumed to have been considered and passed upon by the court of civil appeals, and therefore that court would have been fully authorized to find that the facts set up as an excuse for not filing the transcript in proper time had no existence. We must presume that such was the finding, and in that event the affirmance on certificate was correct, for appellant could not defeat the right to that by suing out a writ of error after he had failed to prosecute his appeal. *Peres v. Garza*, 52 Tex. 571; *Thompson v. Anderson*, 82 Tex. 238, 18 S. W. Rep. 153. The judgment of the court of civil appeals will be affirmed.

WESTERN UNION TEL. CO. v. WALKER.

(Supreme Court of Texas. Oct. 12, 1893.)

APPEAL—FILING TRANSCRIPT—MISTAKE.

Defendant employed counsel to represent it throughout the cause, and paid their fee. After trial and judgment against defendant, said counsel perfected an appeal, and received the transcript in due time. They failed to file it, however, believing that their services were no longer desired. The time having expired, plaintiff asked affirmance of judgment on certificate, when defendant, having employed other counsel, obtained the transcript, and asked leave to file it. Defendant had never discharged its first counsel, and supposed they were prosecuting the appeal until after the certificate for affirmance had been filed. *Held*, that they should be allowed to file the transcript.

Certificate of dissent from court of civil appeals of first supreme judicial district.

Action by Ely Walker against the Western Union Telegraph Company for damages for failure to deliver a message. Judgment for plaintiff. Defendant appeals. On appellant's motion to be allowed to file transcript out of

season. Denied in court of civil appeals, and sent up on certificate of dissent. Reversed.

Lovejoy & Sampson and S. R. Perryman, for appellant. Hobby, Lanier & Kirby, for appellee.

STAYTON, C. J. This cause comes before us upon certificate of dissent, and presents facts substantially as follows: Ely Walker brought an action against the Western Union Telegraph Company, a nonresident corporation, to recover damages for failure to deliver a message, and recovered a judgment. The corporation employed counsel to represent it until the final termination of the cause, and paid the fee demanded, and counsel thus employed tried the cause in the district court, perfected appeal from the judgment, and received the transcript in time to have filed it in the court of civil appeals within the time prescribed by law, but failed to do so, whereupon the plaintiff asked affirmance of the judgment on certificate, when the corporation, having employed other counsel, obtained the transcript, and asked leave to file it, which the court refused, and thereupon affirmed the judgment on certificate. The application to file the transcript shows, with all reasonable certainty, that counsel employed by the corporation were never discharged, and that its officers did not know that they were not prosecuting the appeal until after the certificate for affirmance was filed; but it further shows that counsel believed that their services were no longer desired in the cause, and for this reason ceased to represent the corporation; but there is nothing in the correspondence between client and attorney which to us seems sufficient to show intention on the part of the corporation to dismiss counsel in the cause, or to justify the belief that its officers knew that counsel had, in effect, withdrawn. Under this state of facts, the majority of the court of civil appeals held that no sufficient reason was shown for the failure to file the transcript, while the dissenting judge held to the contrary. The general rule is that fault or negligence of counsel is deemed that of the client, and will not furnish sufficient ground for relief, unless the adverse party be in some way connected with or party to it; but it seems to us that this rule should not be enforced in cases like the present, and that all courts, while a matter is in fieri, should protect a litigant from injury that might result from such mistake of fact as counsel for appellant were evidently laboring under, and especially so when no legal injury could result to the adverse party from such a course.

If the judgment had been affirmed on certificate, without resistance or effort to file the transcript, and appellant was seeking to set that judgment aside on the grounds now urged, a stronger case would be presented for the application of the rule on which the court doubtless acted; but, even in that case, we

are of opinion that, under the statute permitting such judgments to be set aside, the facts shown would have authorized the court to set aside the judgment of affirmance on certificate. As said in *Chambers v. Fisk*, 20 Tex. 345: "The object of the statute is to enable the court to relieve any one, who, by accident, mistake, or misfortune, has failed to file the transcript; but, in administering this relief, it is the duty of the court to see, so far as practicable, that it shall result in no injury to the appellees. This motion having been made so promptly and before a judgment had been asked upon the certificate, it cannot be seen that the lapse of a few days will operate materially to the prejudice of appellees. * * * Appellant has been actuated by a bona fide intention of bringing the cause into this court without delay, that but a few days' delay have occurred, and that appellees' rights have not suffered by it;" and it was held that leave to file the transcript should have been given, although the failure to file it within the time prescribed by statute was caused "by the mistake of himself, through his attorney, as to the time when the district would be called in this court."

The judgment of the court of civil appeals affirming the judgment on certificate should be set aside, and appellant be permitted to file its transcript, after which the cause on appeal should be heard and decided on its merits; and this opinion will be certified to the court of civil appeals for observance.

DE HAM v. MEXICAN NAT. RY. CO.

(Supreme Court of Texas. Oct. 12, 1893.)

DEATH BY WRONGFUL ACT — CONFLICT OF LAWS.

An action for injuries causing death will not lie, though the death occurred within the state, unless the law of the jurisdiction where the injuries were received recognizes such action.

Application for writ of error to the court of civil appeals, first supreme judicial district.

Action by Elizabeth De Ham against the Mexican National Railway Company for injuries to plaintiff's son, resulting in his death. Judgment for defendant affirmed in court of civil appeals. 22 S. W. Rep. 249. Application for writ of error. Denied.

McLeary & Fleming, for petitioner.

GAINES, J. This is an application for a writ of error to the court of civil appeals of the third supreme judicial district, which is asked for the purpose of reviewing and reversing a decision of that court affirming a judgment of the district court of Nueces county. The applicant brought the suit to recover of the defendant, the Mexican National Railway Company, damages for injuries to her son, which, as alleged, resulted in his death. It was averred in the petition that the injuries were inflicted in the

republic of Mexico, and that the death occurred in this state. A general demurrer to the petition was sustained, and, the plaintiff having declined to amend, the suit was dismissed. It is settled law that the statute of a state which, for a tort, gives a right of action in derogation of the common law, or a right of action unknown to that law, can have no extraterritorial force; and, in accordance with this rule, it has been expressly decided in this state that for an injury inflicted in another state or territory, which results in the death of the party injured, the surviving relatives have no right to recover in this state. *Willis v. Railway Co.*, 61 Tex. 482; *Railway Co. v. Richards*, 68 Tex. 375, 4 S. W. Rep. 627; *Railway Co. v. McCormick*, 71 Tex. 660, 9 S. W. Rep. 540. But in each of the cases cited the death occurred without the limits of the state. A seeming exception is that, if the law of the state where the injury is inflicted gives substantially the same right of action which is given by the law of the state where the suit is brought, and in favor of the same parties, by reason of the principle of comity the right will be enforced in the latter state. The doctrine is recognized in the case last cited, though it was there held that the facts of that case did not bring it within the principle. That decision, however, leaves the question open. We use the phrase "a seeming exception" because it cannot in fact be deemed an exception to the general rule. That rule is founded upon the principle that the statutes of a state have no effect beyond its own limits, and that, if the act or omission complained of be not actionable by the law of the state where it is committed, no action can properly be brought on it in another state, although by the laws of the latter the act would have been actionable if committed within its jurisdiction. We do not understand, however, that the applicant for the writ of error in this case controverts these propositions. The contention is, in substance, that because the death occurred in this state, although the injury was inflicted in Mexico, our statute gives a right of action. In support of this contention, we infer that counsel for the applicant rely, in part at least, upon the language of article 3202 of our Revised Statutes. This article provides, in substance, that all actions of this character shall be brought within one year "after the cause of action shall have accrued," and also provides that "the cause of action shall be considered as having accrued at the death of the party injured." But this is merely a statute of limitation, and not a statute defining what shall constitute a cause of action. The reason of the provision is obvious. Since no action could be brought by the relatives of the injured person until death had ensued, and since a great length of time might elapse between the injury and the death, it was reasonable that the time of the death should be taken as the point from

which limitation should begin to run. The article which gives an action in this class of cases reads: "An action for actual damages on account of injuries causing the death of any person may be brought in the following cases," etc. Rev. St. art. 2899. Although the right of action does not accrue to the beneficiaries named in the statute unless death ensues, the wrong for which the action is allowed is the injury which causes the death. The foundation of the action is the act or omission which causes the injury; and, in order to justify a recovery, such act must be forbidden, or such omission enjoined, by the law of the state where it occurs. In order to illustrate this, let us take the case of a servant of a railway company who is injured by reason of the negligence of another employe of the same company. By statute in some of the states of our Union, such corporations are held responsible to their servants for injuries which result from the negligence of their fellow servants. In others they are not liable for such negligence. Let us suppose that, in a state where the common law as to such liability is still in force, one employe of a railway company is injured by the negligence of his coemploye, and that the person injured is carried into a state where the statute has established a different rule, and there dies; would it proper for the courts of the state where the death occurred to hold the company liable for the consequences of the negligence of its servants, when, according to the laws of the state where the negligence occurred, no action would lie for such negligence? The act committed or omitted in every case of this character is the primary ground of the action. Although the death of the injured person is a necessary condition to a recovery on the part of the beneficiaries pointed out by the statute, at the same time, in order to enable them to maintain an action, it is quite as essential that such act or omission should be contrary to the law of the place where the injury is inflicted. It should be not only misconduct recognized by the law of the place where it occurs as unlawful to the person injured, but it should be such as is recognized by that law as legally injurious to those who seek to recover damages for the injury. As to torts, at least, the laws of a state have no operation beyond its own limits. Where, for example, the courts of our state sustain a recovery for an injury to person or property inflicted in another state, it is because the wrongful act is legally injurious in the state where committed, and not simply because it would have been actionable if committed within the terminal limits of the jurisdiction of the forum. The case of *Dennick v. Railway Co.*, 103 U. S. 11, is not in conflict with this doctrine. There the injury was inflicted in New Jersey, and was actionable by the statute of that state. The suit was brought in a court in New York, and was

removed to the United States courts. The statutes of New York upon the subject were similar to those of New Jersey, and the court held that the action could be maintained in the courts of New York. We have found but two cases in which the exact point here presented has been adjudicated, and in both the holding was adverse to the contention of appellant's counsel. In *Needham v. Railway Co.*, 38 Vt. 294, the injury was inflicted in New Hampshire, and the death occurred in Vermont. The injury was actionable under the laws of the latter state, but it was not alleged that a similar statute existed in New Hampshire. It was held that the plaintiff could not recover. In *McCarthy v. Railway Co.*, 18 Kan. 46, the injury was inflicted in Missouri, but the death occurred in Kansas. The court say, in the opinion: "The fact urged with considerable stress by counsel of plaintiff, that the intestate lived in Kansas at the time of his employment, and died in this state, is immaterial in the decision of the questions presented. The wrongful acts were all committed in Missouri. This court has already held that while section 422, Civil Code, gives a cause of action in every case coming within its terms, and happening within the state, the residence of the deceased is not material, and the place of his death unimportant, in determining the right of the administrator to sue." We conclude that judgments of the trial court and of the court of civil appeals (22 S. W. Rep. 249) are correct, and this application for a writ of error is therefore refused.

BARTLEY et al. v. CONN et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

COURTS—JURISDICTION OVER NONRESIDENTS—CONTINUANCE — SALE OF TRUST PROPERTY — PURCHASER—LIABILITY TO CESTUI QUE TRUST.

1. Where nonresidents, who are served, where they reside, with summons in a personal action, voluntarily appear and answer, they thereby waive objection to jurisdiction, and the court may set aside an order made on the previous day of the same term, discharging such nonresidents from the suit.

2. Where nonresidents voluntarily appear in a personal action, it is error to force them to trial on the day following such appearance, and refuse a continuance on the ground of the absence from the county of material witnesses.

3. Where a debtor conveys his property to a trustee, and directs it to be sold, and the proceeds applied to the payments of specified debts, the purchaser of such property from the trustee is not liable to the creditors for failure to pay the purchase money to them, in the absence of any agreement to pay such creditors.

Appeal from Willbarger county court; J. W. Blankinship, Judge.

Action by J. T. Conn against A. C. Sanders, J. A. Rhodes, W. E. Rettig, and J. P. Cox on a promissory note executed and delivered to Cox by the other defendants, and by him transferred to plaintiff. Defendant

Sanders being insolvent, the action was dismissed as to him, and defendants Rhodes and Rettig caused Bartley, Johnson & Co. to be made parties, on the ground that they had agreed to pay such note in consideration of the sale to them of certain trust property by the trustee of defendant Sanders. There was a judgment in favor of plaintiff against the makers of the note, except Sanders, and also a judgment over in favor of defendants Rhodes and Rettig against Bartley, Johnson & Co. From the judgment against them, Bartley, Johnson & Co. appeal. Reversed.

G. W. Walters, for appellants. H. P. Bailey, for appellees.

HEAD, J. Appellee Conn brought this suit to recover upon a note for \$450 made by A. C. Sanders, J. A. Rhodes, and W. E. Rettig to J. P. Cox, and by him transferred to said appellee, for value, before maturity. Sanders being insolvent, and out of the country, the suit was dismissed as to him. Rhodes and Rettig claimed to be sureties for Sanders, and pleaded that he, becoming insolvent, had executed a deed in trust upon all his property to H. W. Jones, trustee, to secure certain of his debts, the note sued on being the first preferred; that, after the execution of this trust deed, appellants purchased the property from the trustee, agreeing to pay the preferred debts, and representing that they had done so, but, instead of paying this one to Conn, the owner, had settled it with Cox, the original payee. Numerous charges of fraud and evil doing were made by each of the parties against the other, but the evidence seems to have been directed to the issue above indicated. Judgment was rendered in favor of Conn against the parties to the note, except Sanders, for the amount due thereon, and in favor of Rhodes and Rettig, for same amount, over against appellants.

The court did not err in entering the order on the 18th of September, setting aside the order entered on the 17th, discharging appellants from the suit. Both orders were entered at the same term. *Williams v. Huling*, 43 Tex. 113; *Blum v. Wettermark*, 58 Tex. 125. This being an action in personam, the notice served on appellants in Kentucky, they being citizens of that state, could not have forced them to appear herein; but having voluntarily appeared, and answered to the merits, they waived their plea to the jurisdiction of the court, and became parties for all purposes, as though regularly served in this state. *York v. State*, 73 Tex. 651, 11 S. W. Rep. 869, and numerous cases since, approving it.

At the request of Rhodes and Rettig, the court gave the following charge to the jury: "If you shall believe from the evidence that the said A. C. Sanders transferred and assigned his property to one Jones in trust for the payment of the note herein declared

on, and that, after the execution of said deed and delivery of the property to the said Jones, the defendants Bartley, Johnson & Co. bought said trust property from the said Jones, it was their duty to apply the proceeds of said trust property to the payment of the claims provided for in the deed of trust from the said A. C. Sanders to the said Jones; and, if you should believe from the evidence that the proceeds of said trust property was in value sufficient to have paid the note sued on, then you will find for the defendants Rhodes and Rettig, as against Bartley, Johnson & Co., the amount of the note, interest, and attorney's fees, unless you shall believe from a preponderance of the evidence that the said Bartley, Johnson & Co. have paid the same." We think this charge is manifestly erroneous. One purchasing property from a trustee of this kind is not required to pay the price to the secured creditors, but must pay it to the trustee, whose duty it is to see to its proper application. If the purchaser should, by agreement, undertake to pay the creditors instead of the trustee, he might render himself liable, should he pay a claim to one not entitled to receive it; but in such case his liability would grow out of his agreement, and this would be one of the principal issues to be submitted to the jury. This was not done, either in the charge quoted above, or in any other, but appellants' liability was made to depend upon the supposed duty a purchaser from a trustee is under to see to the proper application of the proceeds, in the absence of an agreement.

The court also instructed the jury, at the request of appellees, "that it was the duty of Bartley, Johnson & Co., when they paid any debt or claim provided for in the deed of trust from Sanders to Jones, to take up the note which was the evidence of said claim, and if they undertook to make a payment, and failed to take up the note, they cannot avail themselves of said payment in defense to the action against them by J. A. Rhodes and W. E. Rettig." It is not clear, from the record, why this charge was given. We do not understand that it was claimed that Cox owned the note at the time appellants made the payment to him, and, by their negligence in failing to take it up, he was afterwards enabled to negotiate it for value before maturity, but the contention is that Conn had become the owner of the note even before the making of the deed in trust by Sanders. If we are correct in this, it was error to give this charge, inasmuch as the jury were liable to be misled thereby into understanding the law to be that a failure to take up the evidence of the debt, upon paying it, would in all cases subject the debtor to a second payment. This would ordinarily only be so in case it should come into the hands of a bona fide purchaser for value before maturity. It may be that, as the evidence was undisputed that Conn was

a holder for value before maturity, the giving of this charge would not have been considered sufficient cause to require a reversal of the judgment; but, framed as it was, it left but little latitude to the jury, and we have thought it best to direct attention to it, in view of another trial.

Both the pleadings and the evidence raised the issue as to whether or not appellants, as a part of the consideration of their purchase from the trustee, agreed to pay the preferred debts to the parties holding them; but the court failed to submit this, the most important phase of the case, to the jury. If appellants made this agreement under these circumstances, we see no reason why the owners of these claims cannot sue directly thereon, although the contract may have been made with the trustee, Jones. *Spann v. Cochran*, 63 Tex. 240.

In view of the fact that appellees' case is so entirely dependent upon an agreement alleged to have been made between the trustee, Jones, and appellants' agent, Geer, and in view of the fact that appellants were not legally in court until the filing of their answer on the 17th, and could not be required to prepare their defense until that time, their application for a continuance, filed on the 18th, to enable them to procure the evidence of these parties, should have been granted. It was shown that both these witnesses were out of the county, and it was too late on the 17th, by any sort of diligence, to obtain their evidence in time for a trial on the next day. The materiality of their testimony does not seem to have been controverted, but only the diligence used to obtain it, upon the theory that appellants were legally made parties by the service of the notice on them in Kentucky, which we have held to be incorrect. We have deemed it best not to discuss the question as to whether or not the appellees Rhodes and Rettig were entitled to maintain this suit over against appellants before they became the owners of the debt by payment. This question presents several complications, that can be so easily remedied by proper pleading in the lower court that we have thought best to defer its decision until it can no longer be postponed. For the reasons above given, we are of opinion the judgment of the court below should be reversed, and the cause remanded for a new trial.

WALTER A. WOOD MOWING & REAP- ING MACH. CO. v. HANCOCK.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

SALE — RESCISSION BY PURCHASER — DAMAGES —
STATUTE OF LIMITATIONS — "DEBT" — WHAT CON-
STITUTES — VERDICT — WHEN RESPONSIVE —
AMENDED PETITION.

1. Where the purchaser of a harvesting machine executes his note therefor, he cannot, in a suit against the seller to rescind the sale on account of failure of the machine to work, and for damages, recover as damages the costs

and attorney's fees paid by him in an action against him on such note by the indorsee thereof before maturity.

2. The loss or waste of a grain crop, caused by the failure of a harvester to work as represented by the seller, is a "debt," within the meaning of Rev. St. art. 3203, § 4, which provides that "actions for debt, where the indebtedness is not evidenced by a contract in writing," are barred if not commenced within two years after the cause of action accrues.

3. Where the purchaser of a machine brings an action against the seller to recover the purchase money, and relinquishes all claims to, and tenders back, the machine, a verdict in plaintiff's favor for part of the purchase money only, and allowing him to retain the machine, is not responsive to the issues made by the pleadings and submitted by the charge.

4. An amended petition should show the date of the original petition.

Appeal from Wilbarger county court; J. W. Blankinship, Judge.

Action by W. H. Hancock against the Walter A. Wood Mowing & Reaping Machine Company to rescind the sale of a harvester by defendant to plaintiff, and recover the purchase money paid, and certain items of damage alleged to have been caused by failure of the machine to work as represented. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The petition and amendments thereto alleged, in substance, that defendant's agent misrepresented the machine; that it did inferior and defective work; that defendant, by its agent, agreed with plaintiff that, if it did not do good work, he would not have to pay for it; that he paid \$25 cash on the purchase, and gave two notes for \$58.75 each; that defendant transferred the notes to the State Bank of St. Louis, which brought suit on the note first maturing at Dallas, Tex.; that defendant contested such suit, on the ground of failure of consideration, but was unsuccessful; that he paid the judgment in such case, amounting to \$95.90, including the attorney's fee stipulated for in the note, and \$10.45 costs, and also paid \$5 to his attorney for defending such suit; that on the maturity of the other note he paid the same, with interest, amounting to \$72; and that, on account of the defective working of the machine, his oats were wasted in the harvest of 1888 to the value of \$250. He also tendered back the machine, and relinquished any ownership or claim on the same. He asked judgment for the amount paid on the machine, including the costs and expenses incurred in defending the suit on the note first maturing. Defendant specially excepted to that part of the petition which set up the costs and attorney's fees paid by plaintiff in such suit, on the ground that these did not constitute a proper element of damage. The exception was overruled. Defendant also pleaded the two-years statute of limitation in bar of the item of damage claimed for waste of oats in the harvest of 1888. An exception by plaintiff to such plea was sustained. The jury re-

turned a verdict in favor of plaintiff for \$140, and also allowed him to retain the machine. Defendant asked for a new trial, on the ground, among others, that the verdict was not responsive to the issues.

Stephens & Huff, for appellant. McGhee & Easton, for appellee.

STEPHENS, J. The judgment in this case must be reversed, and the cause remanded for a new trial, on the following grounds: The exceptions of appellant to that part of appellee's petition which alleged, as items of damage, the costs of the Dallas suit, including the attorney's fee, should have been sustained, and these items should not have been submitted to the jury as a part of the damage.

There was error also in sustaining the exceptions of appellee to appellant's plea of limitation against the claim of \$250 for loss of the oat crop of 1888. When this suit was brought, July 26, 1890, more than two years had elapsed since this loss was sustained. If this damage was recoverable, it was for a breach of a verbal contract, and hence a "debt," within the meaning of article 3203, § 4, Rev. St.¹ *Robinson v. Varnell*, 16 Tex. 382; *Stiff v. Fisher*, (Tex. Civ. App.) 21 S. W. Rep. 291. Likewise, if construed to be an action of damages for deceit, two years, it seems, would be the limit. *Bass v. James*, 83 Tex. 110, 18 S. W. Rep. 336.

The exception to the amended petition on the ground that it did not show the date of the original should have been sustained, but this error would not require a reversal of the judgment, in view of the allegation of appellant in its answer of the date of the filing of said original petition.

The verdict of the jury was not responsive to the issues made by the pleadings and submitted by the charge, and hence a new trial should have been granted.

Under the issues developed, the court should have submitted the fifth charge requested by appellant, but should not have given some others that were requested and given, and especially in so far as they contained a repetition of the same proposition.

The issue which should have been submitted also in some respects erroneous, as will be seen from the conclusions announced above. The issue which should have been submitted to the jury in behalf of appellee, under the proof offered by him, was whether, in buying and retaining the machine, he relied on the promise of appellant's agent, if such a promise was made, that the machine should cost him nothing, but be returned,

if it failed to do good work, in which event he had the right, within a reasonable time, and after a fair test, upon its proving to be a failure, to relinquish the machine, and recover the money paid for it, with interest. This alleged promise, however, is not satisfactorily alleged in his petition. In the absence of such a promise on the part of appellant's agent, if the machine was not what it was represented and warranted to be, the damage recoverable, if not barred by limitation, would be for breach of warranty, which would ordinarily be the difference in value between the machine in question and the kind it was represented to be. We find no such evidence of fraud in the record of this case as to warrant the submission of that issue to the jury. The judgment will be reversed, and the cause remanded for a new trial.

BATTAGLIA v. THOMAS.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

SALE—SECONDARY EVIDENCE — IMPEACHING WITNESS.

1. Copies of letters written by plaintiff to defendant, which had been read on a former trial of the case without objection, and are on file with the papers, are admissible in evidence, where the originals are in defendant's possession, and notice was given to defendant on the trial to produce them.

2. The only issue in an action for the price of goods shipped by plaintiff to defendant was whether plaintiff warranted that they should arrive in good order. It was not pleaded in defense that they were in bad order when shipped. It appeared without contradiction that the goods were in bad order when received by defendant. *Held*, that evidence as to the condition of the goods when shipped was irrelevant, since, under the issue, that fact could only be material as bearing on the condition of the goods on arriving at their destination, which was not disputed.

3. It is not error to exclude evidence offered to impeach a witness where such witness has testified only to an immaterial fact.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by J. P. Thomas against Angelo Battaglia for the price of goods sold. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Huston and Geo. O. Altgelt, for appellant. Denman & Franklin and Ellis & Raley, for appellee.

NEILL, J. The appellee sued appellant for a car load of cabbage and one of onions, alleging that on the 1st day of February, 1888, at the special instance and request of appellant, he sold and delivered him the car load of cabbage, for which appellant bound himself and promised to pay plaintiff, 30 days thereafter, the sum of \$250.20; that he, on the 7th day of February, 1888, at the special instance and request of appellant, sold and delivered him the car load of onions, for which appellant bound and promised to pay

¹ Rev. St. art. 3203, provides as follows: "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions or suits in court of the following description: * * * (4) Actions for debt where the indebtedness is not evidenced by a contract in writing."

him the sum of \$376.61, 30 days thereafter. The appellant pleaded (1) a general denial; and (2) specially that he purchased from appellee, through his duly authorized agent, G. Lewis, a car load of cabbages, for which he agreed to pay him the sum of money by him alleged, but that, in his contract with appellant for the purchase of said cabbages, it was agreed and understood between them that the car load of cabbages was to arrive in San Antonio, Tex., in good, sound, merchantable condition, or he would not receive them, and that when they arrived in San Antonio they were in bad, decayed, and unmerchantable condition, and that he immediately notified appellee of that fact through his agent, and called his attention to the condition of said carload of cabbages, and notified him that he would not receive it; that, at the request of said Lewis, he at once notified appellee by wire of the condition in which the cabbages had arrived, and of his refusal to receive them; that he notified appellee by letter that he would receive and assort and sell the cabbages at the very best price possible for the account of appellee; that he did so sell the car load of cabbages for the account of appellee, and that, after the payment of the freight and drayages, there remained in his hands to appellee's account \$100.40, which sum he was, and at all times had been, ready to pay him. Appellant also admitted in his answer that he purchased the car load of onions from appellee at the time charged by him in his petition, but alleged that they were purchased under a contract which he averred was similar in every respect to the one by which he purchased the cabbages, and that, when they arrived in San Antonio, they were in a bad and unmerchantable condition; that he immediately notified appellee of their condition, and his refusal to receive them. The appellee, by his supplemental petition, denied that he ever sold the cabbages and onions to appellant with the agreement that they were to be delivered to him in good condition in San Antonio, Tex., and alleged that he agreed to deliver, and appellant agreed to receive, the same free on board the cars in San Francisco, Cal., and that he did deliver them to appellant in good condition in San Francisco free on board the cars, and that from the time they were so delivered they were at the risk of appellant, and that he was not responsible for their loss in transit.

Conclusions of Fact.

(1) On the 1st day of February, 1888, the appellee, through his agent, G. Lewis, sold appellant one car load of cabbage, for which he agreed to pay appellee, 30 days after date, \$250.26, and on the 7th day of said month appellee sold him a car load of onions, for which appellant agreed to pay him \$376.61, 30 days thereafter; and that at the time of the sale both appellee and appellant were merchants and dealers in cabbages and onions. (2) That said onions and cabbage were

by the contract to be delivered appellant by appellee free on board the cars at San Francisco, Cal., to be shipped from there to appellant at San Antonio, Tex., and were so delivered. (3) That appellee's agent, Lewis, was not authorized to contract with appellant that the cabbage and onions should arrive in San Antonio in a good, sound, merchantable condition; that appellant, at the time he purchased the goods, knew that the agent did not have such authority from his principal; and that said agent did not contract that they should arrive in San Antonio in a good, sound, merchantable condition. (4) That the car loads of cabbage and onions arrived in San Antonio in a bad condition. And (5) the appellee never paid for them.

Conclusions of Law.

Where goods are sold by dealers to dealers, there is no implied warranty as to their quality arising out of the ultimate intention that the goods shall be consumed as food. *Lukens v. Friend*, 27 Kan. 664; *Howard v. Emerson*, 110 Mass. 321; *Moses v. Mead*, 1 Denio, 378. Therefore there was no warranty on appellee's part, at the time the goods were sold and delivered, as to their quality or condition. Their condition or unfitness for market was not put in issue by either appellant's denial or special plea. It could only have been put in issue by a plea of fraud, alleging that at the time of sale and shipment appellee knew that they were unsound and unfit for market. This issue not being made, it was immaterial in the case whether the goods were sound and marketable at the time of sale and shipment or not. The only issue made by the pleadings was whether appellee, at the time the cabbage and onions were sold to appellant, warranted they should arrive in good, sound, and merchantable condition in San Antonio; and the correctness of the court's rulings as to the admission or rejection of testimony, as well as the correctness of its charge, must be determined in view of this issue.

It is assigned as error that the court erred in admitting in evidence, over appellant's objection, copies of certain letters purporting to have been written by appellee to appellant in regard to the subject-matter of the controversy, upon the ground that the originals were the best evidence. It appears that the original letters were at the time of the trial in the possession of appellant, at his office, in the city of San Antonio, where the trial occurred, and that he was notified by appellee's counsel on the trial to produce them, and that he had time and opportunity to so produce them before the copies were read in evidence. The copies had been on file with the papers some time, and had been read in evidence upon a former trial without objection. Appellant might have reasonably anticipated that they would be offered in evidence again, and was prepared to produce originals, and would have

doubtless done so if they would have been to his advantage. Under these circumstances, we think secondary evidence was admissible.

It has been seen that the only issue made by the pleadings in this case was whether appellee, at the time the cabbage and onions were sold to appellant, warranted they should arrive at San Antonio in good, sound, and merchantable condition. It was not pleaded in defense that they were not in such condition when shipped from San Francisco. If there was any question about their condition when they arrived in San Antonio, it would have been permissible to prove they were not in good condition at the time of shipment, for the purpose of establishing, under appellant's special plea, their condition when they reached San Antonio. The uncontradicted testimony shows that when they arrived at their destination their condition was not good and merchantable; hence the testimony of the witnesses offered as experts to prove, by circumstances, that their condition could not have been good when shipped, was immaterial and not pertinent, and it was not error to exclude it.

The appellant offered to prove by several witnesses that the reputation of S. Antolde, a witness for appellee, who had for years resided in San Antonio, but who had for the last four years prior to the trial resided in California, for truth and veracity in San Antonio, Tex., was bad when he lived in said city. It seems from *Mynatt v. Hudson*, 66 Tex. 67, 17 S. W. Rep. 396, that the credibility of a witness may be impeached in this way. But in this case the only fact testified to by Antolde was the condition of the goods at the time of shipment, and, as his evidence was of an immaterial issue, it was a matter of no importance in the case whether he testified to the truth or not.

The goods were sold by plaintiff through his broker, G. Lewis. The court instructed the jury that "if they believed from the evidence that Lewis was authorized to warrant the produce to be sound and in good marketable condition on its arrival in San Antonio, and defendant knew said agent's want of authority to make such warranty, it could not be binding on plaintiff; and the defendant could not recover for the breach, even though the warranty was made by the agent while acting in the usual scope of his authority." This part of the charge is assigned as error, upon the ground that, if the warranty was made by the agent, it was binding upon the principal after he elected to confirm the contract. There was no evidence that appellee ever, with knowledge of an unauthorized warranty by his agent, elected to confirm the contract. All the evidence was the other way. In the absence of knowledge on the part of the principal that his agent has exceeded his authority, there can be no ratification of his unauthor-

ized act. The charge of the court did not, perhaps, present the issue to the jury as clearly as it might have; but wherein it failed to do so was upon the measure of damages in the event the contract should be found to be such as was pleaded by appellant. As that issue was determined against appellant, the error, if any, was wholly immaterial. The charge did clearly present the issue upon which the jury found their verdict, and, in view of its finding, it is unnecessary for us to determine whether the charge on the measure of damages was correct upon the hypothesis that the contract was such as pleaded by appellant.

The appellee was entitled to recover from the appellant the contract price for said car loads of cabbage and onions, with interest thereon at the rate of 8 per cent. per annum from the 1st day of January, 1889. No reversible error appears in the record, and the judgment of the district court is affirmed.

MARTIN v. WROUGHT-IRON RANGE CO.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

NEGLIGENCE—ACTION BY EMPLOYE FOR PERSONAL INJURIES—PETITION—SUFFICIENCY.

1. A complaint alleged that defendant employed plaintiff to drive a team and peddle ranges; that defendant's agent told him he would furnish a gentle team; that he was furnished a team which had frequently run away, as defendant knew; that at a certain place where plaintiff was driving such team a sapling was bent across the road too low to permit the wagon seat to pass under it; that, on coming to the sapling, plaintiff halted the team, locked the brake to his wagon, dropped the lines, and began gently to raise the sapling out of the way; and that the team at once took fright, and ran away, and injured plaintiff. *Held*, that the complaint stated a cause of action.

2. Since such complaint shows that plaintiff contracted for a gentle team, he did not assume the risk incident to the use of a vicious team.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by L. D. Martin against the Wrought-Iron Range Company to recover damages for personal injuries received while in defendant's employ, and caused by its negligence. From a judgment sustaining exceptions to the petition, plaintiff appeals. Reversed.

John A. & N. O. Green, for appellant. Houston Bros., for appellee.

FLY, J. The sole question presented in this case is, did the lower court err in sustaining exceptions to plaintiff's petition? Plaintiff sued appellee for damages arising out of a personal injury inflicted through the gross negligence of appellee, and alleged "that petitioner, being an experienced business man, and of good reputation, applied to the said Wrought-Iron Range Company corporation,

at their general office at St. Louis, for employment in their service in Texas, to sell their wrought-iron ranges, and was referred by the said corporation to its general agent in Texas, W. W. Culver, Jr., aforesaid, who then kept the office of said corporation at Liberty, Tex. Accordingly, on the 23d day of January, 1888, petitioner presented himself to said agent of said corporation, W. W. Culver, Jr., at Liberty, aforesaid, and then and there was employed by said W. W. Culver, Jr., acting as agent of the said corporation, to serve the said corporation as a driver of one of their said teams, and to peddle the said ranges for them, and make sales thereof. Petitioner further avers and shows that before accepting employment from the said corporation, or engaging in their service, he distinctly informed the agent of said company that he had been raised on a farm, and had been in the habit of handling gentle teams, and that he was not an expert driver, though able to handle a gentle team, and he then and there requested the agent of said corporation to give him a gentle team, which the said agent promised then and there he would do; that, notwithstanding the knowledge on the part of defendant that petitioner was not an expert driver, the said defendant corporation, by their agent, gave to your petitioner a team of mules to drive in the employ of said company that was a dangerous team, and well known by said company to be dangerous and difficult to manage; that the said team had been in the employment of the company for a long period of time before the time they were delivered to your petitioner, and had run away in harness repeatedly, and was known by the said company as a dangerous team to drive, and especially by one who was not an expert driver; that, upon your petitioner being assigned to the district embraced in Polk county, Tex., not knowing the nature or disposition of the team that was given him, and believing that they were gentle and easy to manage, as had been promised him by defendant, he started for the said district with wrought-iron ranges in his wagon to sell for said company. And petitioner avers and shows that shortly after crossing Menard creek, on his way to the said district from the town of Liberty, aforesaid, on the 12th day of February, 1888, the road passed between a hill on one side and a ravine on the other, between which there was a narrow space for a roadbed; that at the said point petitioner found a small tree or sapling had by some means been bent across the road, so that the seat of his wagon would not pass under it, and therefore, taking care first to lock the brake to his wagon, and halting the same, he began gently to raise the sapling out of the way, when the said mules, upon his dropping the lines, and taking hold of said sapling, at once broke into the greatest fright, and so sudden and unexpected was

their movement that your petitioner was thrown down, and finally fell over the dashboard, and under the heels of the said frightened mules, which continued to run, causing said wagon to go over your petitioner's body, then and there dislocating petitioner's left shoulder, breaking three of petitioner's ribs on his left side, and otherwise bruising and greatly injuring petitioner." To this petition the defendant (appellee) interposed the following exceptions: (1) That the petition was not properly indorsed; (2) "that said pleading shows upon its face that any injury that may have been sustained by plaintiff was occasioned through his own negligence and want of care;" (3) "that it shows upon its face that the injury complained of occurred to plaintiff by reason of no fault of defendant, but was an accident for which it was in no way responsible, occurring in the course of plaintiff's employment, and was one of the risks assumed by plaintiff in taking the employment as one of the ordinary risks of the service."

The allegations of the petition must all be taken together in order to ascertain whether or not a cause of action has been presented. It was doubtless the opinion of the lower court that the allegation as to the manner in which the accident occurred showed such want of ordinary care and precaution on the part of plaintiff as to preclude him from recovering for any damages that resulted to him by reason of the mules running away. Is this true as a matter of law? Suppose plaintiff had made the same allegations of not being an expert driver, of contracting for a gentle team, of the team given him being wild and unmanageable, of defendant being unacquainted with their disposition and proclivities, and then had alleged that, without any provocation whatever, the mules had begun to kick, and had broken the leg of plaintiff, who was trying to control them, would there be any doubt as to his having stated a good cause of action? If not, then it must be the immediate circumstances surrounding the accident that determined the opinion of the lower court. Plaintiff says that he was driving along, and, finding a sapling bent over the road, stopped the wagon, put on the brakes, dropped the reins, and was gently lifting the sapling, when the mules ran away. Can this court say that it is such negligence and carelessness in a man, who believes he is driving a gentle team, to apply the brakes to his wagon, put down the lines, and lift a sapling hanging over the road, that he cannot introduce proof under allegations setting forth the aforementioned facts? We think not. We believe that the allegations in the petition present such a case as entitles plaintiff, if he so desires, to have it submitted, under proper instruction, to a jury; and it is a question of fact for them to determine whether, under the proof, the plaintiff is entitled to recover. We cannot hold

that, under all circumstances, as a matter of law, it would be negligence and carelessness for a man to lay down his lines, and attempt to lift a sapling out of the road, as alleged; and the fact that we cannot do this makes it a question to be determined under the proof. There are instances when the mere statement of the circumstances would preclude the right to recover damages, but this is not one of them. Ordinarily, negligence or contributory negligence is a question of fact to be found by the jury, and it can never be held that an act is one of negligence, under the law, unless it is of such a nature that a jury would have no authority to pass on it. In other words, it must be a question whose status is fully determined by the law, and not a question of doubt, to be determined under proof. We hold that the petition in this case does not present allegations under which we can say, as a matter of law, that the plaintiff has no right to recover damages. This view of the law disposes of the second exception. The third exception is not well taken, because plaintiff alleges that he had contracted for a gentle team, and certainly did not assume any risks incident to driving a vicious team. In a footnote to brief of appellant, he says the exception as to the petition not being properly indorsed was waived by appellee in the lower court, and, as appellee does not mention the matter in his brief, but tacitly admits it, we need not consider that point. For the errors indicated, the judgment of the lower court is reversed, and the cause remanded.

STATE v. SAN MIGUEL et al.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

BOND TO KEEP THE PEACE—FORFEITURE.

1. Under Acts 1891, pp. 199, 200, granting the district court jurisdiction of all suits in behalf of the state to recover penalties and forfeitures, said court has jurisdiction to enter judgment on a peace bond of \$200.

2. A petition to forfeit a peace bond is not demurrable on the ground that the bond shows that the principal was bound to appear and answer charges, neither of which constitutes an offense against the laws of the state, and does not bind him to answer any offense known to the state, and that the bond is void as showing that he was not charged with any offense against the laws.

3. Under Code Crim. Proc. art. 96, declaring that no error in the prior proceeding shall be a defense in an action on a peace bond, the fact that the order requiring a bond that the obligor would keep the peace towards the person threatened failed to add the words "and towards others," as required by Code Crim. Proc. art. 95, is no defense to an action on the bond.

4. A petition alleged that a complaint was filed against M., charging that he had threatened to do J. serious bodily injury, and was about to make an assault on her person as he had before; that the judge ordered M. to give bond in \$200 to keep the peace towards J. for a year; that M., as principal, and S. and L., as sureties, gave bond in

\$200, conditioned that said M. had been accused of having threatened to assault J. and do her bodily injury, and, being about to do so, would not commit such offense, and would keep the peace towards said J. and all other persons for a year; that said M. did assault said J. with intent to murder her, etc.; and prayed for judgment for \$200. *Held*, that there was no such variance between the bond and the prior proceedings, and no such duplicity or uncertainty in the bond, as set out in the petition, as to afford ground for demurrer, in view of Code Crim. Proc. art. 96, declaring that no error of form shall vitiate such a bond, and no error in the prior proceeding shall be a defense to an action thereon.

Error from district court, Maverick county; Walter Gillis, Judge.

Petition by the state against Miguel San Miguel and Louis Ladner, as sureties on a peace bond, to recover the penalty. Judgment for defendants. The state brings error. Reversed.

W. L. Evans, for the State. Winchester Kelso, for defendants in error.

JAMES, C. J. The suit out of which the writ arises was to recover the penalty of a peace bond given by one Falcon, with defendants in error as his sureties. The district judge sustained all the exceptions to plaintiff's petition, and, on plaintiff's declining to amend, dismissed the case. The petition alleged, in substance, that on August 19, 1891, a complaint was filed before the county judge of Maverick county against Miguel E. Falcon, charging that he had threatened to do Justina Castro serious bodily injury, and that he was about to make an assault upon her person to inflict upon her serious bodily injury, as he had theretofore done; that on August 20, 1891, by an order of the said county judge, after an investigation of said accusation, the said Miguel E. Falcon was required to enter into a bond in the sum of \$200 not to commit said offense, and to keep the peace towards the said Justina Castro, for the period of one year from the date of such bond; that on or about that date said Falcon and the defendants executed the bond sued on, whereby the said Falcon, as principal, and M. San Miguel and Louis Ladner, as sureties, jointly and severally acknowledged themselves bound to pay to the state of Texas the penal sum of \$200, conditioned as follows: "That the said Miguel E. Falcon had been accused of having threatened to assault Justina Castro and to do her bodily injury, and, being about to assault her, the said Justina Castro, to do her bodily injury, would not commit such offense, and would keep the peace towards the said Justina Castro and all other persons, for the period of one year from the date thereof." Then follows an allegation, in substance, that on or about February 5, 1892, the said Falcon did make an assault upon said Justina Castro with intent to murder her, etc., and prayer for judgment for the sum of \$200.

One of the exceptions was to the juris-

diction of the district court, on the ground that the amount sued for was \$200. The district court had jurisdiction of all suits in behalf of the state to recover penalties, forfeitures, etc. Acts 1891, pp. 199, 200. The answer also contained a general demurrer, and various special demurrers, all seeking to quash the peace bond, as the same was alleged in the petition. The grounds specified are (1) that the bond shows on its face that Falcon was bound to appear and answer certain alleged charges, neither of which constitutes an offense against the laws of the state, and because the bond does not bind Falcon to answer any offense known to the state of Texas; (2) that the bond was void, in that it shows that Falcon was not charged with any offense against the laws of the state. This was not a proceeding wherein Falcon was charged with having committed any offense; its purpose was to prevent any impending or threatened offense; and their exceptions were not applicable.

The third and fourth special exceptions state, in substance, that the judge's order required Falcon to give bond not to commit the offense of "inflicting bodily injury by an aggravated assault and battery upon Justina Castro," and the condition of the bond did not follow this order, but proceeded as above set forth. Appellees contend that the bond was given in reference to a different charge than that stated in the steps preceding it, viz. the oath of the informant and the order of the judge, and for this reason it was void. They also claim that the bond is void, being more onerous than the order required, and for duplicity, in that it mentions two separate and distinct offenses, not capable of being joined; and that the oath was likewise void for duplicity. The record shows what purports to be the oath, order, and bond, but we cannot regard them for any purpose, as the exceptions were addressed to what was set forth in the petition, and the court dismissed the cause for insufficiency of the petition alone. The petition does not allege the order "required Falcon to give bond not to commit the offense of inflicting bodily harm by an aggravated assault and battery upon Justina Castro," as the exception charges. The allegation was, in effect, that it required Falcon to not commit the offense stated in the complaint. In considering these exceptions, we are met with this proviso in the statute relating to such bond: "No error of form shall vitiate such bond, and no error in the proceeding prior to the execution of the bond shall be available as a defense in an action thereon." Code Crim. Proc. art. 96. The obvious meaning of this clause is to require the courts to hold the bond valid unless it contains some error of substance. No errors or irregularities in the prior proceedings can have any effect upon the validity of the bond. The legislature intended by this to avoid the technical difficulties that usually

attend the enforcement of such obligations, and, by simplifying the proceedings, to make the bond effective for the purpose for which they are designed. Duplicity in the recital of the accusation against the defendant, or uncertainty of such recital, would, we believe, be substantial defects; and we furthermore are of the opinion that a variance between the accusation stated in the bond and that stated in the order, as, for instance, the recital of an entirely different offense, would invalidate the bond. We do not perceive any material difference in respect to the recital of the accusation, if we judge the demurrers by what is presented in plaintiff's pleadings. It is alleged by plaintiff that the complaint charged that Falcon had threatened to do Justina Castro serious bodily injury. The statement also made in said complaint that he was about to make an assault upon her person to inflict upon her serious bodily injury as he had heretofore done did not state anything substantially different from what had already been mentioned in the complaint. Besides, this statement was probably made for the purpose of showing that the threat was seriously made, and that she was in immediate danger therefrom. The order that the county judge entered upon hearing the complaint required Falcon to enter into a bond, in the sum for which the bond was given, not to commit said offense, (meaning the offense named in the complaint,) and to keep the peace towards the said Justina Castro, for the period of one year. He did not order that the bond should be given to keep the peace towards all others, as provided in the statute. Code Crim. Proc. art. 95. The omission from the order of the words "and towards others" was such error or irregularity as the statute provided should not be available as a defense in such cases. The condition of the bond recites that Falcon "had been accused of having threatened to assault Justina Castro, and to do her serious bodily injury, and, being about to assault her, the said Justina Castro, to do her serious bodily injury, would not commit such offense," etc. We can see no variance between the bond and the prior proceedings in this respect, and no duplicity or uncertainty in the bond, and we consider that the petition was good against the general and special demurrers.

We will add that we have considered what is set forth in the petition only. The court evidently dismissed the cause upon the insufficiency of what appears therein. There was no trial. If there was, there is no statement of facts in the record. The complaint, the order of the county judge, and the bond are copied in extenso in the record; but we do not notice them in the proceeding, as they do not appear to have been exhibits to the petition. What we have stated concerning them is from the petition, to which the demurrers were directed. The district judge erred in sustaining the de-

murrers, and the judgment is reversed, and the cause remanded.

On Rehearing.

(Oct. 18, 1893.)

JAMES, C. J. This motion is made on the ground that the exceptions passed on in the opinion were in fact addressed to the affidavit, order, and particularly the peace bond, as they were copied in the record, instead of being addressed to the allegations of the petition; that said exceptions were designed as a motion to quash the bond. As stated in our opinion delivered in this cause, the affidavit, order, and bond had not been made a part of plaintiff's pleadings, and we now state further that the same, although they are copied bodily in the record, are not in any manner a part of the record, as they are not there by virtue of any act of the court trying the cause either by way of statement of facts duly certified, or by way of bill of exceptions; hence we could not consider the several exceptions at all, except in reference to the affidavit, order, and bond, as the same appear in the pleadings, and this we have done. The motion for rehearing is not granted.

CITY OF BONHAM v. PRESTON et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

SIDEWALKS—ASSESSMENTS—COLLECTION.

Rev. St. art. 376, empowers city councils to construct sidewalks at the cost of the abutting owner, to be collected, if necessary, by the sale of the property, in such a manner as the council may by ordinance provide. A city ordinance declared the cost a lien on the property, and provided for its sale in the manner provided for other tax sales, but reserved any right or authority the city might have to collect the assessments by suit. *Held*, that a suit to enforce the city's lien by sale of the property was not authorized.

Appeal from district court, Fannin county; E. D. McClellan, Judge.

Action by the city of Bonham against M. S. Preston and others to sell certain real estate in said city to satisfy plaintiff's lien. Judgment for defendants. Plaintiff appeals. Affirmed.

W. O. Duncan, for appellant. Taylor & Galloway and Richard B. Semple, for appellees.

STEPHENS, J. This case went off on demurrer. The petition discloses that the city council of the city of Bonham had adopted an ordinance providing for the improvement of its sidewalks, making the owner of abutting property liable for the expense thereof, declaring a lien on such property, and providing for its sale to en-

force the same in the manner provided for other tax sales. This ordinance contained the following provision: "Nothing contained in this ordinance shall be construed to deprive the city of any right or authority which it may have to collect said assessments for the construction of sidewalks or the value of the work and labor done and material furnished in constructing said walks by instituting suit in its corporate name in any court having jurisdiction thereof." The ordinance was passed in pursuance of article 376 of the Revised Statutes. While articles 476 and 477 may not relate to sidewalks, but only to streets, we think that the two methods there contemplated for the collection of taxes for street improvement are very analogous to the two methods provided by the ordinance of the city of Bonham for the collection of the taxes for the improvement of its sidewalks. In construing these articles of the Revised Statutes, the supreme court have expressed the view that the suit therein contemplated is not a suit to foreclose a lien, but only to recover a personal judgment. *Bordages v. Higgins*, 20 S. W. Rep. 184. See, also, *Id.*, (Tex. Civ. App.) 20 S. W. Rep. 726; *Id.*, (Tex. Sup.) 19 S. W. Rep. 446. Applying this principle of construction to the ordinance in question, we are of opinion that it did not authorize a suit to foreclose the lien therein declared, but only a suit to collect by personal judgment the costs of improving the sidewalk. As this suit is not of that character, but seeks only to have the abutting property sold to satisfy the lien, we have with some hesitation reached the conclusion that the action of the court below in sustaining the general demurrer to the petition was proper. The judgment will therefore be affirmed.

On Rehearing.

RAINEY, J. This case is before us on motion for rehearing, having been transferred to this court from the court of civil appeals of the second supreme judicial district. That court affirmed the judgment of the court below. After an examination of the authorities within our reach, we are of the opinion that the result arrived at by that court is correct as to the disposition of the case. We do not concur, however, in the conclusions of Justice STEPHENS, who rendered the opinion, that the appellant has a remedy against the appellees personally. As we construe article 376, Rev. St., no personal liability is created against the owner of the lot for the expenses of improvements made as therein specified, but the remedy is by sale of the lot, or a part thereof, "in such a manner as the city council may by ordinance provide." *Galveston v. Heard*, 54 Tex. 445. The motion for rehearing is therefore overruled.

PATTY et al. v. GIBSON.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

REVIEW ON APPEAL—DEFECTIVE RECORD.

On appeal from a judgment in a justice court to the county court, defendants moved to strike out the oral pleadings of plaintiff, on the ground that no such cause of action was pleaded below, which was overruled. *Held*, that where the transcript fails to disclose what the pleadings were in either court, the judgment will be affirmed.

Appeal from Hill county court; J. G. Abney, Judge.

Action by D. M. Gibson against Patty & Brockington. Judgment for plaintiff. Defendants appeal. Affirmed.

Smith & Wear, for appellants.

FINLEY, J. This is a case appealed from the justice's court to the county court of Hill county, and the judgment of the county court is asked to be reversed, for the reason that there were no sufficient pleadings, either orally or in writing, to constitute a basis for the judgment against appellants. In the county court the appellants made a motion in writing to strike out the oral pleadings of appellee, upon the ground that no such cause of action was pleaded in the lower court. This motion was overruled by the court, upon what ground does not appear from the transcript. Aside from the brief statement upon the justice's docket of the original cause of action, the transcript fails to disclose what the pleadings were, either in the justice's court or the county court. In the absence of this information, which should be contained in the transcript, this court cannot determine whether the court below committed any error upon the trial, and will presume in favor of the action of the trial court.

The judgment is affirmed. *Maass v. Solinsky*, 67 Tex. 290, 8 S. W. Rep. 289; *Moore v. Hazelwood*, 67 Tex. 624, 4 S. W. Rep. 215; *Railway Co. v. Shipman*, 1 Tex. Civ. App. 407, 20 S. W. Rep. 952.

HELMS et al. v. CRANE.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

CONTRACTS—CONSIDERATION.

An agreement to extend a note on payment of the accrued interest is without consideration.

Error from district court, Wilbarger county; G. A. Brown, Judge.

Action by A. S. Crane against Albert Streib and T. C. Helms. Judgment for plaintiff. Defendants bring error. Affirmed.

Stephens & Huff and Morgan Bryan, for plaintiffs in error. Elliott & Sitterly, for defendant in error.

TARLTON, C. J. This suit was brought March 16, 1891, by A. S. Crane against Albert Streib and T. C. Helms to recover the amount charged to be due on a promissory note dated January 27, 1890, due January 27, 1891, for the sum of \$650, with 10 per cent. interest from date and 10 per cent. additional as attorneys' fees if sued on. The plaintiff also sought the foreclosure of a vendor's lien on a certain lot in the town of Vernon, in part consideration of the purchase of which the note was executed by Streib and Crane. The petition showed that on March 4, 1890, the defendant Streib conveyed the lot in question to his codefendant, T. C. Helms, in consideration of which, among other things, Helms assumed the payment of the note, and agreed, at its maturity, to pay the sum due thereon to the plaintiff. The defendant interposed a special defense, to the effect that the suit was prematurely brought, because, after the maturity of the note, and after its assumption by Helms, the plaintiff, in consideration of the payment by Helms of the interest then due, agreed to extend the time of payment till May 1, 1891. The court sustained a special exception to this defense, on the ground that the agreement relied upon was without consideration, and, hearing the evidence, it rendered judgment for the amount due upon the note, with decree of foreclosure.

This action of the court we approve. In making the payment of interest referred to, the defendant Helms was only complying with an obligation already resting upon him. The promise by Crane, the plaintiff, founded upon such compliance, was therefore clearly a nudum pactum, not susceptible of enforcement. Crane received nothing for the promise, except that to which he was already entitled. *Bish. Cont.* §§ 48-62; *Yeary v. Smith*, 45 Tex. 72.

The judgment is affirmed.

SCHLOSS v. ATCHISON, T. & S. F. RY. CO.

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

APPEAL—PERFECTING—CLERK'S CERTIFICATE.

Acts Called Sess. 22d Leg. art. 1387, provides that an appeal to the court of civil appeals is perfected by notice of appeal within two days of final judgment, or judgment refusing a new trial, and filing an appeal bond conditioned (article 1400) to pay all costs below "and which may accrue in the court of civil appeals and the supreme court." A clerk's certificate showed notice a month after judgment, and a bond conditioned to pay all costs accrued below "or which may accrue in the civil court of appeals." *Held*, that such certificate gave the court no jurisdiction to grant appellee's motion for affirmance.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action by A. Schloss against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant. Plaintiff appeals.

On motion of appellee to affirm judgment on certificate. Overruled.

Merchant & Wilcox, for appellant. Hague, Falvey & Davis, for appellee.

NEILL, J. The certificate of the district clerk upon which affirmance is asked shows that the judgment was rendered on the 13th day of October, 1892, and that appellant gave notice of appeal on the 13th day of November, 1892. It does not show that a judgment overruling a motion for a new trial was rendered. It discloses that the bond filed as an appeal bond is conditional "that appellant shall prosecute his appeal with effect, and shall pay all costs which have accrued in the court below or which may accrue in the civil court of appeals." To give this court jurisdiction to affirm a case on certificate, the certificate of the clerk must show that an appeal was perfected. An appeal to this court is perfected by the appellant's giving notice of appeal in open court within two days after final judgment, or two days after judgment overruling motion for new trial, and filing with the clerk an appeal bond. Article 1387, p. 43, Acts Called Sess. 22d Leg. The condition of the bond provided is "that appellant shall prosecute his appeal with effect, and shall pay all costs which have accrued in the court below and which may accrue in the court of civil appeals and the supreme court," (article 1400, p. 44, Id.) unless appellant desires to suspend the execution of the judgment, in which case the condition of the bond is prescribed in the succeeding article. As the notice of appeal was not given within two days after final judgment, and the bond is not such as is provided, the appeal was not perfected to this court, and it has no jurisdiction to grant appellee's motion; wherefore the motion is overruled, and the certificate dismissed, at appellee's costs.

KNOXVILLE FIRE INS. CO. v. HIRD.
(Court of Civil Appeals of Texas. Sept. 20, 1893.)

DEPOSITIONS—INSURANCE—CONDITIONS—FIRE-
PROOF SAFE.

1. Where a deposition is taken in the case of "H. vs. Knoxville Fire Ins. Co.," and the interrogatories and the envelope in which the deposition is returned are indorsed, "H. vs. Knoxville Ins. Co.," it cannot be quashed, though the statute provides that the officer taking the deposition shall indorse on the envelope the names of the parties.

2. Under a condition in a fire insurance policy that the insured will keep his books in a "fireproof safe," the insured complies with the letter and spirit of the condition when he puts the books in a safe of the kind generally known as fireproof, and does not by this clause warrant the safe to preserve the books.

3. Where the loss was by fire, there was no error in failing to submit to the jury the excepted causes,—"invasion, insurrection," etc.

Appeal from district court, Cooke county;
D. E. Barrett, Judge.

Action by J. P. Hird against the Knoxville Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by HEAD, J.:

In November, 1890, appellant issued to M. F. Meyers a policy of insurance, whereby it insured him, to the amount of \$1,500, against loss by fire to his stock of goods, etc. The policy of insurance provides that the company shall not be liable for "loss caused by invasion, insurrection, military or usurped power, nor for any loss by fire, where such fire is caused by the falling of any building insured, or of any building containing the property insured, or any part of such building. * * * Nor for loss caused by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only. * * * Nor for loss or damage caused by neglect to use all practical means to save and preserve the property from damage at and after the fire." Also, that "the assured, under this policy, hereby covenants and warrants to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of stock insured; and further covenants and warrants to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured warrants and covenants to produce such books and inventory, and in the event of a failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." On the night of the 12th of December, 1890, while said policy was in force, a fire occurred, destroying the insured property, which was of value more than the amount of the insurance; and this suit is prosecuted by appellee, as assignee of the policy, to recover the amount thereof. Appellant answered by general denial, and specially pleaded failure on the part of the insured to keep his inventory and books in a fireproof safe, and to produce them in case of loss, as required by the clause of the policy above quoted. The evidence showed that Meyers did keep his inventory and books in an iron safe, which he believed, and which was generally reputed, to be fireproof, and that after the issuance of the policy the agent of appellant several times examined this safe, and told Meyers it would be a compliance with his policy if he kept his books, etc., therein. The safe, however, did not in fact withstand the fire, and both the books and inventory were destroyed, so that they could not be produced to aid in ascertaining the extent of the loss. The only testimony as to the loss was by the insured, Meyers,

and was as follows: "My stock of goods, furniture, and fixtures situated in the building described in the policy * * * were totally destroyed by fire on December 12, 1890. * * * I kept a set of books showing my purchases and sales, and the condition of my business, and they and the last inventory, etc., required by the policy, in an iron safe which I supposed to be fireproof, and which was reputed to be fireproof, and in which I did not know of any defects, at all times required by the policy, and they were burned up in the safe by the fire that destroyed the balance of the property. The fire occurred at about 2 o'clock A. M., and when I got to the fire the house was nearly burned down, and was falling in. I could see the safe. The door of it was off, and lying in front of where the safe stood, and the safe itself had fallen over on its side. The frame in which the door to the safe was set was with the door. Cravens was the general agent of the defendant, and issued me the policy in Gainesville." The trial in the court below resulted in a verdict and judgment in favor of appellee for the full amount of the policy, and interest, from which this appeal is prosecuted.

W. O. Davis and J. L. Harris, for appellant. Potter, Potter & Giddings, for appellee.

HEAD, J., (after stating the facts.) Appellee took the deposition of appellant's agent J. R. Cravens for use as evidence in his behalf in the trial below. The style of this case in that court was: "No. 3,814. J. P. Hird vs. Knoxville Fire Ins. Co." The interrogatories filed by appellee, upon which this deposition was taken, had this caption: "J. P. Hird vs. Knoxville Ins. Co. No. 3,814. Suit pending in the Dist. Court of Cooke County;" the word "Fire," in appellant's name, being omitted. On these interrogatories, appellant's attorneys indorsed the following waiver: "Filing notice, certified copies, and commission waived;" and the deposition was in fact taken upon the originals. The envelope in which the deposition was returned was indorsed: "In the Dist. Court of Cooke Co., Texas. J. P. Hird vs. Knoxville Ins. Co.;" also omitting the word "Fire" from appellant's name. Our statute requires that the officer taking the deposition shall "indorse on the envelope the names of the parties to the suit;" and, before the commencement of the trial in the court below, appellant moved to quash the deposition of the witness Cravens because of the omission from its name, as above indicated. We believe the trial judge correctly overruled this motion. We see no good reason why this statute should be given the extremely technical construction contended for by appellant. A substantial compliance with other requirements of the statute in reference to the taking and return-

ing of depositions has been held sufficient, especially when, as in this case, there is no cause to suppose the opposite party has been misled to his prejudice. *Railway Co. v. Larkin*, 64 Tex. 454. In this case it is said: "The objections to the certificate of the notary public taking the depositions are not well taken. The certificate, taken together with the caption which preceded the answers, must be considered together as a part of the officer's certificate, and, if it appears from the whole that the statute has been substantially complied with, that shall be deemed sufficient. *Carroll v. Welch*, 26 Tex. 147. The caption identified the case by its style, although the corporate name of the defendant was abbreviated, and also by the number of the cause, and the court in which it was pending. No technical form of certificate is prescribed by the statute. A substantial, though not a literal, compliance with the directions of the statute is sufficient. *Ballard v. Perry*, 28 Tex. 347." The principal reason for requiring the names of the parties to the suit to be indorsed upon the envelope containing the deposition would seem to be to furnish information to the clerk in filing it, and to identify the cause in which it was to be used, and we think sufficient of the names of the parties was given in this instance for this purpose. A variance in this respect, as well as in others, to be fatal, must be material. A literal compliance with the statute would require the officer to indorse the full names of all the parties to the suit upon the envelope, yet we believe it has never been contended that the use of initials, instead of full given names, would be fatal to the deposition.

Appellant contends that a "fireproof safe," within the meaning of the clause of the policy set forth in the conclusions of fact, is one that actually preserves its contents through a fire, and that Meyers, in effect, warranted that he would keep his books and inventory in a safe that would do this. In *Black's Law Dictionary* the word "fireproof" is defined as follows: "To say of any article that it is fireproof conveys no other idea than that the material out of which it is formed is incombustible. To say of a building that it is fireproof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fireproof buildings. To say of a certain portion of a building that it is fireproof suggests a comparison between that portion and other parts of the building not so characterized, and warrants the conclusion that it is of a different material." By a fireproof safe, within the meaning of an insurance policy such as this, we think is intended a safe constructed of incombustible material, for the purpose of resisting fire, and commonly regarded as sufficient for this purpose. In other words, it is an article of furniture, the distinctive name of which well

conveys the idea that the purpose for which it is intended is the preservation of its contents from the effects of fire. If the safe in which Meyers kept his books, etc., was constructed for this purpose, and was commonly known as a "fireproof safe" among those acquainted with such articles, we think it was a fireproof safe, within the meaning of this policy, although it may have proven insufficient in this instance, he not being negligent in its selection. If Meyers kept his books in a place commonly called and known as a "fireproof safe," he complied with the letter of that part of his contract; and if he acted in good faith, and was not guilty of negligence in making the selection, he complied with its spirit. We are therefore of opinion that appellant's contention that Meyers, by this clause in his policy, warranted the safe to preserve the books through the fire, cannot be sustained. But, even if we are in error in this view of the law, we think the verdict of the jury must have been the same upon this branch of the case, and therefore no injury is shown to appellant. In submitting the case to the jury, the court gave this charge: "But, upon the other hand, if the kind of safe used by said Meyers was in common use in the country, and reputed to be fireproof, and if the said Meyers, in good faith, actually believed the safe used by him was fireproof, and if the agent of the defendant, at the time he executed the policy of insurance sued on, saw the safe of the said Meyers, and knew the kind and character thereof, and contemplated and intended that said Meyers should keep his books and inventory in said safe, in compliance with the provisions of said policy, this would satisfy the stipulation in said policy as to the character of safe in which the said books should be kept." It was thus necessary for the jury, before finding in favor of appellee, to find that the agent of the company, at the time he issued the policy, in effect, accepted this particular safe as a compliance therewith. The evidence that the general agent of appellant did more than once after the issuance of the policy expressly agree with Meyers that, if he kept his books and inventory in this safe, it would be a compliance with the policy, is made clear by the testimony of both Meyers and the agent, and was undisputed. We see no reason why this clause in the policy, like any other, could not be changed by a subsequent parol agreement between the parties. *Cohen v. Insurance Co.*, 67 Tex. 325, 3 S. W. Rep. 296; *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. Rep. 605.

It will be noticed from the conclusions of fact that appellant was not to be liable for "loss caused by invasion, insurrection, military or usurped power, nor for any loss by fire, where such fire is caused by the fall of any building insured, or of any building containing the property insured, or any part of such

building." The evidence copied in the conclusions of fact, which is all that was introduced upon the subject, makes it plain that the loss was caused by fire, and not by invasion, insurrection, military or usurped power, and also that the fire preceded the fall of any part of the building, and was not caused by its fall. There was therefore no error in the failure of the court to submit these excepted clauses to the jury. No question should be submitted to the jury for decision unless there has been sufficient evidence introduced to raise an issue thereon. This is not in conflict with the decision in *Pelican Ins. Co. v. Troy Co-Op. Ass'n*, 77 Tex. 225, 13 S. W. Rep. 980. In that case the issue as to whether the fire was caused by a hurricane was sharply made by the evidence. We are of opinion, on the whole case, that the judgment of the court below should be, in all things, affirmed.

MILLS et al. v. PAUL. (No. 292.)

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

WRIT OF ERROR—CITATION—FINAL JUDGMENTS.

1. A writ of error citing defendant to appear "before the court of civil appeals in the city of Austin, Texas, at the next term thereof to be holden in the city of Austin, Texas, within sixty days from the date of the service of this citation," is not bad for the addition of the words "at the next term," etc., since the court and time are otherwise clearly designated.

2. Nine separate suits having been begun against the same defendant, the court, before trial, ordered them consolidated. After trial, four of the nine were disposed of by separate verdicts and judgments. The record showed that these four were tried together, and that the consolidation continued in force, but did not show that the other five had been disposed of. *Held*, that the judgments entered were not final, so as to support a writ of error, while said five cases remained open.

Error from district court, El Paso county; T. A. Falvey, Judge.

Action by George Paul against Anson Mills and others for money judgment and foreclosure. Judgment for plaintiff. Defendants bring error. Dismissed.

M. W. Stanton and W. W. Turney, for plaintiffs in error. Millard Patterson, for defendant in error.

JAMES, O. J. The defendant in error moves—First, to strike out the statement of facts; second, to dismiss the writ of error. The causes for striking out the statement of facts are not deemed substantial. One ground for dismissing the writ of error is that the writ of error cites defendant to appear thus: "Before the court of civil appeals in the city of Austin, Texas, at the next term thereof to be holden in the city of Austin, Texas, within 60 days from the date of the service of this citation." As the citation distinctly designated the time within which appearance was to be made, and the court, the defendant in error could not have been

misled by the addition of the words, "at the next term thereof to be holden in the city of Austin, Texas." This ground for dismissal is not sustained.

The only grounds advanced why the writ of error should be dismissed, that seem to have any merit, are that the bond is not payable to all adverse parties to the suit, and that the judgment from which the writ of error is taken is not a final judgment of the district court. The record discloses that nine separate suits were instituted by different plaintiffs against the plaintiffs in error, each to obtain a money judgment, with foreclosure of lien on real property; that prior to the trial the district court entered an order consolidating the nine causes under the docket number of one of them; and there is nothing to show that the order of consolidation was ever set aside or modified. On February 26, 1892, a trial was had, and four of the nine cases were disposed of by separate verdicts and judgments,—one of them being the case brought here by this writ of error; and it sufficiently appears from the motion for new trial, and the order overruling same, and the statement of facts, that the four causes were tried together, and that the order of consolidation continued in force. The record contains nothing to show that the other five cases have been disposed of. The bond for writ of error is made payable to defendant in error George Paul, the other parties to the consolidated suit not being named therein as obligees. There are decisions which would indicate that the other adverse parties should have been included in the bond, but we do not make any ruling upon this, as the conclusion we have reached requires us to dismiss the writ of error on another ground, and we should, if we held said bond defective, allow another one to be filed, under the circumstances of this case.

As the nine suits were consolidated as one cause, and several of them, from all that appears in the record, are still pending for disposition in the district court, the matters involved in said cause are not so finally disposed of as to authorize an appeal from the partial judgments entered therein. The district court's jurisdiction cannot be said to have terminated in the causes, as consolidated. Something remains to be done there to fully adjudicate the rights of the various parties to the proceeding, and it is well settled that this court has no jurisdiction to hear an appeal from any other than judgments which dispose of all the parties and matters in controversy, these being what is understood as final judgments in reference to appeals. *Simpson v. Bennett*, 42 Tex. 241; *Linn v. Arambould*, 55 Tex. 611; *Gulf, O. & S. F. Ry. Co. v. Ft. Worth & N. O. Ry. Co.*, 68 Tex. 98, 2 S. W. Rep. 199, and 3 S. W. Rep. 564. The statute provides for appeals to this court from final judgments only, excepting interlocutory orders appointing a receiver or trustee. Acts Called Sess. 22d Leg.

p. 43. Apart from statutory authority, we know of no warrant for varying the rule as above stated, except the case of *Fagan v. Machine Co.*, 65 Tex. 331, where an intermediate order was held to be final for purposes of appeal. This was in a receivership, and the order for which an appeal was held to lie was one fixing the status of a creditor's claim. This seeming exception to the general and well-established rule, we would not be willing to apply to any other than a case of precisely the same character. We can understand how a creditor, if not allowed to appeal directly from such an order in a receivership, might be deprived of an appeal. The final order disposing of a receivership is the order closing it, and when this is entered all claims have, presumably, been settled, and to require a creditor to await this order would be giving him an appeal when it would be useless. This does not present a case of that character. The order of consolidation was entered, and no questions are raised by bills of exception as to the propriety of the order. The other five causes do not appear to have been dismissed, or otherwise relieved from said order, nor have they been tried. We cannot say what may be done to affect these judgments when the court proceeds with the other causes. It therefore appearing that a portion of the cause, or all of the cause, in which this writ of error has been taken, is still in the district court, our conclusion is that we cannot now entertain the writ of error, and it should be dismissed.

MILLS et al. v. BASSETT et al. (No. 290.)
(Court of Civil Appeals of Texas. Sept. 13, 1893.)

Error from El Paso district court; T. A. Falvey, Judge.

Action by O. T. Bassett and others against Anson Mills and others for money judgment and foreclosure. Judgment for plaintiffs. Defendants bring error. Dismissed.

M. W. Stanton and W. W. Gurney, for plaintiffs in error. Millard Patterson, for defendants in error.

JAMES, C. J. The motion of defendants in error, filed in this cause, proceeds upon the same grounds as that in case No. 292, (*Mills v. Paul*, 23 S. W. Rep. 395;) and, the ground for dismissal being also applicable to this cause, the writ of error is dismissed.

MILLS et al. v. CAMERON et al. (No. 291.)
(Court of Civil Appeals of Texas. Sept. 13, 1893.)

Error from district court, El Paso county; T. A. Falvey, Judge.

Action by William Cameron & Co. against Anson Mills and others for money judgment and foreclosure. Judgment for plaintiffs. Defendants bring error. Dismissed.

M. W. Stanton and W. W. Turney, for plaintiffs in error. Millard Patterson, for defendants in error.

¹ Rehearing denied.

JAMES, C. J. The motion of defendants in error, filed in this cause, proceeds upon the same grounds as the motion in cause No. 292, (*Mills v. Paul*, 23 S. W. Rep. 395;) and, the grounds for dismissal being also applicable to this cause, the writ of error is dismissed.

On Rehearing.
(Oct. 18, 1893.)

JAMES, C. J. In these causes, in which we concluded at the present term that we had not jurisdiction to entertain the appeal, because of the want of a final judgment in the cause No. 1,326 in the docket of the district court of El Paso county, wherewith and wherein these causes were consolidated, motions for rehearing have been filed, all being in similar terms. We think it clear that the court of civil appeals at Austin, in its opinion, dismissing one of the causes, states, among other grounds for doing so, the ground of there having been no final judgment in the court below. This is a jurisdictional question, and, if the said court at Austin held differently (which it did not do) on the question, we would not be obliged to follow it if we thought otherwise on the question. The statement in the opinion delivered by said court that, inasmuch as the record shows separate charges, verdicts, and judgments, that court was of opinion that, for the purposes of an appeal, they must be treated as separate and distinct trials, meant simply that, after the cases were in shape for appeals, (that is, after final judgment, to give this court jurisdiction,) the cases might be brought up separately. We do not give any opinion on this question, but, seeing no reason why the order of dismissal was not correct, the motion for rehearing is not granted.

NEILL, J., did not sit in this matter.

SMITH et al. v. HUCKABY et al.
(Court of Civil Appeals of Texas. Sept. 20, 1893.)

MECHANICS' LIENS—CONTRACT OF PURCHASE—ESTOPPEL.

1. Where building improvements are made on premises for one in possession under a parol contract of purchase only, a mechanic's lien for the improvements does not attach as against the true owner.

2. The fact that defendant knew plaintiff was making improvements on land owned by him, for one in possession under a parol contract of purchase, does not estop defendant from denying plaintiff's right to a mechanic's lien, where defendant did not know plaintiff was in ignorance of the condition of the title.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by J. A. Smith and others against Patrick Huckaby and another to enforce a mechanic's lien. From the judgment rendered, plaintiffs appeal. Affirmed.

Following are the findings of fact and conclusions of law filed in the court below by **PATTERSON, J.**, on which judgment was rendered:

Conclusions of Fact.

"(1) I find that the defendant Bailey is the owner of the lots involved herein; that he was such owner prior to the time plaintiffs improved the same; that some time prior to the time plaintiffs placed the improvements on the lots, the defendant Bailey made a ver-

bal sale of said lots to defendant Huckaby; that by the terms of such verbal sale the said Huckaby was to pay \$800 for same, to be paid in monthly installments of \$20 each; that after said verbal sale said Huckaby went into possession of said lots, and employed the plaintiffs to improve the same; that at time of such sale there were two old houses standing on said lots, and the plaintiffs, at request of said Huckaby, moved said houses together, and furnished the material set out in plaintiffs' petition, and repaired and improved said houses on said lots. (2) That the work and material, as charged in plaintiffs' petition, was done and furnished at request of said Huckaby, and is worth the sums charged therefor; that the plaintiffs thereafter, and within the time prescribed, filed for record with the county clerk of Parker county, Tex., their account, duly itemized and verified, as required by statute, to fix a mechanic's lien. (3) That the said Huckaby never paid the said Bailey any part of the purchase money on said place, and, after the improvements had been made on said place, by agreement between defendants Bailey and Huckaby, Bailey took the place back. (4) That Bailey knew that plaintiffs were doing the work for Huckaby on the premises, and made no objection. (5) That Huckaby was and is insolvent."

Conclusions of Law.

"(1) Defendant Huckaby having failed to pay any part of the purchase money, he obtained no title to the premises, and, in default of such payment, the said parties had a right to cancel said trade. (2) As the purchase money was a lien prior to the lien of the plaintiffs, they cannot foreclose their lien without paying the purchase money due Bailey, and, as they did not offer to do so, they cannot foreclose their lien on the land, as Huckaby had no title to the land."

Jasper N. Haney, for appellants.

HEAD, J. We adopt the conclusions of fact filed by the court below as being correct. The only assignment of error relied on in appellants' brief is as follows: "The court erred in its conclusions of law in refusing to foreclose appellants' mechanic's lien." That such an assignment is too general to admit of consideration has been repeatedly decided by the supreme court, (*Legion of Honor v. Rowell*, 78 Tex. 677, 15 S. W. Rep. 217;) and followed by us, (*Gunter v. Lillard*, 1 Tex. Civ. App. 325, 21 S. W. Rep. 118.) We believe, however, the court below did not err in concluding that appellants showed no right to foreclose the mechanic's lien claimed by them against defendant Bailey. This lien was claimed under a contract made by appellants with defendant Huckaby to repair some houses already on the lot. Huckaby's only claim to the lot was under a verbal contract with Bailey to pay him \$600 in monthly installments, none of which had

been paid, for which failure the trade was canceled. Appellants do not seek to comply with Huckaby's contract by paying Bailey for the lot, and have their lien foreclosed against Huckaby's interest, but they ask that they be given priority over Bailey. This they were not entitled to have. *Association v. Perkins*, 80 Tex. 62, 15 S. W. Rep. 633; *Phil. Mech. Liens*, 72. We find in the record no sufficient evidence of estoppel against Bailey to deny appellants' lien. It is only shown that he knew appellants were making the repairs for Huckaby, but not that he knew they were in ignorance of the nature of his title. That this was not sufficient as an estoppel, we think clear from the authorities above cited. The petition did not seek a personal judgment against Bailey upon his promise to Mrs. Huckaby to pay appellants. *Spann v. Cochran*, 63 Tex. 240.

The judgment of the court below must be in all things affirmed.

DRAKE et al. v. STATE.¹

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

INTOXICATING LIQUORS—RETAIL DEALER—BOND—ACTION TO RECOVER STATUTORY PENALTY—PETITION—CITATION—SUFFICIENCY—EVIDENCE—MINOR AS PARTNER.

1. In an action to recover statutory penalties on the bond of a retail liquor dealer, in which the breach alleged is that such dealer permitted a minor to enter and remain in his place of business, it is no defense that such minor was a partner in the business, where he is not a party to the bond.

2. An allegation in the petition that the breach occurred on a certain day in July, 1891, "and on divers other days thereafter" during the month of July and August, 1891," is sufficiently definite as to time.

3. Evidence that the witness saw such minor go behind the counter in such dealer's place of business, and hand out some beer to other persons, is sufficient to support a finding that it was a place where liquors were sold in quantities less than a quart.

4. A petition which alleged the giving of the bond, its violation by such dealer, by permitting a minor named to enter and remain in his place of business in a certain city and county in the state, when and where he was engaged in the sale of liquors in less quantities than a quart, states a cause of action.

5. Where such petition states that the district and county attorneys instituted the suit "on behalf of and in the name of the state, for the use and benefit of the county of K.," in which it was brought, a citation which states that the state of Texas is plaintiff, and the parties to such bond, naming them, are defendants, is not open to the objection that the parties plaintiff and defendant are not properly stated therein.

6. Such suit is properly brought in the name of the state.

7. In such case it is not necessary to set out the bond in *haec verba*, but it is sufficient to set out the substance of the condition alleged to have been broken, and on which recovery is sought.

8. Where there are a number of objections in the record, an assignment which assigns error in reference to them generally, and does not inform the court of the nature of the point intended to be raised, will not be considered.

Appeal from district court, Karnes county; H. Clay Pleasants, Judge.

Action by the state of Texas against W. H. Drake and others, on the bond of defendant Drake as a retail liquor dealer, to recover a statutory penalty. From a judgment for plaintiff, defendants appeal. Affirmed.

Lane & Mayfield and Graves & Wilson, for appellants. Chas. A. Culberson and R. L. Henry, for the State.

JAMES, O. J. This was a suit for the statutory penalty, brought by the district and county attorneys in behalf of the state for the use and benefit of the county of Karnes against W. H. Drake and his sureties upon a retail liquor dealer's bond given the — day of July, 1891, and filed July 11, 1891, with the county clerk of Karnes county. The condition alleged to have been violated was that which binds the principal not to permit any person under the age of 21 years to enter and remain in his house or place of business. The petition, together with a trial amendment filed, contained allegations covering the giving of the bond, its violation on July 11, 1891, and on divers days thereafter during the months of July and August, 1891, by defendant Drake permitting a minor—one John Elder—to enter and remain in his place of business in Helena, Karnes county, Tex., when and where he was engaged in retail and sale of spirituous, vinous, and malt liquors in less quantities than a quart. Defendants interposed a general demurrer and special exceptions to the petition. The petition, considered in connection with the trial amendment, is not subject to a general demurrer. All that was necessary to constitute a cause of action was substantially alleged. The motion to quash the citation was on the ground that it did not state the proper parties plaintiff, or that any party is plaintiff, or that there are any parties defendant, and that it did not inform defendants of the nature of the action. It was clearly sufficient in the last-named respect. The statute directs the district or county attorney to institute this class of suits in the name of the state for the use and benefit of the county. The petition expressly sets forth that said officers did so "on behalf of and in the name of the state, for the use and benefit of the county of Karnes;" and the citation in fact, and properly, states that the state of Texas was plaintiff, and W. H. Drake, Wiley Kelly, and W. B. Lyons, defendants. We hold there was no error in sustaining the petition and citation against this exception.

The second assignment of error complains that the general and special exceptions to plaintiff's petition No. 1, 2, 3, 4, and 6, in defendants' answer, were overruled. This assignment is not sufficiently specific to require consideration. Where there are a num-

¹ For opinion on rehearing, see 23 S. W. Rep. 620.

ber of objections in the record, the assignment should do something more than to assign error in reference to them generally. The statute contemplates that the assignment should inform this court of the nature of the point intended to be raised, without sending us to the record therefor, as this does. The business now in this court is such that it will be necessary hereafter to insist on a compliance with this requirement, unless some fundamental error is involved. *Mitchell v. Mitchell*, (Tex. Sup.) 19 S. W. Rep. 476; *Harris v. Daugherty*, (Tex. Sup.) 11 S. W. Rep. 924; *Burnett v. Friedenhaus*, (Tex. Civ. App.) 21 S. W. Rep. 544.

The special demurrers are directed to the name in which the suit is brought, (which is already disposed of;) the statement in the petition of the date of execution of the bond not being definitely given; the want of clearness and sufficiency with which the conditions and terms of the bond are given; the absence of a direct and sufficiently clear allegation that Drake, the principal, had any house or place of business in Karnes county where he carried on the business of selling the enumerated liquors in quantities less than a quart; and, finally, it is insisted the allegation, "permit one John Elder, who was then under the age of 21 years, to enter and remain in the said house or place of business for the retail of spirituous, vinous, or malt liquors, etc., in quantities less than a quart," was insufficient. None of these exceptions are well taken to the petition, considered in connection with the trial amendment. It was not necessary for the conditions of the bond to be given in *haec verba*, or further than the one upon which recovery was sought, which was done in substance. The charge No. 1 asked for by the defendant and refused by the court was substantially embodied in what was given. The court directed special issues to be answered by the jury: "Did the defendant W. H. Drake permit the witness John Elder to enter and remain in a house in this town on the 11th day of July, 1891, or on any day in said month subsequent to the 11th day, or on any day in the month of August, 1891, and in which said house the said Drake was on the days aforesaid engaged in selling malt liquors in quantities less than a quart? To this question the jury will say as they shall determine from the weight of the evidence." This constituted all the charge given, and the jury's answer was in the affirmative. The court refused to give another charge asked by defendant, and we think properly, which was framed to submit to the jury as a defense the fact that the minor was interested in this saloon business as a partner, and therefore had a right to be there; and by being permitted there under such circum-

stances it constituted no infraction of the bond. What might have been the case if the minor had given or had joined in giving the bond, we are not called upon to say. The bond in question was given by Drake, and his obligation to the state was, if he carried on a retail liquor business for the sale of such liquors less than a quart, to permit no minor to enter and remain in his house or place of business. If he admitted a minor to an interest in his business, it furnished him no dispensation from the terms of the bond. In any view of the subject, the minor would be there through an act of his, and a breach of the bond must be held to result. The time alleged for the breach of the bond was on July 11, 1891, and on divers other days thereafter during the months of July and August, 1891. This was sufficiently definite. The tenth assignment of errors was on the insufficiency of the evidence to support the verdict, in that there was no evidence that defendant Drake had a house or place of business in Karnes county, Tex., for the sale of spirituous, vinous, and malt liquors, or medicated bitters capable of producing intoxication, in quantities less than a quart; and also in this: That the proof is insufficient to show that said Drake permitted witness Elder to enter in his house or place of business where he carried on the sale of spirituous, vinous, and malt liquors, or medicated bitters capable of producing intoxication, in quantities less than a quart. Also that the proof is insufficient to show that said Elder remained in the house or place of business, as contemplated by law. There was evidence to show the bond and its terms, and that Drake kept a saloon in Helena, between July 11, 1891, and the latter part of August, same year, and carried on the business in his name, and that between those dates John Elder, then a person under 21 years of age, entered and remained in this saloon, Drake being present. All this happened during the period for which said bond was given. The evidence as to its being a saloon for the sale of malt liquors in quantities less than a quart is meager. All that we find in the testimony bearing on this question is the statement of witness Yearly that he saw John Elder in said saloon between said dates, and saw him go behind the counter, and hand out some beer to some other persons. This was evidence from which the jury could properly determine the nature of the business there carried on. We cannot say there was no evidence to authorize the finding made by the jury. Our conclusion is that, having considered all assignments of error mentioned in the brief, there has been no error in the proceedings, and the judgment is affirmed.

TEXAS & P. RY. CO. v. DENNIS.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

CARRIERS—EXCURSION TICKETS—EXPELLING PASSENGER FROM TRAIN—DAMAGES.

1. An auction sale of land in a distant city had been advertised by the owners of the land. A railroad company placed excursion tickets to the city and return in the hands of its agents, good for a certain limited time, at reduced rates. *Held*, that a purchaser of one of those tickets, who used all diligence after the sale to make the return trip, could not be lawfully expelled from one of the railroad company's trains, though the limited time had expired.

2. Where a carrier places on sale excursion tickets, good for a limited time, at reduced rates, over its own and connecting lines, to induce purchasers to visit a distant place for a specific purpose, a purchaser has a right to presume, without further inquiry, that the time limited is sufficient for the purpose.

3. The conductor had no more right to look to the ticket alone, in expelling the purchaser from the train, than the principal for whom he was acting would have had.

4. The passenger was under no obligation to avoid expulsion from the train, to pay the extra fare demanded, and then sue to recover it back.

5. Where a passenger was unlawfully expelled from a train by the conductor, who was acting in good faith, for refusal to pay an extra fare demanded, at a point about 12 miles from his destination, without force, a verdict for \$500 damages is excessive.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by N. M. Dennis against the Texas & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Modified.

The other facts fully appear in the following statement by HEAD, J.:

Prior to April 29, 1891, the following circular was extensively distributed and advertised in the papers in North Texas, including Weatherford, to wit: "Round-trip excursion from Ft. Worth to Seymour. Train leaves Union Depot 9 A. M., Thursday, April 30th, and returns May 2d, spending the entire day, May 1st, in Seymour. \$2 the round trip from Ft. Worth and all points up to Wichita Falls. \$1.00 for round trip from Wichita Falls and Iowa Park. One and one-third fare will be sold on T. & P. R. R. for round trip. First opportunity to buy property at public sale. Grand excursion and barbecue April 30th from Ft. Worth to Seymour, Baylor county, \$2. Round trip good for return May 2d. Best chance ever offered to see the glorious Pan Handle country in her robes of green. Rates arranged at hotels for guests at \$1 per day. Don't forget the day. April 30th, 9 A. M., from Ft. Worth, L. & H. Blum's River-Side addition, 200 ft. above the courthouse square. The Oak Cliff of Seymour. 500 lots will be auctioned off on the grounds. Terms of sale: Under \$50, cash; over \$50, $\frac{1}{2}$ cash, balance in one and two years." The record does not disclose that appellant had anything to do with the distribution of these circulars or advertisements, but on April

28th and 29th it placed on sale at Weatherford round-trip tickets from there to Seymour for \$3.25, which was a low excursion rate, being much less than the regular fare; but the record does not disclose whether it was the exact rate advertised as above, or not. These tickets contained printed conditions limiting their use to May 2d; also stipulating that they would "not be good for return passage unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent of the Denver, Texas & Ft. Worth R. R. (Pan Handle route) at point between punch marks, on or before —, 189—, and when officially signed and dated in ink, and duly stamped by said agent, this ticket shall then be good only — days after such date." On April 29th appellee purchased one of these tickets at Weatherford from appellant's agent, paying \$3.25 therefor, and a few moments thereafter entered one of its trains, and proceeded to Seymour to attend the sale advertised as aforesaid. On May 2d he presented his ticket to the proper agent at Seymour, and had it stamped for return passage, and started on his return trip in the first train that left Seymour after the conclusion of the sale on the 1st; but when he reached Ft. Worth, the afternoon of the 2d, he was compelled to delay his journey until the morning of the 3d, because there was no train to Weatherford over appellant's road until that time. In fact, at the time appellant sold the ticket, the different trains did not so connect as to make it possible for appellee to attend the sale at Seymour on the 1st, and reach Weatherford on the 2d, but appellee did not know this until he reached Ft. Worth, on his return. On the morning of the 3d, appellee entered the cars of appellant at Ft. Worth, and insisted upon riding to Weatherford upon this ticket, after explaining the facts to the conductor; but after considerable parleying, and telegraphing by the conductor to the superintendent of appellant, the conductor forced appellee to leave the train about nine miles before he reached Weatherford, from which place he was compelled to ride in a wagon, during the heat of the day, to his destination. The conductor, in compelling appellee to leave the car, exhibited considerable firmness in the presence of a number of passengers, whose attention was thereby attracted, but no more than was reasonably necessary to enforce obedience to his requirements; and, if appellee was wrongfully on the train, he would not have a cause of action on account of excessive force used by the conductor in expelling him. The only objection urged by the conductor to appellee's ticket was the expiration of the time to which it was limited. To go from Weatherford to Seymour, as called for in this ticket, it was necessary to go over appellant's road to Ft. Worth, and from there to Wichita Falls over the Denver, Texas & Ft. Worth Railroad, and from there to Seymour over the Wichita

Valley Railway. But it would seem from the record that the road from Wichita Falls to Seymour was treated as a part of the Denver, Texas & Ft. Worth. At least, the ticket issued by appellant called for it to be stamped at Seymour by the agent of said last-named road. Appellee instituted this suit to recover damages for his alleged wrongful expulsion from the train by appellant, and a trial before a jury resulted in a verdict and judgment in his favor for \$500, from which this appeal is prosecuted.

B. G. Bidwell, for appellant. Lanham & Stephens, for appellee.

HEAD, J., (after stating the facts.) It is well settled that a railroad has the right to limit the time within which a ticket it sells at a reduced rate must be used, but it is equally well settled that such limitation must be reasonable. This question is well considered in an opinion rendered by Fisher, C. J., of the court of civil appeals for the third supreme judicial district of this state, in the case of *Railway Co. v. Wright*, 21 S. W. Rep. 399. Also, see *Railway Co. v. Looney*, (Tex. Sup.) 19 S. W. Rep. 1039; 2 Wood, Ry. Law, 1408, 1404. This question of reasonable time has ordinarily arisen in cases involving the time necessary to make the contemplated trip, without reference to the business in which the passenger is engaged; but we believe that when we take into consideration the fact that these excursions are the source of much revenue to the carriers, as evidenced by the zeal with which they seek to encourage them, it will not be extending the principle too far to hold that, where the carrier seeks to induce a number of passengers to go upon excursions of this kind by offering to them special rates, it should allow them a reasonable time in which to accomplish the purpose of the journey, and, in the absence of knowledge to the contrary on the part of the passenger, he has the right to infer that the limitation contained in his ticket will do this. We know that it has often been said that one proposing to travel in railway cars must inform himself as to the time of the arrival and departure of the trains, and the connections of the different lines, but this has generally been said in its application to one traveling upon his own business in the usual way, (*Beauchamp v. Railway Co.*, 56 Tex. 239;) and we do not think it in conflict with the holding that where one is going upon a special trip, which he has been induced to take by the favorable terms offered by the carrier, who well knows the object intended to be accomplished, the latter should be presumed to know the connections made by the different roads over which it sells the ticket, and the passenger can presume that a reasonable time has been allowed to transact the business in the contemplation of the parties at the time of the sale. If the passenger has

actual knowledge, when he purchases the ticket, that the time allowed is not sufficient, he might perhaps be held bound by his contract as made; but when the carrier places on sale tickets over its own and connecting roads at a reduced rate, for the purpose of inducing a large number of persons to visit a distant place for a specific purpose, we think this, of itself, should be held to be a representation by it that the time named in the ticket is reasonably sufficient for that purpose, and the purchaser can, without further inquiry, act upon such representation. See authorities above cited. In this case there is no direct evidence that appellant had anything to do with the sale of the lots at Seymour, nor that this ticket was sold for that specific purpose, but we think the circumstances leave but little, if any, doubt as to this. The agent who sold the ticket says this excursion had been previously advertised by the town-lot men, and that he had been instructed by the railroad officials to place these tickets on sale at a greatly reduced rate, and he supposed those purchasing them were going to attend this sale. There was no evidence of any other reason for such reduction in the price of tickets, and we have no hesitation in concluding that the purpose of the company in selling these tickets was to enable the purchasers to attend this sale, and, to carry out this contract in good faith, it was bound to give them a reasonable time in which to do this. The evidence is undisputed that a reasonable time was not afforded in this instance, and when the explanation was made to appellant, through its conductor, that appellee had used all possible diligence since the sale to make the return trip within the time named in his ticket, he should have been allowed to proceed. From what we have said, it will be seen that we find no error in the action of the court in permitting appellee to testify that he had no knowledge of the connections made by the different roads over which he was to pass. Under the circumstances, the acts of the appellant were equivalent to a representation by it that the time allowed was sufficient, and, in the absence of actual knowledge by appellee to the contrary, it cannot complain that he relied thereon.

We also think there was no error in admitting evidence to show the publicity that was given to the proposed sale of town lots at Seymour. It was admissible in explanation of the reason appellant had for placing on sale these excursion tickets, and to show its knowledge of appellee's purpose in purchasing one of them.

We have no fault to find with appellant's proposition under its fifth assignment, which is as follows: "The defendant railway company had a right to eject plaintiff from its car and train without the use of unnecessary force, if he failed or refused to pay fare, or present, when demanded by the conductor,

a ticket or other evidence of his right to ride on its train." We think, however, this principle of law was fairly presented in the charge of the court, and there was therefore no error in refusing the special charge requested by appellant. The evidence of appellee's right to ride on this train consisted of his ticket, and explanation to the conductor that the time to which it was limited was too short to enable him to comply therewith, and, under the circumstances, should have been accepted as sufficient.

We do not think there is anything in the record to raise the issue as to the right of appellee to be furnished with a special train, and there was therefore no error in refusing the second special charge requested by appellant. So far as we can see, no one made any such contention. What we have already said sufficiently indicates our views as to the duty appellee was under to inform himself as to the movements of the trains, and we therefore hold appellant's seventh assignment not well taken.

The conductor had no higher right to expel appellee from the train on account of the expiration of his ticket than appellant itself had. He was only its representative in the transaction. The conductor had no more right to look to the ticket alone than appellant itself would have had, if acting in person. The fourth special charge requested by appellant, in so far as it announced the proposition that the conductor can in all cases look to the ticket alone in dealing with the passenger, was therefore correctly refused. *Railway Co. v. Mackie*, 71 Tex. 491, 9 S. W. Rep. 451; *Railway Co. v. Martino*, (Tex. Civ. App.) 21 S. W. Rep. 781; *Railway Co. v. Wright*, *supra*. It seems now to be settled in this state that a passenger cannot be required to pay an additional compensation to induce the carrier to abstain from wrongfully expelling him from the car. Carriers, like other persons, are required to comply with their contracts for the original consideration, and cannot exact additional pay to induce them to do so. Appellant's eighth special charge, to the effect that appellee should have paid the additional fare demanded by the conductor, and brought his suit to recover it back, in order to lessen his damages, was therefore correctly refused, under the decisions in this state, although, both upon principle and authority, much could be said in opposition to this view. *Railway Co. v. Mackie*, *Railway Co. v. Martino*, *Railway Co. v. Wright*, *supra*.

The only objection made to the ticket by the conductor was the expiration of the time to which it was limited. We understand from the statement of facts that the clause requiring it to be presented to the agent at Seymour for signature and stamp had been substantially, if not literally, complied with. At any rate, it is not claimed that appellee had omitted anything, and, if the agent at Seymour failed to sign it exactly as re-

quired, it was his fault; and, as he was the one designated by appellant to attend to this, it is in no position to complain of his neglect. *Railway Co. v. Martino*, *supra*.

In its seventeenth assignment, appellant complains of the verdict for \$500, as being excessive, and we are of opinion this assignment is well taken. Appellee's account of his treatment by the conductor, which is the evidence most favorable to him, and upon which this verdict must be sustained, if at all, is as follows: "I left Seymour, on my return, on the morning of May 2, 1891, on the first train after the sale was over. We came straight on to Wichita Falls, and then took the first train to Ft. Worth, where I arrived the same evening about 5 o'clock. I could not get on to Weatherford that evening. I stayed at the hotel in Ft. Worth overnight, at a cost of \$1.50, and took the first train from there to Weatherford, which was near noon on May 3d, 1891. The conductor came for tickets, and I offered him mine. He looked at it, and said he could not take it, as the time had expired. He said there were other like tickets, and he would telegraph for instructions. The next time he came around, he had what purported to be a telegram in his hand, and said, if I did not pay my fare, he would be obliged to put me off. I told him that, having paid my fare, I did not feel like paying again, and that I had taken the first train from Seymour after the sale, and had complied with my contract. I went forward to Mr. Johns, Dr. Simmons, and Mr. Wells, who had like tickets, and who had received similar notice. When we got to Annetta, we were put off. That was 20 miles from Ft. Worth, and nine miles from Weatherford. The conductor treated me gentlemanly enough, at first, but when I went into the front car his manner changed. When I went forward to them in the car, I asked them what they were going to do. I had determined, before we got to Aledo, that I would not pay. I did not tell the conductor that I had my ticket extended. He asked me to pay my fare or get off. Annetta is a regular station. He stopped there. He knew that I would not pay. I told him so. As we approached Annetta, he said if I would not pay he would be obliged to put me off. At Annetta he stopped the train, and put us off. I do not say that he stopped the train only for that purpose. It is a regular station. He told me to get off. I told him I got off under protest; if he intended to force me off, I would get off. He said, 'I don't know what force you want, unless I raise the window and throw you off.' He also said, if it was a row we wanted, we could get it. I could have paid my fare at the time. I was able. I refused. When I found that I missed the train at Ft. Worth, I was disappointed. When the conductor put me off, he took me by the arm, not hurting me at all, and sort of steered me. It was the manner I objected to. It mortified

me. He had two assistants with him when he made the talk at Anneta. There was no necessity for his taking hold of me. We showed no disposition to oppose him. His bearing at first was gentlemanly. Afterwards, it was abrupt and insulting. It was domineering. On the car, I would have gotten home in about 25 minutes or ½ hour. In a wagon, it took between 2 and 3 hours, and the ride was very uncomfortable, through the heat and dust. I had a soft, comfortable seat in the car. The wagon cost \$2 for the four." Other witnesses, who seem to have been disinterested, describe the conduct of the conductor as having been polite and gentlemanly throughout, but we believe that the testimony of appellee alone shows that the verdict in this case was too large. It is perfectly clear that the conductor, while mistaken in his rights and duty, acted in entire good faith, and plainly manifested a desire to have the parties leave the train without requiring him to resort to any force whatever, and it was only in answer to appellee's demand for force that he used the only petulant expression attributed to him. Under these circumstances, appellee was entitled to compensation only for the damage he had sustained, and while the measure of compensation that should be allowed for mortification thus caused is in the highest degree uncertain, and is therefore peculiarly within the province of the jury, yet we believe appellee's own testimony shows that a much less sum than \$500 will fully compensate him for all the injury he suffered. He seems to have been a man of mature age and judgment, at no time becoming unduly excited, and throughout looked upon the occurrence much in the light of a business transaction. In this transaction, we have held that he was in the right, and appellant was in the wrong, and this entitles him to the actual damage he sustained therefrom, but to nothing more.

We have examined the other assignments, and find no reversible error therein, and nothing that calls for further discussion. For the error in the excess in the verdict, as above indicated, the judgment of the court below will be reversed, and the cause remanded for a new trial, unless the appellee shall within 20 days file in this court a remittitur of all of said judgment except the sum of \$250, in which case it will be reformed and affirmed for said amount, and costs of the court below; appellee to pay the costs of this appeal.

STEPHENS, J., disqualified, and not sitting.

HARGRAVE v. BOERO.¹

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

NEW TRIAL—CONDITIONAL ORDER—VALIDITY.

An order granting a new trial, which recites that the judgment be set aside on condi-

tion that defendant, "before expiration of this term of court, pay all costs of court that have accrued during the pendency of this appeal to the state; otherwise said judgment to remain in full force and effect,"—is void because of such condition, and the judgment remains in full force and effect.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by M. P. Hargrave against G. B. Boero. There was judgment for defendant, and plaintiff appeals. Reversed.

Otto Staffel and L. N. Walthall, for appellant.

FLY, J. Appellant brought suit in the justice's court against appellee on an open account for \$68.00. Judgment was given for appellee in that court, and appellant appealed the case to the district court of Bexar county. On April 25, 1890, appellant obtained judgment by default against appellee, which was on the next day, on motion of appellee, set aside on condition that the defendant, (appellee,) before the expiration of the term, would pay all costs that had accrued during the pendency of the appeal to the day of the order; otherwise the judgment by default to remain in full force and effect. Appellee did not pay the costs, and at the next term the appellant moved the court to award him an execution to enforce the judgment rendered in his favor against appellee, setting up the fact that the order for the new trial was a conditional one, and that appellee had not paid the costs. This motion was overruled. The case was afterwards tried, resulting in a judgment for appellee. As the decision of this case will turn upon the construction of the order granting the new trial, we copy it in full: "Defendant's motion, this day filed, to set aside judgment rendered April 25, 1890, in this cause, coming on to be heard, together with plaintiff's affidavit in contravention, came the parties, by their attorneys, and, the argument of counsel being heard, it is considered by the court that said judgment be set aside, conditioned, however, that defendant, G. B. Boero, before expiration of this term of court, pay all costs of court that have accrued during the pendency of this appeal to this date; otherwise said judgment to remain in full force and effect." As early as the sixth Texas Supreme Court Reports, (page 199,) in the case of *Serest v. Best*, our supreme court has held that a new trial granted upon a condition is a nullity. We quote from the language of Judge Lipscomb in that decision: "The first point presented for our consideration by the assignment of errors involves the legality of the order granting a new trial on condition that defendant should pay all costs on or before the first day of the next succeeding term. It is consented by the appellant's counsel that an order for a new trial on such terms is a nullity, and did not set aside the judgment. He relied in support of his

¹ Rehearing denied.

proposition on the last clause in article 766 of Hartley's Digest. It is as follows: "All motions for new trial, in arrest of judgment, or to set aside a judgment, shall be determined at the term of the court at which said motion shall be made." It would seem that a compliance with this law must make the motion absolute and unconditional at the term at which it was entered. The leaving it to a contingency in pais, not to happen until the first day of the next term, was not authorized. There is nothing in this view of the law just referred to repugnant to the first part of article 763 of Hartley's Digest, that "new trials may be granted in all civil cases, on such terms and conditions as the court may direct." It would have been competent for the court to have granted a new trial either with or without costs. It could have directed the costs to abide the final judgment, or directed execution for the same; but the question of new trial should have been definitely settled by the decision of the court. In the above-quoted case all the proceedings of the lower court subsequent to the verdict and judgment were set aside by the supreme court, and the first judgment was held to be in full force and effect. The doctrine of this case has never been attacked, and only modified in so far as it is held that, where a new trial was granted upon condition, an objection to its validity was waived by a failure to object thereto at the succeeding term. *Gorman v. McFarland*, 13 Tex. 237; *San Antonio v. Dickman*, 34 Tex. 647. In both these cases, however, the idea advanced in *Secrest v. Best*, as to the invalidity of a new trial on condition, was adhered to. The statute under which these decisions were rendered is almost identical in language with article 1568 of the Revised Statutes. Had the order of the court in the case we are considering have unconditionally granted the defendant a new trial, and had then appended to the order a judgment against him for costs, the order would have been valid; but the fate of the new trial is made to hang upon payment of costs, and to make this doubly sure it says, "Otherwise said judgment to remain in full force in effect." "That an order granting a motion for a new trial must be absolute is well settled." "If, therefore, the order in question in this case was conditional,—that is to say, was to take effect and become final upon the contingency of the defendant's paying the costs adjudged against it,—it was a nullity, and the court should have granted the motion made at the next term to strike the case from the docket." *Fenn v. Railway Co.*, 76 Tex. 380, 13 S. W. Rep. 273. In that case it was held that the order granting the motion for new trial was not null, because it did not depend upon the happening of any contingency, or the performance of any duty or obligation enjoined. In the case now before the court, the order to set aside the judgment was to

take place if the appellee paid costs up to that date in a certain time; and, if he did not, the motion was not to be granted. The order setting aside the judgment was a nullity, and all the proceedings after that time in the district court were null. It is the judgment of this court that the order setting aside the judgment in favor of appellant, and all the subsequent proceedings of the lower court, be set aside; that the judgment rendered in favor of appellant on April 25, 1890, be affirmed, and shall remain in full force and effect, and appellee shall pay all costs in this and the lower court.

McGHEE v. DICKEY et al.

(Court of Civil Appeals of Texas. Sept. 20, 1898.)

VACANCY IN OFFICE—RESIGNATION OF JUDGE.

Under Const. art. 16, § 17, providing that all officers in the state shall continue to perform the duties of their offices until their successors are qualified, the unconditional tender of his resignation by a county judge creates no vacancy where it is not accepted and is afterwards withdrawn.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by F. P. McGhee, administrator, against W. T. Dickey and others. Judgment for defendants. Plaintiff appeals. Affirmed.

The following are conclusions of law and fact by the trial court: "The court is of the opinion that the plaintiff is not entitled to a recovery of the town lot mentioned and described in the pleadings, and the same sued for in this case; and it appearing to the court from the evidence adduced upon the trial of the cause that said town lot No. 11, in block No. 26, in the original town of Vernon, was sold as the property of the estate of Uel Music, deceased, upon the application of the administrator of said estate in pursuance of a decretal order of the probate court of Wilbarger county, Tex., and that Tobe Stewart purchased said town lot at said sale so made by the administrator, and that a deed was executed by said administrator and delivered to the said Tobe Stewart for a valuable consideration, and that such sale was reported to the probate court of said Wilbarger county, and that said report was by the probate court approved and in all things confirmed at the August term of said court thereafter said sale, but that said order of confirmation was not entered upon the minutes of said probate court by some oversight or omission on the part of the clerk of said court, and it appearing to the court that T. L. Stewart sold and conveyed said town lot No. 11, in block 26, in said original town site of Vernon, Tex., to the defendant W. T. Dickey, and that Dickey sold and conveyed 10 ft. of said town lot to the defendant R. A. Wood, and that the plaintiff is

not entitled to a recovery of said town lot, it is further ordered, adjudged, and decreed by the court that the plaintiff, F. P. McGhee, Adm'r, take nothing by this suit, and that the defendants recover of and from the plaintiff the said town lot sued for in this suit, and that the defendants recover of the plaintiff all the costs in this behalf expended, and for which the clerk of this court will certify such bill of costs to the probate court of Wilbarger county for payment out of the estate of Uel Music, deceased, in the hands of the said administrator to be administered, and that the clerk of this court issue to the defendants herein a copy of this decree, properly certified, upon the application of the defendants, they paying therefor for registration in the county clerk's office in the records of deeds of said county."

McGhee & Easton, for appellant.

STEPHENS, J. The judgment appealed from contains the conclusions of law and fact upon which it rests, and these conclusions we approve and adopt. The title of appellee to the lot of land in controversy depends upon the validity of a probate sale. The application for the sale was regular, and the order therefor duly entered, but no order approving the sale could be found. The court, however, found that a report of the sale had been made and approved, and we think the parol testimony was sufficient to warrant this finding. The sale seems to have been approved at the August term, 1884, of the county court of Wilbarger county, by Judge Doan, then acting as county judge, though he had a few months prior thereto made an unconditional tender of his resignation to the commissioners' court, which had not been accepted, but, at the instance of the said commissioners' court, had been withdrawn. The contention of appellant that this unconditional tender of resignation created a vacancy in the office of county judge of Wilbarger county is supported by a decision of the court of appeals, reported in 2 Wils. Civil Cas. §§ 707, 708, and by other authorities cited in that opinion. We have reached the conclusion, however, that the weight both of reason and authority is with the holding that, so far as the rights of third persons are concerned, a public office does not become vacant by an unaccepted resignation, especially in this state, where we have the following constitutional provision: "All officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified." Const. art. 16, § 17. In this respect the state, it seems, like nature, abhors a vacuum. The public necessity for continuity of official tenure is not left to the caprice of the office-holder. The contract for public service imposes a mutual obligation upon the

officer and the public, which cannot be arbitrarily dispensed with by either party. Mechem, Pub. Off. § 414; 19 Amer. & Eng. Enc. Law, 562r; Edwards v. U. S., 103 U. S. 471; Thompson v. U. S., Id. 490; Badger v. U. S., 93 U. S. 599; Hoke v. Henderson, 4 Dev. 1; State v. Clayton, 27 Kan. 442; Jones v. City of Jefferson, 66 Tex. 578, 1 S. W. Rep. 903. If, however, this position be erroneous, it would seem that the action of the commissioners' court in inducing Judge Doan to withdraw his resignation amounted to the exercise of the appointive power lodged in that tribunal. Whether this action of the commissioners' court was evidenced by writing does not appear, and whether a verbal appointment to office is valid we need not decide. Mechem, Pub. Off. §§ 115, 116; Hoke v. Field, 10 Bush, 144; People v. Murray, 70 N. Y. 521. In this state of the record, on collateral attack, we think it should be presumed that a minute was made of the action of said court in making choice of Judge Doan to fill out his unexpired term of office, and that in approving the sale he was at least a de facto officer. There was no error in the admission of evidence of which appellant can justly complain. The foregoing conclusions dispose of all of the other assignments of error, and lead to an affirmation of the judgment.

ELLIS et al. v. STONE et al.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

GUARDIAN AND WARD — CONVEYANCE OF WARD'S REALTY.

1. Under Act Tex. May 20, 1848, making it the duty of a guardian to take care of and manage his ward's estate as a prudent man would his own, a guardian had a right to employ a person to hunt up and locate her wards' ancestor's head-right certificate, in consideration of an interest in the land located, without special authority from the probate court. Following Wren v. Harris, 14 S. W. Rep. 686, 78 Tex. 349.

2. In an action for possession of land, founded on a contract with a guardian, declarations of said alleged guardian as to her having been so appointed are incompetent.

3. In an action for possession of land, founded on a contract with a guardian, the records being destroyed, statements of wards of the alleged guardian that she was their guardian, and had authority to make said contract, and that the court ratified her contract, and authorized her to deed the land in question in pursuance thereof, are competent as admissions.

4. Where probate records have been burned, long acquiescence of wards in their guardian's conveyance is competent evidence of her alleged authorization to make such conveyance.

5. When evidence has been introduced to show that heirs have laid no claim to certain land, the judgment of a district court in a suit of certain of said heirs for possession of the land is competent in rebuttal.

6. The fact that one was a county surveyor when he made a contract to locate a head right, in consideration of a compensation other and greater than his official fees, does not in-

validate said contract, when the land located was in another county, and not located by the contractor himself.

Appeal from district court, McLennan county; J. R. Dickinson, Judge.

Suit by James P. Ellis and others against Green B. Stone and others to remove a cloud from their title to land. Judgment for defendants. Plaintiffs appeal. Reversed.

E. H. Graham, Harris & Saunders, and E. A. McKenney, for appellants. Alexander & Campbell, for appellees.

KEY, J. This is the second appeal in this case. A judgment in favor of the present appellants was reversed on the former appeal. 69 Tex. 325, 7 S. W. Rep. 349. The suit was brought by appellants against the heirs of Jesse Russell to remove cloud from title to 1,000 acres of land, part of the Jesse Russell league survey.

Appellants' petition alleges, in substance, that in 1850 Jane Hill, formerly Russell, and widow of Jesse Russell, and guardian of their children, made a contract with one Williams to hunt up the Jesse Russell head-right league certificate, which was lost, and locate and have the same patented, agreeing to give him one-half of the land for his services, he paying all expenses, and that the contract was reasonable and fair; that said Williams performed his part of the contract; that afterwards said widow and Williams divided the land, setting apart the southwest half for the widow's community interest, and the northeast half for the children's one-half, and setting apart the 1,000 acres in controversy off of the north end of the children's one-half to said Williams for his locative interest in their one-half, and the south end, comprising 1,302 acres, to the children for their part; that said original contract of 1850 was authorized by an order of the probate court of Sabine county, where the guardianship was pending, and it and said partitions were reported to and confirmed by said court; that the probate records of said county, with said orders and reports, were burned in 1875; that plaintiffs own said Williams' title to said 1,000 acres, and are in possession of it; that said widow sold her community one-half to said Williams in 1854; that said children have sold off their said 1,302 acres; that for a long time said children were satisfied, and acquiesced in said contracts and partitions, but finally began to claim the said 1,000 acres, and clouded the title; that plaintiffs pray for the removal of the cloud, that their title be confirmed, and for general relief.

The defendants answered by general demurrer, several special demurrers, general and special denials, laches, and stale demand, and prayed that they be quieted in their title, that the cloud of plaintiffs' pretended title be removed, and for general relief. L. G. Merrell was allowed, on the eve of the trial, over plaintiffs' objection, to make him-

self a party defendant, as the vendee of some of the defendants, pending suit. The case was submitted to a jury, and verdict went for the defendants, and judgment was entered up by the court in their favor for the title and possession of the property, and awarding them a writ of possession for the same. A motion for a new trial was overruled, and plaintiffs appealed.

The second paragraph of the court's charge to the jury reads as follows: "If, from the evidence, the jury believe that Mrs. Russell, the wife of Jesse Russell, afterwards the wife of H. H. Hill, was appointed by the probate court of Sabine county guardian of the property of the children of herself and said Jesse Russell, and that she qualified as such, giving the bond and taking the oath prescribed by law, and you further believe that, in pursuance of an order of said court, the said Jane Russell, as guardian, made a contract with one J. K. Williams for the hunting up, locating, and procuring patent on the certificate described in the pleadings and in evidence as the Jesse Russell head right, and that she agreed, under the authority of said court, to give to Williams one-half of the land that should be obtained under said certificate, and that said Williams did, in pursuance of said contract, cause patent to issue on said certificate to said Russell survey, and that the 'acts and doings' of said Mrs. Russell or Hill in making said contract, and the 'acts and doings' of said Williams in procuring said land to be patented thereunder, were reported to and confirmed by said probate court of Sabine county, then, in that case, Williams would become the owner of one-half of said land, including one-half of the interest of the children of said Jesse." This charge is complained of as casting a greater burden upon appellants than was imposed by law, and authority directly in point sustains this contention. *Wren v. Harris*, 78 Tex. 349, 14 S. W. Rep. 606. In the case cited it was contended that, in the absence of authority from the probate court having jurisdiction of the guardianship, a guardian could make no valid contract disposing of part of a land certificate belonging to his ward. The supreme court denied this contention, and held that, under the act of May 20, 1848, relating to guardianships, a guardian could make a binding contract for the location of a land certificate belonging to his ward's estate, in which it was stipulated that the locator should have part of the land in consideration of his services. The charge in question is obnoxious to the doctrine announced in that case, and, in effect, required the jury, before finding for appellants, to find that the contract made by Mrs. Hill, as guardian of the Russell children, with J. K. Williams was authorized and approved by the probate court. This contract was made in 1850, and *Wren v. Harris*, supra, is directly in point.

The court did not err in excluding the testimony of John L. Stone and J. K. Williams as to Mrs. Jane Hill's statements about having been appointed guardian of her children, etc. This evidence does not come within any of the exceptions to the rule which excludes hearsay testimony.

The court erred, however, in excluding the evidence of the witness Stone to the effect that he had heard all the four children of Jesse Russell say that Jane Hill was their legal guardian, appointed by the proper court of Sabine county, and had authority to do what she did, and that said court ratified the partition made by Mrs. Hill and Williams, and authorized her to deed the land in controversy to Williams. Mrs. Hardin and Mrs. Martin, two of the children of Jesse Russell, are defendants in this suit, and the other defendants, excepting L. G. Merrell, are heirs at law of the other two children of Jesse Russell. L. G. Merrell claims under Mrs. Hardin, now Mrs. Stone. It was shown that the records of Sabine county were destroyed by fire; and, if the evidence referred to was not admissible as proof of circumstances—declarations of interested parties against their interests—tending to show that Mrs. Hill had been appointed guardian by the probate court of Sabine county, and that in making the contract for the location of the certificate, and in making the partition of the land asserted by appellants, she acted under authority of said court, still, they were competent evidence to be considered by the jury on the issues just named, because they were in the nature of admissions made by some of the parties to the litigation, and by persons under whom other parties to the suit hold. Declarations or admissions in disparagement of title are admissible against the person making same and against his heirs. They are also admissible against his grantee, not shown to be an innocent purchaser for value, if made prior to the grantee's purchase. *Snow v. Starr*, 75 Tex. 411, 12 S. W. Rep. 673; *Hancock v. Lumber Co.*, 65 Tex. 225; 1 Greenl. Ev. § 189; 5 Amer. & Eng. Enc. Law, p. 367; *Pickering v. Reynolds*, 119 Mass. 111; *Hayden v. Stone*, 121 Mass. 413; *Anderson v. Kent*, 14 Kan. 207.

This court has not overlooked the fact that in this state title to real property cannot be conveyed or divested by oral declarations or admissions, except in cases where such declarations or admissions operate as an estoppel. But the admission of the testimony referred to does not convey or divest title. Appellants, having shown that the probate records of Sabine county had been destroyed, had a right to prove by parol evidence that said records contained the orders which the witness Stone said the children of Jesse Russell admitted to him they did contain; and, having the right to prove such facts by parol testimony, it was equally permissible to prove that, prior to the acquisition of title by appellees from the heirs of Jesse Rus-

sell, said heirs admitted such facts. This is so, because such appellees are privies, all, except Merrell, holding as heirs of the Jesse Russell children, and are not innocent purchasers, and the admissions were made against the interests of the persons making them; and, as against Mrs. Martin and Mrs. Hardin, it was of course permissible to prove their admissions. We do not hold that such testimony would be conclusive proof of the fact it tended to prove. We merely rule that it was competent evidence. It may have proved much or little, as the jury would have determined from a consideration of all the evidence bearing on the question. And for the purpose of proving the existence of the alleged probate orders, it was competent for the jury to consider, if such was the fact, the long acquiescence of the Russell children in the disposition made by their mother of the land involved, and their failure to assert any claim thereto. Such facts were circumstances admissible in evidence, to be weighed, with all the other testimony, by the jury. There was such testimony before the jury, but the court's charge may have prevented them from considering it on the issue above stated.

Appellees having introduced evidence tending to show that the heirs of Jesse Russell had laid no claim to the land in suit, the judgment of the district court of McLennan county in the case of *G. B. Stone and others v. J. K. Williams* was admissible as a circumstance in rebuttal tending to show that they had claimed the land.

In the other rulings made by the trial court on questions likely to arise again, we do not think error was committed.

Although the question does not appear to have been raised in the court below, it is contended by counsel for appellees that the contract between Mrs. Hill and J. K. Williams for the location of the Jesse Russell certificate was unlawful and void, and that the courts should not sustain his title for this reason; and that, whatever errors may have been committed by the trial court, the judgment should be affirmed. This contention is based upon the fact that Williams, at the time he entered into the contract by which he was to locate the certificate for half of the land, was an official surveyor. He did not locate the certificate in the county of which he was the surveyor, but sent it to a friend of his, who was a surveyor, and procured its location in another county. If Williams had contracted to locate the certificate within his county, or if, in fact, he had located it in said county, the doctrine announced in *Wills v. Abbey*, 27 Tex. 203, and other cases cited by appellants' counsel, to the effect that the courts will not aid an officer to enforce a contract whereby he is to receive greater compensation for official services than is allowed by law, might be applicable. But such was not the case. We do not think the contract in question was forbidden by

law, or contrary to public policy. The fact that Williams was an official surveyor for a given territory ought not to preclude him from making a contract and locating a land certificate in a county or district of which he was not the official surveyor, although his compensation under the contract was greater than the fees allowed by law to official surveyors. Holding, as we do, that the contract was not unlawful, it is unnecessary to decide what effect is to be given to the fact that it had been executed. The case of *Wills v. Abbey*, supra, has been approved and followed by this court in *Keith v. Fountain*, (Tex. Civ. App.) 22 S. W. Rep. 181. Those cases are distinguishable from the one at bar.

For the errors indicated, the judgment of the district court is reversed, and the cause remanded.

JOBE v. HOUSTON.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

TRIAL.—INSTRUCTIONS.—DRIVING CATTLE FROM RANGE.

1. Error cannot be predicated of a portion of a charge, for being misleading, if, when construed in connection with the entire charge, it states the law correctly.

2. In an action to recover for injuries sustained by plaintiff's cattle while being ejected by defendant from his pasture, the court refused to charge, at defendant's request, that if defendant had a fence around his pasture, though not a legal one, and there were gaps down at times, and defendant endeavored to keep up the fence, he had the exclusive right to the pasture, and the right to remove any cattle therefrom. *Held* not prejudicial error, where it charged that, to entitle plaintiff to recover, the cattle must have been lost or destroyed by the direct act of defendant in ejecting them from his premises; such charge being more favorable to defendant than the one refused.

Appeal from district court, Gonzales county; George McCormick, Judge.

Action by R. A. Houston against John Jobe. From a judgment for plaintiff, defendant appeals. Affirmed.

Harwood & Harwood and W. W. Glass, for appellant.

NEILL, J. On the 25th day of July, 1885, appellee sued appellant in the district court of Gonzales county for damages which he alleges were caused him by appellant's injuring, drowning, and beating, and causing the loss of, his cattle, by driving them from their accustomed range across the Guadalupe river. He prays for \$1,125 actual, and \$1,000 exemplary, damages. Appellant answered by a general denial, and special plea that the cattle were trespassing on his pasture, of which said river was, on one side, the boundary line, and that he drove them across the river to get them out of his pasture. The case was tried by a jury which gave a verdict against appellant for \$16, upon which judgment was rendered

against him, from which he appeals to this court.

From the evidence, our conclusions of fact are: First. That in January, 1885, appellee owned 75 head of cattle which at the time were accustomed to range in Gonzales county, on the southwest side of Guadalupe river. Second. That at the time appellant owned a pasture on same side of, and partly bounded by, said river; that it had an inferior fence around it, which was usually down at several places, and offered little or no obstruction to the entrance of cattle. Third. That appellee's cattle frequently entered and trespassed upon the pasture, and that at the time alleged in plaintiff's petition his cattle were in the pasture, and, for the purpose of getting and keeping them out, appellant and his servant drove 26 head of them across the river from their range. Fourth. That two head of appellee's cattle were killed or drowned by appellant, in driving them out of the pasture across the river, and that they were worth \$16.

Upon the trial, appellant's counsel offered to prove, by him and others, that he was doing all he could to keep up the fence around his pasture, and that some one was continually cutting and tearing the fence down, and putting cattle in it, and stealing them. He also offered to prove by other witnesses that they lived near defendant's pasture in 1884-85, and that they knew the bunch of cattle that plaintiff turned loose near defendant's pasture in the fall of 1884, and that the cattle were breachy, and broke into several farms and pastures in the neighborhood, besides defendant's, and that the fence did not turn them very much, and that there was but little grass on the range when plaintiff put his cattle there, and that the neighbors complained to Houston about his cattle, but he refused to do anything with them. Upon the court's refusing to admit the testimony proffered, the appellant excepted, and assigns the action of the court as error. Much of the testimony was impertinent, and none of it material, when viewed in the light of a special charge hereinafter set forth, given to the jury at the request of appellant's counsel.

The court, in its general charge, instructed the jury "that if they believed from the evidence that the defendant drove, or had driven, the cattle of plaintiff across the Guadalupe river, and that by so doing he caused plaintiff's loss and damage, that he would be entitled to recover of defendant the value of the cattle lost, if any, as also the expenses that plaintiff may have been compelled to pay for the recovery of his cattle so driven out of the range to the opposite side of the river." This part of the charge is assigned as error. If this paragraph stood alone, the assignment would be well taken, when not considered in connection with the entire charge. In the next paragraph the court instructed the jury that

if they believed that "Jobe owned the pasture, and had the same inclosed, whether with a lawful fence or not, and was using it to graze his cattle upon, he had the legal right to drive plaintiff's cattle out of the pasture, and would not be liable for any damages caused thereby, unless he so acted, in driving the cattle, as to occasion damage to the animals." The jury were further instructed "that if the cattle were found in the pasture, and it was inclosed,—whether the fence was statutory or not,—the cattle would be trespassers upon appellant's land, and that he was authorized to eject the cattle from it, and he would not be responsible in damages for the reasonable exercise of his right of ownership in ejecting them from his pasture; and if his premises abutted on the Guadalupe river, and it formed a part of the boundary of the pasture, the fact that the cattle were driven across the river would not make him responsible, unless the river was the direct cause of the destruction or material injury of the cattle themselves." When the part of the charge complained of is taken and construed in connection with the paragraphs quoted, it is not obnoxious to the objection raised by the assignment.

The appellant requested the court to instruct the jury that if they found from the evidence that the defendant had a fence around his pasture, although not a legal one, and that there were gaps down at times, and that defendant was endeavoring to keep up said fence, he had the exclusive right to said pasture, and the right to remove any cattle from it. The failure of the court to give this charge is also assigned as error. At appellant's request the court instructed the jury "that, in order to entitle plaintiff to recover, they must believe from the evidence that the cattle were lost or destroyed by the defendant in the act of ejecting them from the premises, by the direct act of defendant." This charge was more favorable to appellant than the one refused, and included everything that was favorable to him in it. Under it, it would make no difference whether there were gaps in the fence, or whether his premises were inclosed at all or not. His liability for damages is restricted to the loss or destruction of the animals caused by him in the act of ejecting them from his premises; and, by asking that charge, he, in effect, admits that he would be liable if the damages were caused by his direct act in ejecting the cattle. In view of this special charge, it was immaterial whether "he was doing all he could to keep up the fence around his pasture," or whether the plaintiff's cattle were "breachy" or not. The plaintiff could not recover "unless the cattle were lost or destroyed by defendant in the act of ejecting them." The appellant was entitled to the exclusive use of his land, and he had the right to drive cattle that were intruding off

of it, whether it was inclosed or not. *Davis v. Davis*, 70 Tex. 124, 7 S. W. Rep. 826. But it was his duty, in any event, not to injure or kill them, in doing so. He is only held responsible by the court, in its charge, for damages occasioned by him by a failure to discharge this duty, and this charge he asked himself. There is no error in the record that requires a reversal of this case. The judgment of the district court is affirmed.

FLY, J., having been of counsel for appellee, did not sit in this case.

BEXAR COUNTY v. HERFF et al.¹
(Court of Civil Appeals of Texas. Sept. 20, 1893.)

EMINENT DOMAIN—LAND TAKEN FOR PUBLIC ROAD—MEASURE OF DAMAGES.

On an issue as to the amount of damages due an owner for land appropriated for a public road, and injuries to his remaining land resulting therefrom, it appeared that about three acres had been appropriated. By reason of the laying out of the road, the owner was compelled to put up a half mile of fence on his remaining land. The land taken was shown to be worth about \$12 or \$15 per acre, and the necessary fencing could be done for about \$136. There was no depreciation in the value of the remaining land, which had in fact more than doubled in value since the laying out of the road. *Held*, that the measure of damages was the value of the land, taken together with the cost of the additional fence thus necessitated, and that an award of \$600 was excessive.

Appeal from district court, Bexar county; W. W. King, Judge.

Proceedings by the county of Bexar for the condemnation of land belonging to F. Herff and E. Dittmar for a public road. An appeal was taken by Herff and Dittmar to the district court from the award made by the commissioners' court, and from the award made by the district court the county appeals. *Reversed*.

Otto Staffel and L. N. Walthall, for appellant. George C. Altgelt, for appellees.

FLY, J. This case originated in the commissioners' court of Bexar county, on account of a second-class road being laid out across the land of appellees. The jury of view that laid out the road assessed the damages at \$300, but this was cut down by the court to \$225. Appellees appealed the case to the district court, and on hearing of the case before the judge, a jury being waived, judgment was rendered against the county for \$600. The appellant insists that the judgment is excessive and not supported by the facts. We give below the testimony as to the value of the land and the cost of building fence. F. Herff, Jr., a witness for the appellees, testifies: "I cannot say what the land was worth in the year 1887, [the year when it was condemned,] but it was then probably worth one-half of what it is now worth. The land is now worth

¹ Rehearing denied.

one hundred and ten dollars per acre. I mean the whole tract, not a strip of it. The land is not all alike. * * * If the road is opened, we are compelled to build another fence, or have one of our pastures open, and to repair another fence. The fence along a lane must be better than ordinary in order to be secure. Where the road is to be there is a fence on one side, but it is not very good. It will do as a division fence, but would not answer in a lane. The length of the road is about one-half mile. A good fence will cost two hundred and twenty-five dollars per mile. There is a large tank in the northern pasture. If the road is opened the south pasture is deprived of water in dry times. There is a well at the house in the south pasture, but it will not afford water sufficient for a large number of cattle and horses. The well has not been dry for years. In good seasons there is living water in the south pasture also, but it cannot be depended upon. It is a brook that runs at times, but not always. The whole pasture contains about eleven hundred and eight acres; the south pasture, say three hundred and eight acres." On cross-examination he testified: "I do not know what the land was worth in 1887. I have no idea of the value of land at that time, but I guess it ought to have been worth half as much as it is now. There is now an opening between the two pastures. I have not been out at the place for some time. The brook or stream in the south pasture has water now, I think, but I have seen it dry often. The well at the house in the small or south pasture was deepened five years ago, and has not failed since. When I placed the cost of a fence at two hundred and twenty-five dollars, I mean a substantial fence of cedar posts, three wires, and one board." On re-examination the witness testified: "Such a fence needs repair from time to time, but will last many years." William Locke, a witness for the appellees, testified: "I am the county surveyor of Bexar county, and was such surveyor when the road through the Herff and Dittmar pasture was laid out, and was with the jury of view at that time. The road covers about three acres of ground. The road is — varas long. There is a fence dividing the two pastures which was there when the road was laid out, and is there still. It forms the southern boundary line of the road, and forms the north side of an inclosure around a field and barnyard, which field and barnyard lie between the two pastures, and separate them from each other. The road runs through the south end of the north and larger pasture, having the field and barnyard fence on the south. It requires an additional fence on the north side of the road to keep out stock. The fence on the south side is partly wire and board, and partly a rock fence. The wire and board fence is a good substantial fence, and will turn cattle, but the rock fence

requires some repairing." On cross-examination he testified: "There is no open gap connecting the two pastures, nor was there any when the road was laid out. They are two separate pastures, divided by a field and barnyard, both inclosed by fence. The land over which the road runs was worth about twelve to fifteen dollars per acre at the time the road was laid out and established. I am familiar with the value of the land of those pastures, as well as of lands in the neighborhood at the time; that is, in the month of September, A. D. 1887." Louis Rittermann, a witness for the defendants, testified: "I lived near the Herff and Dittmar pasture for many years, and remember the time when the road was laid out, and was familiar with the value of lands in the neighborhood, as well as of the lands over which the road runs, in September, A. D. 1887, when the road was laid out. The land was not worth more than twelve to fifteen dollars per acre. I am familiar with the locality over which the road runs. There are two separate and distinct pastures, and between the pastures is a field and a barnyard, which field and barnyard adjoin each other and separate the two pastures. That's the way it was when the road was laid out, and is that way still. The only way to drive cattle from one pasture to the other is to drive through the barnyard first, and it becomes necessary to open two gates, which are kept closed. The barnyard is inclosed by a rock fence, and the field by a barbed-wire and six-inch board fence. The wire and board fence is in good condition, and will turn off cattle, and the rock fence is low at some places, and requires repairing. The only additional fencing which is necessary is a string of fence on the north side of the road. A good barbed-wire fence with one six-inch board, and posts eight feet apart, would cost one hundred and thirty-six dollars per one thousand yards. Such a fence would turn cattle. I know the value of fencing. I have done such work myself." Hoefling and Horn also testified in behalf of defendants, and corroborated the statements made by William Locke and Louis Rittermann.

We cannot gather from this statement of what the witnesses swore sufficient testimony upon which to base a judgment for \$600. Say that the land was worth \$110 per acre, and that \$225 worth of fencing was required; we would only have \$555 damages. But the witness Herff says he does not know what the value of the land was in 1887 when appropriated by the county, but guesses it ought to have been worth half as much as it was at time of trial. The other four witnesses, one of them the county surveyor, who was introduced by the appellees, places the value of the land in 1887 from \$12 to \$15 per acre, and it was proved that about three acres of land was appropriated. It is shown that one-half of a mile of fencing was required by the laying out of the road, and it

was shown by the witnesses that it would cost \$136 to build 1,000 yards of fence. There is no attempt to prove up any damages except the loss of the three acres of land and the amount that had to be paid for additional fencing. There is no depreciation of the other land alleged or proved, and, on the other hand, the proof showed that the land had doubled in value in three years. There being no attempt to show depreciation in the value of the remaining land, the true measure of damages in this case would be the value of the land appropriated by the county at time of the appropriation, and the amount required to build the additional fence necessitated by the laying out of the road, with 8 per cent. interest per annum from time of appropriation of the land. Taking the highest value placed by all the witnesses who speak positively as to the matter on the land, to wit, \$45, and placing the fence required to be built and repaired at 1,000 yards, and the cost at \$136, and we are of the opinion that this is the highest amount shown by the evidence. It is the judgment of this court, therefore, that the judgment of the district court be reversed, and that the appellees recover of appellant the sum of \$181, with 8 per cent. interest from September 13, 1887, and that the costs of this court and the district court be adjudged against the appellees, the cost of the commissioners' court to be paid by appellant.

DAVIS et al. v. ESTES.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

APPEAL—AFFIRMANCE—BOND—TRANSCRIPT.

1. Under Gen. Laws Called Sess. 22d Leg. p. 44, art. 1404, prescribing as the condition of an appeal bond "that appellant shall prosecute his appeal with effect, and, in case the judgment of the supreme court or the court of civil appeals shall be against him, he shall perform its judgment," a bond conditioned that appellant "shall prosecute this appeal with effect, and, in case the judgment of the said court of civil appeals shall be against the defendants herein, they shall perform the judgment," etc., of said court, and pay damages awarded, is not so defective as to deprive the court of civil appeals of jurisdiction to affirm the judgment below on motion of the appellee.

2. A motion to file the transcript out of time must be supported by facts in excuse of the default, either verified or apparent of record.

Appeal from district court, Bowie county; John L. Shepard, Judge.

Action by B. T. Estes, administrator, against A. M. Davis and others, for possession of land. Judgment for plaintiff. Defendants appeal. Affirmed.

Talbot & Hart, for appellants. Henry & Henry, for appellee.

PINLEY, J. October 19, 1892, appellee obtained a judgment in the district court of Bowie county against appellants for the

recovery of a lot of land situated in the town of Texarkana, and costs of suit. On the same day appellants gave notice of appeal, and on November 9th they had approved and filed a supersedeas appeal bond. No transcript was filed in the appellate court within the time prescribed by law, and on June 14, 1893, the appellee filed a certificate and motion for affirmance in the civil court of appeals of the second district, to which the cause was then returnable, to which motion the appellants filed opposition in said court, and the same was submitted. Subsequently the submission was set aside, the motion continued, and the cause transferred to this court. The certificate and motion for affirmance are in legal form, and present a proper case for the summary disposition asked, and the court should grant the motion, unless there be sufficient legal reasons shown in appellants' opposition to defeat the right to an affirmance on certificate. The grounds relied on to defeat the affirmance are that the appeal bond filed is defective and insufficient to give this court jurisdiction, and that on June 10, 1893, two of the five appellants, viz. W. C. Hardin and the Muldoon Monument Company, sued out and perfected a writ of error. The appeal bond is defective in its conditions. It is as follows: "Conditioned that the defendants herein shall prosecute this appeal with effect, and, in case the judgment of the said court of civil appeals shall be against the defendants herein, they shall perform the judgment, sentence, or decree of the said court of civil appeals, and pay all such damages as said court may award against the defendants herein," etc. The law requires that the bond shall be conditioned "that appellant shall prosecute his appeal with effect, and, in case the judgment of the supreme court or the court of civil appeals shall be against him, he shall perform its judgment, sentence, or decree," etc. Gen. Laws Called Sess. 22d Leg. p. 44, art. 1404. Does the defect in the appeal bond prevent this court from acquiring jurisdiction of the cause? If so, we are without power to affirm the judgment. Our supreme court has repeatedly held that an appeal bond must substantially comply with the statutory conditions before that court could acquire jurisdiction. *Doss v. Griswold*, 1 Tex. 99; *Young v. Russell*, 60 Tex. 684. Errors in matters of description are held not jurisdictional; and are waived if not objected to in proper time. *Zapp v. Michaels*, 56 Tex. 395. It also holds that defects in amount and number of sureties may be cured by the filing of a new bond. *Shelton v. Wade*, 4 Tex. 148; *Hollis v. Border*, 10 Tex. 277; *Scranton v. Bell*, 35 Tex. 413; *Long v. Smith*, 39 Tex. 160; *Kling v. Hopkins*, 42 Tex. 48. In the *Tynberg Case*, 76 Tex. 418, 18 S. W. Rep. 315, without overruling any previous decisions of the court, but with

the evident purpose of interpreting and limiting previous judicial expressions on the subject, Chief Justice Stayton, speaking for the court, says: "The main purpose of a bond is to give security to the adverse party, and, if the bond filed be not such, in all respects, as the law requires for this purpose, this court will not consider the case over the objection of the party entitled to such protection, if objection be made in the proper time and manner. There are expressions to be found in opinions from which it might be inferred that the giving of a bond strictly in accordance with the statute was essential to the jurisdiction of this court; but it must be understood that the constitution confers on this court what jurisdiction it has as to subject-matter, and that parties may waive irregularities as to matters intended solely for their benefit." See, also, *Ricker v. Collins*, 81 Tex. 662, 17 S. W. Rep. 378. It will thus be seen that our supreme court has taken jurisdiction in cases where the defects in appeal bonds could be and were waived by the parties for whose benefit the bonds were given, or where such defects could be and were cured by filing new bonds. In entertaining jurisdiction under such conditions, the court has done so, not by express statutory direction, but through authority of statutory construction. In creating this court the legislature enacted an additional provision of law governing the subject of defective appeal bonds, as follows: "When there is a defect of substance or form in any appeal or writ of error bond, on motion to dismiss the same for such defect, the court may allow the same to be amended by filing in said court of civil appeals a new bond, on such terms as the court may prescribe." Gen. Laws Called Sess. 22d Leg. p. 82, § 39. Now this court, by express provision of statute, is required to treat defects in appeal bonds, in substance or form, in the same way that the supreme court, under right of construction, treated defects in amount and number of sureties, viz. allow them to be cured by the filing of new bonds. Upon the same principle that the supreme court took jurisdiction in such cases, this court will take jurisdiction of appeals on the filing of bonds, the defects in which it must allow cured under express statutory provisions. In the light of the decisions of our supreme court and the recent act of the legislature before quoted, we conclude that this court acquired jurisdiction of this cause upon the approval and filing of the appeal bond in the court below.

The defect in the appeal bond not being a jurisdictional matter, the appellants will not be permitted to successfully urge it, their own wrong, in opposition of the right of appellee, to an affirmance. The fact that a writ of error has been sued out and perfected at a date too late for the cause to be submitted during the term at which

the affirmance was asked furnishes no legal ground for us to refuse the motion. *Perez v. Garza*, 52 Tex. 571.

Appellants also seek to excuse themselves for not filing the transcript on appeal in the time required by law, and ask, in case the court takes jurisdiction, that they now be permitted to file the transcript. The facts touching this point are not verified in any way, and are not apparent of record, and we cannot therefore consider them.

Motion to affirm the judgment against appellants and sureties granted.

WELLS, FARGO & CO.'S EXPRESS v. FULLER.¹

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

EXPRESS COMPANIES — CONTRACT OF SHIPMENT — FIXING ROUTE — PAROL EVIDENCE — NEGLIGENCE — DAMAGES.

1. Damages for mental suffering of a mother, caused by breach of contract of an express company to ship the corpse of her child, cannot be recovered, the contract having been made by another child of hers in the name of his father, and she not having been named in the contract, and even her existence not having been disclosed to the company.

2. A bill of lading given by an express company, undertaking to forward to point nearest destination reached by the company, (which was the point of destination,) subject to condition that the company should not be liable except as forwarders only within their own line of communication, does not fix the route of shipment over the company's line, but leaves the company free to choose the route.

3. Such a receipt, though signed by the express company, only constitutes a contract, which cannot be varied by parol.

4. Though a contract of a carrier to transport goods, which does not expressly designate the route, gives the carrier the right to fix it, he must select a usual and reasonably safe and direct route.

5. Where a carrier selects a roundabout route it is a question for the jury whether the carrier was negligent in so doing.

Appeal from district court, Lamar county; H. B. Birmingham, Special Judge.

Action by B. F. Fuller against the Wells, Fargo & Co.'s Express for breach of contract of shipment. Judgment for plaintiff. Defendant appeals. Reversed.

Alexander, Clark & Hall, for appellant. Dudley & Moore, for appellee.

FINLEY, J. This case was affirmed by the court of civil appeals of the second district, a rehearing granted, and then transferred to this court. We are not advised of the grounds upon which the court granted the motion for rehearing. There are three questions raised by assignments of error which we deem of controlling importance in the case, and necessary for decision: (1) Can the appellee recover for the mental suffering of his wife? (2) Was the evidence admissible which tended to prove that verbal direction was given by the shipper to the carrier fixing the route of shipment, and

¹ Rehearing denied.

such route agreed to by the carrier? (3) What was the privilege and responsibility of the carrier in regard to the route of shipment? These questions, correctly answered, we think, will solve all the legal difficulties in the case, and render the consideration of other points raised unnecessary. We will consider them in the order stated.

1. The contract with the express company for the shipment of the remains of Dixey Fuller was made by T. A. Fuller, in the name of his father, the appellee, to whom the remains were consigned at Paris, Tex. Mrs. Fuller was in no way named in the contract. Her relation to the deceased, even her existence, was in no way disclosed to the carrier. Therefore her mental anguish and suffering could not have been reasonably in the contemplation of the express company as a probable consequence of a breach of the contract. In suits for damages based upon breach of contract, recovery may be had for such injuries only as may reasonably have been contemplated as a probable result of such breach by the party sought to be charged. That the mental suffering of the wife is not a proper element of damages in cases of this character, when she is not a known party to the contract, and is not disclosed as a beneficiary of it, we think is fully settled by our supreme court. *Telegraph Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. Rep. 70; *Telegraph Co. v. Carter*, (Tex. Sup.) 22 S. W. Rep. 961. It was error, therefore, to admit any testimony as to the mental suffering of Mrs. Fuller.

2. Upon the payment of the express charges by T. A. Fuller, the agent of the company executed and delivered a receipt or bill of lading to him, the material part of which is as follows: "Received of B. F. Fuller, corpse, valued at —, addressed to B. F. Fuller, Paris, Texas, which we undertake to forward to the point nearest destination reached by this company, on these conditions, namely: Wells, Fargo & Company shall not be held liable for loss or damages, except as forwarders only within their own line of communication. * * *" The undertaking of the company was to forward "to the point nearest destination reached by the company." The undisputed evidence is that the company operated its line to Paris, Tex.; therefore the obligation was identically the same as it would have been had the contract read, "We undertake to forward to the point of destination," viz. Paris, Tex. There is no language in the contract which fixes the route of shipment. The clause limiting the liability of the company to that of "forwarders only within their own line of communication" was inserted in the contract for an entirely different purpose. It merely limits the liability of the company to injuries occurring on the line operated by it, and does not confine the shipment to its own line. It is a privilege and right of the shipper to route his shipments. If he fails

to exercise this right, then the law fixes the right in the carrier, with certain imposed restrictions or limitations. In a contract of shipment which falls in express terms to provide the route, the right of the shipper to choose the route is, by force of law, impressed upon, and becomes a part of, the contract as effectually as if expressed therein. The receipt given by the express company purports to state the terms upon which the shipment was made, and, though signed only by the carrier, when accepted by the shipper, he became a party to it, bound by its terms. *Hutch. Carr.* §§ 120, 122. It contains all the necessary elements of a shipping contract, and under well-established principles it must be treated as the final agreement of the parties, into which all parol negotiations and understandings were merged, and by its terms the duties and liabilities of the parties thereto must be determined. "Resort cannot be had to prior or contemporaneous parol negotiations or agreements to vary its terms." And this rule applies not only to its express provisions, but to the legal import of the contract,—the further provisions which the law makes for the parties, such as the right of the carrier to route the shipment when the contract, in its express terms, is silent upon that point. *Hutch. Carr.* §§ 126b, 127; *Port. Bills Lading*, §§ 64, 65, and cases cited; *Arnold v. Jones*, 26 Tex. 335; *The Delaware*, 14 Wall. 579; *White v. Ashton*, 51 N. Y. 283; *Creery v. Holly*, 14 Wend. 26. In the *Delaware Case*, supra, it was held that a clean bill of lading—that is to say, a bill of lading which is silent as to the place of stowage—embraces an implied obligation that the goods are to be stowed under deck, the custom or usage being impressed upon the contract, and becoming a part thereof. This being so, parol evidence of an agreement that the goods were to be placed on deck was inadmissible, because its effect was to vary or contradict the terms of the written contract. In the case of *White v. Ashton*, supra, the defendants contracted to transport a quantity of barley for plaintiff from Albany to New York, to be delivered in good order, "the dangers of seas alone excepted." The bill of lading was silent as to the route. There were two customary or usual routes,—one, the inside or canal route; the other, the outside or ocean route. The defendants took the latter, and the barley was injured by the peril of the seas. In an action to recover damages, plaintiff offered to prove, in substance, that before signing the bill of lading, with the design of effecting insurance, and knowing that it was necessary for the parties to designate a route, the defendants agreed to transport the barley by the inside route, and, relying on said agreement, he caused the barley to be insured by that route, and in consequence of the taking of the other route he lost the insurance, and suffered the damages claimed. It was held that by the

contract defendants had the choice of routes, and that it was not competent to vary or contradict it by parol. It was error for the court to admit the testimony of T. A. Fuller, to the effect that he directed the express agent to ship the corpse from El Paso, by the Texas & Pacific Railroad, to Ft. Worth, and from that point direct to Paris, and that the agent agreed to do so.

3. In contracts of shipment which are silent in their express terms as to the matter of route, as before stated, the carrier has the right to choose the route; but this must be understood with the qualification that this selection must be made with due regard to the rights of the other parties concerned. The carrier must, at its peril, select a usual and reasonably safe and direct route. It cannot arbitrarily select a known unsafe route, except at the risk of incurring liability for negligence. *Express Co. v. Kountze*, 8 Wall. 342; *Transportation Co. v. Kahn*, 76 Ill. 520. Neither can it arbitrarily choose a long, inexpedient route, without assuming the risk of delay incident to the choice. *Snow v. Railway Co.*, 109 Ind. 425, 9 N. E. Rep. 702; *Hutch. Carr.* §§ 312, 313. The rule seems to be that the carrier, in the exercise of this right, must use such care in relation to the shipment as an ordinarily prudent person would use under similar circumstances. The character of the goods shipped, whether perishable or not, the apparent object to be subserved by the shipment, and all the surrounding circumstances throwing light upon the shipment, must be considered by the carrier in the exercise of the right of routing; and if it fails to use that degree of care which an ordinarily prudent person would use under like conditions it is held responsible for damages proximately resulting from its negligence in the selection of the route. Express companies transport their freight usually upon railroads and other public carriers which they do not own or control; and in some instances particular express companies have been cut off from the most direct and expeditious routes by railroads refusing them accommodations or discriminating against them in charges. But since the enactment of what is known as the "equal facility statute" by the twentieth legislature, railroads in Texas are compelled under heavy penalty to afford equal facilities to all express companies without discrimination in charges, and express companies have the privilege of transporting their express matter over any and all railroad routes in the state. *Sayles' Civil St. art. 4255a*. With these facilities furnished them for transportation under laws of the state, if an express company, in exercising its right of routing when the shipper has failed to do so, chooses a long or inexpedient railroad route, when there is a direct and speedy line which it may use, and when the circumstances surrounding the shipment indicate that delay will be damaging, it should be held liable

for any damage proximately resulting from the additional time consumed in the journey. The action of the express company in taking the corpse around by the southern route is simply a question of negligence, and it should have been submitted to the jury as such. We think the charge of the court in this case failed to present the case in this light to the jury, and is subject to the objection urged against the fifth paragraph of the charge. For the errors pointed out in this opinion the cause is reversed and remanded.

HANEY v. FRANCO-TEXAN LAND CO. (Court of Civil Appeals of Texas. Sept. 20, 1893.)

REVIEW ON APPEAL—ASSIGNMENT OF ERRORS.

An assignment of error which is not copied in the briefs cannot be considered on appeal.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Garnishment proceedings by J. N. Haney against the Franco-Texan Land Company on a judgment against W. G. Martin and others. Judgment for defendant. Plaintiff appeals. Affirmed.

Chas. F. Stiltz and Jasper N. Haney, for appellant.

Conclusions of Fact and Law.

HEAD, J. This is a garnishment suit by appellant, Jasper N. Haney, against appellee, the Franco-Texan Land Company, as garnishee to W. G. Martin et al. On the 13th day of May, 1887, appellant, Haney, in the district court of Parker county, recovered judgment against W. G. Martin et al. for \$6,171.66 and costs. On the 17th October, 1888, said Martin, in the district court of Taylor county, recovered a judgment against the Franco-Texan Land Company, garnishee herein, for one-ninth of \$10,000, or \$1,111.11. On the 20th October, 1888, appellant, Haney, (based upon his judgment of Martin et al.,) sued out a writ of garnishment against the Franco-Texan Land Company, and had it properly served on the company. The company appealed the case, wherein Martin recovered against it in Taylor county, to the supreme court, which was affirmed June 9, 1891. On May 9, 1889, garnishee answered, setting up the facts of the judgment against it in Martin's favor, and stating therein the appeal to the supreme court. Thereupon, the garnishment case was, by consent of both parties, regularly continued to await the result of the appeal in the supreme court, which was affirmed 9th June, 1891. On the 27th of November, 1891, this case was tried before the court without a jury upon the answer of garnishee, and its contest by plaintiff, and judgment rendered discharging the garnishee, upon the ground that the judgment in Martin's favor was not such a debt as

could be reached by garnishment. Appellant has assigned only one error, which assignment is not copied in his brief filed in the supreme court, and transferred to us, and cannot, therefore, be considered. *Blankenship v. Kely*, (Tex. Civ. App.) 23 S. W. Rep. 27; *Chappell v. Railway Co.*, 75 Tex. 82, 12 S. W. Rep. 977; Rule 29, Ct. Civ. App., 84 Tex. 701, 20 S. W. Rep. viii. As we find no error apparent of record, which we would be authorized to consider in the absence of an assignment, the judgment of the court below must be in all things affirmed.

STEPHENS, J., disqualified and not sitting.

ATKESON v. BILGER.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

STATE SCHOOL LANDS—BONA FIDE SETTLER—FORFEITURE.

1. Under Act April 1, 1887, § 9, requiring the applicant for the purchase of state school land to be an actual settler, in good faith, an applicant is not entitled to his selection, where he only built a small house thereon, which remained unoccupied, and once plowed a fire guard around it, but lived on other land, where he was employed.

2. Act April 1, 1887, § 11, providing that "if any purchaser [of state school land] shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, and such land shall again be for sale as if no such sale and forfeiture had occurred," does not require the state to obtain, by action against the purchaser, a decree of forfeiture, before the land may be sold to a subsequent purchaser.

Error from district court, Carson county; B. M. Baker, Judge.

Action in trespass to try title by Frank Bilger against J. B. Atkeson. Plaintiff had judgment, and defendant brings error. Reversed.

The other facts fully appear in the following statement by TARTLTON, C. J.:

Frank Bilger, on April 24, 1891, in this action of trespass to try title, brought by him September 26, 1890, recovered from J. B. Atkeson judgment for "Sec. No. 24, in block B4," of state school land in Carson county. The claim of the plaintiff is founded upon a purchase from one W. D. Rippey, who, it is alleged, acquired a right to the land by a compliance with the provisions of the act of April 1, 1887, having reference to the sale of land belonging to the public free schools. The claim of the defendant and plaintiff in error, Atkeson, is founded upon the contention that neither the plaintiff, Bilger, nor his vendor, Rippey, ever, "in good faith, settled" upon the land, as prescribed by the act invoked by them; that if, in fact, such settlement was made by the plaintiff, he wholly abandoned the land; and that on February 17, 1890, while it was vacant and unoccupied public domain, he (the defend-

ant, Atkeson) settled upon it in good faith, and in all things complied with the requirements of the act referred to. The learned trial judge rests his judgment upon the following conclusions of law and fact found by him: "(1) When, under the provisions of the act of April 1, 1887, land belonging to the public free schools has been awarded by the commissioner of the general land office to an actual settler, said settler having complied with the law to secure said award, the said commissioner of the general land office has no authority to declare the purchase forfeited on proof of the purchaser's non-occupancy, filed in his office, so long as the purchaser continues to pay the interest as required by law. (2) No such forfeiture can be declared, except by a court of competent jurisdiction. (3) When such land has been so awarded, a forfeiture of the purchase can only be declared by a court of competent jurisdiction at the suit of the state of Texas; that is, on the ground that the purchaser has abandoned the land, or failed to continue his occupancy of it. (4) When such land so awarded has been applied for by another person, subsequently settling thereon, and the award has been canceled by the commissioner of the general land office, and the land awarded to the second applicant by said commissioner, on proof filed of the first settler's failure to continue occupancy, the superior right remains with him who obtained the first award, and in an action of trespass to try title he may recover. (5) I find that W. D. Rippey became an actual settler on the land in controversy, the same being public free school land, on the 10th day of February, 1888, and that he, on said day, applied for the purchase of the same to the commissioner of the general land office, and that said commissioner awarded the same to him on the 14th day of February, following. (6) Said Rippey complied with all the requirements of law as to filing application, obligation to the state, payment of first payment of purchase money, and continued payment of annual interest as it has become due; and the provisions of said law of April 1, 1887, in the said award to Rippey, were complied with. (7) Said Rippey occupied said land about 10 days, and he sold it to plaintiff, Bilger, by deed dated April 3, 1888, which said deed was filed in the general land office December 19, 1889. (8) Plaintiff, Bilger, filed in said land office his application to purchase the land in controversy, and the obligation to the state prescribed by law, on the 30th October, 1890. (9) On purchasing said land from Rippey, Bilger erected thereon a small house, and at times kept bedding and cooking utensils, and broke, and caused to be broken, about 12 acres of sod land, and subsequently plowed a fire guard around the land. But nearly his entire time was spent working away from, and living off, the land, and the bedding and cooking vessels remained in the

house but a short while, and the house was soon abandoned, and the door nailed up; and he has not occupied the land at all since a few months after his purchase from Rippey, and has not attempted to do so, except on one occasion, after Atkeson took possession, he went on it, prepared to plant wheat, which he did not do. (10) The defendant, J. B. Atkeson, made his application to the commissioner of the general land office to purchase the land in controversy on the 20th day of November, 1889, and he was on that day, and has remained ever since, an actual settler thereon, residing continuously upon it during the whole period. His application complied in all things with the law, and was received in the land office November 25, 1889. (11) Said land was awarded to Atkeson by the commissioner of the land office, on said application, on February 17, 1890, and he has kept up all the interest payments required by law, and with said application he filed the obligation to the state prescribed by the statute. (12) Said Atkeson has built a house on the land, and has made various other improvements thereon."

J. M. Thomasson and F. M. Brantley, for plaintiff in error.

TARLTON, C. J., (after stating the facts.) Under our interpretation of the statute invoked by the defendant in error, Bilger, only such persons come within its provisions as are settlers in good faith on the land about which it was enacted. *Metzler v. Johnson*, 1 Tex. Civ. App. 137, 20 S. W. Rep. 1116. It becomes, therefore, necessary to inquire whether, in this instance, W. D. Rippey was such a settler. To affect him with this character, the evidence relied upon (save such as may consist in his application to the commissioner of the land office, and the recitals in the accompanying affidavit of settlement, made in accordance with section 9 of the act) is to the effect that on February 10, 1888, he filed on the land; that on that day he and his wife were living in a tent on the land; that he took his meals sometimes at the section house, and sometimes at the tent, and stayed at the section house in bad weather; that he stayed on this section about 10 days, and sold it to Frank Bilger, to whom he made a deed on April 3, 1888; that he did not know that he ever stayed all night at the tent. We do not think that these facts show that "permanent inhabitancy" necessary to constitute actual settlement in good faith. *Burleson v. Durham*, 46 Tex. 152; *Baker v. Millman*, 77 Tex. 46, 13 S. W. Rep. 618.

If, however, the foregoing conclusions be erroneous, we think it quite beyond question that the plaintiff, Bilger, cannot be regarded in the light of a settler in good faith. He himself, who should best know the character of his occupancy, abstained from testifying.

He relied quite exclusively upon the testimony of his vendor, Rippey, to make out his case. The latter's statement on this subject is as follows: "I know that Frank Bilger lived on this section. He went on the section, and stayed about a month. I know that he carried his goods down there, and kept them there awhile; that he worked on the section a good deal; some in every month. He worked for me the most of the time, and stayed at my house; was my overseer. He did some plowing and other work on the land, and put up a house 14 by 16 feet. The plaintiff had a cooking stove and some bedding in the house. I was not in this country more than half of that month that Bilger was on this section. I saw him there only twice that month. I stated that Bilger lived on the section about a year and a half. I do not know that I saw him more than five times during the year and a half. He was at my house the most of the time. He kept his bedding and camp outfit in his house on the section for awhile, but some one broke into his house, and stole some of his goods, and then he brought them away. I don't know who broke into the house,—whether it was Bilger or not. I do not know that any of his goods were stolen. I know that he carried away from my house three pairs of blankets, and only brought back one pair. I do not know what became of the other two. After he brought his goods away from the house, he would go down to his section about once a month, and would take his camp outfit with him. I do not know whether he went to the section, or where he went. I know that he was not at my house. Sometimes he went once a month, and sometimes he did not go so often. If he was busy at my place, he did not go so often." Witnesses for the defendant, who had lived in the immediate neighborhood of the section since about April, 1889, and who were familiar with the facts, testified that no one lived on it until its occupancy by the defendant; that the plaintiff, Bilger, was never seen on it but twice,—once in October, 1889, when he plowed a fire guard around it, and once when he came to plant wheat, in August, 1890, long after its occupancy by the defendant. The small house upon the land during all this time was unoccupied. It was without a window, or a chimney, or a flue, or any place to let out smoke, and its contents consisted of a sack and a piece of timber. The foregoing testimony of the witness, Rippey,—vague and self-conflicting, as it appears to us,—fails to show that the plaintiff was a bona fide settler on the section in controversy. It tends, on the contrary, to show that the plaintiff was living elsewhere, in the house of Rippey, employed as his overseer. *Baker v. Millman*, 77 Tex. 46, 13 S. W. Rep. 618. The foregoing testimony of the defendant's witnesses, on the other hand, induces the conclusion that, if the land was ever occupied by the plaintiff, it had been abandoned by him. The small

house mentioned by these witnesses was not suggestive of occupancy by "civilized man." Meanwhile, after this abandonment, the evidence further shows that on November 18, 1889, the defendant, Atkeson, took possession of the land as an actual settler in good faith; that after such occupancy he improved the property as a home, building a residence upon it, planting an orchard, constructing a fence of three miles, and paying all dues as prescribed by the act of 1887.

We do not concur with the learned trial judge that, after such abandonment by Bilger, he should yet be held (if a settler in good faith in the first instance) entitled to the land against a subsequent purchaser, such as the defendant, until the state, in an action brought by it, shall have obtained against him a decree of forfeiture. The view entertained by the trial court does not, we think, comport with the language of the act of 1887, § 11, wherein it is provided that "if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, and such land shall be again for sale, as if no such sale and forfeiture had occurred." Nor does it comport with the intent of the legislature in adopting the enactment, the evident purpose of which was, not only to secure the sale of the public free school lands, but the settlement of the unoccupied domain. Such settlement would be greatly retarded if, in every instance of failure to reside upon and improve by a purchaser, this fact would have to be judicially ascertained by the state before the land would be open to settlement to a second purchaser, and the fact of failure and abandonment could be fully and fairly determined. See *Metzler v. Johnson*, supra.

We conclude, for these reasons,—an expression of which is called for by the several assignments of error,—that the defendant should have prevailed in the trial court; and as he prays for affirmative relief, recognizing his claim as against the plaintiff, we here reverse and render the judgment,—that the plaintiff's claim be held for naught, and that the defendant, Atkeson, recover of him the land in suit.

FUNCK et al. v. HEINTZE et al.

(Court of Civil Appeals of Texas. Sept. 28, 1893.)

PARTNERSHIP—POWER OF PARTNER AFTER DISSOLUTION—APPEAL.

1. After the dissolution of a partnership, a note executed by one member in the firm name, even in the payment of a debt due from the firm, is not binding on the other members of the firm, unless they have authorized the execution, or unless the payee of the note received the same in ignorance of the dissolution.

2. In an action against a firm on a note signed in the firm name by one of the partners after a dissolution, and given for a debt owing by the firm, a judgment in favor of the part-

ners not signing will not be disturbed on appeal, where there is no statement of facts in the record, and no finding by the court as to whether the signing partner had authority from his copartners to execute the note, or whether the payee had knowledge of the dissolution.

Appeal from Fayette county court; W. S. Robson, Judge.

Action by Funck & Hertzler against August Heintze, H. Speckles, and R. Aschen, Sr., on a promissory note. From a judgment in plaintiffs' favor as against Heintze and Aschen, but against them as to defendant Speckles, plaintiffs appeal. Affirmed.

Ehlinger & Williams, for appellants. Brown, Lane & Jackson, for appellees.

PLEASANTS, J. Appellants sued August Heintze, H. Speckles, and R. Aschen, Sr., for the recovery of \$392.05, alleged to be due them upon a promissory note, bearing date March 2, 1891, and due and payable 1st September following, executed by the mercantile firm of August Heintze & Co., and which firm, the petition alleged, was composed of the said Heintze, Speckles, and Aschen. Speckles and Aschen, by answer, made under oath, denied the partnership. The cause was tried by the judge of the court, without a jury, and judgment was rendered for the plaintiffs against defendants Heintze and Aschen, Sr., and for Speckles against plaintiffs for his costs. The appellants insist that the judgment should have been rendered against all of the defendants. The court found that, prior to the execution of the note sued on, the firm of August Heintze & Co. was composed of August Heintze, H. Speckles, and R. Aschen, Jr.; but that the copartnership was dissolved on the 23d day of May, 1890, by sale of the interest of R. Aschen, Jr., to R. Aschen, Sr., and that subsequent to this dissolution the defendants August Heintze and R. Aschen, Sr., formed a copartnership under the same firm name of August Heintze & Co., which copartnership continued until after the execution of the note. The consideration of the note was goods sold by plaintiffs to the firm of Heintze & Co., as it existed prior to the dissolution on the 23d of May, 1890; but there is no evidence showing authority to Heintze from Speckles to execute the note sued on, nor does the evidence show whether or not the appellants had notice of the dissolution of the copartnership of Heintze, Speckles, and R. Aschen, Jr., when they received the note from August Heintze. There is no finding by the court on either of these points, and there is no statement of facts. Under these circumstances, we cannot say that the court erred in refusing to give judgment against Speckles. Every presumption indulged must be for the correctness of the judgment. After the dissolution of a copartnership, a note executed by one member in the name of the firm, even in payment of a debt due from the firm, is not binding upon

the other members of the firm, unless they had authorized the partner executing the note to do so, or unless the payee of the note received the same in ignorance of the dissolution of the firm. We discover no error in the judgment, and it is affirmed.

NUNN v. McCAUSLAND.

(Court of Civil Appeals of Texas. Sept. 28, 1893.)

APPEAL—REVIEW—EVIDENCE.

A finding by the court that defendant is liable as a partner on a note executed by a firm will be reversed on appeal, where there is no evidence in the statement of facts that he was a member of the firm.

Appeal from Washington county court; Lafayette Kirk, Judge.

Action by Alex McCausland against James H. Nunn and others on a note executed by J. W. Nunn & Bros. From a judgment in plaintiff's favor, defendant James H. Nunn alone appeals. Reversed.

Searcy & Garrett, for appellant.

GARRETT, C. J. This suit was brought by McCausland, the appellee, against J. W. Nunn & Bros., which was alleged to be a partnership composed of J. W. Nunn, Thos. N. Nunn, George P. Nunn, and the appellant, James H. Nunn, to recover on a promissory note, executed by J. W. Nunn & Bros. The appellant answered under oath, denying the partnership. The case was tried by the court, without a jury, and judgment was rendered against all the defendants, including the appellant, for the amount of the note sued on. James H. Nunn alone has appealed from the judgment.

We have examined the statement of facts carefully, and there is not a particle of evidence to show that the appellant was a member of the firm of J. W. Nunn & Bros. The petition seeks to charge the appellant as a partner, but the finding of the judge who tried the case is that J. W. Nunn was the authorized agent of Nunn Bros. We fail to find evidence to support even this conclusion. The judgment of the court below, in so far as it affects the appellant, James H. Nunn, will be reversed, and here rendered in his favor. As to the other defendants it will not be disturbed.

WYNNE v. ADMIRE et al.

(Court of Civil Appeals of Texas. Sept. 28, 1893.)

PLEADING AND PROOF—VARIANCE—HARMLESS ERROR—CHATTEL MORTGAGES—PRIORITIES.

1. In an action to foreclose a chattel mortgage made subject to a prior one in favor of persons not parties, the failure to allege this fact does not constitute a variance, and the exclusion of the mortgage as evidence on this ground is error.

2. To render the exclusion of the mortgage harmless error, defendants must affirmatively

show that under no state of facts which plaintiff could have established under his pleading could he have succeeded in maintaining a right against them under the mortgage.

3. A verbal agreement between a mortgagor and mortgagee of chattels, that property acquired by the mortgagor after the execution of the mortgage, and not covered by it, should also be subject to the mortgage, does not affect a subsequent mortgagee of such after-acquired property for value without notice; and, though the subsequent mortgagee had notice, or advanced no consideration sufficient to protect him, an assignee of the note, purchasing from such mortgagee before maturity for value and without notice, would take the mortgage unaffected by the verbal agreement.

4. A recital in a bill of sale that the property is subject to a chattel mortgage of a particular date, is not notice of a verbal agreement between the seller and the mortgagee, entered into before the sale, extending the mortgage to property not described therein, so as to bind a subsequent mortgagee of such property under a mortgage executed by the purchaser.

Appeal from Brazos county court; W. H. Harman, Judge.

Action by G. W. Wynne against J. H. Admire, A. J. Buchanan, and A. W. Buchanan on a promissory note, and to foreclose a chattel mortgage. From a judgment in favor of defendants Buchanan, plaintiff appeals. Reversed.

Tallaferro & Butler, for appellant. H. H. Boone, for appellees.

WILLIAMS, J. Appellant brought this suit to recover of J. H. Admire the amount due on a note of the latter, given to W. D. Cox, December 12, 1889, for \$375, and to foreclose a mortgage of date August 12, 1890, also given by Admire to Cox, to secure the note, upon an undivided one-half interest in a printing press and job press; appellant alleging that he had bought the note and mortgage before the maturity of the former. A. J. Buchanan and A. W. Buchanan were made defendants, as claimants of the mortgaged property, and a decree of foreclosure was asked against them. Defendant Admire defaulted, and judgment was rendered against him for the amount of the note. The other defendants defended, claiming that they had the title to the mortgaged property superior to the lien asserted by plaintiff. Upon the trial, when plaintiff offered his mortgage in evidence, it was objected to by defendants, and excluded by the court, upon the ground that there was a variance between it and the allegations in the petition. The mortgage, by its terms, was made subject to a prior one upon the same property in favor of Cranston & Co.; and plaintiff, in declaring upon it, omitted any allegation of that provision. This was held to constitute a variance, and such holding is assigned as error. We think the assignment is well taken. The mortgage, so far as its provisions affected the rights of the parties to this action, was sufficiently described. Cranston & Co. were not parties to the suit, and it was not necessary for plaintiff to mention in his pleadings the

provisions in their favor. After his mortgage was excluded plaintiff offered no evidence in support of his rights under it, and it would have been of no avail for him to have done so. He had no hope of an enforcement of such rights without his mortgage before the court and jury. Notwithstanding this, the defendants were allowed to proceed and to develop the facts under which they sought to free the property from the operation of the lien asserted by plaintiff, and under the rulings of the court succeeded in obtaining a verdict in their favor, establishing their claim to the property; and it is now contended that, inasmuch as the facts thus shown are sufficient to defeat the lien claimed by plaintiff, the ruling of the court in excluding the mortgage was immaterial, and wrought no injury to the plaintiff, and that the judgment should therefore be affirmed. It is, perhaps, a sufficient answer to this to point out that some of the facts necessary to the establishment of defendants' claim to the property were contested; and to require plaintiff to contend before the jury about these facts, with his mortgage excluded, was to force him, as it were, into a one-sided trial, in which he could not possibly win, but must necessarily lose; for, without the mortgage in evidence, no verdict or judgment could have been rendered in his behalf, enforcing it, though the controverted facts had been found in his favor, while, if this proceeding be sanctioned, a verdict in favor of his antagonists is to be treated as binding upon him. Thus the error of the court in excluding the mortgage necessarily put him at disadvantages in the trial of the issue before the jury. But, waiving this view of the case, the appellees, in order to make good their contention that appellant sustained no injury by the ruling in question, must unquestionably assume the burden of showing affirmatively that under no state of facts which appellant could have established under his pleading could he have succeeded in maintaining a right against them under the mortgage; for, with that document excluded, appellant was under no obligation to further develop the facts upon which he relied to secure a foreclosure, as none which he could have shown would have availed him.

The facts shown by appellees are as follows: On the 28th day of June, 1889, W. D. Cox bought of D. D. Dawson an undivided one-half interest in all of the property belonging to the office of the Brazos Pilot, a newspaper published at Bryan, giving his notes for the purchase money, and a mortgage on the property purchased to secure them, in which power was given to Dawson, in case of breach of contract on the part of Cox, to take possession of the property, and sell it, either at public or private sale. This mortgage, by its terms, embraced only the property then in the office and

rooms where the paper was published. On December 22, 1889, Cox conveyed to defendant J. H. Admire a one-sixth interest in the property belonging to the publishing company, for which the note sued on was given. On the same date Cox gave to Dawson another mortgage conveying this one-sixth interest. This mortgage has no effect upon this appeal, as it has never been enforced, and does not include property in controversy. About January 1, 1890, Cox, Admire, and Buchanan, the then owners of the concern, having sold the newspaper, printing press, and job press which had been in the office at the time of the sale by Dawson to Cox, purchased and placed in the office a new printing press and job press. It is shown that Dawson consented to the sale of the old presses, but there is a conflict of testimony between him and Cox as to the conditions upon which he did so; the former stating that it was agreed that the new presses should take the place of the old, under the first mortgage given to Dawson, and become subject to it, and the latter claiming that there was no such agreement, but that Dawson agreed unconditionally to the sale of the old presses. On May 4, 1890, Cox conveyed to J. H. Admire and A. W. Buchanan one-third interest in the property connected with the paper, reciting that Cox and Admire assume all indebtedness of the paper, and protect Cox from liability for same; and that the sale is subject to the first mortgage given by Cox to Dawson, describing same, and that it is a mortgage given on the property therein conveyed; and that Admire and Buchanan assume the unpaid notes due to Dawson. On August 12, 1890, J. H. Admire gave to Cox, to secure the note which he had given for the one-sixth interest in the property, and which is the one sued on, the mortgage declared on, upon an undivided half interest in the new presses, which had been put into the office. On September 13, 1890, Admire released to Dawson all claim to the property acquired by him by his purchase from Cox of December 12, 1890. On September 13, 1890, Admire and Buchanan released to Dawson the property received from Cox by conveyance of May 14, 1890. On November 14, 1890, Dawson, in the exercise of the power conferred by the mortgage to him from Cox of date June 28, 1890, two of the notes secured by that instrument remaining unpaid, sold all of the property connected with the paper, including the new presses, to A. J. Buchanan. Under that conveyance defendants claim that the property is discharged of all lien imposed by the mortgage sued on. Plaintiff bought the note and mortgage sued on from Cox before the maturity of the former. From this statement it will be seen that the prior mortgage given by Cox to Dawson, under which defendants claim, did not embrace the property upon which plaintiff is asserting a lien. That mortgage described as its sub-

ject the property then in the office and rooms where the paper was published, and referred to an inventory and a book in which a list of such property was then contained. If a lien attached to the property subsequently bought, it was by a verbal agreement between the mortgagor and mortgagee. This would not affect a subsequent mortgagee of such other property for value without notice; and, though the subsequent mortgagee had notice or advanced no consideration sufficient to protect him, an assignee of the note, purchasing from such mortgagee before maturity for value and without notice, would take the mortgage unaffected by such a verbal agreement as is supposed. Jones, Chat. Mortg. §§ 501, 513, note 2. Whether plaintiff was such an innocent purchaser or assignee of the note and mortgage given by Admire to Cox does not fully appear. It may be that he could have maintained such an attitude had he been allowed to introduce his mortgage and other evidence in connection with it. Of this opportunity he was deprived by the ruling complained of. It is contended by appellees that plaintiff, inasmuch as he claims his mortgage lien under Admire, is chargeable with notice of recitals in the title papers, under which his mortgagor claimed the property; and that the recital in the bill of sale from Cox to Admire and Buchanan of the prior mortgage to Dawson would charge plaintiff with notice of a lien in Dawson's favor upon the new presses, which were then among the property conveyed. Admitting that plaintiff is to be charged with notice of the recital in the bill of sale, it must be conceded, we think, that such notice would extend only to facts recited or reasonably pointed to. The recital is of a mortgage of a particular date, and the record of it is referred to for fuller information. That instrument does not confer a lien on the property in controversy. In order to reach that, a verbal agreement is relied on, of which nothing is said in the bill of sale. We think the recital could operate as notice only of the mortgage referred to as it existed, and not of any verbal extension of its scope. But, even upon appellees' contention, the notice claimed would be conveyed only with respect to the property which passed by the bill of sale. This was only a third interest in the concern, whereas plaintiff's mortgage covered a half interest in the presses. It seems that Admire owned an interest in them which he did not get by purchase from Cox. The judgment is reversed, and the cause remanded.

KALKLOSH v. HANEY et al.

(Court of Civil Appeals of Texas. Sept. 28, 1893.)

SPECIFIC PERFORMANCE—TENDER OF PAYMENT.

Where a vendee of land pleads and proves his willingness to pay the entire balance due, he is not required, before obtaining a de-

cree for specific performance, to make actual payment, or tender of payment, but is entitled to relief, provided that, within a time to be fixed by the decree, he shall pay the amount due.

Appeal from district court, Parker county. J. W. Patterson, Judge.

Trespass to try title by Jasper N. Haney against A. Kalklosh, who by his answer pleaded the Franco-Texan Land Company. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by TARTLTON, C. J.:

September 11, 1890, the appellee Jasper N. Haney brought this suit, as an action of trespass to try title, to recover from the appellant, A. Kalklosh, 80 acres of land, the south part of the northwest quarter of section 165, in Parker county. The defendant, Kalklosh, in his answer, disclaimed all interest in the land sued for, save as to 53 acres, which he described by metes and bounds. As to this tract, he claimed the right of possession by virtue of a certain agreement to sell and convey, more particularly below described, executed to him by the Franco-Texan Land Company, a corporation, which he pleaded. He prayed for a specific performance of this contract, alleging that the plaintiff Haney, who claimed under the Franco-Texan Land Company, purchased with notice of his rights, and pleading that he was ready and willing to comply with the obligations imposed upon him by the terms of the contract. The plaintiff Haney, in a supplemental petition, prayed that, in the event of a recovery by the defendant, Kalklosh, he have judgment against the Franco-Texan Land Company for the sum of \$200 paid, and for the cancellation of certain promissory notes executed in consideration of the land purchased by him from the Franco-Texan Land Company. From a judgment in favor of the plaintiff against the defendant, Kalklosh, and denying to the latter any relief against the Franco-Texan Land Company, this appeal is prosecuted.

Conclusions of Fact.

The Franco-Texan Land Company, prior to September 27, 1884, was the owner of the land in controversy. On that day it executed to the appellant, A. Kalklosh, the following instrument: "Sept. 27th, 1884. Rec'd of Mr. A. Kalklosh the sum of \$24, as part payment on 40 acres in section 165, block —, in Parker county, being in the N. W. part of ¼ of said section. The terms of this sale are at the rate of \$3 per acre,—one-fifth cash, and balance to be secured by five notes of even date, with ten per cent. interest per annum. The said A. Kalklosh is to have this land surveyed at his own expense by county surveyor within 30 days from date, to bring the field notes to this office, sign five notes, and get his deed, or forfeit the above deposit amount. R. W. Duke. Franco-Texan Land Co." When this

contract was executed, it was supposed by Mr. Duke, the president of the company, and the defendant, that the quantity of the land was 40 acres, but a survey was required to ascertain the exact quantity. In case of an excess, the purchaser was to increase the cash payment to such sum as would equal one-fifth the value of the tract at \$3 per acre. In case of a loss, a proportionate amount of the cash payment of \$24 was to be returned to the purchaser. A survey made by Kalklosh according to the terms of the agreement disclosed the fact that there were 53 acres in the tract. Accordingly, the defendant, within the time named, offered to pay to Mr. Duke, the president, the requisite balance of the cash payment, and offered to execute the five notes provided for demanding the deed. Duke, the president, when this offer was made, failed to consummate the arrangement, on the ground that he was too busy to do so. The offer was thereafter several times renewed by the defendant, with similar results, until finally he was told by the president that the latter would inform him when to come and execute the notes and secure the deed, at a time when business would not be so pressing, and that in the mean time the defendant would proceed with his improvements. The company had notes in printed form, which it required to be signed in transactions of this character. The defendant consequently took possession of the land, and has since continuously resided upon it, paying the taxes due upon it, and erecting permanent improvements of the value of \$300. Some time in 1886, Duke ceased to be the president of the Franco-Texan Land Company, and was succeeded by A. J. Hood, who has declined to execute the deed or to accept the notes, claiming that the payment made by Kalklosh was forfeited. The defendant has made only the first payment on the land, nor has he ever tendered the money; but, as already stated, he, several times, while Duke was president, offered to execute the notes, and to carry out the contract, and during the trial testified, as he had alleged in his answer, that he was willing to pay the balance of the purchase money, principal and interest. Since the contract with Kalklosh, the land has greatly increased in value. In September, 1889, the appellee Haney purchased from the Franco-Texan Land Company the 80 acres described in his petition, including the 53 acres which the company agreed to convey to the appellant. At the time of his purchase, the appellee knew of the claim of Kalklosh. Haney took a bond for title from the company, paying \$200 in cash, and executed three promissory notes, for \$280, \$240, and \$220, respectively.

E. P. Nicholson, for appellant.

TARLTON, O. J., (after stating the facts.)
On the foregoing facts, the trial court ad-

judged that Kalklosh was not entitled to specific performance of the contract pleaded by him, because he failed to pay the money due upon the contract, or to make an actual tender thereof; that payment, or tender of payment, on the trial, if not previously made, was necessary to the relief sought. We do not thus understand the law. Where, as in this case, the vendee pleads and proves his willingness to pay the entire balance due, he is not required to make actual payment, or tender of payment. The rule is to grant him the relief for which he prays, provided that within a reasonable time, to be fixed in the decree, he shall make payment of the amount due. Failing in this, his right should cease. *Spann v. Sterns*, 18 Tex. 556; *Ward v. Worsham*, 78 Tex. 180, 14 S. W. Rep. 453. That the lower court may, on another trial, apply this rule in solving the issues between the several parties, we order that the judgment be reversed, and the cause remanded.

STEPHENS, J., disqualified and not sitting.

GULF, C. & S. F. RY. CO. v. ROWLAND.
(Court of Civil Appeals of Texas. Sept. 28, 1893.)

APPEAL—REVIEW—EVIDENCE—RAILROAD COMPANIES—KILLING STOCK—FIRES.

1. In an action against a railroad company for killing a horse, where there is no evidence that the fence through which the animal escaped on the right of way was ever a lawful fence, the question whether a railroad company must have notice of the defective condition of a fence which had once been sufficient will not be considered on appeal.

2. The admission of evidence will not be reviewed on appeal where the bill of exceptions does not state the objections made.

3. The exclusion of evidence will not be reviewed on appeal where the testimony sought to be introduced is not preserved by bill of exceptions.

4. Where there is evidence that the animal killed had a market value, and also that it had not, it is proper for the court to instruct the jury on the measure of damages in each case.

5. The omission of the court in its general charge to inform the jury as to the rules on which defendant's liability would depend is cured by special charges on this subject, given at the request of the parties.

6. A railroad company which permits combustible material to grow and remain on its right of way, where it is liable to be ignited by sparks from passing engines, is guilty of negligence as matter of law, and an instruction to this effect is not objectionable as being on the evidence.

Appeal from Burleson county court; John Alexander, Judge.

Action by J. C. Rowland against the Gulf, Colorado & Santa Fe Railway Company for killing plaintiff's mare, and setting fire to his grass and fencing. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Chas. K. Lee and J. W. Terry, for appellant.

WILLIAMS, J. This is an appeal from a judgment in favor of appellee against appellant for the value of a mare killed by a train, and for value of grass and fencing burned, and damage therefor, caused by sparks escaping from one of appellant's engines. The mare escaped from a pasture adjoining appellant's road through appellant's wire fence, got upon the track, and was killed. It was shown that the fence was in such a dilapidated condition as to allow the passing of stock through it, and that it had been in this state for some time before the killing of the animal, appellee having made frequent complaint to appellant's agent concerning it. There was no evidence that the fence had ever been such as the law requires. In this state of the evidence, the charge of the court complained of in the third assignment is as follows: "If you believe from the evidence that defendant's train killed plaintiff's mare, then you shall further inquire whether, at or near where the said animal was killed, defendant had at the time a good and sufficient and lawful fence on each side of its track; and if it did not have such a fence, but, on the contrary, its fence was out of repair, so that an animal of the kind sued for by the plaintiff could easily go through same, the defendant would be liable." There being no proof that the fence was ever a lawful one, the question discussed in appellant's brief whether or not, in order to hold a railroad company liable because of defective condition of a fence which had been sufficient, it must be made to appear that the company knew or ought to have known of such condition, does not arise. Besides, the evidence, we think, shows a state of the fence of which appellant presumably should have known, even if it had formerly been good, and the charge could not have prejudiced appellant. For these reasons also, the assignment that the verdict is not supported by evidence is not sustained.

The bill of exceptions to the admission of the testimony of the witness J. E. Carroll does not state the objection made to the evidence, and this point cannot be considered. The same reason, as well as the additional one that the answers which the witness would have given to the questions propounded are not stated, precludes us from considering the ruling excluding the testimony of King and McArthur, offered by appellant.

The second bill of exceptions, taken to the refusal of the court to withdraw from the jury, on motion of appellant, the testimony of J. C. Rowland, W. C. Carroll, and J. E. Carroll, does not show when the motion was made, and no reversible error is shown.

The charge of the court as to the measure of damages for the killing of the mare is as follows: "Then defendant would be liable to plaintiff in damages for killing the said mare, if they did kill her; said damages to be based on the market value of said mare, if there was any market value for said animal,

and, if not, then the size, breeding, qualities, disposition, and blood of the said animal may be considered in arriving at her value." There was evidence both that the mare had a market value and that she had none. We do not understand that it was shown conclusively that she had a market value anywhere. That she probably had, was no sufficient reason to require the court to ignore the testimony to the effect that she had not. It was proper to submit the rule applicable to either hypothesis. *White & W. Civil Cas. Ct. App. 648.* There was sufficient evidence to sustain the finding of \$150 for plaintiff.

The special charges given at the request of the parties sufficiently informed the jury as to the rules upon which liability of defendant would depend, and the omission of the court to do so in the general charge was cured.

The charge that "defendant would be guilty of negligence if it allowed grass or combustible material to grow and remain on defendant's right of way, which were liable to be ignited by sparks from engines," is in accordance with the authorities. *Railroad Co. v. Hogsett, 67 Tex. 685, 4 S. W. Rep. 365.* It is true a jury must, as a rule, determine what facts constitute negligence, and such a charge as the above, in some cases, might be held to be upon the evidence. It is only where the facts assumed are shown by the evidence, and are so unequivocal as to allow no conclusion but that they constitute negligence, that the court ought to give such an instruction. Here the facts bring the case within the rule, and there was no error in the charge. The judgment is affirmed.

FOREMAN v. MISSOURI PAC. RY. CO.
(Court of Civil Appeals of Texas. Sept. 28, 1893.)

CARRIERS—STOPS AT STATIONS—TIME FOR STARTING—BOARDING MOVING TRAIN.

A railroad company is liable to a passenger who is injured while getting on a moving train; he having been induced to leave it by the assurance of the conductor that it would stop at the station five minutes, and the conductor having, before the expiration of that time, given the signal to start, with knowledge that the passenger had left the train, and while he was so far away that he could not board the train before it started.

Appeal from district court, Walker county; Norman G. Kittrell, Judge.

Action by James T. Foreman against the Missouri Pacific Railway Company for personal injuries. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed.

Benton Randolph, for appellant. Baker, Botts, Baker & Lovett, for appellee.

PLEASANTS, J. This cause was by the supreme court, upon appeal by the appellee from judgment in favor of appellant, reversed at the Galveston term, 1889, and the

decision is reported in 73 Tex. 311, 11 S. W. Rep. 326. Upon second trial of the case in the district court, judgment was rendered for the defendant upon demurrers, general and special, presented to the petition; and, the plaintiff declining to answer, his suit was dismissed, and he brings his case to this court by appeal. The petition, after averring plaintiff's residence to be in the county of Marion and state of Texas, and that the defendant was a corporation duly incorporated by the state of Missouri, and that the International & Great Northern Railway Company was a corporation created under the laws of Texas, and that it was the owner of a railroad running between the town of Trinity, in Trinity county, Tex., and the town of Conroe, in the county of Montgomery, Tex., and through the town of Huntsville, in Walker county, Tex., and that said railroad was being operated by said defendant, the Missouri Pacific Railway Company, under leave from said International & Great Northern Railway Company, and that said defendant was engaged in carrying passengers over said road, and that on the 29th of January, 1887, plaintiff purchased from the duly-authorized agent a ticket for passage over said road from the town of Trinity to the town of Conroe, alleges as follows: "That while plaintiff was a passenger on the train of said Missouri Pacific Railway Company by virtue of said contract of purchase and of said ticket, on his way to said town of Conroe, and just as the arrival at Dodge, an intermediate station, was announced, plaintiff told the conductor that he was expecting letters at Dodge, and asked the conductor how long the train would stop at that station, and if he would have time to go to the post office and back, and that the conductor replied 'Yes;' that the train would stop five minutes, and he would have time to go and return. That plaintiff at once went hurriedly towards the post office, which was not more than fifty yards from said train, for the purpose of making inquiry for important letters which he was expecting to find there. That, before plaintiff had gone more than halfway to the post office, the train was started, and plaintiff returned hurriedly to it, and arrived on the platform of the depot, close to and opposite the middle of the rear coach of the train, in less than one minute from the time the said train had stopped, and as the train passed him he took hold of the guard on the rear platform of the rear coach with his hand, and attempted, in a prudent, cautious manner, to board the train. That just as he took hold of the guard the engineer pulled open the throttle valve, and jerked the train with such force that it threw plaintiff on his right side, on a tie between the rails of the track in rear of the coach, breaking and depressing in his chest the anterior $\frac{1}{4}$ of four of his right ribs, producing an exterior bruise covering

a space of seven by nine inches from the fractured ribs on the right side to the cardiac end on the stomach, and injuring the anterior wall of the stomach, and producing hernia or rupture at or near the stomach, and producing intense pain and suffering, which has continued up to this time without much intermission. That he has been unable to labor since he received said injuries, and has been confined to his bed, in consequence thereof, much of the time since he received them, and has sustained damages in consequence of said injuries inflicted, as aforesaid, by the gross misrepresentation of the agent of the said Missouri Pacific Railway Company, and the gross carelessness and reckless conduct, as aforesaid, of the agent of said railway company, to the amount of ten thousand dollars." This was plaintiff's first amended original petition, and to it the defendant filed the following demurrer: "It specially excepts and moves to strike out of said amended original petition, on the third page, so much thereof as is in these words: 'And just as the arrival at Dodge, an intermediate station, was announced, plaintiff told the conductor he was expecting letters at Dodge, and asked the conductor how long the train would stop at that station, and if he would have time to go to the post office and back, and the conductor replied, "Yes," the train would stop five minutes, and he would have time to go and return.' And also so much of amended original petition on the last page as is in these words: 'By the gross misrepresentation of the agent of said Missouri Pacific Railway Company,' because the same is immaterial, and, if true, gives the plaintiff no right of action against this defendant for the damages claimed. And, for general exception, defendant says the plaintiff's amended original petition shows no cause of action, and prays judgment of the court thereon, and of this defendant asks the judgment of the court."

This court is of the opinion that the petition is good on general demurrer, and that, while it is doubtless obnoxious to other exceptions than those made by the special demurrer, it is not so as to them. If the plaintiff was induced to leave the train by assurances, expressed or implied, given him by the conductor, that the train would not leave for five minutes, and the conductor, with knowledge that plaintiff had left the train, started it before the expiration of the five minutes, and before the plaintiff had returned sufficiently near to the track to board the train before it was put in motion when the signal to start was given, and the plaintiff, in attempting, in a cautious and prudent manner, to get aboard, was, by a sudden and rapid movement of the train, thrown to the ground and injured, if, in the opinion of the jury, such facts constitute negligence on the part of the defendant, the plaintiff, unless guilty of contributory

negligence in attempting to board the train under the circumstances, should recover damages for his injuries. Reversed and remanded.

TEXAS & N. O. R. CO. v. JONES.

(Court of Civil Appeals of Texas. Sept. 28, 1893.)

APPEAL FROM JUSTICE'S COURT—FILING ANSWER ABOVE.

Under Rev. St. art. 316, providing that, on appeal from a justice's court to the county or district court, either party may plead any new matter, except that no new cause of action shall be set up by plaintiff, nor counterclaim by defendant, not pleaded in the court below, though defendant allows judgment by default in the justice's court, he may answer in the district court on appeal.

Appeal from district court, Orange county; W. H. Ford, Judge.

Action by Tony Jones against the Texas & New Orleans Railroad Company. Plaintiff had judgment, and defendant appeals. Reversed.

Perryman & Gillaspie, for appellant.

PLEASANTS, J. The appellee sued appellant in justice court, and on the 28th of October that court rendered judgment by default against defendant, for plaintiff, for \$50 as damages, and \$10 as attorney's fees, besides costs of suit. The defendant in due time perfected an appeal to the district court, and in that court filed a general denial, which, upon exception and motion of plaintiff, was stricken out, and the defendant excepted. Upon trial of the cause a verdict was rendered for the plaintiff for the same sums of money as were rendered by the justice of the peace,—\$50 damages, and \$10 as attorney's fee,—and upon this judgment verdict was rendered for plaintiff against defendant for said sums, and for costs of suit. His motion for new trial having been overruled, defendant appealed to this court, and assigns for error the judgment of the court sustaining plaintiff's motion to strike out defendant's answer, and we are of the opinion that the assignment is well taken. Upon an appeal from a justice court to the county or the district court the cause is tried de novo, and any party may plead any new matter, provided no new cause of action is set up, and provided that no set-off or counterclaim not pleaded in the court below is set up by the defendant. Rev. St. art. 316. This judgment of the court, from matter apparent in the transcript, would seem to be based upon the idea that the defendant, having failed to appear and answer in the justice court, was precluded from answering in the district court. But we know of no such law. To deny a defendant the privilege of pleading in defense to plaintiff's demand, for failure to answer in the justice court, would ordinarily be tantamount to denying him the right of appeal. But the

law, as we understand it, does restrict the right of appeal from judgments rendered by justice courts to such defendants as appear and defend in those courts.

The appellant also assigns as error the judgment of the court in sustaining plaintiff's objection to defendant's questions propounded to several witnesses. These assignments are not presented in conformity with the rules of practice prescribed for this court, and we are not, therefore, called on to consider them. But by reference to the transcript it does appear that all of the objections to the questions propounded by the defendant to witnesses were sustained by the court upon the ground urged by the plaintiff in his objections to the questions. To wit, that the defendant had no pleadings under which the evidence solicited by the questions would be admissible. This was, in effect, to deny the defendant a new trial,—a right given him by the statute. For the errors indicated the judgment of the lower court is reversed, and the cause remanded for a new trial.

TAYLOR v. CRISWELL.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

PUBLIC LANDS—PRE-EMPTION—FAILURE TO SURVEY—EVIDENCE.

2 Sayles' Civil St. art. 3048, provides that if any person claiming a homestead donation shall fail to have the survey made, and the field notes thereof returned to and filed in the land office, within 12 months after the date of his application, he shall forfeit all right to the land. Held that, to relieve one from the operation of the section, on a failure to comply therewith, because of the wrongful acts of the surveyor, such acts must be clearly shown.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action in trespass to try title by Ira B. Taylor against Dave Criswell. Defendant had judgment, and plaintiff appeals. Reversed.

Albert Stevenson and Jasper N. Haney, for appellants.

HEAD, J. Prior to November, 1886, the 100 acres of land in controversy was vacant public domain of the state of Texas, and subject to pre-emption under her laws. In that month, appellee, with his family, moved on this land, and on the 20th of January, 1887, filed his application in writing, under oath, in compliance with the law, with the surveyor, to have it surveyed. On the 7th of March, 1887, before any survey had been made for appellee upon his application, one J. F. Harp moved with his family, in a tent, upon the land, filed his application for a survey, in form, in compliance with the law; had the survey made, and the field notes returned to the general land office; paid one dollar per acre; and had patent issued on the 17th of May thereafter.

He then moved off the land, and on the 18th of September, 1887, conveyed it to appellant. In fact, his moving on the land, and procuring the patent thereto, was at the instance of appellee, and for his benefit, he paying the expenses. In July, 1887, after the issuance of the patent to Harp, appellee called upon the surveyor to make the survey under his application, which he at first refused to do, because of the Harp survey. But on the 19th of that month he made the survey, after having appellee to file another application, but these field notes were not recorded, or returned to the general land office, until the fall of 1889,—much more than 12 months after the filing of the last application by appellee, and after the institution of this suit. Appellant instituted this suit, in the form of an action of trespass to try title, claiming under his Harp patent against appellee, who had remained in possession since his first location. Appellee reconvened, seeking affirmative relief by reason of the steps taken by him to pre-empt the land, above detailed, and asked the cancellation of the Harp patent, as a cloud upon his title. The court below held appellee to have the superior title, and entered a decree canceling the conflicting patent, as prayed for by him, from which this appeal is prosecuted.

The law under which appellee was seeking to acquire this land contains this provision: "Should any person claiming a homestead donation fail to make the written application as provided in this chapter, or should he fail to have the survey made and to have the field notes thereof (duly certified to and recorded) returned to and filed in the general land office within twelve months after the date of his application, or should he or his assignor fail to make satisfactory proof that he had resided upon, occupied and improved the land claimed by him for three years after the date of his application, as provided in this chapter, he shall in either event forfeit all right and title to said land and the same shall become subject to entry or location as other vacant and unappropriated public land." 2 Sayles' Civil St. art. 3048. Unless appellee had some legal excuse for his failure to have his field notes recorded and returned to the general land office within the time required by this statute, it is clear that all rights he had acquired thereunder had become forfeited, and he was not entitled to the relief granted him by the court below. *Garza v. Cassin*, 72 Tex. 440, 10 S. W. Rep. 589. Appellee charged in his answer that he was prevented from returning his field notes by fraud and collusion between the county surveyor, appellant, and Harp; but the court below did not, in its conclusions, find whether this allegation was sustained by the evidence or not. The conclusions of the court only go to the extent of finding that the surveyor, in July, at first refused to make the survey, because field notes had already been re-

turned for Harp. In a few days, however, he did make it; but as to why the field notes were not recorded, and returned to the land office, we are left in ignorance. The record does not disclose any effort on the part of appellee to have the law complied with during the two years that intervened between the filing of his second application and the institution of this suit. It has been several times held that, where a surveyor wrongfully refuses to make a survey, the time consumed in litigation to compel him to a performance of his duty will not be included in the time allowed by law, but the disposition of the court has not been towards an extension of excuses. *Holloway v. Holloway*, 30 Tex. 164; *Land Co. v. Thomson*, 83 Tex. 169, 17 S. W. Rep. 920. We are of opinion that the facts set forth in the special findings of the court were not sufficient to relieve appellee from the forfeiture declared by the law, and he was therefore not entitled to the judgment rendered in his favor; but as there is no statement of facts in the record, and the findings of the court may not be as full as the evidence introduced would have warranted, we have thought it best to remand the cause for a new trial. If appellee should be able to preserve his location from the absolute forfeiture decreed by the statute, it would seem that he should prevail over the Harp patent. The survey upon which it was issued, having been made during the year allowed him in which to return his field notes, would at least be void as to any rights he may have. *McKinney v. Grassmeyer*, 51 Tex. 376; *Cassin v. O'Sullivan*, 61 Tex. 594. If, however, it should be held that appellee has no right to the land, but as to him it has become vacant public domain, it has been held that the Harp patent would not be void as to other persons. *Young v. O'Neal*, 54 Tex. 544. We are of opinion the judgment of the court below should be reversed, and the cause remanded.

WEATHERFORD, M. W. & N. W. R. CO. v. GRANGER.

(Court of Civil Appeals of Texas. Sept. 27, 1893.)

CORPORATIONS—ASSUMPTION OF DEBTS OF PROMOTERS.

Where the promoter of a corporation is indebted to plaintiff for procuring a bonus for the corporation, the latter, on its organization, on accepting the bonus with knowledge of the claim for services, assumes the indebtedness also.

Appeal from district court, Parker county; J. M. Patterson, Judge.

Action by Francis Granger against the Weatherford, Mineral Wells & Northwestern Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by TARTLTON, C. J.:

Appellee sued appellant to recover the sum of \$1950 for certain services alleged to have been rendered by him at the request of the defendant, as shown by an account attached to his petition, as follows:

W., M. W. & N. W. R. Co., to Francis Granger, Dr.	
To services in raising subsidy at Weatherford	\$1,000
Examination of charter and correction of same	100
Drawing subscription contract in June, 1889	100
Drawing bond for \$40,000 R. R. Co. to directors and Commercial Club.....	250
Consultation and opinions and advice to said Co. upon various questions under the law of corporations and the Texas R. R. Act during the months of July, Aug., and Sept., 1889.....	500
	\$1,950

In a supplemental petition the plaintiff pleaded that "if it should appear that said services, or any part thereof, were rendered prior to the creation of defendant corporation, then plaintiff alleges that said services were rendered at the instance of the promoters of said corporation, in furtherance of the purposes of said corporation, which acts of said promoters and services so rendered were afterwards adopted by said corporation, and said corporation has availed itself of the said services of plaintiff." From a judgment for \$500 recovered by the plaintiff this appeal is prosecuted.

The following are substantially the conclusions of fact found by the trial judge: "In April or May, 1889, certain parties, and among them one William Anderson, put on foot a scheme to build a railroad from Weatherford, Parker county, to Mineral Wells, in Palo Pinto county, Tex., by way of certain coal fields, provided the citizens of said places would contribute as donations specified sums. William Anderson was the principal mover in the scheme, and was so recognized by all parties. The parties so desiring to build the railroad were organized into some kind of company, and Anderson was recognized and treated by all as the head and principal person in the company, which, through Anderson, proposed to the citizens of Weatherford and vicinity that if they would make a donation of \$40,000 to the company the latter would build and operate the railroad. About the last of May, 1889, Anderson, as manager of said company, contracted and agreed with the plaintiff, who was a practicing attorney, that if he would aid and assist them in getting up the bonus he should be liberally paid for his services. In pursuance of said agreement, plaintiff went to work, and assisted in getting up the bonus or donation, and at the request of said Anderson, acting for said company, the plaintiff examined a charter for a railroad that had been prepared in Kansas City, and suggested certain changes therein, and rendered the other services set out and charged

in plaintiff's petition. The bonus or donation was required of the people. About the 1st day of June, 1889, T. R. Stone, at the suggestion of William Anderson, became interested in said company. At the time that Anderson employed the plaintiff the defendant company was not incorporated. It was duly incorporated under the laws of Texas about July 1, 1889. Anderson and Stone were charter members in said corporation. The charter for said company was prepared, signed, and acknowledged in Kansas City, Mo., on the — day of —, and was filed in the office of the secretary of the state of Texas on the — day of —. Some time after the company was incorporated William Anderson and other stockholders in the railroad company had some kind of disagreement, when Anderson sold out his interest in the company to other parties, and thus severed his connection with the company. Up to the time Anderson quit the company he was regarded and recognized as its principal officer. He was never appointed or elected as manager of the company. P. R. Stone has been the president of the company since about the time Anderson quit it. After the company was incorporated it accepted the bonus. The services performed by plaintiff were reasonably worth the sum of \$500. A part of the services were performed by the plaintiff after the company was incorporated, and after T. R. Stone became connected therewith." In addition to the foregoing conclusions, which we adopt, we find further, as follows: The charter for the defendant company was signed and acknowledged about June 1, 1889, and was filed in the office of the secretary of state at Austin, July 2, 1889. The bonus or subsidy was not secured until after the filing of the charter. The record would have justified the trial court, and so justifies us, in finding (as we do) the fact to be that in availing itself of the subsidy secured the company knew of the services of the plaintiff in raising the bonus.

Geo. A. McCall, for appellant. L. W. Stephens, for appellee.

TARLTON, C. J., (after stating the facts.) Appellant's first assignment of error complains of the action of the court in overruling its exception that the "petition does not show the items of service claimed by plaintiff with sufficient certainty and particularity." In an opinion heretofore rendered in this cause (on March 30, 1893, 22 S. W. Rep. 70) we held that this exception should have been sustained, and ordered accordingly that the judgment should be reversed, and the cause remanded. Subsequently, having granted a motion for a rehearing, we certified the question of the sufficiency of the petition to our supreme court. That tribunal held that the exception was properly overruled. 22 S. W. Rep. 959. We

consequently adjudge this assignment to be without merit.

Appellant's second assignment of error is as follows: "The court erred in finding that defendant was bound to pay plaintiff for services of getting up the bonus. For this the contract of the promoter of a corporation binds the promoter only, and not the corporation, and the corporation cannot ratify the contract; and the evidence shows that Anderson at the time was only a promoter, under a special contract, to raise the bonus, when he agreed to pay Granger for his services." Under the conclusions of fact already set out, to the effect that the company, after its organization, knowingly accepted the benefit of plaintiff's services, we are unable to sustain this assignment. The propositions therein contained, as far as they are abstractly sound, are not applicable to the facts of this case. In the opinion of this court rendered heretofore in this cause, and already referred to, Head, J., on the question suggested, uses the following language: "It may be stated as a general rule that a corporation cannot be liable against its will upon the contract of its promoters, unless such liability is declared in its charter. If, however, the corporation, after its organization, sees proper to adopt such contracts, it has this right; but it must do so 'cum onere.' It should not be allowed to adopt the good and reject the bad part of the contract; and we believe this principle should be extended so as to hold that, where the promoters have secured a subscription for a corporation, and have been at expense in employing attorneys in doing this, if the corporation sees proper to accept such subscription after its organization, and has knowledge of the expense so incurred, it should be required to pay it." Citing *Cook, Stock, Stockh. & Corp. Law*, 707; 1 *Mor. Priv. Corp.* 547-549; *McDonough v. Bank*, 34 Tex. 309.

Appellant's third assignment of error is as follows: "The court erred in his conclusion of law that defendant was bound to pay plaintiff for his services in raising the bonus before the incorporation of defendant, because the court does not find that defendant accepted the bonus with knowledge of plaintiff's services, or of his claim, or that he had done anything of value for defendant, but the evidence wholly disproves and contradicts that fact." We overrule this assignment, because, as already indicated, we dissent from the statement therein contained that "the evidence wholly disproves and contradicts" the fact "that defendant accepted the bonus with knowledge of plaintiff's services." Accepting exclusively the version of the defendant's witness and president T. R. Stone, appellant's view might be sustained. He testifies that "the company never knew of this claim till suit was brought." He states elsewhere, however, that he "knew Granger was interesting

himself in the bonus matter, but supposed he was working for W. W. Johnson, who had had him employed in Strawn. Johnson was also one of the charter members of the corporation, and also was the owner of certain coal lands which he wished to sell to the projectors of the railroad. It is undisputed that the plaintiff was employed at the instance not of Johnson, but of Anderson, the admitted promoter of the road before its organization, and who was afterwards, until the month of September, 1889, regarded as the principal officer of the company, though Stone was in fact its president. The testimony of Stiltz, a disinterested witness, shows that at divers meetings of citizens of Weatherford held before and after the organization of the company, at which Anderson acted as the representative of the company, the plaintiff "was continuously with Anderson, and acting for him. The company established an office in the Carson and Lewis Hotel after Mr. T. R. Stone purchased the hotel, and Capt. Anderson was in charge of that office. Mr. Granger was there at the office with Mr. Anderson very often. Mr. Granger was active in assisting to raise the \$40,000 bonus, and his whole time seemed to be taken up in the affairs of the railroad." The plaintiff, without contradiction, states that "T. R. Stone, as president of the railroad company, conferred and advised with witness as an attorney in regard to the subscription contract and bond, and had witness to examine the authorities and express an opinion as to what the company's liability on the bond would be; that Stone, as president of the company, repeatedly advised with plaintiff as an attorney in regard to defendant's business at a meeting of the stockholders for the organization of the company, and at divers other times. We have thus, in justice to appellant, deemed it proper, at the cost of prolixity, to detail the testimony on which we found our conclusion that the company accepted the bonus with knowledge of the plaintiff's services. The judgment of the trial court is in all things affirmed.

STEPHENS, J., disqualified, and not sitting.

STATE v. MEYER et al.¹

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

INTOXICATING LIQUORS — PERMITTING MINOR IN PLACE OF BUSINESS.

Where a minor is permitted to enter and remain in a retail liquor dealer's place of business, such dealer and his bondsmen are liable to the penalties imposed by Acts 1887, p. 59, regardless of whether the owner or his agents in charge of such place believed, or had reason to believe, that such minor was over 21 years old.

¹ Rehearing pending.

Appeal from district court, Karnes county; H. Clay Pleasants, Judge.

Action by the state of Texas against Albert Meyer as principal, and Herman Seidel and J. J. Seale as sureties, on a retail liquor dealer's bond, to recover certain statutory penalties. From a judgment entered on the verdict of a jury in favor of defendants, the state appeals. Reversed.

A. B. Davidson and W. A. Little, for the State. Graves & Wilson, for appellees.

JAMES, C. J. This suit was brought for the statutory penalty by the district and county attorneys, on behalf of the state, against Albert Meyer as principal, and Herman Seidel and J. J. Seale as sureties, upon a retail liquor dealer's bond given October 30, 1890. The condition alleged to have been violated was that which required the principal not to permit any person under the age of 21 years to enter and remain in his house or place of business. The petition charged an infraction of the bond by defendant Meyer, in permitting a minor, one A. B. Pile, to enter and remain in his house in Helena, Tex., where he was then engaged in retailing spirituous, vinous, and malt liquors, etc., in quantities less than a quart. Defendant pleaded general denial, and further set up, in substance, that said Pile was at the date stated in the petition over the age of 21 years, and, if he was not, then he had fraudulently represented to defendant's agents Seidel and Hall, who managed Meyer's business, that he, the said Pile, was over 21 years of age; that Meyer had given instruction to his manager Seidel to never, under any circumstances, permit a minor to enter upon or remain in his place of business; that Hall had the same instructions; that said Pile applied for work, representing that he was over 21 years of age; that, in addition to this, Pile had the appearance of a matured man, and Seidel and Hall knew that Pile had for more than a year previous managed his own affairs, and believed the representations made to them by Pile concerning his age, and were induced thereby to admit him into the premises. Defendant Meyer answers, further, that Hall was not his agent for the purpose of employing any one for conducting any retail liquor business for him. Plaintiff excepted to all that part of said answer which sets up as a defense the fraudulent representations of A. B. Pile concerning his age, which exception the court overruled, we believe, erroneously. The cause proceeded to trial, and the court submitted the evidence to the jury on these special issues: "(1) Was A. B. Pile 21 years of age at the time he entered the saloon of defendant Meyer, and became engaged there? (2) Did E. H. Hall, the keeper of the saloon, use such caution and diligence as a prudent man would have used, under like circumstances, to ascertain the age of A. B. Pile,

before engaging him as a salesman in the saloon? (3) Did said Pile falsely represent to said Hall that he was 21 years of age before he engaged him as salesman?" To all these inquiries, the jury answered, "Yes," and thereupon judgment was rendered against the plaintiff. Errors are assigned in respect to the charges, and also the said ruling on plaintiff's exceptions.

The case of *McGuire v. Glass*, (Tex. App.) 15 S. W. Rep. 127, is decisive of the questions raised here. The reasoning of that case meets with our approval. The statute under which this bond was given, considered in connection with the statute which it replaced, leaves no doubt of the legislative intent to constitute an infraction of the bond any act of the dealer which permits a minor to enter into, and remain in, his place of business. Acts 1887, p. 59; Acts 1881, p. 22. He is required to know the fact of minority, and to not permit the minor to enter and remain. This may be, and is, a severe condition to the carrying on of the business of a retail liquor dealer; but the statute, as we find it, seems to exact this onerous duty of him, if he engages in the business. This being our conclusion, we hold that the defense which availed defendants was not a good one, and the court erred in its charges. Therefore, the judgment is reversed, and the cause remanded.

McMICKLE et al. v. TEXARKANA NAT. BANK.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

TRANSCRIPT ON APPEAL—SHOWING SERVICE—AMENDMENT OF RECORD.

1. Under Sayles' Civil St. arts. 1411, 1412, providing that the transcript on appeal shall contain the citation and return, if the pleadings or judgment do not show an appearance in person or by attorney, it is not enough that the judgment recite that service was had.

2. A rehearing in the appellate court, on the ground that there was error in the transcript filed by the other party, will not be granted, as either party has a right to have it corrected, but this right ceases on submission of the cause for decision.

Error from Bowie county court; W. W. Dillard, Judge.

Action by the Texarkana National Bank against E. P. McMickle and others on a note. There was judgment for plaintiff, and defendants brought error. The judgment was reversed. Plaintiff moves for rehearing. Motion denied.

P. A. Turner, for plaintiffs in error. Henry & Henry, for defendant in error.

FINLEY, J. September 2, 1891, the defendant in error filed suit in the county court of Bowie county against E. P. McMickle, Mrs. Matilda Levy, and Peter Ivy on a promissory note for \$235, principal, interest, and attorney's fees. October 29, 1891, judgment by default was rendered against the

original defendants for the amount claimed in plaintiff's petition, and on February 6, 1892, the defendants in said judgment, E. P. McMickle and Mrs. Matilda Levy, filed their petition and bond for writ of error, and on the 25th of August, 1892, the defendant in error, by its attorneys of record, entered in writing upon said petition in error a waiver of the issuance and service of citation. Plaintiffs in error filed an assignment of errors in the court below, applied for and obtained a transcript of the record, and in due time filed the same in the court of civil appeals for the second district. Defendant in error first submitted the case on a motion to affirm as on certificate, upon the ground that plaintiffs in error had failed to prosecute their writ of error, in this: that they had filed no brief in the court below, or appellate court. This motion was overruled by the court, the failure to file briefs furnishing no valid reason for affirmance as upon certificate. The defendant in error then filed, and submitted the case upon, a suggestion of delay. The court, on examination of the record, found that it appeared therefrom that judgment by default was rendered in the court below without citation being issued and served upon the defendants, and without voluntary appearance by them. On account of this error apparent from the record, the court declined to consider the appeal as being prosecuted for delay, but reversed and remanded the cause for a new trial. A motion for rehearing was then filed by defendant in error, and the cause was transferred to this court from the second district, with the motion pending, and this court is now called to act upon it. The grounds upon which a rehearing is sought are, in substance, as follows: (1) The judgment recites that service was had upon the defendants; (2) the transcript was taken out and filed in the appellate court by plaintiffs in error; (3) there was citation issued and served upon defendants. And in verification of this statement a certified copy of the citation and return of the sheriff thereon, showing legal notice to the defendants, is attached to the motion. Upon this showing, this court is asked to set aside the previous order of reversal, and upon the record, as it now stands, affirm the case, with damages., upon the suggestion of delay.

It is a sufficient answer to the first ground of the motion to say, where the pleadings and judgment fail to disclose an appearance in person or by attorney, the citation and return must be contained in the transcript. *Sayles' Civil St. arts. 1411, 1412; Rules Dist. Ct. 85, 20 S. W. Rep. xvii.*

It is shown in the motion that in fact due process was served, and responsibility for the failure of the transcript to contain a copy of

the citation and return of the sheriff thereon is sought to be avoided by reason of the fact that plaintiffs in error took out the transcript, and filed it in the appellate court. By filing a suggestion of delay, the defendant in error invited a close scrutiny of the record, asserted thereby that the judgment was legally rendered, and that it was apparent from the record that no errors were committed on the trial, and that the writ of error was prosecuted for delay, and asked damages provided by law as a penalty for delay. By taking this course, responsibility for the correctness of the record was assumed, in the fullest sense. Under the law, either party can take out a transcript, and file it in the appellate court. *Sayles' Civil St. art. 1410; rules 3, 4, Civ. Ct. App., 20 S. W. Rep. vi.* And if the transcript filed be defective or incomplete, upon application at the proper time, this court will grant a writ of certiorari to perfect the record. *Rule 11, Civ. Ct. App., 20 S. W. Rep. vii.* Every reasonable facility is afforded, under the law, to all parties, to present to this court, on submission of a case, a perfect record of the proceedings of the trial court for review, but there is no law or practice of the appellate courts of this state authorizing a correction of the record after it has been submitted to the court for decision. Indeed, it has long been the established practice of our supreme court to confine the right of correcting the record to the time preceding the submission of the cause. *Ross v. McGowen, 58 Tex. 603; Railway Co. v. Scott, 78 Tex. 860, 14 S. W. Rep. 791.* In the case of *Ross v. McGowen*, the court says: "After a cause is once submitted upon a transcript supposed to be correct, and as the parties have made no objection to it, and we have decided it upon such transcript, we cannot undertake to re-examine such cause because the counsel for either party discovers a defect in the transcript, which, if supplied, might possibly lead us to a different conclusion. A mistake in the pleadings or facts, of a single word, might influence the decision. This discovered and remedied, a new opinion, framed to suit the altered record, might itself be set aside upon the discovery of some other error; and so on, to numberless changes in the transcript, and the decision upon it. This practice cannot, of course, be allowed, and, to prevent it, the right to a certiorari must be limited to some point in the proceedings, which must not extend beyond the date of the submission of the cause to the court for decision." This rule of practice in the appellate courts of the state, long ago plainly established by our supreme court, as we believe, upon sound reason, must govern this court. Therefore, the motion for rehearing is overruled.

HAYDEN v. McMILLAN et al., (RICE et al., Interveners.)(Court of Civil Appeals of Texas. Oct. 11, 1893.)¹**WIFE'S SEPARATE ESTATE — RENTS FROM REALTY — GARNISHMENT.**

Rev. St. art. 2851, provides that all property owned by the wife before marriage, or acquired afterwards by gift, devise, or descent, and the "increase of all lands thus acquired, shall be the separate property of the wife; and during the marriage the husband shall have the sole management of all such property." *Held*, that the rents accruing on the wife's realty are not her separate property, but are subject to garnishment for the debts of the husband as community property.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by G. W. Hayden against Rice Bros. & Co., defendants, and McMillan, Devine & Howard, garnishees. M. F. Rice and J. P. Rice intervened, claiming the amount sought to be recovered from the garnishees. From a judgment for interveners, plaintiff appeals. Reversed.

Jay Winter, S. M. Ellis, and James Routledge, for appellant. Barnard & McGown, for appellees.

FLY, J. The parties to the above cause submit the following agreed statement of facts under article 1414 of the Revised Statutes: (1) That this is a garnishment proceeding sued out in the case of G. W. Hayden v. Rice Bros. & Co., pending in the district court of the thirty-seventh judicial district of Bexar county, Tex. McMillan, Devine & Howard are the garnishees, and filed an answer herein, admitting their indebtedness to Mrs. M. F. Rice and her husband, under lease contract entered into between them and Mrs. M. F. Rice, joined by her husband, leasing the premises known as No. 252 West Commerce street, in the city of San Antonio, Bexar county, state of Texas; and prayed that Mrs. M. F. Rice and her husband, J. P. Rice, be made parties defendant. Mrs. M. F. Rice, joined by her husband, J. P. Rice, in response to the answer of McMillan, Devine & Howard, appeared, and filed an answer setting up that the rents due under the lease contract with McMillan, Devine & Howard were the separate property of Mrs. M. F. Rice, under the constitution of the state of Texas, art. 16, § 15, and the Revised Statutes of the state of Texas, art. 2851; and filed cross action against McMillan, Devine & Howard for the rents admitted to be due under said lease contract. (2) It is admitted that J. P. Rice was a member of the firm of Rice Bros. & Co. at the time the judgment in the above case was rendered against said firm, and that the said judgment was for debts for the payment of which Mrs. M. F. Rice's separate property would not be liable. (3) Mrs. M. F. Rice is the wife of J.

P. Rice, and was his wife when the above judgment was rendered against him as a member of said firm. (4) McMillan, Devine & Howard are indebted under said lease contract to Mrs. M. F. Rice in the sum of \$324.27 for rents due thereunder up to March 6, 1893, upon the premises known as "252 on West Commerce Street," in the city of San Antonio, Bexar county, Tex. The lease contract was executed by Mrs. M. F. Rice, joined by her husband, with said McMillan, Devine & Howard. (5) The premises known as "252 on West Commerce Street" consist of lots and store buildings erected thereon, and are the separate property of Mrs. M. F. Rice, having been acquired by her by devise from her father, William Vance, before her marriage. (6) Interveners, on their cross action against McMillan, Devine & Howard, are entitled to recover judgment for the rents due under said lease contract, unless the plaintiff, G. W. Hayden, is entitled to recover same by reason of his garnishment. Under these facts, the issues submitted to the court are: "(1) Are the monthly rents accruing from the lease of Mrs. M. F. Rice's separate property subject to garnishment for the satisfaction of the debts of her husband, J. P. Rice? (2) Are the rents accruing from the lease of Mrs. M. F. Rice's separate property the community property of J. P. Rice and his wife, M. F. Rice, under section 15, art. 16, of the constitution of 1876, and article 2851 of the Revised Statutes of the state of Texas?"

The constitution of 1845 (article 7, § 19) provided that "all property, both real and personal, of the wife owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." This section was copied verbatim et literatim into the constitutions of 1861, 1866, 1876. The constitution of 1869 (article 12, § 14) was as follows: "The rights of married women to their separate property, real and personal, and the increase of the same, shall be protected by law." This is the only constitutional provision that has ever in Texas in any way mentioned the increase of the separate property of married women. As required by the constitution of 1845, the legislature, on March 18, 1848, passed a law defining the rights of married women, which has, amid the downfall of governments and the wreck of constitutions, except as to dropping the word "slaves," remained the same. It is article 2851, Rev. St., which reads as follows: "All property both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of

¹ Rehearing denied.

all lands thus acquired, shall be his separate property. All property, both real and personal, of the wife, owned or claimed by her before marriage and that acquired afterward by gift, devise or descent as also the increase of all lands thus acquired shall be the separate property of the wife; but during the marriage the husband shall have the sole management of all such property." It can be readily seen that this statute does not declare that the increase of separate personal property shall be separate property, but it is only the "increase of lands" that is so denominated. The only difficulty in construing the statute is in arriving at the legislative intent as to increase of lands. We find by consulting the decisions of other states that a large number of them differ with Texas decisions on the subject of the separate property of married women, both real and personal. But where there are a long line of decisions in our own state under which property has been acquired, and which have met the sanction of bar and people for a long time, we do not believe that we should make a departure from the paths hitherto followed in order to conform to the weight of authority in other states. We have our peculiar system of laws, which from time to time have met with judicial construction, and the reasons must be cogent indeed, and the arguments unanswerable, that would induce us to shake confidence in rights acquired under them, in order to follow the opinions of sister states. In regard to the question of the separate property of married women, we are of the opinion that, whatever seeming inconsistencies there may be in our decisions, they are, as a rule, founded in wisdom and learning, and, whenever unbroken in their general trend, we shall endeavor to follow them. It was, perchance, unnecessary to say this, but counsel for appellees, in his very ingenious and well-executed brief, insists so strenuously on this court following the opinions of California that we have felt it proper to say what we have in regard to the matter. From the time of the admission of our state into the Union there has been an evident disinclination on the part of our supreme court to enlarge by judicial decision the scope of our laws in regard to the separate property of married women. Our statute on that subject being an innovation upon the common law, the supreme court has given a strict construction to all its provisions, and whatever was not expressed clearly in the statute, or was not the only reasonable and tenable deduction from it, was discarded. Under the same statute, now in effect, (article 2851, Rev. St.) and under a section of the constitution of 1845 identical with that of our present constitution, the supreme court has held that crops grown upon the separate land of the wife, cultivated and gathered by her slaves, are community property. De

Blane v. Lynch, 23 Tex. 25; Conner v. Hawkins, 66 Tex. 640, 2 S. W. Rep. 520. Again, it was held that lumber sawed in a mill, the separate property of the wife, from trees grown on land, the separate property of the wife, the labor being performed by her slaves, was community property. White v. Lynch, 26 Tex. 195. In the case of De Blane v. Lynch the learned judge says: "The principle which lies at the foundation of the whole system of community property is that whatever is acquired by the joint efforts of the husband and wife shall be their community property." The statute defining the separate property of the wife clearly sets forth what property acquired by her during marriage shall be her separate property, and it is that "acquired by gift, devise, or descent." This would preclude the idea that anything acquired during marriage by the joint labor of husband and wife could be the separate property of either. The same statute gives the sole management of all the separate property of the wife to the husband. By the common consensus of the human family, barbarous and civilized, the man is placed at the head of the family, clothed with its government, care, and protection, and burdened with the management and direction of its property; and, it being the general rule that men occupy this responsible position in a fairly creditable manner, the law makes them the managers of the separate property of wife as well as the community property. The fact that this power and authority is often abused, and the wife's property made unavailing to her and the children of her body, can offer no sound argument against the general rule. The law is unable to meet every exigency, and is powerless to smooth all the inequalities of this life, but the wisdom and experience of the ages has shown that it is far better to recognize the headship of the man in his family, and that fewer evils will arise from this, than in creating a divided government. It is therefore a legitimate inference that crops, though grown on the separate land of the wife, have been produced through the combined efforts of the husband and wife, and that rents arising from the lease of her property are the result of the joint care and management of him and his wife, and therefore community property. Rents are not the natural outgrowth of lands. Land has never yet brought rents without some intelligence behind it to prepare for it, to contract for and collect it. Certainly, if crops grown upon the separate property of the wife, and lumber sawed from the trees cut from her land, are not the increase of the lands, rents cannot be held to be the increase, for if the one be the outgrowth of the joint labor of husband and wife the other must be, too. The first two would, on a liberal construction, be looked upon as the increase of the land, because they have grown out of and

been sustained by it. The latter is but a right to a certain profit issuing periodically out of the land. 2 Minor, Inst. p. 32. The moment the rents become due they are disconnected from the land, and become personal property, and, being acquired by the joint labors of the married couple put forth during the marital relation, they must necessarily become community. The rent of land is merely incident to it, a right connected with it, and is not a part of the land. Speaking on this subject, the learned author just cited says: "The reservation, in order to come within the definition of rent, must be of a profit, (something not in the grantor before,) whether in labor, provisions, part of the annual product, money, or other things. Hence a reservation of the trees or of the vesture or herbage growing on the land at the time would not be a rent, because not a profit." 2 Minor, Inst. p. 33. Under the common law, the rent or right itself could not be recovered in a personal action, but the arrears of rent was regarded in the same light as the severed fruits of the soil, and held to be personalty. 20 Amer. & Eng. Enc. Law, p. 1035. In the case of Rhine v. Blake, 59 Tex. 240, this question has been distinctly and clearly answered; and while it is contended by counsel for appellees that, if it was held in that decision that rents of the separate property of the wife are community property, it was obiter dictum, and not called for in the decision of the case, we differ from learned counsel on this point, and are of the opinion that every other issue is ignored, and the decision of the case made to turn on the construction that the rent was community estate, and as much under the control of the husband as though the property from which it resulted was his separate estate. The language is certainly strong, and does not admit of doubtful construction. We are of the opinion that the rents due on the lease of Mrs. Rice's separate estate were community property, and, as such, subject to garnishment for community debts. There being error in the judgment of the lower court, it is reversed, and judgment is here rendered in favor of appellant against the garnishees for \$324.27, the rent due by them to Rice and wife, and against J. P. Rice and M. F. Rice for all costs in this and the lower court.

SHEPFLIN et al. v. SMALL.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

COMMUNITY PROPERTY—RENTS OF REALTY.

1. The rents of the separate real estate of a married woman are community property.
2. A conveyance by husband and wife of the wife's separate real estate to a trustee, to apply the rents and profits to the support of the wife, is a withdrawal of the rents from the community estate.

¹ Rehearing denied.

Error from El Paso county court; J. E. Townsend, Judge.

Action by Shepflin, Baldwin, Tweedy & Co. against Maurice Ullman. Plaintiff, having obtained a judgment, instituted garnishee proceedings against Ben Small to satisfy the judgment. The court refused to strike out a portion of an intervention, and plaintiffs bring error. Reversed.

Allen Blacker and Zeno B. Clardy, for plaintiffs in error. H. H. Neill and W. B. Brack, for defendant in error.

JAMES, C. J. This cause is presented to us on agreed facts. The controlling facts appear to be these: Maurice Ullman was indebted to plaintiffs in error on a judgment for \$1,070.08, and by virtue thereof plaintiffs instituted garnishment proceedings against Ben Small, the defendant in error, who was a tenant occupying separate real property of Louisa Ullman, the wife of Maurice Ullman. It appeared that soon after the garnishment Ullman and wife conveyed all the wife's separate realty (consisting of the premises occupied by Small and other similar property, all occupied by tenants garnished also by plaintiffs in error) to Sidney Ullman as trustee, in trust to collect the rents and appropriate the same to the support and maintenance of the wife and to the education and maintenance of their children. The date of this conveyance in trust is not given, but it appears that at that time Small, the garnishee, was indebted for rent the sum of \$75. At the time of the trial the garnishee had become indebted \$150 more. There is nothing in the record to show when the answer was filed, nor how much rent had become due at the time the garnishee disclosed. Other facts appear as agreed on,—such as the insolvency of the husband and of the community estate; that the husband was unable to support the large family they had, and that the rents were necessary for the support of the wife and children,—but these facts need not here be amplified, as, from the view we take of this case, they become immaterial. Louisa Ullman duly intervened to assert her rights to the fund garnished. Plaintiff in error assigns as error the refusal of the judge to strike out that portion of the intervention of Louisa Ullman which sets up that the rents garnished were not subject to garnishment, as her intervention disclosed that such rents were community property.

The second assignment of error is that the court erred in permitting defendants to introduce any testimony upon the question of what was necessary for the support and maintenance of the family of intervener. The petition of intervention is not in the transcript, but the agreed facts, as above condensed, show that the fund garnished was community property, and therefore subject to the husband's debts. Our statute

provides that the wife's separate property shall consist of "all property, both real and personal, of the wife owned or claimed by her before marriage and that acquired afterward by gift, devise or descent, as also the increase of all lands thus acquired; but during the marriage the husband shall have the sole management of all such property." Rev. St. art. 2851. If rents derived from her lands are a part of the wife's separate property, they must be so on the ground of being increase thereof. What is the full signification of the word "increase" in this statute has not been explained by our courts, but they have frequently been called on to decide whether or not certain personality derived from the wife's lands was community property. Thus, crops grown upon the wife's lands, lumber manufactured upon her land from timber grown on the land, have been held to be community property. And that rents derived from the wife's lands are community property has been expressly held in *Rhine v. Blake*, 59 Tex. 240, the decision of which was grounded squarely upon the proposition that such rents are a part of the community estate. If crops grown upon the wife's land become community property, we do not see any reason why rents should not. Neither comes spontaneously from the wife's lands. While the land is the foundation for each of these, yet their production from the land is due, in greater or less degree, to the joint or individual efforts of the spouses. The personal skill, industry, and business management of each, and particularly of the husband, who is intrusted by the statute with the management of the wife's separate estate without compensation, are important factors in making the real estate of the wife yield its full measure of rents. We here refer to opinion this day rendered by this court in the appeal of *Hayden v. McMillan*, 23 S. W. Rep. 430, for more extended discussion of this question. We hold, therefore, that the rent garnished formed no part of the wife's separate estate, and up to the making of the trust deed to Sidney Ullman the rents were community property, and could be subjected to the debts of the husband, and although they may have been needed for the maintenance of his wife and children, that did not exempt them from the operation of the writ.

Plaintiff in error insists that article 2853, Rev. St., recognizes the right of the wife to a support out of the proceeds of her lands, and gives a remedy where the right is violated, and argues from this that, where it is shown that there are no other proceeds than rents from her lands, and that the husband and wife have no other resources, the right of the wife to be provided for out of these rents, is superior to any right the husband has to use these rents and consequently superior to any rights of his creditors to such fund. It is sufficient to dispose of this position taken by plaintiff in

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error to say that the article relied on does not relate to community property, but only to the proceeds of her separate estate, which remain her separate property, and this does not embrace rents. We see no objection, however, to the wife's separate land being conveyed to a trustee for the purpose of applying the rents and revenues to her support or to any other lawful purpose. The right to convey the separate lands would necessarily include the power to convey them for specific purposes lawful in their nature. We therefore are of the opinion that the conveyance to Sidney Ullman in trust had the effect of withdrawing the rents from the community estate, except so far as they had been subjected to the writ of garnishment. The decisions in this state seem to have determined that a writ of garnishment subjects what is due by the garnishee at the time he makes his answer, and that what may have become due after he discloses is not held by the writ. *Gause v. Cone*, 73 Tex. 239, 11 S. W. Rep. 162; *Blankenship v. Moore*, (Tex. App.) 16 S. W. Rep. 780; *Drake*, *Attachm.* § 451a. The county judge trying this cause rendered judgment for the wife for the \$75 due when the trust was created, and for the trustee for the \$150 that accrued between them and the trial. The judgment giving the \$75 to the wife was clearly erroneous. And so much of the rent that became due after the execution of the trust deed, and up to the coming in of the answer, would likewise be subject to the writ, for it is distinctly held in *Gause v. Cone*, supra, that the debtor had no power to assign any part of the debt accruing during such period as against the garnisheeing creditor. But we are not informed by the record how much rent had accrued at the time of answering, nor is the answer copied in the record. The only fact appearing in this regard is that \$150 had accrued at the time of the trial. What became due after the answer was subject to the provisions of the trust deed, and as we cannot separate these sums by means of any facts before us we are unable to render a judgment here as we otherwise should do. Consequently the judgment is reversed, and the cause remanded.

NEILL, J., having been of counsel, did not sit in this case.

TEXAS & P. RY. CO. v. ROBINSON.
(Court of Civil Appeals of Texas. Sept. 20, 1893.)

INSTRUCTIONS—INJURY TO PERSON ON TRACK.

1. A court is not required to give an instruction on a given issue, where the instruction is not formulated and presented.

2. Where an engineer blows the whistle on seeing a man on the track, and, on discovering from the man's manner, when within 200 feet of him, that he is intoxicated, makes no effort to check the train, and there is evi-

dence that the man was struck on the side, as he was trying to leave the track, the jury are justified in finding defendant liable.

Appeal from district court, Parker county; J. M. Patterson, Judge.

Action by Mary Robinson, for herself and minor child, against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by TARLTON, C. J.:

This appeal is prosecuted from a judgment recovered by the appellee for herself and her minor son, R. R. Robinson, as damages on account of the killing of her husband, George C. Robinson, by a freight train of appellant on October 3, 1890. At the time of the killing, George C. Robinson was intoxicated, though not entirely or helplessly drunk. When he was struck by appellant's locomotive he was seeking to leave the track, which at this place was on an embankment about eight feet high. The circumstances immediately surrounding the occurrence are detailed by the appellant's engineer substantially as follows: "About 6:25 o'clock P. M., and $1\frac{1}{4}$ miles west of Millsap, in Parker county, the company's freight train, consisting of 16 cars, partly loaded, was going west. Robinson was walking east when he was struck by the engine and knocked from the track, the train running about 18 or 20 miles an hour. * * * He was 900 feet distant from the train when I first saw him. He was killed on a curve of the track, which bent to the left; and as I started on this curve, before seeing him, I sounded the whistle four times, as is the usual signal on approaching curves. When I first saw him I supposed he had heard the blasts of the whistle already sounded for the curve, and as he was walking facing me I presumed that he saw the train approaching and would get off the track. I did not discover that there was anything unusual in the manner of the man until I was within 200 feet of him, when I again sounded the whistle several times in quick succession, and Robinson made a start to the left of the track as if to get off, and I supposed he had gotten off the track. I had not seen him when I sounded the whistle for the curve, but sounded the whistle as the usual signal for approaching curves. After I was on the curve I saw the man, but as he was only distant about 900 feet, and walking facing the train, I presumed he had heard the first whistle; but after I was within about 200 feet of him I noticed there was something unusual in his manner and sounded the whistle again, and he made a slight and slow move to the left of the track, which I took to be an effort to get off the track. He made the motion to the left about the time I sounded the whistle the second time. It could not have been more than a few seconds before he was killed. I did not make any effort to stop the train after I

saw Robinson on the track, because we were going down grade, with a heavy train, and it was impossible to stop the train in the short distance after I had discovered that there was something unusual in the man's conduct. After he was struck the train ran about one-half mile before we could bring it to a halt." There was evidence tending to contradict the statement of the engineer to the effect that he had blown the whistle on reaching the curve. From the location of the injuries,—upon the right side of the decedent, his right hip, legs, and body being bruised and mutilated, and his neck broken,—the inference is justifiable that a very brief space more of time would have sufficed for him to get off the track. A conductor and two brakemen were on the train at the time of the occurrence, the first of whom, at least, was very near a brake, but, having no signal to that effect, the inference is that he made no attempt to use it. We insert the following portions of the court's charge as pertinent to the questions raised by the appellant's assignments of error: "(1) If you [the jury] find from the evidence in this cause that the said Geo. C. Robinson was on the defendant's railroad track, and if you believe that while he was on said track there came along one of defendant's freight trains; and if you believe that said Robinson was then in danger; and if you believe the agents and servants of the defendant in charge of its said train were aware of the danger the said Robinson was in; and if you believe that after becoming so aware of his said danger they had it within their power by ordinary care and diligence on their part to prevent injury to or the killing of said Robinson; and if you believe that said agents in charge of said train, after becoming aware of said danger, and having the power to prevent injury, carelessly and negligently ran said steam engine and train against said Geo. C. Robinson, and thereby killed him; and if you believe the plaintiff is the surviving widow of the said Geo. C. Robinson, and that the said Robert R. Robinson is his only surviving child, and that the parents of the said Geo. C. Robinson were then dead,—you will find for the plaintiff and the said Robt. R. Robinson the damages, if any, they sustained by said killing. (2) A railroad company, like an individual owner of land, owes no duty of carefulness to persons coming on its track purely as trespassers, and it is not answerable for injuries casually resulting to them. Yet if those running a train discover a trespasser in danger, they must use all reasonable exertions to prevent the impending harm, and if they fail to use such reasonable exertions to prevent injury the railroad would be responsible. (3) The defendant has a right to a clear track, and no one can lawfully obstruct the passage of its cars over its tracks, except at a crossing or in a town, city, or village. If the said Robinson went on the track, and used it as a passway to

walk on, at a place not a crossing or in a town, city, or village, he was a trespasser, and the defendant owed him no duty except to use ordinary care and prudence not to injure him after the engineer first discovered that the said Robinson would probably not get off the track. (4) If you find that the said Robinson was walking on the defendant's track, as before stated in this charge, and being so there contributed to his injury, plaintiff cannot recover, unless you further find that after the agents of defendant discovered the danger they could by ordinary care have prevented the injury. If you find from the evidence that when the engineer in charge of the train discovered that the said Robinson would probably not get off the track he could not by the use of ordinary care have prevented the injury, then the defendant would not be liable. If, therefore, you find that any ordinary effort the engineer might have used to stop or lessen the speed of the train would have been ineffectual, the fact (if it be a fact) that he did not make such effort is immaterial. The engineer operating the engine had a right to presume Robinson would get off the track, out of danger, and was not required to do anything except to give the ordinary warning of an approaching train by sounding the whistle, until said engineer saw that he would probably not get off. Negligence is doing something that a reasonably prudent man would not do under the circumstances, or in doing something that a reasonably prudent man would do under the circumstances. It devolves upon the plaintiffs to establish by a preponderance of the evidence the facts entitling them to recover."

B. G. Bidwell, for appellant. Lanham, Stephens & Moseley, for appellee.

TARLTON, C. J., (after stating the facts.) Appellant first complains that the court erred in refusing its special request "to instruct the jury upon the issues of deceased's contributory negligence, and also his having been intoxicated when he was killed." We understand the rule to be that, when the court's general charge is in any respect or on any issue defective, it is the duty of the complaining party to present a special instruction curing the defect. *Gallagher v. Bowle*, 66 Tex. 265, 17 S. W. Rep. 407; *Johnson v. Granger*, 51 Tex. 42; *Cockrill v. Cox*, 65 Tex. 669. A distinction exists between an instruction formulated and presented on a given issue and a request in general terms that a charge be given on that issue. The request in this instance neither states nor suggests a proposition of law with reference to either of the issues named. Such a request we do not think the court was required to heed.

It is apparent that the appellee's case rests upon the doctrine of discovered neg-

ligence. According to this doctrine, as we understand it, if a person, whether drunk or sober, negligently incurs danger from a passing train, he is by such negligence precluded from recovery, unless, after the danger is discovered, the operator of the train fail to use ordinary care to avoid injuring him and injury consequently result. "If, after the impending danger becomes known to the defendant, he should then fail to use such ordinary care as would have prevented the injury, and the same results as a consequence thereof, then another principle of law [than contributory negligence] governs and the defendant would be liable; and this liability would be increased if, under such circumstances, the injury was inflicted willfully and wantonly, in a manner showing a reckless disregard of life and property." *Railway Co. v. Smith*, 52 Tex. 178; *Railway Co. v. Weisen*, 65 Tex. 443; *Railway Co. v. Hauka*, 78 Tex. 300, 14 S. W. Rep. 691; *Beach*, *Contrib. Neg.* § 395; *Rozwadowskie v. Railway Co.*, 1 Tex. Civ. App. 493, 20 S. W. Rep. 872. We are unable to concur with appellant's counsel that the evidence fails to show a failure on the part of the engineer to exert ordinary care to prevent the injury in this instance. We think that from the evidence the jury were authorized to conclude that if the engineer, in compliance with the suggestions of reasonable prudence, had sought, after he had discovered the danger of Robinson, to lessen the speed of the engine, he would probably have so retarded its movements as that the deceased would have escaped from the track. But such an attempt the engineer did not make, and hence the legitimate inference of negligence.

There is palpable error in the court's definition of negligence, obviously due to a clerical omission in the concluding clause thereof. This error, however, was, we think, rendered harmless by the remaining clauses of the court's charge, which we have quoted, and which on the issues presented by this record quite fully and accurately applied the principles of the law to the facts in evidence. The error must be regarded as immaterial. *Railway Co. v. Wright*, 62 Tex. 515. These remarks cover the appellant's several assignments of error, and they lead to an affirmance of the judgment, which is accordingly ordered.

STEPHENS, J., disqualified, and not sitting.

DAVIS et al. v. WHEELER et al.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

VENDOR'S LIEN—SALE MADE EXCLUSIVE—PRIORITIES.

1. Where land is sold and a deed executed to a married woman, and notes are given by her for the price, the vendor has an equitable lien on the land, though not expressly reserved,

and though the husband did not join in the deed.

2. A vendor's equitable lien does not pass by sale under execution of the land on which the lien exists.

3. A purchaser of land at execution sale acquires no priority over a vendor's equitable lien, of which he had notice at the time of the sale.

Appeal from district court, Parker county; J. M. Patterson, Judge.

Action by H. F. Wheeler and others against D. C. Davis and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by HEAD, J.:

January 28, 1886, M. S. Jackson conveyed to Aneta Sale 15 acres of land, in consideration of three notes for \$58.33 each, signed by her alone, and payable to him. At this time, Mrs. Sale was the wife of C. S. Sale, but the record fails to show why he failed to join her in the execution of the notes, or what, if anything, he had to do with making the trade. On June 10, 1889, an execution against Jackson was levied upon this land, as his property. At the time of this levy the deed to Mrs. Sale had not been recorded, and the statement of facts is silent as to whether or not the plaintiff in execution had actual notice thereof. This deed was, however, recorded on the same day the sale was made under the execution, and the case is presented by appellant as though the purchaser had notice at that time. This suit was instituted November 2, 1890, by appellee Wheeler, as alleged owner of the three notes made by Mrs. Sale to Jackson, against her, her husband, Jackson, and appellants, to foreclose his vendor's lien upon said land. The three notes were mentioned in the deed to Mrs. Sale, but no lien was expressly reserved therein. Appellants claim under the execution sale against Jackson. The statement of facts does not disclose whether Wheeler acquired the notes before or after the levy of the execution. Judgment was rendered by the court, on a trial without a jury, foreclosing the lien, but denying execution for any balance that may remain unpaid, from which this appeal is prosecuted.

E. P. Nicholson, for appellants. Geo. A. McCall, for appellees.

HEAD, J., (after stating the facts.) We think the court below did not err in holding the land subject to the vendor's lien to secure the payment of the three notes given by Mrs. Sale as the consideration for its purchase, although she was a married woman at the time she executed them. In such case, it has been held, a court of equity will grant relief. *Matlock v. Glover*, 63 Tex. 231. No personal judgment was rendered against Mrs. Sale for any balance that may remain after subjecting the land, and neither she nor her husband complains. So far as we can see from the record, the land, under this purchase, was community property of

Mr. and Mrs. Sale; and, had it been alleged and proven that this trade was made and notes given with the knowledge and consent of Mr. Sale, we see no reason why the debt could not have been treated as a community debt, and the husband held liable therefor, although made in the name of the wife. Such we understand to be the effect of the decisions of our supreme court. *Schmick v. Bateman*, 77 Tex. 326, 14 S. W. Rep. 22; *Miller v. Marx*, 65 Tex. 131. We think the learned trial judge correctly held the land subject to an equitable lien for the purchase money, although the notes evidencing the debt were executed by a married woman.

At the time the execution was levied upon the land as the property of M. S. Jackson, he, if then the owner of the notes, only had an equitable lien to secure their payment, and that this would not pass by a sale under execution of the land upon which the lien existed is quite too clear for argument. *Willis v. Sommerville*, (decided by us at our last term,) 22 S. W. Rep. 781. If the plaintiff in the execution, at the time of its levy, had no notice of the deed to Mrs. Sale, the purchaser thereunder, by reason of our registration statute, would acquire a right to the land superior to her; but this is by virtue of the statute alone, and does not apply to equitable liens not embraced within its terms. *Senter v. Lambeth*, 59 Tex. 259. For the purchaser at the execution sale to acquire priority over the vendor's lien in favor of the owner of these notes, it would be necessary for him to have been without notice at that time. *McKamey v. Thorpe*, 61 Tex. 651.

In their fourth assignment, appellants complain of the action of the court below in rejecting evidence offered by them to prove that Jackson was in possession and exercising ownership over the land at the time of the levy of the execution upon it. The bill of exceptions does not state the objection interposed by appellees to this evidence, which was sustained by the court, and this assignment cannot, therefore, be considered by us. *Johnson v. Crawl*, 55 Tex. 571; *Calhoun v. Quinn*, (Tex. Civ. App.) 21 S. W. Rep. 705. Besides, we are unable to see that appellant has suffered injury by the action of the court, even if there be error therein. Had appellant attempted to show that the trade between Jackson and Mrs. Sale had been legally canceled before the levy of the execution, it may be that the excluded evidence would have been admissible upon this issue; but we do not understand, from the other evidence introduced, nor from the bill of exceptions, that such attempt was made. Standing alone, it would not have been sufficient for this purpose, and we see no other issue upon which it could have been material.

In their fifth assignment, appellants complain of the exclusion of evidence offered by them to show that the transfer of the notes

from Jackson to Wheeler was simulated, and without consideration; but the bill of exceptions also fails to state the objection that was interposed to this evidence, upon which it was excluded, and the assignment, therefore, cannot be considered. What we have said would, however, have equal application to the case if Jackson himself had been plaintiff, and the proposed evidence was therefore not material. The judgment of the trial court should be in all things affirmed, and it is so ordered.

STEPHENS, J., disqualified and not sitting.

WITHROW et al. v. ADAMS et al.¹
(Court of Civil Appeals of Texas. Sept. 27, 1893.)

COMMUNITY PROPERTY—SALE BY SURVIVOR—DEBTS.

1. Pasch. Dig. art. 4642, vests the husband with full control over the community property on the decease of his wife, empowering him to sell the same, and sue and be sued in regard thereto, in the same manner as during her lifetime, on filing in the probate court a full and complete inventory and appraisal, to be taken and recorded as in cases of administration. *Held*, that article 4652, which vests the surviving wife with exclusive management and control of the community property, under the same rights, rules, and regulations as are enacted in favor of the surviving husband, so long as she remains unmarried, empowers an unmarried surviving wife to sell the community property.

2. The fact that an inventory of community property filed in the probate court by the surviving wife did not, in terms, purport to be an inventory of all the community property, that no list of claims owing to the estate was attached thereto, and that the inventory was not signed and sworn to by her, as required by Pasch. Dig. art. 4648, is not sufficient to invalidate a sale of the community property by her.

3. In an action involving the validity of a sale of community property by a surviving wife, the records of a suit against her to recover a debt owing by her husband, during the pendency of which the sale was made, are admissible to show that creditors of the estate had no complaint to make against her control and management of the estate, and that there was a valid debt against it.

4. In such an action, where plaintiff, claiming under the heirs of the deceased husband, contends that the surviving wife had no power to sell the community property, because of her failure to properly qualify as survivor, defendants, claiming under the sale, may introduce in evidence the final decree settling the wife's accounts as survivor, showing that there were debts against the estate, which gave her power to act without qualifying.

5. A decree on such final settlement, in proceedings to which the husband's heirs were parties, showing sales of community property by the wife, charging her with the proceeds, the payment by her of debts owing by the estate, the adjustment of the existing rights of all parties, and the partition of the residue of the estate between the widow and the heirs, is admissible to show that the heirs were bound by the decree, and received their share of the estate, and could not now complain against a purchaser from the survivor before such partition.

6. Though a power of attorney executed

by a surviving wife, authorizing a sale of community property, does not expressly designate her as the duly-qualified survivor, yet a deed executed by the agent conveys a good title, where there are debts owing by the estate authorizing a sale by her without qualifying as survivor.

7. The failure of a survivor of a community to execute a bond, as required by Act Aug. 1, 1870, passed during the pendency of the administration of the community, does not invalidate a deed executed by her after the passage of that act, where there are debts and charges against the community authorizing a sale by the wife without qualifying as survivor.

Appeal from district court, Tom Green county; J. W. Timinls, Judge.

Action by Amelia P. Withrow and others against H. B. Adams and E. D. L. Wickes for a partition of land. From a judgment in defendants' favor, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

Appellants state the nature and result of the suit as follows: "On May 21, 1890, appellants, Amelia P. Withrow, joined by her husband, George B. Withrow, James Masterson, B. A. Shepherd, Sidon Harris, and Carrie Chew, a lunatic, by her guardian, Henry F. Fisher, Jr., filed this suit against H. B. Adams and E. D. L. Wickes, asking for a partition of 640 acres of land in Tom Green county, being survey 173, patented to Henry F. Fisher, Sr. They allege that Amelia P. Withrow, Sidon Harris, and Carrie Chew each owned an undivided one-eighth, and Masterson and Shepherd jointly an undivided one-eighth, and admitted that Adams and Wickes owned the remaining undivided one-half. Adams & Wickes answered, and denied that any of the appellants owned an interest in the land, and set up title in themselves to the whole of the survey. On April 19, 1890, trial was had before the court without a jury, and judgment rendered for appellees for the whole survey of land, and for costs. Plaintiffs appealed. The land in controversy was the community property of Henry F. Fisher, Sr., and his wife, Mary C. Fisher. He died intestate in 1867, leaving surviving him his wife and four children, to wit, Amelia P. Withrow and Carrie Chew, two of the appellants, and Mary S. McKeen, wife of Byron McKeen, and Henry F. Fisher, Jr. The son, Henry F. Fisher, in 1882, conveyed to appellants Masterson and Shepherd his interest in his father's estate, and Mary S. McKeen, April 3, 1889, conveyed to appellant Sidon Harris her interest in her father's estate. Appellants admit that appellees own the community half of Mary C. Fisher of the land in controversy, but deny that they have acquired title to the community half of said Henry F. Fisher, deceased. This half, appellants contend, is now owned by them, as alleged in their petition." Appellants contend that the court erred as follows: "In admitting in evidence, over plain-

¹ Rehearing pending.

tiffs' objections, the copies of the purported application and inventory and appraisalment of lands of the community estate of H. F. Fisher, deceased, because said inventory and appraisalment do not appear to have been made in compliance with the directions of the law, as fully set forth in bill of exceptions No. 1." Defendants, having shown title by deeds to Mary C. Fisher's community half of the land, read in evidence a general warranty deed executed by Mary C. Fisher through Gustav Schleicher, her attorney in fact, to Adams & Wickes, defendants, for an undivided half of the same, her remaining interest, of date June 5, 1871, duly recorded on date. The proceedings of the county court, objected to by appellants, are: First. The petition of Mary C. Fisher to the county court of Harris county, Tex., in which she alleges the residence of herself and former husband, Henry F. Fisher, in that county, his death on the 23d day of October, 1867, intestate, leaving four children surviving him, naming them; that there was community property of herself and deceased, consisting principally in lands; that the business of the estate required attention, and that she desired to settle it as surviving wife. She prays that "inventory may be recorded, and an appraisalment made, according to the statute in such cases." The petition was sworn to by her on February 27, 1868, and filed March 18, 1868, in the county court. Second. A document filed same day, with the following caption: "Inventory of the community estate of Henry F. Fisher and Mary C. Fisher, acquired during their marriage." Then follows in the document a list of some 134 surveys of land, many thousand acres; giving, in ruled columns, the abstract number, name of the original grantee, the number of acres in each survey, in what counties situated, and the valuation, the total value being \$4,770. It is signed and sworn to before the county judge, by three persons, —G. Loeffler, I. G. Veith, and Otto Artz. It contains only a list of lands, no personal property, and is not signed or sworn to by Mrs. Fisher. The minutes of the court of same date, March 18, 1868, Book F, p. 296, have the following entry: "Mary C. Fisher, surviving wife, having filed an inventory of community property of herself and her deceased husband, and G. Loeffler, I. G. Veith, and Otto Artz being appointed appraisers, and having returned an appraisalment duly sworn to according to law, the said inventory is approved and ordered of record. It is further ordered that the clerk issue this certificate in testimony to the effect that said Mary C. Fisher be recognized under the act of August 26, 1856, as having authority to manage, control, and dispose of the community property subject to the provisions of said act, without bond, and without any further action in the probate court. Closed." The act of August 26, 1856, dispensed with administration upon the community estate of

the husband and wife in case of the death of the latter, and made it his duty to file in the county court "a full, fair and complete inventory and appraisalment of all the community property of himself and his deceased wife, to be taken and recorded as in cases of administration, and to have the same force and effect in all suits between parties claiming under it, after which, without any administration or further action whatever in the probate court, he shall have the right to manage, control and dispose of said community property, both real and personal, in such manner as to him may seem best for the interest of said estate, and of suing and being sued with regard to the same in the same manner as during the life of the wife." Pasch. Dig. arts. 4647, 4648. The same act also provided that "the surviving wife may retain the exclusive management and control of the community property * * * in the same manner and subject to the same rights, rules and regulations as provided in the foregoing provisions of this act until she may marry again." Id. art. 4652. No bond was required of the survivor under this act, but was required under the act of August 1, 1870, in amount equal to the value of the whole community. Pasch. Dig. arts. 4648, 5494. It is contended that, as the statute requires the inventory and appraisalment of all the property belonging to the community to be taken and recorded as in cases of administration, the directions of the law as to such inventories must be fully complied with, viz. that three appraisers should be appointed by an order entered on the minutes of the court, and that the survivor, with the assistance of the appraisers, should cause to be made a full inventory and appraisalment of all the estate; that the inventory and appraisalment be subscribed and sworn to by the appraisers; and that the survivor should make and attach to the inventory a full and complete list of claims owing to the estate, signed and sworn to by him, as a complete inventory and list of all the property belonging to the community, as required by the statute in cases of administration; and appellants say that, because all this was not done by Mrs. Fisher, the proceedings were invalid, and gave her no control of the property, as survivor, under the statute.

Sidon Harris, for appellants. Simpson & James, for appellees.

COLLARD, J., (after stating the facts.) The statute prescribing the duties of executors and administrators after the grant of letters required inventories, appraisements, and lists of claims, as stated by appellants; but we do not think the mere absence of such list, if required, or the failure to comply with prescribed forms, would render the proceeding invalid. The courts have been liberal in this respect in favor of the survivor. We are not advised by the record that there

were claims due the estate, nor can we say that a full inventory of all the property was not presented by Mrs. Fisher, and appraised; but, if there had been an omission, the parties interested could have had a more complete inventory, by complaint to the court. *Cordier v. Oage*, 44 Tex. 534 et seq. The proceeding in this case was under the direction of the court, which, by the statute, was clothed with all necessary powers in the premises; and the usual force should be allowed to its order showing that the inventory of the community estate had been filed by the survivor, that appraisers had been appointed, and the property duly appraised. It has been decided that an approval of the inventory by the court is not necessary, but such approval, and the formal statement in the order of the facts showing that the law had been complied with, are not without force in establishing the facts stated as judicial finding. If the inventory failed to list any of the property, it might have been corrected, upon complaint to the court, but such failure would not deprive the survivor of the powers conferred by the statute. *Dawson v. Holt*, 44 Tex. 173; *Jordan v. Imthurn*, 51 Tex. 287; *Green v. Grissom*, 53 Tex. 435; *Long v. Walker*, 47 Tex. 173; *Pratt v. Godwin*, 61 Tex. 335; *Lumpkin v. Murrell*, 46 Tex. 52. We conclude that the law was substantially complied with by Mrs. Fisher, and that she was fully empowered to act as survivor of the community, as upon full compliance with the statute. In this connection, we add that the act referred to conferred upon the surviving wife the same powers, rights, and obligations that were conferred upon the surviving husband, so long as she remained unmarried. Article 4632, Pasch. Dig., does not, in terms, declare that she may dispose of the property, as in the articles defining the husband's power, (4647, 4648;) but it gives her the exclusive management and control, in the same manner, and subject to the same rights, rules, and regulations, as provided in foregoing sections of the act. No distinction has ever been made as to the powers of the survivors. They have always been recognized as being equal in cases where the statute has been followed, and where it has not. This construction has always been given to the statute without question or argument. That this is correct is apparent from the language of the statute suspending the right of the wife to act after she marries again. It says: "But upon second marriage she shall cease to have such control and management of said estate, or the right to dispose of the same, under the provisions of this act, and said estate shall be subject to administration as in other cases." Pasch. Dig. art. 4652; Acts 1870; 2 Pasch. Dig. art. 5497; *Tucker v. Brackett*, 28 Tex. 337; *Leatherwood v. Arnold*, 66 Tex. 417, 1 S. W. Rep. 173; *Davis v. McCartney*, 64 Tex. 584; *Cordier v. Oage*, 44 Tex. 534; *Green v. Grissom*, 53 Tex. 434; *Green v. Ray-*

mond, 58 Tex. 80; *Johnson v. Taylor*, 43 Tex. 121.

Appellants' second assignment of error is that the court erred in admitting in evidence, over plaintiffs' objection, the copy of purported proceedings in the district court of Harris county, being a copy of pleadings and judgment in suit of Wm. G. Hale v. Mary C. Fisher, because such pleadings and judgment are irrelevant, and not legitimate evidence, the pleading especially being evidence of a declaratory, ex parte hearsay character, and secondary in a remote degree. The pleadings of Hale in the suit referred to, filed March 25, 1869, "set forth a copy of a purported contract by H. F. Fisher and others, made in 1858, employing Hale to represent their interests in certain lands and land certificates involved in litigation, they agreeing to pay Hale \$20 per section. The pleadings allege that, by virtue of the contract, Fisher became indebted to Hale to the amount of \$2,540 in 1862; and he sues for that amount and interest, alleging that Mary C. Fisher had qualified, and taken possession of the community estate" of herself and deceased husband. Judgment was rendered in the foregoing suit on May 3, 1872, in favor of Hale against the defendant, for \$473.90 and all costs; Mrs. Fisher having answered that H. F. Fisher had in his lifetime paid Hale all he was liable for under the contract sued on. Mrs. Mary C. Fisher conveyed her undivided one-half of survey 173, described in the petition, to Gustav Schleicher, on the 11th day of April, 1868, for \$320, from whom defendants show title by deeds to such half. The other half was conveyed by her through her agent, G. Schleicher, to defendants Adams & Wickes, June 5, 1871, for \$2,000. The Hale suit was pending when the last sale was made. The evidence was admissible to show that creditors had no complaint to make against her control and management of the estate, and that there was a valid debt against the estate. If, however, the evidence was superfluous, it would not constitute reversible error.

Appellants insist that "the court erred in admitting in evidence, over plaintiffs' objections, the copies of purported orders and decrees of the district court of Harris county, purporting to be a general adjustment of accounts, debts, receipts, expenditures, and liabilities between Mary C. Fisher, surviving wife of H. F. Fisher, and their four children, and decreeing partition of lands, which orders and decrees do not mention the land in controversy, but do contain recitals that Mary C. Fisher had established to the satisfaction of said court that she had paid certain amounts, that were community debts, by exhibiting certain vouchers, receipts, etc., and that she was liable for other small and unpaid community debts." "These orders, decrees, and recitals," say appellants, "are certainly matters of irrelevant, illegitimate,

secondary evidence, of a remote and unreliable character, not pertinent to the issue in this case, not authorized under the pleadings, and not binding, per se, upon the plaintiffs, so as to affect their title to the land in controversy." Such an order of the district court for settlement of the accounts of the survivor, Mrs. Fisher, and partition of the community estate of herself and her deceased husband, dated December 23, 1874, was read in evidence by defendants, as was also a final decree of the partition ordered. Nothing but the decrees were read in evidence,—none of the pleadings, exhibits, or vouchers. The decree of settlement and order of partition is quite voluminous, requiring division of about 120 surveys of land in the state, or near 60,000 acres, and adjusting all accounts of the survivor with the estate and the heirs. We insert some part of the recitals in the decree, to show its character, and relation to the case before us. After preliminaries as to parties, and waiving a jury, the decree states: "There was heard the pleadings and evidence, from which it appears that the said Mary C. Fisher, since the death of her husband, has sold off the community lands, consisting of the several tracts specified in her answer, 4,787 acres, for the aggregate sum of \$4,733.80, with which sum she stands chargeable; and it further appears that she has paid out for taxes on said community, as shown by her answer and by vouchers and proof, \$2,494.69, and has paid debts contracted during the marriage, as per schedule filed with voucher and proof to the satisfaction of the court, \$1,663.69, and amounts paid on other debts of the community, and expenditures on account thereof, as per voucher and proof, \$2,617.40, less an item of expense \$1,000, and tuition of \$500; \$1,500; \$1,117.40,—which last two items being expended for benefit of defendants Amella and Henry, are properly chargeable to them in equal moieties, in partition, as so much received. And it further appearing that the said Mary C. owes C. J. Koehler a balance on judgment against her for a debt of the community of \$165, and a fee to Gray & Botts, for services rendered on account of the community, \$400, makes the whole disbursement on account of the community the sum of \$5,840.78; and deducting therefrom the amount for which she has sold community land, \$4,733.80, leaves the community estate indebted to her in the sum of \$1,106.98, one-half of which balance is due the said Mary C. from the defendants Amella, Mary, Henry, and the plaintiff Carrie, each one-fourth part, say \$138.37. It is therefore adjudged," etc. Then follows judgment against the heirs named for the amount so due to Mrs. Fisher. Other rights are adjusted between the parties by the decree, and partition of the estate ordered, consisting solely of lands, except two certificates in the hands of Koehler for location. Commissioners and the sheriff, Ashe, are appointed to make

the partition as ordered,—one-half to Mrs. Fisher, and the other half to the four heirs,—taking into the account the amounts due Mrs. Fisher, as ascertained by the decree. The survey in suit is not mentioned in the judgment, or alluded to, unless it is included in the 4,787 acres found to have been sold by her, referred to as reported in her answer. The partition made pursuant to the order of the court was confirmed by final decree, which was read by defendants. Defendants claimed that Mrs. Fisher was duly authorized to act in the sale of the land in suit, by virtue of her compliance with the statute of 1856. This was denied by plaintiffs, and then, to show that her act was valid, defendants relied upon the fact that there were debts against the estate, which gave her power to act without compliance with the statute, and that her act was valid against the heirs, in any event. The decree of the district court was legitimate proof of the existence of debts binding upon the heirs, and, in case she had not power to sell the land in suit by virtue of filing an inventory as required by the statute, the existence of debts against the community would be sufficient authority for her act of sale. Besides, the decree of partition was binding upon the heirs, showing sales of community property by Mrs. Fisher; charging her with the proceeds of the same; the payment of debts by her, which were charges against the estate; adjustment of the existing rights of all the parties; and a partition of the residue of the estate,—all important testimony to show that the heirs were bound by the judgments, and had received their shares of the estate, in which case they could not now complain against a purchaser from the survivor before such partition. Defendants were entitled to this effect of the testimony, and it was sufficient both to justify the sale, and to show that the heirs had no cause of complaint in this suit. The decree of confirmation shows that they received the lands they were entitled to. If Mrs. Fisher had power, under the statute, by filing inventory, to sell and did sell the land in dispute under such power, the decrees would be unnecessary; but plaintiffs denied that she had complied with the statute, and denied that she had sold under such power. It was not error to admit the evidence.

On May 27, 1871, Mary C. Fisher executed to G. Schleicher a written power of attorney to sell the land in controversy. The language of the power, material to the issue, is: "I, Mary C. Fisher, surviving wife of Henry F. Fisher, dec'd, have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint, Gustav Schleicher my true and lawful agent and attorney for me, and in my name and place, to sell, alien, and convey all the right, title, interest, and estate which I have in and to 640 acres of land, [describing the land,] and I hereby authorize my

said attorney to execute to the purchaser or purchasers of said land good, valid titles, in fee simple; to receive and receipt for the purchase money; and generally to do and perform all and every act and thing necessary to be done in and about the premises, as I myself could, were I personally present," etc. The agent, under this power, conveyed, by general warranty deed, an undivided one-half of the land to defendants, for a consideration of \$2,000, June 5, 1871. Mrs. Fisher had already, on April 11, 1868, in consideration of \$320, conveyed her undivided one-half of the survey to Gustav Schleicher, who, on May 4, 1868, conveyed an undivided one-fourth of the tract, and again, on February 7, 1871, conveyed another undivided one-fourth, to defendant Wickes, who in turn, on February 15, 1871, conveyed an undivided one-fourth to defendant Adams. Appellants' fourth assignment of error reads as follows: "The court erred in admitting in evidence, over plaintiffs' objections, the purported power of attorney from Mary C. Fisher to G. Schleicher, of date May 27, 1871, to bargain, sell, and convey 'all her right, title, interest, and estate' in the land in controversy, because, from evidence previously adduced, it appears she had sold and conveyed all the interest she had ever possessed in such land on April 11, 1868; and because she is not shown to have had power to bargain, sell, and convey the one-half of said land at that date, (May 27, 1871,) which then belonged to the four children of herself and her deceased husband; and because said purported power of attorney did not, either expressly or impliedly, undertake to confer or delegate power and authority to G. Schleicher to bargain, sell, and convey the said one-half of said land belonging to said children, but simply and only authorized him to bargain, sell, and convey 'all the right, title, interest, and estate which I [Mary C. Fisher] have in and to 640 acres, known as survey 173, in district 11,' in her individual name and capacity; and because, if she did then possess power and authority to bargain, sell, and convey the one-half of said land that belonged to said children, it was most certainly a power she could not absolutely delegate to another." We are of opinion that, as survivor, the wife may make a sale by an agent duly appointed; that the existence of debts shown in this case authorized Mrs. Fisher to sell the land in suit; and that the sale by her agent conveyed all the unsold residue of the same, even though the power of attorney may not describe her as surviving wife, duly qualified under the statute. The writer is of the opinion that the language of the power of attorney is sufficient to delegate to the agent all the authority she had as survivor duly qualified by compliance with the statute. She is described as the surviving wife of Henry F. Fisher, and this, it seems to the writer, is

sufficient to designate her as such survivor, with all the capacity she actually had. She, as such survivor, did have the legal right to convey the land, having qualified by filing inventory, and could make title that could not be attacked collaterally, if done in good faith. The power of attorney made, describing her as survivor, carried all the power she had as survivor, and gave the agent the right to sell all the estate vested in her by law as owner, and as survivor duly qualified. We are agreed that, if the power of attorney did not designate her as the duly-qualified survivor, still, as her deed in her own name would, under the law, convey a good title, there being proof of debts, her deed by an agent would have the same effect. We have no doubt as to the legality of sale by an agent of the survivor, whether the survivor be qualified by compliance with the statute, or by existence of debts. We also agree that the power of attorney authorized the agent to sell all the unsold interest in the land of the estate,—that is, of the heirs and Mrs. Fisher,—and that such sale, together with the previous sale and conveyances to defendants, vested in them the title to all the land.

Appellants contend that after the act of 1870, repealing the act of 1856, and requiring the survivor to give bond, Mrs. Fisher, having failed to give bond, lost control of the estate as survivor, and that her deed by her agent in 1871 to the unsold half of the land passed no title. If it be true that she lost the legal control of the estate as survivor duly qualified by compliance with the statute, still, there being debts and charges against the community property, for which it was liable, she could sell, as she did, and the decree of partition, finding such debts, and adjusting the respective rights of the parties in relation to the estate, would be conclusive, in the absence of fraud, against the plaintiffs in this case. So it must be held that defendants have made a good defense upon this ground. The opinion of the writer is that the act of 1870, requiring bond, did not revoke powers of the survivor who had qualified under the act of 1856, while it was in force; that such survivor could continue to act with full powers without new proceedings and bond; and in such case, whether debts are shown or not, the sale by Mrs. Fisher in 1871, by her agent, was legal and valid. The sale was legalized by her compliance with the law when she took and retained possession of the estate. It is not necessary to so hold in this case, as there were debts against the community which authorized the sale, and vested in defendants title to all the land. We find no error in the judgment of the lower court, and it is affirmed.

FISHER, C. J., did not sit in this case.

GULF, C. & S. F. RY. CO. v. RAMEY et al.
(Court of Civil Appeals of Texas. Oct. 4, 1893.)

CARRIERS—LOSS OF FREIGHT—REVIEW ON APPEAL.

Where an action against a carrier for loss of goods shipped is tried on the theory that the bill of lading issued by a connecting carrier was adopted by defendant, an objection that the evidence fails to show that the bill of lading was executed by or on behalf of the defendant will not be considered.

Appeal from Brown county court; R. P. Conner, Judge.

Action by Ramey, McCullough & Co. against the Gulf, Colorado & Santa Fe Railway Company for loss of goods shipped. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. W. Terry, for appellant. T. C. Wilkerson, for appellees.

KEY, J. The assignments of error predicated upon the ruling of the court in the admission of testimony are not well taken. The fourth assignment, complaining of the court's charge, is too general to be considered, and it cannot be aided by the propositions thereunder.

The only other assignment complains of the action of the court below in not granting a new trial upon the fifth ground stated in appellant's motion therefor. The fifth ground of the motion for new trial was, in substance, that the weight of the evidence conclusively showed that the bill of lading upon which the freight was shipped was not executed by or on behalf of appellant. If this proposition be conceded as true, it does not follow that a new trial should have been granted. The plaintiffs had another theory of the case, which the court submitted to the jury, and which was that appellant had adopted the bill of lading as its own. It is not charged that the verdict was not supported on this theory of the case, and therefore we cannot say that the court erred in overruling the motion for a new trial. However, we do not hold or intimate that the verdict is not supported by the testimony. The judgment is affirmed.

FOLEY v. STORRIE.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

CONTRACTS—CONSIDERATION—MODIFICATION.

February 1st plaintiff agreed to deliver defendant so much wood, at an agreed price per cord, by April 1st; plaintiff not to be responsible for the railroad's failure to supply cars, nor for delays beyond human control. No cars were furnished till April 10th or 11th. March 28th plaintiff wrote to defendant that, in view of the wages he had then to pay, he must ask for a better price for the wood. Defendant answered that he would pay him a certain advanced price per cord, and requested him to hurry his shipments. *Held*, that the modification of the contract was not without consideration.

¹ Rehearing pending.

Appeal from McLennan county court; W. H. Jenkins, Judge.

Action by J. C. Foley against R. C. Storrie for the price of wood sold and delivered. Judgment for defendant. Plaintiff appeals. Reversed.

D. H. Hardy, for appellant.

COLLARD, J. It was error to instruct the jury that there was no consideration for the contract sued on, and the assignment must be sustained. On the 1st day of February, 1890, plaintiff and defendant entered into a contract, by which plaintiff was to deliver to defendant 1,000 cords of cedar wood on railroad cars near Fowler, in Bosque county, to commence work at once, load first car in 15 days from date, and load one car each day thereafter for the first five days, to increase the loads to thirty cords per day by March 1st, and to continue delivering thirty cords per day; Storrie, the defendant, to pay freight and expenses of shipment to Waco, and of unloading; all duty of Foley, the plaintiff, to end when the cars were loaded at or near Fowler; for which defendant was to pay four dollars per cord, as stated in the contract. It was stipulated that Foley "should not be held responsible for failure of the railroad company to furnish cars in amount sufficient to handle the above-mentioned number of cords per day, nor for delays occasioned by the weather or other matters beyond human control." The terms of the contract required its performance by Foley by the 1st day of April, 1890. No cars were furnished by the railroad company for loading the wood until about the 10th or 11th of April, and plaintiff delivered no wood under the contract. On March 28, 1890, plaintiff wrote to Storrie at Waco: "I have secured twelve more men, making twenty in all, chopping; but I am not having good success holding them. They cannot make wages cutting at \$1.00 per cord this weather, and pay board. Working with the force I now have, and the price I am now getting, I am simply giving you the wood for nothing, and it would require all summer to complete the contract. If you can stand a raise of \$1.00 per cord, I can pay choppers a little better wages, and push the work through; but if you cannot, I will be compelled to stop work, as I cannot pay choppers wages enough to induce them to stay in the woods this warm weather; and without choppers, of course I cannot do anything. I am sorry I am compelled to demand this, but it has got so late in the season that it is almost impossible to get hands unless you can pay them decent wages, and this I cannot afford to do at present price. Please let me hear from you as early as possible." On April 5th, defendant, Storrie, replied to the foregoing letter as follows: "Yours of the 27th inst. at hand, and would state that I will pay you \$5.00 per

cord. Please hurry up and ship wood. Let me hear from you soon." Plaintiff delivered, after this, wood to the amount of 100 cords or more, and has brought suit for same on the contract as shown by the foregoing correspondence. Defendant set up the contract of February 1st, claiming that he was damaged by the failure of plaintiff to perform the same, showing that he was under contract to put down certain wood pavements in the city of Waco in a given time, which fact was known to plaintiff; that his employes under pay were idle on account of the delay of plaintiff, and that he had to pay two dollars per cord more for wood than he agreed to pay plaintiff. Verdict and judgment were rendered for defendant for the sum of \$25 upon the issues so made.

The circumstances show that plaintiff was not in default at the time the first contract was rescinded or modified; that no part of said contract had been performed; that its obligations, if any existed at all, were to be performed in the future; and that to compel its performance would work a great hardship upon plaintiff,—facts known and recognized by the defendant. In such case it could not be held that the new promise was without consideration. The parties had the right to rescind their contract, or to modify it by mutual agreement. Where one contracted to furnish materials and build a house at a certain price, and, on account of a rise in the price of materials, informed his employer that he would not comply, and the employer directed him to go on and he would pay him what was right, it was held that the new contract was based upon a sufficient and valid consideration. *Bishop v. Busse*, 69 Ill. 403. In Massachusetts it was held that a modified agreement as to future obligations, without further consideration, will be sustained, though partly performed before the new promise was made. *Holmes v. Doane*, 9 Oush. 135. In Michigan an ice company had a contract with a brewery to furnish them ice during the next season at a given rate. The ice crop failed, and in May the defendants were informed by the ice company that no more ice would be furnished under the contract, when defendants, being compelled to have ice to prevent their beer from spoiling, made a new arrangement with the ice company, and agreed to pay a higher price for the ice, giving note for the same when furnished. It was held that defendants could not dispute the validity of the note upon the ground that it was without consideration, and that the parties were competent to make the new arrangement. *Shipman v. Butterfield*, 47 Mich. 489, 11 N. W. Rep. 283. In the same case it was also held that defendants could have stood upon the original contract, and claimed damages for breach of it; but, having elected to do otherwise, they were bound to pay the note. In the case of *City of Galveston v. Galveston City R.*

Co., 46 Tex. 440, it is said that, "If a contract has been obtained by mistake, or if, through change of circumstances, it is deemed to operate oppressively, an agreement to make an additional compensation, or to annul or modify it, is not, as is well settled, invalid for want of consideration." See *Bean v. Jay*, 23 Me. 117; *Bish. Cont.* §§ 812-814, 836. In the case before us defendant might have relied upon his original contract, and, upon default by plaintiff, if there had been such default in fact, have recovered damages for its breach; but for reasons at the time deemed by him sufficient, he elected to modify the contract, and pay a greater price for the wood. The parties were competent to make the change, and rest it upon their mutual promises to be performed in the future, and by so doing defendant waived performance and damages under the contract as it was at first made. The rights of the parties must stand or fall upon the contract as reconstructed by them. Other assignments of error need not be noticed. The judgment of the court below should be reversed, and the cause remanded, and it is so ordered.

TEXAS & P. RY. CO. v. HAYES.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

JUSTICES OF THE PEACE—APPEALS—JURISDICTION—AL AMOUNT.

In a suit for damages less than \$20, when the pleadings are in writing, the justice's failure to enter on his docket the amount claimed in reconviction, being more than \$20, will not deprive the county court of jurisdiction of defendant's appeal.

Appeal from Denton county court; F. M. Davidson, Judge.

Action by Newton Hayes against the Texas & Pacific Railway Company for damages for killing a cow. From a judgment of the county court dismissing its appeal from the justice's court, defendant appeals. Reversed.

Ferguson & Bottorff, for appellant.

Conclusions of Facts and Law.

HEAD, J. Appellee sued appellant in justice's court for \$19.75 damages for killing a cow. Appellant filed in same court a written plea in reconviction for \$130 damages for driving cow on track in front of its engine, and thereby delaying its passenger train, and expense of burying the cow. No exception was filed to this last plea, nor was it attacked as being a fraudulent attempt to confer jurisdiction upon the court, nor was any note made on his docket by the justice of the pleadings of either party. Judgment was rendered by the justice in favor of appellee for the \$19.75 claimed by him, from which appellant prosecuted an appeal to the county court, in which its appeal was, on motion of appellee, dismissed for want of

jurisdiction, and from this judgment of dismissal this appeal is prosecuted.

We think the county court erred in dismissing the appeal to it. The amount in controversy in the justice's court was the damages claimed in appellant's plea in re-convention, as well as the amount sued for by appellee; and, this being more than \$20, the county court had jurisdiction on appeal. *Roberts v. McComant*, 70 Tex. 743, 8 S. W. Rep. 543; *Railway Co. v. Tacquard*, 3 Civil Cas. Ct. App. 250. The pleading in the justice's court, being in writing, was sufficient to apprise the county court of the matters litigated there, although the justice may have failed to do his duty, in not making a note of the pleading of the parties on his docket, as required by the statute. *Whittington v. Eppstein*, 3 Civil Cas. Ct. App. 369; *Maass v. Solinsky*, 67 Tex. 290, 8 S. W. Rep. 289. We do not think the failure of the justice to make this entry on his docket has ever been held ground for dismissing an appeal in the county court, even when the pleading is entirely oral. On the contrary, it has been strongly intimated that an entry made on the docket of that court would enable the supreme court to review the case, when appealed there. *Moore v. Jordan*, 67 Tex. 394, 3 S. W. Rep. 317. The judgment of the county court should be reversed, and the cause remanded, to be there tried de novo on its merits.

GRACE et al. v. MILLER.

(Court of Civil Appeals of Texas. Sept. 28, 1893.)

CONTRACTS—CONSIDERATION—ESTOPPEL.

M., for the purpose of controlling cotton on which he and H. had liens, indorsed a note from G., the owner of the cotton, to H. This note had been given as part of the consideration for a contract by which G. agreed to purchase land of H., to be conveyed on payment of the purchase price. At the time the contract was made there was a verbal agreement that G. might elect not to purchase, and the note should be treated as an obligation for rent. This election was made, and the contract was considered by G. and H. as rescinded. H. desired payment of the note before its maturity, and M., not knowing of the rescission of the contract or of the agreement giving the right to rescind, offered to pay it then, if H. would transfer it to him with the vendor's lien, which was agreed to, and the transfer made, G. being present, and saying nothing of the rescission. *Held*, that G. and H. were precluded from denying the existence of the vendor's lien, the payment of the note by M. before its maturity being a consideration for the agreement that he should have the lien.

Appeal from district court, Polk county; L. B. Hightower, Judge.

Action by C. R. Miller against M. B. Grace and others on a note, and to enforce a vendor's lien. Judgment for plaintiff, and defendants appeal. Affirmed.

Jas. E. Hill, for appellants. J. M. Crosson and Holhousen & Feagin, for appellee.

WILLIAMS, J. During the fall of 1888, M. B. Grace, who was occupying a farm in Polk county, gave to appellee, Miller, a mortgage on all crops which Grace should produce, "to the extent of three bales," during the year 1889, to secure a debt then due, and such other sum as might become due thereafter for supplies, etc., furnished Grace by Miller. Grace did not own the land, but on the 28th day of May, 1890, joined by his wife, E. J. Grace, concluded a written contract with appellant Holliman, by which he agreed to purchase from Holliman a two-thirds interest in the land and certain personal property, for a consideration of \$800, for which he gave the three joint notes of himself and his wife, the first for \$200, payable on the 1st day of December, 1890, and the other two for \$300 each, payable at subsequent dates, and gave to Holliman a mortgage on all crops to be grown by Grace upon the premises during the years 1890, 1891, and 1892, to secure such notes. It was also stipulated that the title to all the property should remain in Holliman until the notes were paid, and upon such payment Holliman bound himself to convey the property to Mrs. Grace. At the time the written contract was made, there was a verbal understanding between the parties that Grace might during the year 1889 elect not to purchase the land, in which event the note for \$200 was to be considered and treated as an obligation for the rent of that year. Early in the fall of the same year, Grace decided that he would not consummate the purchase, and so told the agent of Holliman, who held the notes for collection. This was communicated to Holliman, and was satisfactory to him, and the contract of purchase and sale was considered by all of the parties as rescinded, and the \$200 was held for collection as rent by Holliman's agent. After this, and in October, Grace notified Oates, the agent of Holliman, that he had brought to market three bales of cotton. Miller desired to ship the cotton in order to obtain good prices, and a conversation ensued between him and Oates in which the latter claimed the right to hold the cotton until the note for \$200 was paid, but expressed to Miller a willingness to let the latter ship the cotton if he could "get him [Miller] where he could make him pay the note." Miller asked Oates, if he (Miller) would indorse the note, if that would not make it good, to which Oates assented, and Miller accordingly wrote his name across the back of the note, and thereupon was allowed by Oates to take the cotton. Before indorsing the paper, Miller inquired of Oates if his indorsement would put him in the place of Holliman, to which Oates replied that it would. Miller told Oates he was willing to indorse the note if he could control the cotton, and, after he had indorsed it, promised that he would pay it as soon as he had gotten enough cotton from Grace,

and would notify Oates when the remainder of the cotton was brought in. Miller was to have the cotton gathered, which he did, and later, about November 1st, notified Oates that the rest of the cotton was ready. Oates went with the note to Miller's store, and a transaction occurred, about the most of which the witnesses agree in their statements, though upon one or two points there is a material conflict. Miller stated to Oates that as the note was not due for 30 days, if it suited Oates, he (Miller) would prefer not to pay it then, as he needed the money. Oates replied that, as he was acting for another, he would prefer that the note be paid. Miller then proposed, according to Oates' testimony, that if Oates would transfer to him (Miller) the note, together with all liens on the land and stock, he would give a check for the amount of the note. Miller's statement of his proposition is substantially the same as Oates', except that he says his proposition was that Oates should transfer the vendor's lien on the land and the lien on the stock. To the proposition of Miller, Oates agreed, the check was given and accepted, and the following transfer was written upon the note by Miller, which Oates signed: "This note is this day transferred to C. R. Miller, with all claims or vendor's lien on land and stock, as per contract or deed from J. H. Holliman to M. B. Grace, as far as this note goes as payment on said land and stock. [Signed] J. H. Holliman. Per Oscar E. Oates." Grace was present at and assented to the transaction between Oates and Miller. Miller subsequently credited Grace upon his account with the proceeds of the cotton, and, there being a balance, it was indorsed as a credit on the note. This was all done with Grace's knowledge and consent. There is a conflict of testimony as to whether or not Miller, at the time he obtained the note, had notice of the fact that the contract of sale between Holliman and Grace had been rescinded, and the note converted into an obligation for rent. Oates states positively that he informed him fully of the fact. Holliman also states that he communicated knowledge to Miller, but does not give the time when he did so. Further on, he says Miller knew all about the fact, but does not state how he knows. He was not present at either of the interviews between Oates and Miller. Miller denies that he had any such knowledge, stating that he never heard of any verbal agreement that the contract could be rescinded, nor of the rescission, until after his transaction with Oates, and that it was after that time that Holliman made the statement to him; that he does not remember that Oates ever told him of the cancellation, and that the note was for rent; would not say positively that he did not, but did not remember that he did; that he knew that he did not have notice from any source at the time he bought the note. There is no de-

nial of Oates' authority to make the agreement claimed by Miller, and to transfer the note. There are other circumstances relied on by the parties tending more or less to sustain their respective versions of the dealings above set forth, but enough has been stated to develop the nature of the issues upon which the decision must turn. The defendant Garvey bought the land from Holliman after all of the facts stated had transpired, and no facts are shown to put him in any other or better attitude with reference to them than Holliman himself would occupy. This suit was brought by Miller, to recover of Grace and wife, as makers, and of Holliman, as indorser or assignor, the amount due on the note, and to foreclose against them and Grace the vendor's lien on the land. Judgment was rendered against M. B. Grace alone for the amount of the note, discharging Mrs. Grace and Holliman from personal liability, and foreclosing against all of the parties a lien on the land, and decreeing its sale to pay the sum adjudged. The judgment orders the residue, if any, after payment of the debt, to be paid to defendants.

There is no statement in the record of the facts found by the court below, nor of his rulings upon the law of the case. If, therefore, from the evidence in the record, facts can be found which will sustain the judgment, it must be affirmed, and all conflicts in the evidence must be determined so far as necessary in favor of that view which tends to support the judgment. We must therefore conclude, in addition to the undisputed facts stated, that, in the second transaction between Oates and Miller, the latter, without notice of any verbal agreement between Holliman and Grace giving Grace the privilege of rescinding the contract, and without notice of any actual rescission, proposed to Oates to pay the note before its maturity, and before he was bound to pay it, if Oates would transfer the note, with the vendor's and other liens to Miller; and that Oates accepted this proposition, and made the transfer on the note, without notifying Miller of any change in the contract of Grace; and that Miller gave the check as the consideration of such transfer; and that this was all done with the knowledge and consent of Grace. Holliman and Grace were the parties interested in freeing the land from the vendor's lien, and when they both assented to a transfer of the note to Miller, not only with the assumption, but upon the express stipulation, that it represented part of the purchase money of the land, and was secured by a vendor's lien, and obtained from Miller money, which he was not then bound to pay, it would seem that they ought to be precluded from afterwards denying the existence of such lien. If they had previously agreed upon the rescission of the contract of the purchase and sale, it was still within their power to reinstate it, and to confer

upon a purchaser of the note all the rights which accompanied the note as an obligation for purchase money. That Miller was already bound to pay the note is no answer to this view of the transaction. He was not bound to pay it then, nor perhaps at all until after default on Grace's part. It is true that he promised Oates to pay it as soon as enough cotton was in hand, but this seems to have been volunteered by him after he had indorsed the note. His legal obligation was expressed by the note and his indorsement, and was not then mature. Nor is it an answer that he received cotton which had been charged with a lien to secure the payment of the note. The very object of the indorsement was to release the cotton from such lien in order that he might control it; at least the facts warrant that construction. Besides, treating the second transaction as a purchase by Miller of the note, Grace being the debtor, with his cotton subject to two liens, one to secure the note, if that was still in force, and one to secure Miller's account, he had the right to apply the payments on either, and, as is shown, he consented to the application of them to the account. If hardship results to Holliman in depriving him of his right to sell the land, or in burdening it with a note, of which payment should have been exacted, instead of a transfer of it to another person, it flows from the contract made by himself through his authorized agent. Had he simply enforced his rights under his original contract, or under that made with Miller, when the latter indorsed the note, and became liable for it, the note would have been paid and the lien discharged. But in the second agreement between Oates and Miller new rights and changed relations resulted; at least the court below could have legitimately so found from the evidence, and we can only recognize them as they exist. The facts may have authorized a different judgment, but we think they sustain also the view we have expressed, under which the judgment must be affirmed. There was no effort made in the lower court to alter the form of the judgment, wherein it directs that any residue of the proceeds of sale after paying the debt and costs be paid over to defendants. There was no issue on that point between defendants, and the judgment will not prevent the party entitled to such residue from receiving it. **Affirmed.**

HURLBUT et al. v. BOAZ.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

MALICIOUS PROSECUTION—MALICE AND PROBABLE CAUSE.

1. The burden is on plaintiff to show, not only his prosecution and acquittal on the charge, and defendants' malice and lack of probable cause in making it, but also that the charge was in fact false.

2. In an action for malicious prosecution on the charge of embezzlement by plaintiff from defendants, his employers, plaintiff's statement that he did not blame defendants for prosecuting him; that they had to do it to vindicate themselves, as people believed that they had instigated him to burn their store building,—was incompetent and prejudicial.

3. Opinion evidence as to defendants' motive in the alleged malicious prosecution is competent.

4. Advice of counsel should be considered in determining, not only the existence of probable cause, but also the absence of malice.

5. If plaintiff was innocent of the crime, but defendants had reasonable ground of suspicion, supported by circumstances strong enough, in themselves, to warrant a cautious man in the belief that he was guilty, the jury should find for defendants.

6. The fact that a witness has been directly examined as to a conversation with a party, competent against the latter, does not admit his cross-examination as to the rest of the conversation, if that be impertinent to the first part, and objectionable otherwise.

7. It is error to charge the jury that they may consider certain evidence for certain purposes, or in proof of certain issues, since the admission of the evidence is an intimation to them that they may consider it as a part of the whole testimony, and a special charge upon it gives it undue emphasis, and is in the nature of argument.

Appeal from district court, Brown county; A. W. Timmins, Judge.

Action by Lon Boaz against Hurlbut & Semple for damages for malicious prosecution. Judgment for plaintiff. Defendants appeal. Reversed.

Goodwin & Goodwin and T. O. Wilkinson, for appellants.

FISHER, C. J. This is an action for damages, instituted by appellee against the appellants, growing out of an alleged malicious prosecution of the appellee at the instance of the appellants, charging him with the offense of embezzlement. The trial below resulted in a verdict and judgment against the appellants for \$4,000 as actual and \$4,000 as exemplary damages.

At the trial of the case, witness Cole, over the objection of the appellants, was permitted to testify that in a conversation he had with appellee, Boaz, at Ft. Worth, he stated to appellee that "he [Boaz] could not blame Hurlbut & Semple for prosecuting him; that they had to do it in order to vindicate themselves, as the people of Brownwood believed that they instigated him [Boaz] to burn the house. That he heard John Summers and Charles Turner say that the people of Brownwood thought Hurlbut & Semple instigated Boaz to burn their house." It appears from the evidence in the record that Hurlbut & Semple were engaged in the hardware business in the town of Brownwood, and that the appellee, Boaz, was their agent or manager in charge of the business there. While so engaged in business, a fire originated in the store, and partially destroyed some of the goods. Soon after this occurrence, Hurlbut & Semple filed a complaint against Boaz, charging him with

embezzlement of a sum of money while acting as their agent in the control of the business at Brownwood. The testimony of the witness Cole, as quoted, was clearly inadmissible. The opinion of the witness Cole as to the motive that actuated Hurlbut & Semple in instigating the prosecution of Boaz was not admissible against them, nor could Hurlbut & Semple be affected by the general belief of the people of Brownwood that they caused Boaz to burn the storehouse. The prejudicial effect of this evidence is obvious, and was well calculated to injuriously affect the interests of the appellants in the mind of the jury. The effect of this evidence was to show that Hurlbut & Semple initiated the criminal prosecution against Boaz without probable cause for belief in his guilt, and that he was put forward and offered by them as a vicarious sacrifice, in order to change the current of public opinion in his direction, as being alone the guilty agent in burning the house. We are at a loss to understand why the court below admitted this evidence, unless the ruling was based upon the fact that Cole was a witness for the appellants, and this evidence was brought out on cross-examination, as a part of a conversation between witness and Boaz that was brought out in the direct examination. Cole was placed upon the witness stand at the instance of the appellants, and testified, upon his direct examination, as to a conversation he had with Boaz about a matter altogether different from the evidence objected to, and which was properly admissible against Boaz. The fact that a part of a conversation that is legal evidence is admissible in evidence does not warrant the admission of other parts of the conversation, that do not tend to explain that already admitted, and that are objectionable on other grounds; such as being hearsay, or the opinion of a witness about a matter in which his opinion is not admissible, etc. The conversation itself gives no vitality to evidence that is objectionable as violative of some rule of law that otherwise excludes it. There was error in admitting this evidence. What we have said disposes of the third assignment of error, as the testimony of Bean Scott, Rogan, and Maples, which was excluded, becomes unimportant upon another trial, for the reason of its admission no longer exists.

Appellants' seventh assignment of error complains of the charge of the court, in so much as it instructs the jury that they may consider the advice of the county attorney given to Semple, advising him to make the affidavit against Boaz for embezzlement, as a fact that they may consider, together with all the other facts, in determining whether or not the appellants had probable cause to institute the prosecution. The objection urged to this charge is that, in effect, it limits the right of the jury to consider the advice of counsel only in determining if the appellants acted upon probable cause, and

impliedly excludes them from considering such advice in determining if they in the prosecution acted with malice. There is a conflict in the authorities as to the effect that should be given to the advice of counsel, when the prosecutor has honestly acted upon it, and for what purpose the jury are permitted to consider such advice in cases of this character. Malice and probable cause are questions of fact for the jury, and the advice of counsel is a fact that may be considered, along with the other facts and circumstances in the case, in determining the absence of the former, and the existence of the latter. This seems to us to be the proper rule, and the consideration of such advice should not be limited to determining the existence of probable cause, but should be considered, also, in ascertaining the want of malice. 14 Amer. & Eng. Enc. Law, pp. 53-56, and notes; Glasgow v. Owen, 69 Tex. 170, 6 S. W. Rep. 527; Railway Co. v. James, 73 Tex. 24, 10 S. W. Rep. 744. There was error in the charge, in the respect complained of. From what has been said, we do not desire it to be understood that we would approve a charge that would instruct the jury that they may consider the advice of counsel, even for the purposes for which they may legally do so. The advice of counsel is legal evidence, and may be, by the jury, considered, in its bearing upon the want of malice and the existence of probable cause, like the evidence of other facts that may throw light upon those questions. But this court and the supreme court have repeatedly deprecated the practice that prevails in some of the trial courts, in their charges to the jury, in carving out of the mass of evidence in the case certain facts, and instructing the jury that they may consider such facts for certain purposes, or as tending to establish certain issues. Gray v. Burke, 19 Tex. 228; Jacobs v. Crum, 62 Tex. 408; Hanna v. Hanna, (Tex. Civ. App.) 21 S. W. Rep. 721, and cases cited. The charge should submit the case to the jury upon all the facts and circumstances in evidence, leaving to the jury, in the exercise of their discretion, a determination of these facts, and the weight to be given them. The fact that the court admits in evidence proof of certain facts and circumstances conveys the information to the minds of the jury that such evidence is legal, and may be considered by them in reaching a verdict; and in such case it is not only unnecessary, but improper, to tell the jury that certain facts or circumstances may be considered by them. The effect of such instruction is argumentative, and calculated to give such fact undue prominence. It is beyond the province of the court to either directly or indirectly intimate its opinion as to a controverted fact. Giving it prominence, by directly calling the jury's attention to it, by telling them they may consider it in determining an issue in the case, is an indirect way of emphasizing

ing it, and, by culling it out from the mass of other facts in the case, tends to impress the minds of the jury that, in the opinion of the court, this fact is important to be considered in determining the fact in issue.

The court instructed the jury that, in "order for the plaintiff to recover, he must show, by a preponderance of evidence, (1) that he was prosecuted under the charge made by the defendants, and that he was acquitted of said charge; (2) he must show that the defendants, in instituting said prosecution, were instigated by malice, and that they acted in said matter without probable cause for believing plaintiff guilty of said charge; (3) and plaintiff has been damaged by said prosecution." In addition to what was above given, the appellants requested a charge to the effect that, in order to entitle the plaintiff to recover, he must also show that the alleged charge of embezzlement was false. This charge the court refused to give. We think this additional charge should have been given, and it was error to so refuse. It embodied one of the essential elements that must exist in cases of this character, in order for the plaintiff to recover, and the proof of this fact rested upon him. Some of the reported cases and writers upon this subject, in laying down the rule as to what must be shown by the plaintiff in order to entitle him to recover, do not go beyond the issues submitted by the court in its general charge, as quoted, and do not require that the plaintiff should prove the falsity of the accusation as a prerequisite to recovery. In cases of this character, the burden rests upon the plaintiff, and no presumption of innocence is indulged in his favor, as exists in his behalf when prosecuted for a crime, and neither is the acquittal of the criminal accusation conclusive evidence of his innocence, or the falsity of the charge preferred against him. Upon this subject, the court, in the case of *Wheeler v. Nesbit*, 24 How. 549, says: "To support an action for malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of the prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without probable cause, and that the defendant, in making or instigating it, was actuated by malice. Proof of these several facts is indispensable to support the declaration, and clearly the burden of proof, in the first instance, is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars the defendant has no occasion to offer any evidence in his defense." In *McManus v. Wallis*, 52 Tex. 545, the court prescribes "the falsehood of the alleged charge" as one of the essentials to be shown by the plaintiff in order for him to recover. If the plaintiff was

guilty of the crime charged, although acquitted, he could not recover, even though there did not exist at the time of the prosecution a knowledge of facts, within the possession of the defendants, that would warrant a probable cause for the prosecution. The plaintiff may be guilty, although probable cause for the prosecution did not exist at the time of its inception. There is no presumption in favor of the innocence of the plaintiff; and, as said in the case of *Wheeler v. Nesbit*, supra, "because the evidence is negative in character does not relieve the plaintiff from the burden of its proof." We believe the issue presented in the special charge should have been given to the jury, along with those covered by the general charge.

The appellants, at the trial below, requested the court to instruct the jury "that it is immaterial whether Boaz was guilty or innocent of the charge of embezzlement. If you believe the plaintiff innocent of the crime, but believe that the defendants had reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of the offense, you will find for defendants." It is true, as a proposition of law, that the innocence of the plaintiff of the criminal accusation will not entitle him to recover, if the defendants, acting with ordinary caution and prudence, instituted the prosecution based upon a probable cause. In view of the facts of this case, we think that the charge should have been given, and that it was error in the court to refuse it. For the errors discussed, the judgment will be reversed, and the cause remanded.

There are assignments of error questioning the charge of the court in submitting to the jury any issue as to attorney's fees in the criminal prosecution, and the expenses of the appellee in attending court, and his loss of time at said trial, for the reason that the evidence fails to show that the amount of attorney's fees paid out was reasonable, and what amount of damages, if any, the plaintiff sustained by reason of the expenses and loss of time in attending court. The plaintiff can only recover his reasonable attorney's fees paid out in the criminal prosecution, and can only recover some amount as damages that may be shown by the evidence he has sustained by reason of loss of time in attending court, and the reasonable expenses so necessarily incurred. We will not make this error a ground of reversal, as we have sent the case back for other errors, but admonish the court to be governed by the rules here stated, if these issues should be again raised upon another trial.

There is no merit in the twenty-sixth assignment of error, because the judgment follows the pleadings and the evidence, and was properly rendered against Hurlbut & Semple. In view of another trial, we will

not discuss the other errors assigned. The judgment of the court below is reversed, and the cause remanded.

DUNN v. SMITH et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

LIMITATION OF ACTIONS—CHATTEL MORTGAGES.

A second mortgagee, who has foreclosed and bought in the chattels, can plead limitation against the first mortgagee, seeking to foreclose, though the mortgagor has waived his right, and the first mortgage was not barred when the second was given.

Appeal from Robertson county court; O. D. Cannon, Judge.

Appellant, George H. Dunn, on April 13, 1891, filed suit in the justice court of precinct No. 7, Robertson county, Tex., against E. M. Smith, on his note for \$100, of date February 26, 1883, and to foreclose his lien on 20 head of cattle described in the chattel mortgage of the same date, with power of sale to secure the said note, and which was duly filed by Dunn in the office of the county court of Robertson county on July 20, 1884, and registered. J. W. Johnson, appellee, was made party defendant for this: E. M. Smith owed Johnson \$500, and February 13, 1886, gave her note to Johnson for that amount, and secured it by a chattel mortgage on 28 head of cattle described, due October, 1886. September 23, 1890, Johnson brought suit in the county court of Brazos county against said Smith on her note and mortgage, and October 23, 1900, recovered judgment, with foreclosure on the cattle, order of sale, etc.; and December 24, 1890, the sheriff of Robertson county, under said order, sold the cattle, and Johnson bought and now has the cattle in his possession. Appellant claims that his lien is superior to that of Johnson, and asked for judgment against Smith for amount of her debt with foreclosure of his lien, and against Johnson that he surrender property purchased, on which appellant has a lien, to proper officer to be sold, or that execution be issued against him for the value of the property. E. M. Smith answered, acknowledging plaintiff's debt and mortgage, and that she recognized them as in full force and effect, and had no defense. Johnson filed special exceptions, setting up that appellant's lien as to him was barred by limitation of four years. Justice's court, on May 2, 1891, sustained Johnson's exceptions, and he recovered judgment against appellant for his costs, and judgment was rendered in favor of appellant against Smith for \$171.83, with foreclosure of his lien on the 20 head of cattle. Appellant appealed from that judgment to county court of Robertson county. May 13, 1891, the case was tried before the court without a jury, and the court sustained Johnson's special exceptions, setting up limitation of four years, and he recovered

judgment against appellant for his costs, to which ruling appellant excepted; and in favor of appellant against E. M. Smith for \$172.10, with interest, and foreclosure on the cattle described. Appellant excepted, and appeals. Affirmed.

Simmon & Crawford, for appellant. Tallaferrero & Butler, for appellees.

FISHER, C. J. The judgment of the court below is affirmed.

ALAMO CEMENT CO. v. CITY OF SAN ANTONIO et al.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

ASSIGNMENT OF CONTRACT—FRAUD AS TO CREDITORS.

The assignment of a contract with a city will not be set aside on the ground that it is fraudulent as to the assignor's creditors, where assignee, who was surety on the assignor's bond to the city for faithful performance, testifies without contradiction that he took the assignment solely to protect himself from loss, the assignor having been unable to perform the contract, and no evidence of fraud is given except an attempt to show that the assignor was insolvent at the time of the assignment.

Appeal from district court, Bexar county; W. W. King, Judge.

Garnishment by the Alamo Cement Company against the City of San Antonio and others. The garnishees were discharged, and plaintiff appeals. Affirmed.

William Aubrey, for appellant. Upson & Bergstrom, for appellees.

FLY, J. This is a garnishment suit brought by appellant against the city of San Antonio, the affidavit alleging that appellant had reason to believe, and did believe, that said city was indebted to one George W. Lewis, who appellant averred was indebted to it in the sum of \$309.82, and against whom appellant had brought suit. The city answered, denying that it was indebted to Lewis in any sum; that said Lewis had contracted to build garnishee a schoolhouse for the sum of \$4,880; that during October, 1889, Lewis had begun said house, and had received on the contract price \$916; that afterwards said Lewis, with the consent of the city, had assigned the contract, with all moneys due thereon, to one August Santeleben, and it was prayed that Santeleben be made a party, in order that the court might determine to whom the money must be paid. Santeleben alleged that he was a surety on a bond executed by Lewis to the city of San Antonio for faithful performance of his contract; that said Lewis, for want of funds, was unable to comply with the contract, and had, with consent of all parties concerned, for a valuable consideration, transferred or assigned the contract and all moneys due thereon to him; and that the money in the hands of the city due on the

¹ Rehearing denied.

contract was his. Traversing these answers, appellant alleged that the debt for which the original suit against Lewis was brought was for material furnished said Lewis to be used on the schoolhouse, and, under the terms of the contract between Lewis and the city, was to be paid for by said Lewis or his assignee, before call could be made on the city for money due on the contract; that the assignment of the contract was fraudulent and colorable, and made to defeat and defraud the creditors of Lewis; and that the assignment is without authority of law, and not binding upon the plaintiff. Exceptions made by Santleben were sustained to all of the traversing affidavit of plaintiff, except the part setting up fraud in the assignment. There is no evidence whatever in the record to show that the debt upon which appellant obtained judgment against Lewis was for material furnished him to be used in the construction of the schoolhouse for the city of San Antonio. Kalteyer's testimony is the only evidence introduced by appellant outside of the documentary evidence, and it fails to show when or for what the debt was contracted. This rids the case of all complication on the question of material being furnished with the knowledge of the city and Santleben, and the latter obtaining the benefit of it in the assignment to him.

There can be but one other question in the case. Was the assignment a fraudulent one? If so, under the testimony, it must be because Lewis was insolvent, and was in debt, and these matters were known to Santleben and the city of San Antonio, because this is all that is attempted to be proved by plaintiff. The only testimony as to insolvency is that of Kalteyer, who says: "I think Lewis was insolvent at the time of the assignment of the contract between the city and Lewis to Santleben. At least, he did not and could not pay his bills." It will be seen that the reason given by the witness of why he thought Lewis insolvent was because he could not and did not pay his debts. Santleben swore that his only reason for buying the contract from Lewis was to protect himself on the bond that he had given to the city, and there is nothing to contradict this testimony. Santleben had the right, even if Lewis was insolvent and owing debts, to use means sufficient to protect himself from loss, and the testimony does not show that he did more than this. The witnesses were before the judge, and fraud in the assignment was made a direct issue, and the judge, in his conclusions, finds against it. In this we are not prepared to say that he erred. The lower court failed to find in favor of Santleben as against the city, and, he having assigned it as error, we are of opinion that, while the parties were all before the court, the court should have rendered judgment against the city for all amounts due by it on this transaction to

Santleben, as shown by the proof. If the testimony showed satisfactorily what the indebtedness was, this court might reform the judgment of the lower court; but defendant Santleben, having failed to show what the real indebtedness was, cannot ask for a reformation of the judgment, or that it be reversed. The judgment is affirmed.

JAMES, C. J., disqualified.

ROOS v. LEWYN et al.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

ATTACHMENT—VACATING—RIGHTS OF CLAIMANT—EVIDENCE.

1. Rev. St. art. 159, declaring that an attachment issued without the bond and affidavit, as the statutes provide, "shall be abated on motion of defendant," does not give a claimant of the property levied on the right to move in abatement.

2. On a trial of the right of property in goods taken under attachment, where the attachment creditor contended that the attachment debtor had transferred the goods to one B. to defraud creditors, and that claimant purchased from B. with notice of the fraud, it was proper to admit in evidence a circular by which B. represented himself as an infallible seer of all human affairs.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Lewyn & Martin against Carl Von Studnitz to recover a debt. An attachment was levied on goods in possession of C. Roos, and, on trial of the right of property, judgment was rendered for plaintiff, from which said Roos, the claimant, appeals. Affirmed.

J. H. James and Chas. W. Ogden, for appellant. C. S. Robinson and B. L. Aycock, for appellees.

NEILL, J. The appellees, Lewyn & Martin, brought suit in the district court of Bexar county against Carl Von Studnitz for debt, and sued out an original attachment which was levied on certain cigars, tobacco, etc., in the possession of appellant, who filed a claimant's affidavit and bond for trial of the right of property. In their tender of issues, the appellees alleged that the goods levied on were the property of Studnitz, and, as such, subject to the levy of the writ of attachment issued in their suit against him; that on the — day of November, 1888, Studnitz transferred his stock of goods to B. Montefure for the purpose of delaying, hindering, and defrauding his creditors, and placed them in his possession to hold for him, and that the possession of the goods, both in Montefure and in appellant, was in trust for Studnitz; that appellees were creditors of Studnitz, and had obtained judgment against him, subjecting the goods seized by their attachment to the satisfaction of such judgment, which was for the sum of \$359.17 and costs; that appel-

¹ Rehearing granted.

lant had notice of the fraudulent conveyance from Studnitz to Montefure, and of the invalidity of the latter's title. Appellant, in his tender of issues, pleaded a general denial; that the attachment by virtue of which the goods were levied on was void on account of the insufficiency of the affidavit therefor that Von Studnitz was justly indebted to plaintiff,—and alleged, specially, that he was the legal and equitable owner of the property at the time of its seizure under the attachment, and that he owned and held the same by virtue of a bona fide sale to him; that he paid a full consideration for said property, and at the time of the levy was holding the same under a bill of sale from Jake Wolff.

There was no error in the court's overruling appellant's exception to the affidavit, and attachment issued on it, nor in refusing to render judgment for appellant because of the alleged invalidity of the attachment. Our statutes provide that an attachment issued without affidavit and bond, as the statutes provide, "shall be abated on motion of defendant." Rev. St. art. 159. In accordance with this statute, the right to abate an attachment on account of defects in affidavit or bond has been restricted to defendants. *Goodbar v. Bank*, (Tex. Sup.) 14 S. W. Rep. 851, and authorities cited.

Appellant assigns that the court erred in admitting in evidence, over his objections, the following circular: "The world-renowned Prof. B. Montefure, Jr., the greatest Hebrew sight-seer and most wonderful man on the globe, now on a tour around the world, has arrived in this city, and will give private sittings, (to ladies only.) He will astonish all who may call to see him. He will give your parents' names before their marriage; the name of the gentleman whom you love; and whom you are to marry. To convince you of his marvelous powers, he will give each one desiring a sitting a free test, to prove his wonderful gift. A trial will convince you. He can be consulted on all affairs of life, no matter what trouble. If not satisfactory, pay refused. For a short time only. No. 342 Soledad St. Office hours: 9 A. M., 2 P. M., 3 P. M., 8 P. M. References: San Francisco Chronicle: 'The most wonderful man on the globe.' San Francisco Alta, 'Never heard or seen his equal.' Chicago Times: 'He beats the world.' Globe-Democrat: 'He must be the second Christ.' Denver Republican: 'We have never seen his equal before,'—for the reason that it had no bearing on defendant's good faith, and was, in its nature, calculated to prejudice his rights before the jury. It was through this circular that the great Hebrew sight-seer introduced and made himself known, not to ladies only, but to Von Studnitz and the people of San Antonio, when he arrived in that city on his tour around the globe; and it was proper that this man, who "beats the world,"

should, when the question of good faith in his dealings, through which appellant claims the property, is to be determined, be introduced and made known to the jury in the same way. If such a circular did not furnish intrinsic evidence that its subject was a scoundrel, it was sufficient to put any reasonable, prudent man on inquiry, before dealing with him in any matter of importance.

Counsel for appellant, in their brief, do not contend that the pretended conveyance was not fraudulent, or that appellant did not have full notice of its fraudulent character before and at the time of his purchase, if, indeed, he purchased the goods at all. The record abundantly establishes the fraudulency of the transaction, and that appellant, with full knowledge, attempted to enjoy the fruits of it. The court's charge that whatever is sufficient to put a reasonable man upon inquiry is equivalent to notice, which is assigned as error by appellant, is favorable to him, when the record shows that he had knowledge of facts from which no reasonable conclusion could be deduced, save that the transaction between the professor and Von Studnitz was as fraudulent as fraud could be. The judgment of the district court is affirmed.

JAMES, C. J., having been of counsel, did not sit in this case.

LYTLE et al. v. CUSTEAD.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

JUDGMENT BY DEFAULT—FOREIGN CORPORATIONS.

1. The mere filing of an answer will not prevent a judgment by default, but there must also be a subsequent appearance by defendant to protect his rights.

2. The statute of 1887, relating to foreign corporations, having been declared unconstitutional, there was from its date, until the act of 1889 went into operation, no effective statute concerning foreign corporations, and they were therefore on an equal footing with domestic corporations during such period.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by N. T. Custead against J. T. Lytle and others. There was a judgment in favor of plaintiff, and defendants appeal. Reversed.

Barnard & Green, for appellants. Peter Shields, for appellee.

FLY, J. This suit was brought by appellee against J. T. Lytle, J. W. Presnall, W. W. Toby, J. W. Maddox, B. F. Buzzard, and the Sierra Blanca Mining & Smelting Company, a foreign corporation incorporated under the laws of Colorado, and operating and doing business in El Paso county, Tex., but without complying with the laws of Texas relative to foreign corporations, of which corpo-

ration J. T. Lytle was president, Toby treasurer, and said Maddox was secretary, general agent, and representative. It was also alleged that the corporation was insolvent, and that defendants Lytle, Presnall, Toby, Maddox, and Buzzard were the chief stockholders and managers of said corporation, and are liable individually for failure to comply with the laws of Texas relative to foreign corporations. The suit was based on an open account in favor of one George Hutchins, who had transferred it to plaintiff, the account being sworn to by Hutchins, as provided in article 2263, Rev. St. On March 7, 1890, defendants answered by general demurrer and general denial. On June 4, 1890, B. F. Buzzard not having been served, the suit was dismissed as to him, and the judgment was taken against the other defendants, the judgment reciting: "And the other defendants, although duly served with process, came and answered not, but wholly made default; and it appearing to the court that the cause of action is liquidated and proven by and being a sworn account, here introduced in evidence, and on which there is due the sum of one thousand and seventy-five and 84-100 dollars, besides interest, the court proceeds to assess the damages, and render judgment accordingly." There was no action taken by the defendants in the matter until December 11, 1890, when a petition for a writ of error was filed. One of the errors assigned is the action of the court in rendering a judgment by default against defendants, when their answer was on file. This assignment is untenable. Something more is required by a defendant than the mere filing of an answer. He is then presumed to be in court, and ready to see his rights protected, to call the attention of the court to his answer, and demand proof of plaintiff's claim; but, instead of doing this, they launch their general demurrer and general denial upon its voyage on March 7th, seemingly with no one to steer it on its way, and, uncared for, it runs upon the breakers on June 4, 1890. Not an effort is made to set aside the judgment or to get a new trial, and their next appearance upon the scene is six months afterwards, when this writ of error is sued out. It is too late for them to complain that a judgment by default was taken when they had filed an answer but did nothing more. *Pierson v. Burney*, 15 Tex. 272; *Corporation v. Lee*, 66 Tex. 247, 18 S. W. Rep. 508; *Hopkins v. Donaho*, 4 Tex. 336. There is no charge made that any undue advantage was taken in obtaining the judgment, and there is nothing to show why no effort was made to get a new trial in the lower court. At the time that the account sued on was made, the law of 1887 in regard to foreign corporations was in effect, but has since been declared unconstitutional. *Mortgage Co. v. Worsham*, 76 Tex. 556, 13 S. W. Rep. 384. Then there was no law regulating foreign corporations in Texas at the time the account was made, and, such being

the case, the Sierra Blanca Mining & Smelting Company being regularly incorporated under the laws of a sister state, the comity existing between sovereign states would place the corporation on an equal footing with those of this state. 2 Beach, Priv. Corp. § 411 et seq. There being no effective law requiring anything to be done in order for a foreign corporation to do business in Texas in 1887, 1888, and up to July 3, 1889, when the present law went into effect, there was no illegality in the foreign corporation entering into any business for which corporations could be created in Texas. If this be true, then the individual defendants could not be sued on the ground that, the corporation being defective or illegal, the stockholders could be sued as a partnership. *Walt, Insol. Corp.* §§ 464-477; *Beach, Priv. Corp.* § 162. If there had been any illegality or irregularity in the incorporation of the corporation in this case, it might be held, by a very liberal construction, that the petition in alleging that the corporation was insolvent, and was acting in violation of the laws of Texas, would be sufficient on general demurrer; but, with our view of the law, their business not being irregular or illegal, there should have been allegations showing that the stockholders or directors were liable for the debts of the corporation, either under their charter or the laws of Texas. *Walker v. Lewis*, 49 Tex. 123; *Ang. & A. Corp.* §§ 41, 595, 602; *Field, Corp.* §§ 55, 74, 404. Had there been allegations of fraud upon the part of the directors, or that false and fraudulent representations were made in regard to the solvency of the corporation, then the other defendants in this case might have been held, under proper state of proof, liable for the debt. *Seale v. Baker*, 70 Tex. 283, 7 S. W. Rep. 742; *Bigelow, Estop.* p. 538. There is no such allegation in the petition. Under our laws the directors of any corporation are liable jointly and severally to the amount of any dividend, knowingly declared when the corporation is insolvent. Article 594, Rev. St. There is also a provision in the statutes that, "if any corporation be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit." Article 608, Id. There is no allegation in the petition of the dissolution of the corporation. In connection with the last-quoted statute, article 610, "no stockholder shall be liable to pay debts of the corporation beyond the amount unpaid on his stock," must be kept in view. We are of the opinion that the allegations in the petition are insufficient to render the defendants Lytle, Presnall, Toby, and Maddox liable for the whole or any part of the debt sued on, and are insufficient to fix the liability of the stockholders. We are of the opinion that the petition was bad on general demurrer, and was insufficient to support a judgment by default. It will be unnecessary to notice the

other assignments of error. For the errors indicated the judgment of the lower court is reversed, and the cause remanded.

**GALVESTON, H. & S. A. RY. CO. v.
SCHEIDEMANTEL.¹**

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

**ACTION FOR SERVICES—CONTRACT OF EMPLOYMENT
—EVIDENCE.**

Plaintiff was employed by defendant railroad company as stock claim agent. Afterwards, a new contract was made, increasing his salary for the same services. In an action for part of his salary under the second contract, a witness for defendant testified that, during the period thereof, defendant had had no employees, but that its road had been managed and controlled by another company under a lease, which he had seen, but the contents of which he did not state. Plaintiff testified that he was employed by defendant; that he never heard of any lease of the road; that defendant was the one who accepted his resignation; and that he was under the impression, all the time, that he was working for the same company. *Held*, that there was evidence to support a judgment for plaintiff.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by Charles Scheidemantel against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

John Sehorn, for appellant.

FLY, J. This suit was brought by plaintiff (appellee) to recover expenses incurred by him while acting as stock claim agent for appellant. It is not controverted that plaintiff was employed by appellant in 1883, and for a number of years received \$100 per month and his expenses; that a second contract was made with plaintiff; and that it was agreed that he was to have his territory extended, and his pay increased to \$125 and expenses. The expenses were allowed for several months under the last contract, but about March, 1888, Mr. Van Vleck, general superintendent or general agent, refused to allow the expenses, claiming that he did so under instructions from Mr. Kruttschnitt. Who Mr. Kruttschnitt may be, we are not informed by the record. However, Van Vleck, general agent, verbally and in writing, promised to pay plaintiff his expenses, and "just to keep on, and take his assurance that it would be fixed up." Twenty dollars per month was shown to be reasonable for expenses. Plaintiff swore that he was employed by appellant; that he never heard of any lease of the railroad property to the Southern Pacific Company; that, when he resigned, his resignation was accepted by appellant; and that he was of the impression, all the time, that he was working for the same company. This is about the substance of plaintiff's testimony. The defendant introduced one witness, John T. McQueeney,

who swore that from 1885 until July 1, 1889, the railroad property of defendant was managed and controlled by the Southern Pacific Company, and that during that time defendant had no employees. This witness also swore that he had seen a lease under which the defendant's railroad was operated by the Southern Pacific Company, but did not state what was in it, and did not know whether the lease embraced all the employees of the company or not. We are left in doubt as to what this lease spoken of by witness may contain, and the question of whether plaintiff had changed masters or not was brought as a question of fact before the lower court, and he resolved it in favor of plaintiff. We are not prepared to say that there is no testimony to support his ruling. We are of the opinion that there is sufficient testimony to support the judgment of the lower court, and the same is affirmed.

LA PRELLE v. FORDYCE et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

1. In an action for injuries received in leaping from a derailed train, an instruction requiring plaintiff to have believed himself in imminent peril of his life is erroneous; well-grounded fear of serious bodily injury being sufficient cause for his action.

2. On an issue of contributory negligence, consisting of a lack of ordinary prudence, the court should instruct as to what would be expected of a "person of ordinary prudence," and not of a "person of prudence."

Appeal from district court, McLennan county; W. W. Evans, Special Judge.

Action by James La Prella against S. W. Fordyce and A. H. Swanson, receivers, for damages for personal injuries. Judgment for defendants. Plaintiff appeals. Reversed.

Alexander & Campbell, for appellant. Clark, Dyer & Bolinger and Sam H. West, for appellees.

FISHER, C. J. This is an action by La Prella against the appellees to recover damages for personal injuries received by him while a passenger on the St. Louis, Arkansas & Texas Railway, operated by the appellees. The appellant received his injuries in jumping from the train while in motion, and when the car in which he was riding was partially off of the track. His purpose in leaping from the train was to escape the danger that might exist, and he might encounter, if he remained upon the train until the car completely left the track. It appears that the train was approaching the bridge over the Brazos river when the car partially left the track, and the leap by the appellant was made just before the car reached the trestle or bridge.

The ninth subdivision of the charge of the court, among other things, instructs the jury "that plaintiff, believing himself to be in

¹ Rehearing granted.

imminent peril of his life, and acting under the impulse of an apparently well-grounded fear, sought to escape such peril, and in doing so leaped from such car," etc. The principal objection to this charge is that it restricts the right of the passenger to leap from the car only when his life is in imminent peril. It is not only the peril to life that justifies the passenger in leaping, but the right exists to escape serious bodily injury. He cannot justify his conduct in encountering a danger that the appearances of things reasonably indicate is greater than the danger he is seeking to avoid. But the danger he is seeking to avoid may reasonably indicate that, if encountered, it would result in serious bodily injury, something less than death. In such circumstances, he would have the right to avoid it, provided he did not encounter a greater danger in doing so than the facts and circumstances reasonably indicate existed. For this error in the charge, the judgment below will be reversed, and the cause remanded.

In view of another trial, we will call the attention of the trial court to some other parts of the charge that are complained of. In defining a person of prudence, the court omitted to state a person of ordinary prudence, and instructed the jury what would be expected of a person of prudence. In submitting these instructions, it is best to accurately follow the law. It is what is reasonably expected of a person of ordinary prudence, under like circumstances, which is the demand of the law. A prudent person may mean a person of more than ordinary prudence. That portion of the seventh paragraph of the charge which says, "and you further find from the evidence that such injury was not caused by a failure on the part of plaintiff to use ordinary care and prudence at the time to prevent such injury." A technical objection to this charge, in the connection in which it is given, may be tenable,—that it shifts the burden of proof as to contributory negligence. It would probably have been free from objection if it had read, "unless you find from the evidence that such injury was caused by a failure on the part of plaintiff to use ordinary care," etc.

The judgment of the court below is reversed, and the cause remanded.

BAILEY v. BAKER et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

TRESPASS TO TRY TITLE — BOUNDARIES BY ACQUISITION — STATUTE OF LIMITATIONS — FAILURE TO PLEAD — FAILURE TO SHOW TITLE.

1. Where adjoining landowners agree on a disputed division line, and such line is acted on and acquiesced in by them, it is binding on them, and those claiming under them, without regard to the length of time it was so acted on and acquiesced in.

2. Where, in trespass to try title against two defendants, only one of them pleads the

three-years statute of limitations, it is error to submit the issue of limitation by possession as to both defendants.

3. Where the defendant pleading the three-years statute of limitations fails to show title, it is error to submit to the jury the issue raised by such plea.

Appeal from district court, Bell county: W. A. Blackburn, Judge.

Action of trespass to try title by M. J. Bailey against John Baker and Newt. Wear. From a judgment entered on the verdict of a jury in favor of defendants, plaintiff appeals. Reversed and remanded.

The other facts fully appear in the following statement by COLLARD, J.:

This is an action in form of trespass to try title, brought on December 23, 1889, by appellant, M. J. Bailey, against appellees, John Baker and Newt. Wear, for the east half of the Rhoda Reed 640-acre survey, to which he deraigned title. Both defendants filed pleas of not guilty, and defendant Baker filed pleas of three and five years' limitation. Defendant Wear was in possession of the eastern part of the M. Young labor, and Baker of the whole of the Weeks labor. The north line of the Young labor, prolonged to the west, is the north line of the Weeks. The Young survey calls to begin at the southeast corner of the Reed, and its fourth corner is in the south line of the Reed. The surveys were made about the same time,—the Young on July 7, 1845, the Reed in the same month and year, but the day of the month is left blank in the original field notes, and the Weeks on October 12, 1845. One of the questions in the court below was the true locality of the division line between the Reed on the north and the Young and Weeks on the south, the land in dispute being a strip less than 100 varas in width between them. The plaintiff, having shown that he was the owner of the Reed survey, offered testimony to show that he and one Ben Ellis, while the latter was the owner of the Young labor, 18 or 20 years before the trial, had a dispute about the line between them, and that they agreed upon and established the line, and had it run out and marked; and that he, Bailey, being in possession of the Reed, had claimed to that line ever since. This agreed line is south of the line as claimed by defendants, the land in controversy being between these two lines. There was testimony tending to place the true line where defendants claimed it was,—north of the alleged agreed line,—and also testimony that might place it even some 25 to 30 varas to the south of the agreed line, but plaintiff relied upon the line established by him and Ellis. Both defendants recovered judgment, and plaintiff appealed.

Harris & Saunders, for appellant. Mon-teith & Furman, for appellees.

COLLARD, J., (after stating the facts.) Upon the subject of the agreed line the court

instructed the jury, in effect, that if the true boundary between Ellis and plaintiff was unknown to them, and when they were owners of the adjoining surveys—the Reed and the Young—they fairly agreed upon and marked out their division line, and, after long acquiescence, the true line was found to vary from the one agreed upon, the agreed line would be binding and conclusive between them and those claiming under them. The plaintiff requested a charge to the same effect, except that it did not require “long acquiescence” by the parties to bind them, but only that if, after the agreement, the line was acted upon and acquiesced in by them, it would be binding. The court refused the requested charge, and plaintiff (appellant) assigns the refusal as error. We concur with plaintiff. Long acquiescence was not necessary to give binding effect to the agreement; acquiescence for any time was not necessary. *Cooper v. Austin*, 58 Tex. 494; *Levy v. Maddux*, (Tex. Sup.) 18 S. W. Rep. 877; *Lecomte v. Toudouze*, 82 Tex. 212, 218, 17 S. W. Rep. 1047.

The court below submitted the issue of three years' limitation by possession of both defendants, Baker only having set up limitation; and this is assigned as error. If there was a conflict between the Reed and the Weeks survey, the plea of limitation of three years, set up by defendant Baker, would have been a proper issue to be submitted to the jury with explanations as to rights of holders under the senior and junior titles, and as to actual and constructive possession, plaintiff himself being in possession of part of the Reed survey; but it was undoubtedly error to submit such issue as to both defendants. If Baker had a deed to the whole or any part of the Weeks labor from G. W. Standifer,—to whom title was deaigned from the sovereignty of the soil,—such deed was not put in evidence, or, if in evidence, it was omitted in the statement of facts. In such case we must sustain the assignment of error to the effect that the court should not have charged upon limitation of three years at all; Wear not pleading it, and Baker failing to show title. His testimony about facts occurring at the time, before and after he bought from Standifer, merely assumes that there was a conveyance; it does not show from what Standifer, or how much or what part of the Weeks labor, he bought. Other assignments of error need not be considered. The judgment of the lower court should be reversed, and the cause remanded, and it is so ordered.

ALLIANCE MILLING CO. v. EATON et al.
(Court of Civil Appeals of Texas. Oct. 11, 1893.)

PLEADING—ANSWER—DEED OF TRUST.

1. When one defendant has filed an answer, and another answers, adopting that answer as his own, an answer adopting the lat-

ter answer, after the case has been dismissed against the first defendant, is a good adoption of the substance of his answer.

2. Under Rev. St. art. 1262, permitting a defendant to plead as many several matters, whether of law or fact, as he may think necessary, an answer may embrace a general demurrer.

3. Creditors, beneficiaries of their debtor's deed of trust of his property to secure his debts to them, need not accept the deed in order to make it effective against a subsequent attachment lien, since the trustee's acceptance inures to their benefit. Following *Bank v. Marshall*, 23 S. W. Rep. 246.

Appeal from district court, McLennan county; L. W. Goodrich, Judge.

Action and attachment by the Alliance Milling Company against Eaton, Guinan & Co. and others for the price of goods sold and delivered. Judgment for defendants, claimants against the attachment. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

“Eaton, Guinan & Co., who were merchants in the city of Waco, failed in business on the 1st day of December, 1888, while they owed the appellant the debt herein sued for; and on said date they conveyed their property, by deed of trust, to John F. Marshall, trustee, for the purpose of securing the payment of certain of their debts named in said deed of trust,—among others, a debt to N. K. Fairbank & Co., \$3,327.11; a debt to Kehlor Bros. for \$4,935.61; a debt to Niggeman & Sayers, for \$2,477.15; a debt to J. K. Armsby Company, for \$3,897.00. Said deed of trust provided that said trustee, Marshall, should take immediate possession of the property conveyed, which he did, and sell a sufficiency thereof, in the usual course of trade, for cash, to pay off the debts therein mentioned, reserving to said trustee a commission of 2½ per cent. on the amount realized by such sales, also a sufficiency to pay all expenses of sales and executing said trust, and the rest of the storehouse, and, after having sold said sufficiency, to return to Eaton, Guinan & Co. the remainder of said property and effects, when said conveyance or instrument was to be of no further effect. On the 3d day of December, 1888, the appellant brought this suit against Eaton, Guinan & Co. for the recovery of a debt of \$1,463, and at the same time sued out an attachment for said amount, which it caused to be levied by the sheriff of McLennan county at 8 o'clock and 10 minutes P. M. on said 3d day of December, 1888, on all the goods, wares, and merchandise and all other property conveyed by said Eaton, Guinan & Co. to said John F. Marshall, trustee; said levy being made by giving notice thereof to said John F. Marshall, trustee, in possession. John F. Marshall, trustee, was made defendant by amended petition filed June 1, 1889. The defendants N. K. Fairbank & Co., Niggeman & Sayers, J. K. Armsby Com-

pany, and Kehlor Bros. were made defendants by second amended original petition, filed July 22, 1889, and were all cited by personal service in another state. During the pendency of the suit the Waco State Bank, T. D. Clark, and J. W. Mann were made parties defendant, but the suit was dismissed as against Waco State Bank on the 13th day of June, 1890, and as against T. D. Clark and J. W. Mann on the 24th of October, 1890. In its second amended original petition, appellant pleaded the execution and delivery to said John F. Marshall, and the acceptance by him, of the deed of trust from Eaton, Guinan & Co.; that said deed of trust conveyed all the property of Eaton, Guinan & Co. that was subject to execution; that appellant's attachment was levied on said property on the 3d day of December, 1888, and that said execution and delivery, by said Eaton, Guinan & Co., of said deed of trust, was without the knowledge or consent of said J. K. Armsby Company, Niggeman & Sayers, N. K. Fairbank & Co., and Kehlor Bros.; and that said four last-named defendants (appellees) knew nothing of said transaction, or of the execution and delivery of said deed of trust, or of the contents and provisions of the same, and did not consent thereto, or acquire any right thereunder, or interest in or right to the property therein conveyed, until long after the appellant had, by due course and process of law, obtained and acquired a valid and subsisting attachment lien upon all the property mentioned in and conveyed by said deed of trust; and praying that its said attachment lien be decreed to be superior to any right or lien which the said four last-named appellees acquired in or to said property by virtue of said deed of trust, and that said John F. Marshall, trustee, be directed, by order of court, to pay off the judgment herein rendered in favor of appellant out of any proceeds of said property that may remain in his hands after the satisfaction of the mortgage secured debts of those preferred creditors who took and acquired rights under said deed of trust before the acquisition by appellant of its said attachment lien; for a foreclosure of said attachment lien, and for general relief, both in law and equity. Judgment interlocutory, by default, was rendered against Eaton, Guinan & Co. on the 14th day of May, 1890, and against Niggeman & Sayers, N. K. Fairbank & Co., J. K. Armsby Company and Kehlor Bros., on the 13th day of June, 1890." John L. Dyer, Esq., on behalf of these four last-named defendants, excepted to the judgment by default, and obtained leave of the court to answer for them. Afterwards on the 22d day of October, 1890, the same four defendants filed an answer pursuant to the leave granted, in resistance to the execution of the writ of inquiry, adopting the an-

swer of Marshall, filed on the 14th of June, 1889, and the answer of the Waco State Bank, filed on the 14th day of June, 1889, making the averments and defenses therein their own. The answer of the trustee, Marshall, simply adopted the answer of the Waco State Bank, which contained a general demurrer, (and some special exceptions, not involved.) Before the beneficiaries under the trust deed filed their answer, plaintiff had dismissed as against the Waco State Bank, to wit, on June 13, 1890. Marshall's answer was filed before the bank was dismissed, to wit, on the 14th of June, 1889. Marshall was still in court, and he and the four beneficiaries, defendants, orally insisted on the general demurrer to plaintiff's petition, which was objected to by plaintiff. The court sustained the general demurrer as to the trustee and the other named defendants, as to whom plaintiff declined to amend, but, taking final judgment against Eaton, Guinan & Co., appealed from the judgment on the demurrer, and assigns errors, as follows: "Appellant's first assignment of error: The court erred in hearing, considering, and sustaining the unwritten general demurrers of the appellees, John F. Marshall, trustee, Niggeman & Sayers, N. K. Fairbank & Co., J. K. Armsby Company, and Kehlor Bros., for the reasons set out in appellant's bill of exception No. 1, which reasons are as follows: (1) Because none of said defendants (appellees) had filed a general demurrer in this case. (2) Because the said John F. Marshall, trustee, in his answer filed herein on the 14th day of June, 1889, adopted only the answer of the Waco State Bank, and neither adopted nor filed any general demurrer herein. (3) Because the answer of the Waco State Bank was eliminated from the record in the case on the 13th day of June, 1890, at which time plaintiff (appellant) dismissed its case against said Waco State Bank, as of record is manifest. (4) Because said defendants Niggeman & Sayers, J. K. Armsby Company, N. K. Fairbank & Co., and Kehlor Bros., in their answer filed herein on the 22d day of October, 1890, in which they attempt to adopt the original answer of John F. Marshall, trustee, and the original answer of said Waco State Bank, which answers were filed on the 14th day of June, 1889, attempt and profess to adopt only the answers of said Marshall and said Waco State Bank, and do not attempt or profess to adopt any demurrer of any other defendant. (5) Because the defendants Niggeman & Sayers, N. K. Fairbank & Co., J. K. Armsby Company, and Kehlor Bros., whose first and original answer herein was filed on the 22d day of October, 1890, could not at that time adopt the answer or the demurrer of the Waco State Bank, even if they had, in terms, attempted to do so, because at that time the answer of said Waco State Bank had been

eliminated from the record in this case, as is hereinbefore said."

Scarborough & Rogers, for appellant.
Clark, Dyer & Bollinger, for appellees.

COLLARD, J., (after stating the facts.) It is a common practice, often recognized in our courts, for one defendant or one party to adopt the answers of another defendant, or the pleadings of another party, without in terms repleading the same matter, and such pleadings are allowed effect by the courts for the party making them his own, in so far as applicable and consistent. When defendant Marshall adopted the answer of the Waco State Bank, it was still in court. The subsequent dismissal of the bank would not require him then to replead its defenses already adopted by him. He was not dismissed, and, when other defendants adopted his answer, they made his answer and defenses their own, with all matters included therein. Indeed, we are of opinion that the dismissal of the bank would not so eliminate from the record its answer as that it could not afterwards be referred to and adopted by other parties. It was still a part of the record of the case, together with the order of dismissal. Its answer contained a general demurrer, which could be made available to other defendants adopting the answer before or after its dismissal.

Appellant's contention that the answer would not embrace the demurrer, cannot be upheld. "The defendant may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause." Rev. St. art. 1202; Rules Dist. Ct. 7, 20 S. W. Rep. xii.

The assignments do not raise the question that it was too late to file an answer after the judgment by default was taken, probably for the sufficient reason that in the same judgment leave was granted to defendants to answer, thus qualifying the interlocutory judgment to that effect, to which plaintiff did not except, and has not yet objected. If the ordinary effect of an interlocutory judgment by default is to deprive the defaulting defendant of the privilege of an answer, the order or judgment itself may limit such effect, and grant the privilege, as was expressly done in this case without objection. *Boles v. Linthicum*, 48 Tex. 221.

It was not necessary that the beneficiaries of the deed of trust should accept thereunder before the levy of plaintiff's attachment, in order to give it effect superior to the attachment lien. The trust was at once accepted by the trustee, and, in the absence of repudiation by the beneficiaries, his acceptance would inure to their benefit, as has been decided by this court in reference to the same instrument. *Bank v. Marshall*, 1 Tex. Civ. App. 711, 23 S. W. Rep. 246; *Wallis v. Beauchamp*, 15 Tex. 306; *Montgomery v.*

Oulton, 18 Tex. 747. Finding no error in the judgment of the court below, it is affirmed.

SAN ANTONIO & A. P. RY. CO. v. KNIFFIN.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

CONVERSION—EXEMPLARY DAMAGES—PLEADING—EVIDENCE—INSTRUCTIONS—REMITTITUR.

1. An allegation, in a petition claiming exemplary damages, that the act of conversion complained of was done unlawfully, wantonly, and maliciously, and with the fraudulent intent to deprive plaintiff of the value of certain coal, was sufficient, without stating the circumstances showing it to have been so done.

2. There is no error in allowing one who has recovered verdict for a certain amount, and interest thereon, as exemplary damages, to remit the interest.

3. A charge directing the jury to separate their findings of actual and exemplary damages, "in order that the amount of either or both may be known," is not open to the construction that the jury are expected to find both actual and exemplary damages.

4. Where defendant desires to use as a defense against, or in mitigation of, exemplary damages for using certain coal, the fact that it used it believing that it had a legal offset against plaintiff for the value of it, it should ask for a charge submitting that view to the jury; and, failing to do so, it cannot, on appeal, have such matter considered, or complain if the jury did not take it into consideration.

5. A petition for the value of coal shipped to and used by defendant, alleging that the shipment was to plaintiff's order, plaintiff drawing his draft on defendant for the value thereof, with bill of lading attached, on which was indorsed, "Delivered to" S., (defendant,) that the draft was presented, and not paid, but that defendant took possession of the coal, and appropriated it to its use, without plaintiff's consent,—states an action in tort for conversion, in which exemplary damages can lie, provided the conversion was attended with circumstances of fraud, malice, or wanton regard of plaintiff's rights.

6. The evidence showed that the coal was allowed to go onto defendant's road on the promise of its auditor, in the presence of its general manager, that it would not be used by defendant till paid for; plaintiff refusing to allow it thus to get into defendant's hands, except on this promise. There was also evidence that the coal was used by defendant without payment, on orders of the auditor from its main office, it claiming an offset against the coal by reason of a prior transaction, which claim was found baseless. Held, that the jury were warranted in concluding that there was a wanton disregard of plaintiff's rights, and a purpose to defraud him of his coal, or harass him in the assertion of his rights thereto, authorizing exemplary damages.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by H. L. S. Kniffin against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Upson & Bergstrom, for appellant. J. H. McLeary, for appellee.

Conclusions of Fact.

JAMES, C. J. (1) The plaintiff, H. L. Kniffin, sued the appellant for the value of certain

coal, amounting, as claimed, to the sum of \$2,333, shipped to and used by appellant between February 26, 1890, and March, 1890. All of the petition was struck out, on exception, except the claim for value, as above, and those portions upon which exemplary damages were asked, in the sum of \$10,000. No exception was presented by Kniffin to the action of the court striking out part of his petition as aforesaid. On the contrary, he is asking affirmance of the judgment. Appellant does not ask a reversal for any error in the judgment against it for the \$2,333 actual damages, and we have only to consider the record as to errors assigned in reference to the finding of \$1,000 exemplary damages. The jury returned a verdict for exemplary damages in the sum of \$1,000, with 8 per cent. interest per annum from date of appropriating the coal, which interest was remitted by plaintiff in the district court. The exception to plaintiff's pleadings which were overruled was a general one, as follows: "To the allegation in the petition claiming exemplary damages, because said petition fails to state any facts entitling plaintiff to recover such damages." The petition alleges that the shipment of coal, in each instance, was to plaintiff's order; plaintiff drawing his draft on the defendant for the value thereof, with bill of lading attached, upon which was indorsed, "Delivered to the San Antonio and Aransas Pass Railway." It also alleges, in connection with each separate shipment, that "the draft was duly presented, and not paid, but nevertheless the defendant, through its officers, agents, and servants, took forcible possession of the car load of coal, and unlawfully, wantonly, and maliciously appropriated the same to its use and benefit, without plaintiff's consent, and with the fraudulent and felonious intent to deprive plaintiff of the value thereof, * * * and that by reason of the wrongful, wanton, and outrageous act of defendant's officers, agents, and servants, and the willful and wanton and utter disregard of the plaintiff's rights in the premises, in taking possession of his property without his consent, and forcibly appropriating the same to the use of the defendant, and by the refusal of all compensation for said grievous wrongs and flagrant trespasses, the defendant has become liable to pay to the plaintiff vindictive, punitive, and exemplary damages, for which plaintiff prays in the sum of ten thousand dollars." (2) The answer was a general denial, and also a set-off in the sum of \$3,060.37, based on allegations, in substance, as follows: That said coal was shipped under an order given by defendant on or before November 18, 1889; that, prior to the shipment of said coal, defendant had received from plaintiff on said order 6,120½ tons of coal; that in said order the plaintiff was directed to consign said coal to defendant from McAlester, in the Indian Territory, via West Point, Tex., to Yoakum, Tex.; that

plaintiff accepted such order and instructions, but did not consign the coal to Yoakum, and caused it to be stopped at West Point; that defendant was to pay the freight, and that defendant had an arrangement, as plaintiff knew, with the Missouri, Kansas & Texas Railway Company, over which the coal was sent, by which defendant was entitled to \$1 per ton upon all shipments to Yoakum, Tex., which would leave a net rate of \$2.50 per ton to West Point; that the rate from McAlester to West Point on coal that was not shipped through to Yoakum was \$3 per ton; and that by plaintiff not shipping the coal to Yoakum, as per agreement, defendant was caused damage in the sum of 50 cents per ton on the 6,120½ tons, amounting to \$3,060.37, asked to be allowed defendant against plaintiff. The portions of the court's charge assigned as error are as follows: "Second. The plaintiff further claims that he is entitled to recover from the defendant exemplary damages for the alleged wrongful conversion of plaintiff's coal; and upon this subject you are charged that if you believe from the evidence that the defendant, in willful and wanton disregard of plaintiff's rights to the coal, took possession thereof without his consent, and, without compensation, appropriated the same to the use and benefit of the defendant, under such circumstances as operated as a fraud upon plaintiff's rights, or in willful and wanton disregard thereof, then you may, in addition to the price of the coal, find exemplary damages in such sum, in view of all the circumstances surrounding the commission of the alleged trespass, as you may think right and proper." "Fourth. In your verdict, you are instructed to separate your findings of actual and exemplary damages. In order that the amount of either or both may be shown." The court also gave the following in charge to the jury: "The defendant claims an offset against plaintiff of \$3,060.37, by reason of an overcharge in freight paid by defendant; and upon this subject you are charged that if you believe from the evidence that the defendant directed the plaintiff to cause the coal to be shipped to the town of Yoakum, and the plaintiff disregarded said instruction, and shipped the same to the town of West Point, whereby the defendant was compelled to pay an increased rate of freight, in the sum of \$3,060.37, then you will allow the defendant that sum in offset, unless you believe from the evidence that the shipment to West Point was by and with the consent of the defendant, and that consent may be established by word or oath of defendant." The evidence by which the verdict for exemplary damages is supported, if sufficient in law to support it, is as follows: The testimony of Kniffin is, in substance, that he had not, on or about November 17, 1889, agreed to ship the coal to Yoakum, instead of to West Point, unless the defendant would have

payment for the coal delivered at West Point guaranteed, which was never done; that, before shipping to Yoakum the coal sued for, he had a conversation with A. G. Cooper, the auditor of defendant's road, and Cooper promised him that if he would bill the coal through to Yoakum, so as to give them the benefit of the through rate of freight, the coal would be left on the side track, and none of it would be used until it was paid for; that, when the bank reported the drafts not paid, he went to San Antonio, and saw Mr. Cooper about it, who said that the company had not paid the drafts, but had used the coal, and that "I would have to see their attorneys about it;" that he then went to the company's attorneys, and was by them informed that the drafts had not been paid because they had a claim on him for about \$3,000 freight overcharges on coal shipped from November to February; that he then went to Yoakum to look after his coal, but on arriving there found the coal had been nearly all used; saw the agent at Yoakum, and asked him about the coal, and the agent said he did not like to tell tales out of school, but the company "has been using your coal without paying for it." He was also informed by another agent that orders had been received from the main office to use the coal. Kniffin also testified that he told Mr. Cooper on February 19, 1890, when Cooper gave his personal assurance that the coal would not be used until paid for, that he would ship all coal thereafter to Yoakum. It was in evidence that B. F. Yoakum was general manager of the road. A. G. Cooper testified that the coal was ordered by the general manager of the San Antonio & Aransas Pass Railway Company, and was shipped to the order of Kniffin, to be delivered to defendant on his order. Defendant agreed to pay \$2.25 per ton for the coal free on board at the mines. The freight was to be, and was, paid by defendant. Defendant used the coal, and it considered it had a right to take it, as an offset to a claim it had against Kniffin. "I gave Mr. Kniffin my personal promise that the coal would not be used until paid for. I directed our agent at Yoakum to use the coal as an offset to our claim against Mr. Kniffin." The agent at Yoakum testified that he received this order from the main office, thus identifying Cooper with the main office. The foregoing is the substance of the testimony upon which the verdict of the jury for exemplary damages must stand, if at all. The assignments of error raise the following questions, only: First. Did the court err in overruling the exception above mentioned to plaintiff's petition? Second. Did the court err in submitting to the jury the question of exemplary damages, for the reason, as appellant puts it, that there was no evidence authorizing a recovery of exemplary damages, the uncontradicted evidence showing that the coal sued for was

sold by plaintiff to defendant at a fixed price, and shipped to defendant over its line of road, and defendant received and used the coal without paying therefor, and falling to pay for it because defendant then believed, in good faith, that it had a legal offset against plaintiff for the value of the coal? Third. Did the court err in giving the fourth charge, on the ground, as appellant states it, that it assumes that the jury could and must find a verdict for plaintiff for both actual and exemplary damages? Fourth. Did the court err in permitting a remittitur of interest in connection with the finding of exemplary damages?

Conclusions of Law.

The court did not err in overruling the exception. The allegation that the act complained of was done unlawfully, wantonly, and maliciously, and with the fraudulent intent to deprive plaintiff of the value of the coal, was sufficient, without alleging the circumstances showing it to have been so done. *Cone v. Lewis*, 64 Tex. 331; *Gross v. Hays*, (Tex. Sup.) 11 S. W. Rep. 523. Nor was any error committed in the charge directing the jury to separate their findings of actual and exemplary damages, "in order that the amount of either or both may be known." Taken together with the remainder of the charge, the jury could not have understood that they were expected to find both actual and exemplary damages, and the concluding part of that clause in quotation marks above excludes that understanding of it. The interest that was remitted was a part of the exemplary damages found, and this assignment of error is not well taken.

The appellant contends that the court erred in submitting the question of exemplary damages, and that the verdict for exemplary damages was contrary to the law and the evidence, as the uncontradicted evidence shows that the coal sued for was sold by plaintiff to defendant at a fixed price, and shipped to defendant over its line of road, and defendant used the coal without paying therefor, and falling to pay for it because defendant then believed, in good faith, that it had a legal offset against plaintiff for the value of the coal. The charges of the court are not complained of, as not stating correctly the rule in reference to exemplary damages, and the above contention is not well founded, for two reasons: (1) Because there was evidence going to show that the sale had not been fully consummated when defendant used the coal, and (2) if defendant desired to use, as a defense against, or in mitigation of, exemplary damages, the fact that the coal was used because defendant believed, in good faith, that it had a legal offset against plaintiff for the value of the coal, defendant should have asked a charge submitting that view of the case to the jury. Having failed to ask such matter submitted, defendant is in no position to have this court

consider such matter, or to complain if the jury did not take it into consideration.

These matters disposed of, we have the remaining question,—that of determining whether or not this was a case in which exemplary damages could lie; and, if so, the more serious question of whether or not there was evidence upon which a verdict for such damages can legally rest.

Exemplary damages will not ordinarily lie, in action for breach of contract. This action, according to the pleadings of plaintiff, was for the value of coal converted by the defendant, the title to which remained in plaintiff,—thus stating a tort; and it is well settled that such damages lie in suits for the tort known as conversion in proper cases,—that is to say, where the act constituting a conversion has been attended with circumstances of fraud, malice, or wanton disregard of the rights of plaintiff. *Cole v. Tucker*, 6 Tex. 266; *Oliver v. Chapman*, 15 Tex. 409; *Railway Co. v. Shirley*, 54 Tex. 125; *Kolb v. Bankhead*, 18 Tex. 228; *Gordon v. Jones*, 27 Tex. 620; *Gross v. Hays*, (Tex. Sup.) 11 S. W. Rep. 523. The evidence clearly shows that the coal was shipped to plaintiff's order, and the defendant, not paying the drafts, did not obtain the bills of lading, or an order entitling it to the coal. It also clearly appears that the coal was allowed by plaintiff to go upon defendant's line of railroad to Yoakum, and thereby come into the custody of defendant, upon the promise of one of defendant's officers—A. G. Cooper, the auditor—that it would not be used by defendant until it was paid for. It seems that the general manager of defendant's road was present when this promise was made. The evidence also shows clearly that the coal was used by defendant without being paid for. That a conversion of the coal to defendant's use took place, is evident; but, to render the defendant liable in damages beyond what was necessary to compensate plaintiff for the value thereof, requires, in addition to the act, that it was done under some or one of the aggravated circumstances above indicated. What circumstances are shown in the evidence, surrounding this act of conversion? The jury were authorized, from what was before them, to conclude that Kniffin refused to allow his coal to go upon defendant's line of road, and into its hands, without first being paid therefor, and that he was induced to relax this position, and allow this to be done, on the promise of the company's auditor that if the coal was shipped through to Yoakum, thereby enabling defendant to save on its freight, the same would not be used until paid for. They further could fairly conclude that this promise was made in the presence of B. F. Yoakum, the general manager of the road, and therefore that it was the act of the defendant, and, further, that the underlying purpose of defendant in making such promise, and in thus obtaining custody of the coal, was to use it

and not pay for it, or at least to delay and harass plaintiff in the collection of his money, by interposing a plea of offset, which the jury ascertained to be unfounded in fact. If the jury took this view of the case,—and it was not inconsistent with the facts, after they had ascertained, under a proper charge, that the claim for set-off was baseless,—we are unable to say that their verdict for exemplary damages was wrong. The circumstances under which defendant obtained the possession of the coal, and the subsequent appropriation of it, would indicate an act characterized by a wanton disregard of plaintiff's rights, and a purpose either to defraud plaintiff of his coal, or to harass him in the assertion of his rights thereto, and we understand the decisions in this state as permitting exemplary damages in cases showing these attending circumstances. The verdict not appearing excessive, the judgment is affirmed.

McKEEN et al. v. JAMES et al.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

MORTGAGES—ABSOLUTE DEED—STATUTE OF LIMITATIONS.

1. Where it is sought to declare a deed absolute on its face a mortgage, the burden of proof is on the party asserting such claim, and in determining such question the situation of the parties, and all the attending circumstances, at the time the deed was agreed on and made, are to be considered.

2. Where a personal judgment is obtained on a note secured by mortgage, the note is merged in the judgment, which also carries with it the mortgage lien, and an action on the original indebtedness will not stop the running of the statute of limitations against the judgment.

3. A grantee in a deed absolute in form, but intended as a mortgage, cannot enforce the lien thereof, where he is not in possession under it, after the debt secured is barred by limitation.

Error from district court, Bexar county; George H. Noonan, Judge.

Trespass to try title by A. C. McKeen and others against John H. James and others. There was a judgment in favor of defendants, and plaintiffs bring error. Affirmed.

Denman & Franklin, John Ireland, Shook & Van der Hoeven, and John A. & N. O. Green, for plaintiffs in error. Simpson & James, for defendants in error.

NEILL, J. A. C. McKeen, the ancestor of appellants, on the 18th day of December, 1875, sued appellees in the district court of Bexar county, in trespass to try title, for 1,000 acres, undivided interest in one-third of a league in name of Adam Stafford, situated in Bexar county. John James, who claimed the remainder of the one-third league, was also made a party defendant, who having died during the pendency of the suit, his executors, John H. and Annie James, were made parties, and a partition

¹ Rehearing denied.

of the property prayed for by appellants, between themselves and the estate of John James. On September 4, 1888, all the defendants except the Jameses filed their second amended original answer, setting up—First, a plea of not guilty; second, that a certain deed from John H. Herndon to J. L. and A. C. McKeen, of date January 7, 1867, was made by said Herndon, and intended by him and the McKeens as a mortgage only, to secure the payment by Herndon of his note bearing that date to J. L. and A. C. McKeen, for the sum of \$1,605; third, that the debt evidenced by said note was usurious, and the interest not collectible; fourth, that they are the owners of the land sued for, claiming the same under a deed from Herndon's assignee in bankruptcy dated August 31, 1869; and, fifth, that the debt and interest that said deed from Herndon to plaintiffs was given to secure are barred by the statute of limitations. Appellants, as sole heirs of A. C. McKeen, on the 4th of September, 1888, filed their first amended supplemental petition, adopting the original petition of their ancestor, A. C. McKeen, and pleaded fully the facts attending the execution of the instrument from Herndon to A. C. and J. L. McKeen, for the purpose of showing that it was an absolute deed of conveyance, as upon its face it purported to be, and that the note of \$1,605 was given after the deed was executed, in pursuance of a subsequent agreement between them that Herndon should have the privilege of repurchasing the land within 60 days, upon paying the amount specified in the note, and that it was given merely as a memorandum of the amount to be paid on the repurchase; that afterwards, to wit, on the 18th of September, 1868, judgment was rendered in the district court of Galveston county, in favor of the McKeens, for the sum of money, in gold, mentioned in said note, reduced to currency, making in currency \$2,102.55, and for other sums owing by Herndon to said McKeens, making in all \$3,064.48, with interest at 12 per cent. per annum until paid, upon which judgment an execution was issued on September 18, 1868, returned "Not satisfied" November 30, 1868; that said judgment had never been paid; that J. L. McKeen had conveyed to A. C. McKeen his interest in the land in controversy, whereby all interest of said J. L. McKeen, of whatever character, in said land, or claims connected therewith, became the property of A. C. McKeen. Appellants then pray that, should the court hold said deed to be a mortgage, they have judgment foreclosing the lien on said land for said \$2,102.55 of said judgment, and 12 per cent. interest thereon from date of its rendition. The said defendants then plead that, if said deed was ever reduced to judgment, it was a personal judgment only, and merged the debt, and that the debt was barred by the statute of limitations, which

they plead against it, and the foreclosure of the alleged lien thereunder. On March 9, 1877, the plaintiffs amended their pleading, setting out fully the facts and circumstances under which the deed and note for \$1,605 were executed to them by Herndon, averring that the deed was intended as an absolute conveyance of the property, and the note as a mere memorandum of the amount that Herndon should pay within 60 days from its date, in the event he exercised the privilege given him by the McKeens to repurchase the property within that time. In such amended pleading, they asked that, if the deed should be held a mortgage, they have a foreclosure of the same on the lands for \$1,500, gold, with interest from the date it was due. In this pleading the judgment described in their first amended supplemental petition, filed September 4, 1888, was in no way mentioned. On September 5, 1888, the case was tried by a jury, and the question was submitted as to whether the instrument of January 7, 1867, purporting upon its face to be an absolute deed of conveyance, was in fact such deed, or a mortgage, and, if the latter, whether the lien it was given to secure was barred by the statute. Upon the jury finding it to be a mortgage, and the lien barred by statute, a judgment was rendered in favor of defendants, from which judgment this appeal was taken. The questions for determination are: First. Was the instrument from Herndon, of January 7, 1867, to the McKeens, which purported upon its face to be an absolute deed of conveyance, upon a proper charge of the law by the court, and upon sufficient evidence, rightfully found by the verdict of the jury to be a mortgage? Second. If the finding of the jury that it was a mortgage is correct, was the debt it was given to secure, upon a proper charge and upon sufficient evidence, rightfully found by the jury to be barred by the statute of limitations? Third. If the debt was barred by the statute, could appellees avail themselves of such bar as a defense to appellants' action?

Conclusions of Fact.

First. John H. Herndon, on the 1st day of September, 1851, was the owner of one-third of a league of the land described in the petition of A. C. McKeen, filed in this case December 18, 1875, and appellants and appellees all claim the land in controversy under said Herndon, as their common source. Second. A. C. McKeen, the original plaintiff, died since the institution of suit, and L. C. McKeen, Byron McKeen, and Robert L. McKeen, plaintiffs, are the only heirs of A. C. McKeen, and as such are entitled to his property. Third. John James, one of the original defendants, died since the institution of this suit, and Annie James and J. H. James are the duly-qualified executors of his estate. Fourth. At the time

this suit was instituted, John James was the owner of one-third undivided interest in said one-third league survey, (it being the portion of land not sued for by plaintiffs,) and he was entitled to have the same partitioned to him, and his said executors now have the same right. John James acquired his said interest since the 1st day of September, 1857, by conveyance duly executed, from said Herndon. Fifth. On the 7th day of January, 1867, John H. Herndon executed an instrument in writing, in the form of, and purporting on its face to be, a deed, to J. L. and A. C. McKeen, to the land claimed by the appellants, which instrument recited that it was made in consideration of the sum of \$1,500, and in it the receipt of said money was acknowledged by said Herndon from said grantees. Said instrument also, on its face, purported to convey one-third of a league between San Antonio and Castroville, it being the head right of John Bonnett, and also a tract of 800 acres,—part of the William T. Neal head right. The instrument contained a general warranty of title to said lands, and was proven up and acknowledged on October 29, 1868, by James Sorley, one of the subscribing witnesses, and duly recorded in Bexar county on November 7, 1868. Sixth. On May 23, 1874, J. L. McKeen executed to A. C. McKeen a deed conveying the land in controversy, which was recorded in Bexar county on May 28, 1874. Seventh. The evidence by which the verdict of the jury finding said instrument to be a mortgage, and as to the debt which it was given to secure, is supported as follows: (1) The testimony of J. H. Herndon that he executed the deed to secure the payment of \$1,500, gold, borrowed by him from the McKeens on the day it was executed. That when he borrowed said money he gave them his note, payable in 60 days, for \$1,605, and agreed with them to ship them sugar, molasses, and cotton to pay the same. That the instrument was not delivered as an absolute deed, but as an escrow. That it was delivered to James Sorley by agreement with the McKeens, to be held by him in accordance with the terms of his receipt, signed by him, which is as follows: "Rec. Galveston, January 7th, 1867, from John H. Herndon, his deed to J. L. and A. C. McKeen, of this date; the following tracts of land situated in Bexar county, to wit: One thousand acres on the Salado, out of the head right of Adam Stafford; a tract of 1,476 acres on the Protranco, the head right of John Balnes; and a tract of 800 acres out of the head right of Wm. T. Neal,—which said deed is to be held by me as an escrow for sixty days, and if at that time the said John H. Herndon fails to pay to the said J. L. and A. C. McKeen a note of even date with this receipt, executed by the said John H. Herndon in favor of the said J. L. and A. C. McKeen, for sixteen hundred and five dollars payable sixty days after date,

then this above-mentioned deed to be delivered to the said J. L. and A. C. McKeen as a deed in fee simple to the lands therein described; but if the said Herndon shall pay, or cause to be paid, to said J. L. and A. C. McKeen, said note, at or before maturity, then I am to deliver said deed in escrow to said Herndon. [Signed] James Sorley." (2) At the end of the 60 days, the note not being paid, Sorley delivered the deed to J. L. and A. C. McKeen, the latter of whom, in his depositions, testified that he believed Herndon gave him the note at the time he gave him the deed. (3) After the deed was delivered by Sorley to the McKeens, they continued to hold and assert against Herndon the note, and in an account rendered by them to him in July, 1867, the note is mentioned as follows: "Your note due March 7th, \$1,605.00; commissions for 4 months, to July 7, \$213.98." The statement in which this appears shows a balance against Herndon of \$1,873.96. (4) Afterwards, in December, 1867, another statement was rendered by the McKeens to Herndon, as follows: "July 7, 1867. Amount account rendered, \$1,873.96; commissions and interest, as per agreement, to Dec. 27, 1867, \$353.97; due this day, in gold, \$2,227.93." (5) This amount of \$2,227.93, gold, was on December 27, 1867, reduced to currency, and a new note taken by the McKeens from Herndon, for \$2,818.58. (6) Upon this note, J. L. and A. C. McKeen sued in the district court of Galveston county, and recovered judgment on June 5, 1868. (7) Execution issued on this judgment November, 1868. And (8) the judgment was not declared on in this suit until it was by the pleading filed September 4, 1883.

Conclusions of Law.

The court instructed the jury that "the deed from Herndon to the McKeens is on its face an absolute deed to the land in controversy, and to change the manifest character of said deed, and to establish it as a mortgage, the burden of proof rests on the defendants. In considering the issue as to whether said deed was intended, at the time of its execution, as a security for money, and not as an absolute deed, you will look to the evidence disclosing the position, respectively, of the parties to the deed, and all of the attending circumstances, at the time said conveyance was agreed upon and made. If you believe the defendants have established, by a preponderance of evidence, that the deed in question was intended and executed as a security for money, then it is, in law, a mortgage." The charge of the court clearly presented to the jury the proper test and rule for determining whether the instrument in question was a mortgage. The facts are sufficient to show that it was. We therefore answer the first question for our determination in the affirmative. *Alstin v. Cundiff*, 52 Tex. 462; *Ruffler v. Womack*, 30 Tex. 339; *Loving v. Milliken*, 59 Tex. 423; *Gibbs v.*

Penny, 43 Tex. 560; Hart v. Eppstein, 71 Tex. 752, 10 S. W. Rep. 85; Gray v. Shelby, 83 Tex. 406, 18 S. W. Rep. 806; Ragland v. Wisrock, 61 Tex. 395; Smith v. Cassidy, 73 Tex. 164, 12 S. W. Rep. 12.

There was no error in the refusal of the court to give the second and third special charges asked by appellants, because the principles of law enunciated in them were substantially given in the court's general charge, and it was unnecessary to repeat them.

The refusal of the court to give a special charge asked by appellants, which is as follows: "If you believe from the evidence that Herndon executed and delivered the deed to the McKeens in the morning of January 7, 1867, as an absolute deed, you will find in favor of plaintiffs, although you may believe that McKeens, in the morning of the same day, agreed with Herndon to allow him to redeem or repurchase the land by paying them sixteen hundred and five dollars within sixty days. Such agreement, not being in writing, could not change the effect of the deed previously delivered, and could not convert it into a mortgage,"—is assigned as error. The evident purpose of asking this charge was to submit to the jury the effect of a statement in A. C. McKeen's depositions that Herndon delivered the deed to him in the morning, and, in the afternoon of the same day, he, to enable Herndon to repurchase the land for \$1,605 within 60 days, allowed the deed to be placed in Sorley's hands as an escrow for such use and purpose. McKeen, in the same depositions, had testified that when he took the deed from Herndon he believed that Herndon gave him the note at the time. The issue as to whether the deed was intended at the time of its execution as a security was clearly presented to the jury in the charge of the court. It has been held improper for the court to emphasize in a charge any particular portion of the evidence, unless it, as a matter of law, establishes an issue. *Medlin v. Wilkins*, 60 Tex. 415. It cannot be said that the testimony of McKeen, upon which the charge was asked, in view of his statement that he believed the note was given when he took the deed, and the other evidence in the case, as a matter of law, established the issue that the deed was intended at the time it was delivered as an absolute conveyance. The charge asked gave undue prominence to the evidence upon which it was predicated, and on that account would have been improper. *Randall v. Gill*, 77 Tex. 350, 14 S. W. Rep. 134; *Railway Co. v. Kutac*, 76 Tex. 475, 13 S. W. Rep. 227. What we have said above in relation to the refusal of the court to give special charges Nos. 2 and 3 applies also to its refusal to give special charge No. 7.

Appellants also requested the court to instruct the jury "that defendants are bound by the statement and admissions of their

vendor, Herndon, contained in the receipt from James Sorley to Herndon, introduced by them in evidence," and its refusal to give it is assigned as error. We do not see the object of such charge, for there is nothing in the receipt, when read in connection with the circumstances attending its execution, inconsistent with the theory that the instrument was intended as a mortgage. We think it is rather corroborative of the theory that it was. Then, how would appellees' being bound by "the admissions or statements" contained in it benefit the appellants? The eighth special charge asked by the defendants, and given by the court, (which is also assigned as error,) to the effect that, if the jury believe the deed from Herndon to the McKeens was given as security for money, they must find the deed to be a mortgage, notwithstanding it was styled by the parties, or either of them, "a deed," was proper, in view of the fact the instrument of January 7, 1867, was termed in the receipt of Sorley a "deed." Certainly, such a term did not make it so, and if appellants intended their special charge to relate to that term, and bind defendant by it, as "an admission" that it was a deed, they were not entitled to it, for an instruction could have hardly been given that would have been more misleading. This disposes of all the assignments of error on the question as to whether the instrument of January 7, 1867, was a deed or a mortgage.

We will now consider the second question: Was the debt which the instrument was given to secure, upon a proper charge and upon sufficient evidence, rightfully found by the jury to be barred by the statute of limitations? The note which the mortgage was given to secure was reduced to a judgment in the district court of Galveston county on June 5, 1868. Execution issued on it in November, 1868. The judgment was not declared on in this case until September 4, 1888, for the debt declared on in 1878 was simply a money demand for \$1,500, with a prayer for foreclosure in the event it should be held that the instrument from Herndon to the McKeens was a mortgage. The question then is, was the cause of action declared upon on the 4th day of September, 1888, the same as the one sued upon in 1878? If it was, it must be for the reason that, as the debt declared on was merged in the judgment, therefore a declaration upon the debt was tantamount to a declaration on the judgment. If this reason should hold good, then the suit on the debt being, in effect, one on the judgment, and it being brought within 10 years after the issuance of execution, the statute of limitation would not bar it; but if the causes of action are different, 10 years having elapsed from the time of the issuance of the execution to the time the judgment was declared on, it would be barred. One of the most important results of the merger of a cause of action in

the judgment recovered upon it is that thereby a new debt is created. Thenceforth the original claim or demand is extinguished, or is transformed into a new obligation. 2 Black, Judgm. § 677; 1 Freem. Judgm. (4th Ed.) § 215. When the judgment was obtained in the district court of Galveston county on the note which the mortgage was given to secure, though a personal judgment, it carried with it the mortgage lien which originally secured the note itself. *Slaughter v. Owens*, 60 Tex. 670; *Beck v. Tarrant*, 61 Tex. 405. The note being extinguished by the judgment, and the judgment carrying with it the mortgage lien, it was necessary to declare on the judgment to enforce such lien, and the cause of action arising from the judgment was essentially different from the one on the original note; and, there being no error in the charge of the court submitting the question as to whether the action was barred upon the judgment at the time it was sued on, and 10 years having elapsed from the issuance of execution to the time of declaring on the judgment, we hold that the jury rightfully found the mortgage lien evidenced by the instrument of January 7, 1867, barred by the statute of limitations.

The debt being barred by the statute of limitations, we will consider whether appellees could avail themselves of such bar as a defense to appellants' action. Appellants strenuously contend that as Herndon executed a deed absolute on its face, and appellees having subsequently acquired title from his assignee in bankruptcy by a pure quit-claim deed, purporting on its face to carry the land subject to all incumbrances, they, having actual and constructive notice of McKeen's claim, cannot have such deed declared a mortgage without paying the debt secured thereby, and that equity will not accept the plea of limitations as payment. The rule in most of the United States seems to be that the fact that a debt secured by a mortgage is barred by the statute of limitations does not extinguish the mortgage security, or prevent the maintaining of an action to enforce it. It is founded upon the principle that the mortgagor and his vendee hold in subordination to the title of the mortgagee, and the statute of limitations does not run in favor of the mortgagor or his vendee, without some overt act throwing off allegiance. *Wood*, Lim. Act. 446. This is founded on the common-law doctrine that regards a mortgage as a conveyance of real estate. This principle has never obtained in this state. Here a mortgage is not regarded as a conveyance of the property, but the title, as well as the right of possession, remains in the mortgagor. It is a mere incident of the debt, (*Duty v. Graham*, 12 Tex. 427; *Perkins v. Sterne*, 23 Tex. 561; *Ross v. Mitchell*, 28 Tex. 151; *Blackwell v. Bennett*, 52 Tex. 333;) and when the debt is barred, there being no remedy in the courts to enforce the mortgage, it must share the fate

of the debt. This does not lead to the conclusion that the statute of limitations operates upon or affects any remedy the mortgagee may have outside of the courts. *Fleavel v. Zuber*, 67 Tex. 279, 3 S. W. Rep. 273. For instance, a court of equity will not enforce an absolute deed as a mortgage, where the grantee is in possession, after the debt is barred by the statute of limitations, without requiring the debt to be paid, (*Hannay v. Thompson*, 14 Tex. 144.) nor permit the mortgagor to recover the premises from the possession of the mortgagee after the debt is barred without paying it, (*Rodriguez v. Haynes*, 78 Tex. 225, 13 S. W. Rep. 296.) nor will a creditor be deprived of a remedy which he has provided by contract to enforce without the assistance of the courts, (*Goldfrank v. Young*, 64 Tex. 433.) In this case the grantee McKeen was not, and had never been, in possession of the premises, nor was there any provision in the instrument—which, we have held, was properly found to be a mortgage—authorizing its enforcement as such without the assistance of the courts. Appellants claimed title to, and sought to recover possession of, the property, from the appellees, by virtue of it, as though it was, as it purported to be, an absolute deed. When the effect of it was pleaded by appellees as a mortgage, they (appellants) sought to have it foreclosed, and subjected to the payment of a debt which the jury properly held to be barred; and as all of Herndon's title to the property had passed to the appellees through the deed of his assignee in bankruptcy, and the mortgage being simply an incident of the debt, and not such an instrument as entitled McKeen to the possession of the property, we are of the opinion that appellees could defeat appellants' recovery of the land by showing that the instrument was a mortgage, without paying the debt it was given to secure. In the case of *Mann v. Falcon*, 25 Tex. 276, which was an action of trespass to try title, brought by Mann against Falcon to recover certain real estate, the court held that under a plea of "not guilty," the defendants could show the deed under which plaintiffs claimed title to the land, though on its face an absolute conveyance, was in fact a mortgage, and that, as the right of property and possession remained in the mortgagor, the action could not be maintained, "for that would be to dispossess the party who is the rightful possessor against the mortgagees and those who claim under them, and whose right of possession is not defeated or determined by the breach of the condition of defeasance, and can only be determined by a decree of foreclosure of the mortgage." In that case it was objected by the appellants that the judgment, which was for the defendants, did not accord them their rights under the mortgage. The court answered the objection by saying that they did not frame their petition so as to enable the court to decree

a foreclosure. If in that case the petition had been so framed, and limitation had been pleaded to the debt, and established, by the defendants, the result must have been the same, for the defendants would certainly have been just as much bound to pay a debt not barred by the statute as to pay one that was; and if they could defeat the recovery of the property by showing the instrument under which plaintiffs claimed, though upon its face a deed of conveyance, was a mortgage, without paying the mortgage debt that was not barred, they certainly could defeat a recovery in a case like this, where the debt was barred, by not paying it. In this case the defense that the deed was a mortgage was specially pleaded as a bar to plaintiffs' right to recover the property. While this plea restricted the defendants, in their proof, to the matters set up by it, it was as available as a plea of not guilty, for the purposes for which it was pleaded. *Nye v. Gribble*, 70 Tex. 491, 8 S. W. Rep. 608. We therefore hold that, the debt being barred by the statute of limitations, appellees could avail themselves of such bar in this case as a defense to appellants' action, without paying the debt the mortgage was given to secure. The judgment of the court below is therefore affirmed.

JAMES, C. J., being a party to the suit, did not sit in this case.

GAINES et al. v. GAINES et al.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

HOMESTEAD — ABANDONMENT — SETTING APART HOMESTEAD—HOW AUTHORIZED.

1. Intestate died insolvent, leaving, him surviving, three minor children by his first wife, his second wife, and one child by her, part of his land being set aside to the wife and their child for homestead. Shortly after his death his wife left such land, and lived in another county till her death. *Held*, that the wife had abandoned her homestead, and that her child acquired no homestead right by the prior occupancy of her mother.

2. The fact that such child's guardian, without order of court, rented out the land and collected rents therefor, and that his reports accounting for the rent were approved by the probate court, is not equivalent to an order authorizing the guardian and his ward to occupy the land as a homestead, as provided by Const. art. 16, § 52, to the exclusion of the other heirs of intestate.

3. Since the law in force at the time of intestate's death vested in the surviving wife and minor children, when the estate was insolvent, an absolute title in the homestead, they would take equal interests in the homestead, and on the death of the widow her child inherited her share, and the judgment of the trial court in partition against such child by intestate's other three children, awarding her one-fourth of the land instead of two-fifths, was erroneous.

Appeal from district court, Falls county;
L. W. Goodrich, Judge.

Action by D. Y. Gaines and others against

v.24s.w.no.10—30

W. D. Gaines and another. From a judgment for plaintiffs, defendants appeal. Reversed.

B. B. Clarkson, for appellants. B. H. Rice and S. R. Scott, for appellees.

FISHER, C. J. This was a suit for partition of 125 acres of land, brought by the appellees, D. Y. Gaines, Lillian Degraffinreidt, joined by her husband, F. T. Degraffinreidt, and Helen Hatch, joined by her husband, Dill Hatch, against Bettie Gaines, and W. D. Gaines, the guardian of her estate. The judgment of the court below decreed to D. Y. Gaines, Helen Hatch, Lillian Degraffinreidt, and the defendant Bettie Gaines each an undivided one-fourth interest in the land in controversy. The plaintiffs, D. Y. Gaines, Lillian Degraffinreidt, Helen Hatch, and defendant Bettie Gaines are the children of D. Y. Gaines, Sr., who died in March, 1876, and all said children were minors at the time of his death. The first three named are the children of a former marriage; the defendant Bettie Gaines is the child of a second marriage of D. Y. Gaines, Sr. D. Y. Gaines, Sr., at the death of his first wife, occupied and owned as the community homestead of himself and wife 250 acres of land, of which the 125 acres in controversy are a part. After the death of his first wife, he married Lina, the mother of the defendant Bettie, and they, with his children of the first marriage, continued to occupy his 250-acre homestead, and were so occupying it when he died. After his death the land was divided, and the children by his first marriage were given 125 acres of the land as their mother's community interest, and the remaining 125 acres—the land in suit—was set aside to the widow and the children as a homestead. Not long after the death of her husband, Mrs. Lina Gaines left the land, and removed to another county, where she continued to reside until her death, in 1883. The conclusion is warranted that Mrs. Lina Gaines at her death was insolvent. At the time of the death of D. Y. Gaines, Sr., all of the plaintiffs and the defendant Bettie were minors, aged, respectively, 13, 14, and 10 years, and Bettie 5 months. The estate of D. Y. Gaines, Sr., at the time of his death, was insolvent. After the death of Mrs. Lina Gaines, defendant W. D. Gaines, guardian of the estate of Bettie, rented out the land in controversy, and collected the rents. The land was never occupied by Mrs. Lina Gaines after she left it, nor by either the guardian, W. D. Gaines, or defendant Bettie Gaines. No order of the probate court was made authorizing the guardian to rent the land, or setting it aside to him or his ward, Bettie, as a homestead, or authorizing them to so occupy it. It appears that the guardian reported the collections of rent to the probate court, and that his reports were approved. The court below—and, we believe, correctly—found that Mrs. Lina Gaines had, by her removal to another coun-

ty, under the circumstances as disclosed by the facts, abandoned her homestead interest in the land in controversy. However this may be, we do not believe that the appellant minor, Bettie Gaines, can claim any homestead interest by virtue of the prior occupancy of her deceased mother. Her rights in that respect must be determined by the law in force when her mother died, in 1883.

The constitution, in order to defeat a partition of the homestead among the heirs upon whom descent is cast when neither of the parents survive, requires that it shall be set aside, by an order of a proper court having jurisdiction, to the guardian of the minor children, for use and occupancy. Article 16, § 52, Const. 1876. The minor or his guardian has no possessory right in the old homestead by virtue of the fact that it was once the homestead, but the right of possession as the homestead of the minor can only be acquired when it is based upon an order of court designating the property for such purpose. *Ashe v. Yungst*, 65 Tex. 637. The probate court that has the jurisdiction over the interests of the ward may, for sufficient reasons, decline to set aside the property for the use of the ward or his guardian. No order of court exists in this case which authorizes the minor or her guardian to occupy the property in controversy as their homestead. The fact that the guardian, without an order of the court, collected the rents of the property, and accounted for in his reports to the court showing the condition of his ward's estate, and the approval of such reports by the court, cannot be held tantamount to an order authorizing the guardian and his ward to occupy the property as a homestead. The court could properly approve such reports without intending the effect of giving the ward a greater interest in the property than that of the other heirs.

We will next determine what interest the appellant Bettie Gaines acquired in the property upon the death of her father and mother. D. Y. Gaines, Sr., at the time of his death, in March, 1876, with his second wife, the mother of appellant Bettie, and with her the appellees, who were then all minors, was living on the property in controversy as their homestead. His estate at that time was insolvent. The rights of the parties in ascertaining their respective interests in the property constituting the homestead are to be determined at the time when descent was cast by the death of D. Y. Gaines, Sr., which occurred prior to the adoption of the constitution of 1876. The law in force at the time of his death vested in the surviving wife and minor children, when the estate was insolvent, an absolute title in the homestead, free of the claims of creditors of the estate and of adult heirs. The absolute fee, under such circumstances, became vested in the surviving wife and the minor children.

Such has been the interpretation placed upon the laws of 1848 and the probate laws of 1870, which latter govern the disposition of this case. *Green v. Crow*, 17 Tex. 180; *Horn v. Arnold*, 52 Tex. 161; *Scott v. Cunningham*, 60 Tex. 566; *Watson v. Rainey*, 60 Tex. 321, 6 S. W. Rep. 840; *Zwerneemann v. Von Rosenberg*, 76 Tex. 525, 13 S. W. Rep. 485; *Childers v. Henderson*, 76 Tex. 664, 13 S. W. Rep. 481. The difference between the law of 1848 and that of 1870 consists in the former act more clearly defining the interest in the property which the several beneficiaries shall take. *Scott v. Cunningham*, 60 Tex. 566. The law of 1870 did not provide what interest the surviving wife and minor children should each, respectively, take in the property. In determining the interest that each of the beneficiaries is entitled to when the grant is in solidum, we understand the law to be that their interest shall be equal in the thing granted. Applying this rule to the facts of this case, we think the widow, Mrs. Lina Gaines, and the four minor children, at the time of the death of D. Y. Gaines, Sr., were each entitled to a fifth interest in the property in controversy. Upon the death of Mrs. Gaines, her interest descended to the appellant Bettie Gaines, and such interest, with that of one-fifth that Bettie acquired when her father died, would make her total interest in the property equal two-fifths. Therefore the judgment of the court below awarding her one-fourth interest in the property is erroneous. But for the fact that the record discloses that the guardian of the appellant collected the rents of the property, and, it seems, applied same to the use of the appellant Bettie, we would reverse and render this judgment; but, as the amount of rents, and whether it was used for the benefit of the minor, and what proportion it bears to the value of the property, is left uncertain by the evidence, we will reverse the judgment, and remand the cause for another trial.

BLAGGE et al. v. MOORE et al.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

DISTRICT COURT—JURISDICTION—EX PARTE PARTITION—SALE OF LAND UNDER VOID DECREE—ACTION TO RECOVER—ESTOPPEL—INNOCENT PURCHASER.

1. Consts. 1866 and 1869, by what are termed "general jurisdiction clauses," provided that the district court had jurisdiction to try "all suits, complaints, and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, one hundred dollars, exclusive of interest." *Held*, that to give such court jurisdiction the pleading must disclose an adversary, and assert a right against him which is not shown to be conceded by him; and therefore it did not have jurisdiction of an ex parte proceeding in partition, wherein all the parties in interest were perfectly agreed, and there was nothing for the court to decide.

¹ Rehearing pending.

2. The facts that a wife, who owns an interest in lands, joins her husband and the other joint owners in an ex parte application to the district court for partition, and that the attorney for all the parties bought in the land in trust for one of them, and accounted to such husband for his wife's interest in the proceeds of the sale, all with the wife's knowledge, do not estop her from afterwards denying the validity of the sale, where the wife did not conceal any facts, and no part of the proceeds were used to discharge any lien on, or otherwise benefit, her separate property.

3. The grantees of the purchaser of land at a void partition sale are chargeable with notice of the vice of their grantor's title.

Appeal from district court, McLennan county; A. C. Prendergast, Special Judge.

Action by Caroline E. Blagge, H. W. Blagge, her husband, Fannie L. Nichols, Fred M. C. Nichols, her husband, A. J. Butler, Sadie J. Butler, and Allen G. Butler against Barb Moore and others, to recover certain land. On the hearing on appeal it was admitted that the action was barred as to all of plaintiffs except Caroline E. Blagge. From a judgment for defendants, plaintiffs appeal. Reversed as to Caroline E. Blagge and her husband, and affirmed as to other plaintiffs.

The other facts fully appear in the following statement by KEY, J.:

Appellants, Caroline E. Blagge, joined by her husband, H. W. Blagge, Fannie L. Nichols, joined by her husband, Fred M. C. Nichols, A. J. Butler, Sadie J. Butler, and Allen G. Butler, instituted this suit against appellees to recover 600 acres of land, part of a two-league grant to Thomas J. Chambers, in McLennan county. Appellants stated in their petition that Caroline E. Blagge owned an undivided one-half interest in said land in her separate right, that Fannie L. Nichols owned an undivided one-fourth, and the other plaintiffs the remainder. They also pleaded, in the alternative, that if any of the plaintiffs should fail to recover, and it appear that the other plaintiff or plaintiffs and the defendants owned the land jointly, then for a decree of partition. Appellees, defendants in the court below, pleaded not guilty, the statutes of three, five, and ten years' limitations, and improvements made in good faith. In avoidance of the plea of limitation, Caroline E. Blagge pleaded coverture, and Fannie L. Nichols pleaded infancy and coverture. The court instructed the jury to return a verdict for the defendants, which was done, and judgment rendered accordingly.

Upon the testimony in the record and admissions in appellants' brief this court finds as follows:

On Plaintiffs' Evidence.

(1) The land in controversy is part of two leagues granted by the states of Coahuila and Texas to Thomas J. Chambers on the — day of March, 1832. (2) August 7, 1847, Thomas J. Chambers conveyed said two leagues of land to John S. Sydnor, by deed

duly executed. (3) July 24, 1848, John S. Sydnor conveyed said two leagues of land to Jonas Butler, by deed duly executed.

(4) It was admitted by the defendants that, in partition with the other joint owners of said two leagues, the land described in plaintiffs' petition was duly and legally set aside to Jonas Butler and his heirs, in the year 1859, in a decree of partition. (5) The plaintiff Caroline E. Blagge was married to Jonas Butler in the year 1848, in Galveston county, Tex. Said Jonas Butler died in said county and state in 1858, leaving two children, viz. George Butler, born August, 1845, and Fannie Butler, born September, 1854. Said Fannie married the plaintiff Fred M. C. Nichols in November, 1871, and was his wife at the time of trial. George Butler died May 2, 1888, leaving his wife and three children surviving him. These children were a son named Kinney, born in March, 1867, married in 1888, and died in 1889, and had a posthumous child, a girl named Kinney, now living; two boys, one named Fred, born in 1869, the other named Allen, born in 1883, both now living. (6) On the 20th day of September, 1865, Caroline E. Butler was married to H. W. Blagge, and her coverture has continued ever since.

On Defendants' Evidence.

The defendants put in evidence the following proceedings of the district court of Galveston county in a cause styled *Ex Parte Harry W. Blagge et al.*:

"In the district court of the state of Texas, including the county of Galveston. To the June term, 1869. To the Hon. Geo. R. Scott, Judge of the Court: The petition of Harry W. Blagge and Caroline E. Blagge, (late Caroline E. Butler, wife of Jonas Butler, dec'd,) George J. Butler, and Fanny Butler, a minor, by her guardian, George Butler, all residents of the county of Galveston, state of Texas, respectfully sheweth unto your honor: First, that they are joint owners of the real estate set out in bill of particulars hereto attached and marked 'Exhibit A'; second, that the said Harry W. and Caroline E. Blagge (for the said Caroline E. Blagge) are entitled to the one undivided half of the same, and the said George J. and Fanny Butler are entitled to the remaining undivided half thereof; third, that the said property is not susceptible of division in kind, so as to make an equitable partition of the said estate between the respective parties in interest; fourth, that it is advisable, proper, and necessary that a partition of the said estate should be made between the parties in interest, and that the only mode by which such an end can justly be attained is by and through a public sale of the same under the orders of your Hon. court. The premises considered, therefore, it is asked by all of the said parties in interest that such order be now made by your honor as by which the

said lands may be sold on the 1st Tuesday in November, A. D. 1869, in front of the courthouse door in the city and county of Galveston, for cash to the highest and best bidder at said sale, after advertisement made of the time, terms, and place of sale for thirty days previous to said sale, by publication in one of the newspapers therein published in the city of Galveston, as well as by advertisement after the manner of sales under execution from your Hon. court, and that orders may issue from the clerk of your Hon. court, addressed to the sheriff of the county of Galveston, commanding that such order be carried into effect, by and through the said sheriff; that the said sheriff shall make a conveyance of all the right, title, and interest in and to the said property, to the purchaser or purchasers at said sale, belonging to the said Harry W. and Caroline E. Blagge and Geo. J. and Fanny Butler, and the proceeds of said sale, after paying all the costs of this proceeding, shall be divided between the said parties in proportion to their respective interest; that each and all of said parties in interest shall have the right to bid at said sale to the extent of their respective interest, or in the aggregate sum of the entire proceeds of the sale, and the lands, if any be bought by them, or any of them, at said sale, within the limit of said moneyed interest in the entire proceeds of sale, shall be conveyed to them, or any of them, without the payment of money, to the extent of said interest; provided, nevertheless, that the cost of this proceeding and the commissions of sale shall be paid in money by the said parties so purchasing as strangers to the record; and if any of the said parties in interest shall purchase lands to a greater value than their interest in the entire proceeds of the sale, then, in that event, such excess shall be paid in money, as other persons at said sale are required to pay. It is respectfully urged that the said orders and decrees should be made by your honor, and that all things may be done that are necessary and proper to be done to carry out the object of this bill, and for different and general relief, and as in duty bound, etc. Harry W. and Caroline E. Blagge, George Butler, and Fanny Butler, by her guardian, Geo. Butler. By McLemore & Hume, Attys. for the Parties in Interest, as supra."

Attached to and following this petition is Exhibit A, containing a list of lands in several counties. The land in McLennan county is described in this exhibit as follows:

"McLennan County. \$2.00. John S. Synnor to Jonas Butler, (1/5) one-fifth of two leagues, situated where the city of Waco is now built. T. O. Chambers, grantee. Recorded in Milam Co., Book 5, pages 166 & 167."

(2) "State of Texas, county of Galveston: At a term of the district court begun and holden at Galveston, within and for the county of Galveston, before the Hon. Wm. H.

Stewart, and ending on the 7th day of July, A. D. 1869, the following case came on for trial, to wit: Harry W. Blagge, Caroline E. Blagge, Geo. J. Butler, Fanny Butler, minor, George Butler, her guardian. Ex parte. No. 4,248. 'No. 4,248. July 5th, 1869. Harry W. Blagge, Caroline E. Blagge, Geo. J. Butler, Fanny Butler, George Butler, her guardian. Ex parte. The above entitled and numbered cause coming on to be heard and it appearing to the court that the prayer of the petition in said cause is made for the best interest of all concerned, and that the orders and decrees therein asked are in all things right and proper, it is therefore ordered, considered, and adjudged that the prayer of said petition be, and the same is hereby, granted, and it is hereby ordered, considered and adjudged that the said lands recited in said petition be sold at public auction to the highest bidder in front of the courthouse in Galveston county, in said city of Galveston, on the 1st Tuesday in November, 1869, between the hours of 10 A. M. and 2 P. M., by the sheriff of Galveston county, after advertisement first being made of the time, terms, and place of sale in some newspaper published in the city of Galveston for 30 days previous to the sale day, as well as after advertisement, after the manner of sales under execution. And it is ordered that any and all of the said parties interested may bid at said sale, to the extent of their respective interest or interests in the entire proceeds of the sale, for any property offered for sale under this decree; and a conveyance shall be made to such bidder or bidders by the sheriff, without payment of money, except as to costs and commissions, by such bidder or bidders, up to the amount of said interest in the entire proceeds of the sale; and, after deducting the costs of this proceeding, the proceeds of said sale shall be divided between the said parties as follows: One-half to Caroline E. Blagge, one-fourth to Geo. J. Butler, one-fourth to Fanny Butler. And the clerk of the court is hereby instructed and commanded to issue all orders to carry out the decree of the court. And after the sheriff shall have received and paid into court the proceeds of sale of said lands, the clerk of the court is hereby commanded to pay over all sums thus received to the respective parties in interest, or their attorneys of record."

(3) "Harry W. Blagge & Caroline E. Blagge, Geo. J. Butler, and Fanny Butler, minor, by her guardian, Geo. Butler. No. 4,248. Ex parte. At this term of the Hon. district court for Galveston county came the parties by their attorneys in the above entitled and numbered cause, and stated to the Hon. court that the decree heretofore made under the prayer of the said parties, to wit, on the 5th day of July, 1869, at the last term of your Hon. court, was not carried into execution, and the parties therefore ask that the said cause be reinstated upon the docket, and that your Hon. court will grant the or

der whereby the former decree in the premises may be executed on the 1st Tuesday in March next, 1870, in the manner and form directed in the previous decree of your Hon. court, and as in duty bound, etc. Harry W. & Caroline E. Blagge, Geo. J. Butler, Fanny Butler, by her guardian, Geo. Butler. Per McLemore & Hume, Attys. for Parties." Indorsements on the back thereof: "No. 4,248. H. W. & C. E. Blagge et als. Ex parte. Motion to reinstate, etc. Filed Jan. 17th, 1870. Wm. H. Sinclair, D. C. G. C."

(4) "State of Texas, county of Galveston. At a term of the district court begun and holden at Galveston, within and for the county of Galveston, before the Hon. Geo. R. Scott, and ending on the 1st day of February, A. D. 1870, the following case came on for trial, to wit: Henry W. Blagge, Caroline E. Blagge, and Fanny Butler, minor, by her guardian, Geo. Butler. Ex parte. No. 4,248. Henry W. Blagge, Caroline E. Blagge, and Fanny Butler, minor, by her guardian, Geo. Butler. No. 4,248. Ex parte. January 17th, 1870. In the above entitled and numbered cause, decided at the last term of the Hon. district court of the state of Texas for Galveston county, in which certain orders were therein made for the sale of lands for the purpose of partition as prayed for by the parties in interest, and it being made known to the court at this January term, 1870, of the said court that the decree of this court heretofore made in this behalf has not been carried into execution, and the parties in interest being present by their attorneys ask that the said order heretofore made be executed on the first Tuesday in March next, A. D. 1870, after 20 days' notice, instead of 30, as heretofore ordered, and the order appearing to the court to be in all things right and proper, it is therefore ordered by the court that the said order heretofore made, to wit, on the 5th day of July, A. D. 1869, by the court, be executed and in all things carried into effect as therein ordered on the first Tuesday in March, A. D. 1870; the said lands to be sold as under said order being as follows, to wit: [Then follows a list of the lands to be sold, that in McLennan county being described as follows: "McLennan County. John S. Sydnor to Jonas Butler, 1/5 of two leagues situated where the city of Waco is now built. J. C. Chambers, grantee. Recorded in Millam Co., Book —, pages 166 & 167."]

(5) Plaintiff admitted that an order of sale had been issued by the clerk of the district court of Galveston county on the 7th day of February, 1870, in accordance with the foregoing decree and order of said court. That said order of sale had been lost, and could not be found after proper search had been made for same by the district clerk of said court, whereupon the defendants offered in evidence a certified copy of the return of the sheriff, which was taken from the execution docket of the district court of Gal-

veston county, to wit: "Harry W. and Caroline E. Blagge, George and Fanny Butler, by Geo. Butler, her guardian. Execution No. 4,248. Ex parte. Docket. Order of sale for partition 2,796. Order of sale issued Feb. 7th, 1870. Clerk's costs, \$14.05. Sheriff's fee, \$2.50. February 7th, 1870. Sheriff's Return. Received this writ on the 7th day of February, A. D. 1870, and in obedience to the same, on the first day of March, 1870, that being the first Tuesday in said month, within the hours prescribed by law, to wit, between the hours of ten o'clock A. M. and four P. M., I sold said premises at public vendue in the county of Galveston, at the door of the courthouse thereof, having first given public notice of the time and place of such sale by causing an advertisement thereof to be posted up at three public places in said county, one of which was the courthouse of said county, for full twenty days previous to said sale, and also by causing the same to be published in the Galveston News, a newspaper published in said county, for twenty full days previous to said sale, as directed in the order of sale; and the aforesaid property was struck off to the highest bidder for the sum of thirteen thousand five hundred and 70-100 dollars, (\$13,500.70,) of which a full description accompanies this writ. Frank Dirks, Sheriff Galv. Co." This return is followed by a list of the lands sold, names of purchasers and prices, and the only reference to land on the Chambers grant or in McLennan county is as follows: "1/5 2 leagues, 640 acres, T. C. Chambers head right, McLemore, 3.50 — 3,100.00." This return is dated March 5, 1870. It shows that the total proceeds of the sale amounted to \$13,500.70; costs, \$373.82; leaving a balance of \$13,126.88 paid over to McLemore, "attorney for all parties."

(6) The defendants next introduced in evidence a certified copy of deed by Frank Dirks, sheriff of Galveston county, issued to M. C. McLemore, dated 1st day of March, 1870, which is as follows: "The State of Texas, county of Galveston. Know all men by these presents that whereas, by virtue of an order of sale issued out of the district court in a certain cause numbered 4,248, Harry W. Blagge, Caroline E. Blagge, Geo. Butler, and Fanny Butler, a minor, by George Butler, her guardian, ex parte, and in which there was a decree rendered on the 5th day of July, A. D. 1869, and a further order rendered January 17th, A. D. 1870, and said order was directed and delivered to me, as sheriff of the county of Galveston, and state aforesaid, commanding me to sell certain property in said writ specified, part of which is as follows, to wit, one-fifth of two leagues of land in McLennan county, state aforesaid, and on which the city of Waco now stands, and granted to T. J. Chambers, and by John S. Sydnor to Jonas Butler, and recorded in Book V, pages 166 & 167, and in obedience to the aforesaid order of sale, I,

Frank Dirks, sheriff of the aforesaid county, on the 1st day of March, A. D. 1870, being the first Tuesday of said month, within the hours prescribed by law, to wit, about 11 o'clock A. M., did sell said premises at public vendue in the county aforesaid at the door of the courthouse thereof, having first given public notice of the time and place of such sale by causing a notice thereof to be posted up at three public places in the county of Galveston, one of which was the courthouse of said county, for full twenty days previous to such sale, and also by causing the same to be published in the Galveston News, a newspaper published in said county, for full twenty days previous to said sale, as directed in the aforesaid order of sale; and whereas, at said sale the heretofore described premises were struck off to M. C. McLemore, at three dollars and fifty cents per acre, he being the highest bidder therefor: Now, in consideration of the premises aforesaid, and of the sum of six thousand one hundred and ninety-nine dollars and twenty cents to me paid, I, Frank Dirks, sheriff, as aforesaid, have sold, and by these presents do grant and convey, unto the said M. C. McLemore all the estate, right, title, and interest of the aforesaid Henry W. Blagge, Caroline E. Blagge, Geo. Butler, and Fanny Butler in and to the above-described tract of land to have and to hold the above-described premises unto the said M. C. McLemore, his heirs and assigns, as fully and absolutely as I, as sheriff as aforesaid, can convey by virtue of the aforesaid order of sale. In testimony whereof I have hereunto set my hand and seal, using scroll for seal, this first day of March, A. D. 1870. Frank Dirks, [Seal] Sheriff of Galveston County. Witness: Joseph L. Franklin. W. P. Suffoert." This deed was properly acknowledged, and duly recorded in McLennan county, Tex., March 31, 1870.

(7) Defendants next introduced in evidence a certified copy of power of attorney from M. C. McLemore to S. H. Renick, dated 1st day of July, A. D. 1870, duly empowering the said Renick to sell and convey in the name of the said McLemore land described in said sheriff's deed to said McLemore, hereinbefore set out.

(8) Defendants next introduced in evidence certified copy of a deed from M. C. McLemore, by his attorney in fact, S. H. Renick, to Hugh Evans, conveying to said Evans the tract of land described in plaintiffs' petition, dated 5th day of July, 1870, duly acknowledged and recorded.

(9) The defendants introduced in evidence a regular chain of warranty deeds down to each of the defendants from the said Hugh Evans, and those claiming through him, to the respective portions of land claimed by defendants in their answers. Defendants proved that they, and those under whom they claim, held adverse, peaceable, con-

tinuous possession under deed duly registered, cultivating, using, and enjoying the lands in controversy continuously from the fall of 1870 until the institution of this suit, and paid all the taxes on the same regularly each year.

(9) Defendants further proved that each of them had been in possession of the respective portions of land claimed by them respectively more than one year before the institution of this suit, in good faith, believing they had title to the land, and made permanent and valuable improvements on the same of the character and value as set out in their respective answers.

(10) Though there was testimony pro and con on the subject, it was not shown by a preponderance of the evidence that Mrs. Blagge personally authorized the proceedings in the district court of Galveston county hereinbefore stated, nor that she had personal knowledge of the sale of the land in controversy by the sheriff to McLemore, and by him to Hugh Evans. Perhaps, however, such authority and knowledge ought to be presumed.

(11) It was shown by the testimony of M. C. McLemore that after he sold the land in suit to Hugh Evans he accounted to George Butler, guardian of Fanny Butler, for her interest, and to H. W. Blagge for Mrs. Blagge's interest, in the proceeds of the sale, though it was not shown how much he paid each.

The record does not show when this suit was begun, but it is admitted in appellants' brief that they are all barred by limitation except Mrs. Blagge.

F. G. Morris, for appellants. Clark & Bollinger, for appellees.

KEY, J., (after stating the facts.) 1. The evidence introduced by appellants showed prima facie that they were the owners of the land sued for, and they are entitled to recover the same, unless defeated by the testimony offered by the appellees. Counsel for appellants concedes in his brief that all the appellants except Mrs. Caroline E. Blagge are barred by limitation. For this reason her rights only will be considered in this opinion.

Appellees rely upon the proceedings, and sheriff's sale made thereunder, in the district court of Galveston county, in the case of Ex parte H. W. and Caroline E. Blagge and others, shown by the record, to show that appellants, or those under whom they claim, had been divested of all title to the land.

Appellants, among other objections to the validity of the sale in question, contend that said district court had no jurisdiction to entertain the petition and order the sale, and, therefore, that the sale made by the sheriff was and is absolutely void.

The first step in the proceedings referred to consists of an ex parte petition filed by

McLemore & Hume, as attorneys for Harry W. Blagge, Caroline E. Blagge, George J. Butler, and Fanny Butler, a minor, by her guardian, George Butler, the parties at interest. This petition states that Mrs. Blagge and George J. and Fanny Butler are joint owners of the real estate therein described, the former owning an undivided half, and the two Butlers owning the other half; and it asks the court to make an order directing the sheriff of Galveston county to sell said lands at public sale at the courthouse door of said county on the first Tuesday in November, 1869. This petition was filed July 5, 1869, and on the same day the court granted the order as prayed for. On the 17th day of January, 1870, the same parties, by same attorneys, filed another petition or application, stating that the decree made on July 5, 1869, had not been executed, and asking the court to make an order directing said sheriff to sell said real estate on the first Tuesday in March, 1870. January 17, 1870, the court granted this order. February 7, 1870, the clerk issued the order of sale, as provided in the two decrees referred to, and on the first Tuesday in March, 1870, the sheriff of Galveston county made the sale. If the district court of Galveston county had no jurisdiction to make the decretal orders above referred to, then it follows that said orders have not the binding force of a judgment, and they can be assailed in a collateral, as well as in a direct, proceeding. When the first decree was made, the constitution of 1866 was in force. When the other order and the sale were made, the constitution of 1869 had gone into effect, (*Peak v. Swindle*, 68 Tex. 242, 4 S. W. Rep. 478;) but it is immaterial by which constitution the question of jurisdiction is to be tested, because, if under either it existed, it was conferred by the general jurisdiction clause, and these are exactly the same in the two instruments. Each constitution, after conferring original jurisdiction on the district courts to try certain enumerated classes of cases, reads as follows: "And of all suits, complaints, and pleas whatever without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, one hundred dollars, exclusive of interest." This and similar provisions in other constitutions of this state constitute what are termed "general jurisdiction clauses." When this clause is analyzed, it will be seen that there can be no jurisdiction under it until there is a suit, complaint, or plea, and a matter in controversy. The phrase "matter in controversy" does not signify that there must necessarily be an issue of either fact or law when the case is called for trial, because the defendant may confess judgment; but it implies that the pleading which invokes jurisdiction must disclose an adversary, and assert a right against him, which is not shown by the pleading to be conceded by him. In *Mess-*

ner v. Giddings, 65 Tex. 308, in considering the question of district court jurisdiction under the constitution of 1866, where the petition disclosed an apparent, but not a real, defendant, our supreme court said: "It cannot be claimed that the clause of the constitution first quoted gave such power, for the proceeding was neither a suit, complaint, nor plea involving a matter of controversy. It was a proceeding essentially administrative in its character, and not a controversy between party and party, in which adverse claim of right was asserted, such as was evidently contemplated by the constitution. If it is claimed that in the court, as a court of equity, under that clause, the power existed, it must be replied that the district court, whether as a court of law or a court of equity, had only such power as the constitution gave it. There is no such thing as the inherent power of a court, if by that be meant a power which a court may exercise without a law authorizing it. That clause of the constitution empowered district courts to exercise all the power given, whether the procedure necessary to accomplish that purpose be such as pertains to a court of law or a court of equity; but it in no manner conferred upon such courts the power to exercise any and every power, which at any time may have been exercised by courts of chancery in England or elsewhere. Courts of chancery in England, at an early day, may have exercised such a jurisdiction as the district court for Washington county assumed to exercise, but we have no inclination now to consider the ground on which the power was then claimed, for at the present day no such power is claimed to exist in a chancery court in England, unless given by act of parliament. *Taylor v. Phillips*, 2 Ves. Sr. 23; *Russel v. Russel*, 1 Moll. 525." The essential functions of district courts in this state have always been judicial, and not administrative. They are organized to adjudicate differences between litigants, and not to register and execute agreements between individuals. When they have acquired jurisdiction of a cause, they may, by a receiver or otherwise, do many things that are not strictly judicial, but administrative. But their power to do these things is ancillary to their jurisdiction over the main cause; and in the exercise of jurisdiction in probate matters they may exercise functions that are administrative. Such jurisdiction is expressly conferred by other constitutional provisions. In the proceedings under consideration, the pleadings, which form the basis of jurisdiction, were not only *ex parte*, but they disclosed the utmost harmony among the parties to the supposed litigation. Each conceded all the rights that the others asserted. Nothing was left for the court to decide. They were agreed in every particular, and even the possibility of an issue did not exist. All that was asked of the court

was to enter the agreement upon its records, and issue a mandate for its execution. Such being the case, the district court of Galveston county had no jurisdiction, and the orders made by it are not binding upon Mrs. Blagge. If it be suggested that, as Fanny Butler was a minor, it was necessary to have a judicial sale of her interest in the property, otherwise title could not be divested out of her, it may be answered that the proper court to make such a sale, so as to bind the minor's estate, was the probate court, in which the guardianship of said estate was pending.

2. Although at the time in question there was no statute authorizing the sale of real property for the purpose of partition, still we do not hold that, had a suit been instituted to partition the land, with parties plaintiff and defendant thereto, the district court would not have had the equitable power to order the sale of the property and a division of the proceeds. But such is not the case before us.

3. But it is contended by appellees that Mrs. Blagge is estopped by her conduct from denying the validity of the sale in question. If it be conceded that the facts testified to by the witness McLemore are true, though as to some of them he is contradicted by Mrs. Blagge, the facts upon which it is sought to base an estoppel are these: Mrs. Blagge joined in the application for the order under which the land was sold. McLemore, the attorney of all the parties, bought in the land at the sale, in trust for George Butler. Afterwards he sold it to Hugh Evans, under whom defendants hold, and accounted to Mrs. Blagge's husband, who was acting for her, for her interest in the proceeds of the sale; and all of these facts were known to her at the time. Mrs. Blagge did not misrepresent or conceal any fact. No part of the proceeds of the sale was used to discharge any lien upon, or to otherwise benefit, her separate property. It must be presumed that purchasers were as well qualified to judge of the validity of the sale as was she. In the case of *Berry v. Donley*, 26 Tex. 737, it was held that a deed executed by a married woman, but not acknowledged before an officer in the manner prescribed by statute, did not pass title to real estate, and that the fact that the consideration was used for the support of herself and family did not create an estoppel against her. The doctrine announced in that case has been repeatedly followed by the same court in other cases. *Eckhardt v. Schlecht*, 29 Tex. 130; *Fitzgerald v. Turner*, 43 Tex. 79; *Johnson v. Bryan*, 62 Tex. 623; *Williams v. Ellingsworth*, 75 Tex. 480, 12 S. W. Rep. 746. In *Johnson v. Bryan*, supra, the rule of estoppel against a married woman is thus stated: "To estop a married woman from asserting her rights to land it is essential that she should be guilty of some positive act of fraud, or else of some

act of concealment or suppression which in law would be equivalent thereto; for all who deal with a married woman directly, or deal in any manner affecting her rights are chargeable with a knowledge of her disability, and that she can only convey land in the manner prescribed by the statute." The cases cited by counsel for appellees are not similar in their facts to this case, and do not conflict with the cases cited in this opinion. Conceding the truth of appellees' evidence wherever conflict exists, still it must be held that Mrs. Blagge is not estopped.

4. If we are correct in holding that the district court of Galveston county had no power to order the sale of the land, and that McLemore acquired no title through his purchase at said sale, of course, Evans, who purchased from McLemore, and appellees, claiming under Evans, are chargeable with the vice in McLemore's title. His deed discloses its own invalidity, and no one holding under him can be an innocent purchaser.

5. We deem it unnecessary to consider other points presented in the briefs of counsel. Our views on the questions considered are decisive of the case. A question of practice is all that remains for consideration. It is insisted on behalf of Mrs. Blagge that, if it be held that her prima facie title is not defeated by appellees' evidence, conceding it all to be true, then judgment should be here rendered for her for one-half of the land, and the cause remanded for partition. Appellees do not deny this contention, nor intimate a desire to offer further testimony, and the record does not indicate the existence of other material evidence. Therefore it is assumed that this disposition of the case, as it will enable appellees at once to take it to the supreme court, will be more satisfactory to them than a total reversal. The judgment of the court below as against all of the appellants except Caroline E. Blagge and her husband, H. W. Blagge, will be affirmed. As to Mrs. Caroline E. Blagge and H. W. Blagge, said judgment will be reversed, and judgment here rendered for said Caroline E. Blagge for an undivided half interest in the land sued for; and for the purpose of partition between her and the appellees, and adjustment of equitable rights growing out of improvements made by the latter, the cause will as to them be remanded. One-half of the costs of this appeal will be taxed against George J. and Fanny Butler, and the other half against the appellees.

SASSE et al. v. MARTIN et al.
(Court of Civil Appeals of Texas. Sept. 13, 1893.)

Appeal from Coryelle county court; S. F. Duffie, Judge.

Action by Martin & Moorhead against Sassee & Powell, originally brought in a jus-

tree's court, on a written guaranty in the sale by defendants to plaintiffs of one Osburn harvesting machine. Plaintiffs allege a breach of guaranty, and seek to recover back freight charges and money paid to defendants on said machine, and also to recover certain notes executed by them in favor of D. M. Osburn & Co., and delivered to defendants. Judgment was rendered in the county court on appeal from the justice's court in favor of plaintiffs, and from the judgment, and from an order overruling a motion for a new trial, defendants appeal. Affirmed.

White & Taylor, for appellants.

FISHER, C. J. We find no reversible error in the record, and affirm the judgment.

GULF, C. & S. F. RY. CO. v. PATTERSON et al.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

Error from McLennan county court; W. H. Jenkins, Judge.

Action by J. C. Patterson and another against the Gulf, Colorado & Santa Fe Railway Company for damages resulting from delay in furnishing cars for the shipment of plaintiffs' sheep, delay in transit, and negligent treatment. The case was tried without a jury, and judgment was rendered in favor of plaintiffs for \$453.84, and defendant brings error. Affirmed.

J. W. Terry, for plaintiff in error. Clark, Dyer & Bollinger, for defendants in error.

KEY, J. In this case the judgment appealed from is affirmed.

LEON & H. BLUM LAND CO. v. DUNLAP.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

OBJECTIONS TO EVIDENCE.

1. An objection to the acknowledgment of a deed sought to be introduced in evidence, on the ground that it "was not acknowledged as required by law," is too general.

2. Where the acknowledgment of a deed under which plaintiffs claim title states that there personally appeared before the notary "Leon & H. Blum, by Sylvan Blum, partner of said firm, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same," such acknowledgment is sufficient; it appearing on the face of the deed that Sylvan Blum was a member of the firm whose act it purported to be.

3. A deed conveying a head-right survey cannot be excluded from evidence for imperfect description of the land because it appears that the number of acres which would seem to be included in the field notes considerably exceeds the number called for in the body of the deed.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Action by the Leon & H. Blum Land Company against T. L. Dunlap to recover certain land. Judgment was entered in favor of defendant, and plaintiff appeals. Reversed.

N. R. Morgan, for appellant. James M. Robertson, for appellee.

HEAD, J. This suit was instituted by appellant, as plaintiff in the court below, to recover of appellee 767½ acres, a part of a survey in the name of John S. Brown. The statement of facts and bill of exceptions show that appellant, in attempting to de-rail its title, introduced in evidence a regular chain of transfers from the state to Leon & H. Blum, and then offered a deed reciting that "we, Leon Blum and Sylvan Blum, of the city of Galveston, and Hyman Blum, of the city of New York, partners, composing the firm of Leon & H. Blum, of the city of Galveston, for and in consideration of two thousand nine hundred and eighteen dollars, to us paid by the Leon & H. Blum Land Co., have bargained, aliened, and sold, and by these presents do bargain, sell, alien, and confirm, unto the said the Leon & H. Blum Land Co., all our right, title, interest, and estate in and to the following described premises, viz.: That certain tract or parcel of land lying and being in the county of Bosque, state of Texas, containing 1,535 acres of land, being the head-right survey of John S. Brown, granted to him by patent bearing date the 20th day of January, 1853, which said head right is bounded and described as follows: Lying and being situated between Spring creek and Main Bosque, about eight miles above the mouth of Meridian creek, beginning at the N. E. corner of a survey for L. W. Smith, assignee of Lavin Lago, from which a post oak, marked V, bears S. 9° W., nine varas; another, marked T, bears N., 71° W., 5 varas. Thence N., 30 W., 3,256 varas, to corner, from which a Spanish oak, marked X, bears S., 4 E., 3 varas; another, marked I, bears N., 83° E., 2½ varas. Thence S., 60° W., 3,400 varas, to corner, from which a post oak, marked W., bears S., 55° W., — varas; another, marked X, bears S., 30° E., 3 varas. Thence S., 30° E., 2,150 varas to a branch, 3,256 varas to corner, from which a live oak marked V, bears S., 87° E., 57 varas. Thence N., 60 E., 490 varas to a branch, 2,900 varas to another, 3,400 varas to the beginning." This deed is signed "Leon & H. Blum," and has the following acknowledgment: "State of Texas, county of Galveston. Before me, J. W. Jackson, a notary public in and for said county and state, this day personally appeared Leon & H. Blum, by Sylvan Blum, partner of said firm, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the

¹ Rehearing pending.

same for the purposes and considerations therein expressed. Given under my hand and seal of office at Galveston, Texas, this 15th day of May, A. D. 1885. J. W. Jackson, Notary Public in and for Galveston County, Texas." To the introduction of said deed appellee objected, as appears from the bill of exceptions, because "the deed to plaintiff was not acknowledged as required by law, and that the description of the land was too vague and indefinite; that it failed to describe any land." These objections were sustained by the court, and judgment rendered for appellee. We believe the court erred in excluding this deed. The objection to the acknowledgment was too general, and should not have been entertained by the court without requiring appellee to specify the particular defect relied upon by him. We have, however, examined the acknowledgment, and think it in substantial compliance with the law. A deed purporting to be made by a firm should be acknowledged by one of the members. 1 Devl. Deeds, § 645; Sloan v. Machine Co., 70 Mo. 206. In the note to Webb on Record of Titles, (section 57,) we also have reference to McCoy v. Boley, 21 Fla. 803, as being in point, but we have not access to this volume. In Baldwin v. Richardson, 33 Tex. 16, it was held that proof by a subscribing witness that he saw "Richardson & Co. sign the name" was sufficient to admit the deed to registration. To this decision, however, Morrill, C. J., dissented, upon the ground that the acknowledgment should have named the member of the firm who signed. The deed upon its face showed that Sylvan Blum, who acknowledged the deed, was a member of the firm whose act it purported to be; and, if this had not already been shown to be a fact by the deed under which Leon & H. Blum claimed, (as to which we are not advised by the statement of facts,) the deed should nevertheless have been admitted, and appellee allowed to make this proof by other evidence. The extent to which one member of a firm has power by deed to convey its land has been so fully considered in this state we will not undertake to add to what has already been said. Frost v. Wolf, 77 Tex. 455, 14 S. W. Rep. 440, and authorities there cited.

The objection to the deed on account of supposed defective description of the land attempted to be conveyed we think still less tenable than the one to the acknowledgment. We think an inspection of the description of the land, as contained in the deed and copied above, will show it to be more than ordinarily full and definite. We attach no importance to the fact that the number of acres which would seem to be included in the field notes considerably exceeds 1,535, the number called for in the body of the deed. The deed would convey all the interest of the makers in the land embraced in the field notes, whether it be more or less than 1,535 acres.

We see no objection to attaching copies of instruments as exhibits to a statement of facts as was done of this deed; also, we think the deed objected to was sufficiently identified when we consider the bill of exceptions and statement of facts together. The judgment of the court below should be reversed, and the cause remanded.

HARRIS v. CRABTREE et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

ASSIGNMENTS OF ERROR.

Where appellant's assignments of error are not copied in his brief, as required by amended rule 29 of the supreme court and by the rules adopted by that court for the court of civil appeals, such assignments cannot be considered.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Action by G. B. Harris against Joe Crabtree and others to recover certain land. Judgment was entered in favor of defendants, and plaintiff appeals. Affirmed.

Felix H. Robertson, for appellant. S. H. Lumpkin, for appellees.

HEAD, J. This suit was instituted by appellant, as plaintiff in the court below, against appellees as defendants to recover 1,180 acres of the Calvin Stockbridge head right. The trial resulted in a judgment in favor of all of the defendants, from which this appeal is prosecuted. Numerous errors have been assigned by appellant, but none of them have been copied in his brief, as required by amended rule 29 of the supreme court, which was in force at the time of the filing of this record therein, and they cannot therefore be considered by us. Chappell v. Railway Co., 75 Tex. 82, 12 S. W. Rep. 977; Cooper v. Lee, (Tex. Cir. App.) 21 S. W. Rep. 998. This is also one of the rules adopted by the supreme court for this court, and we have no right to disregard it, especially when its enforcement is insisted upon by appellees, as in this case. Rule 29 for courts of civil appeals, 84 Tex. 701, 20 S. W. Rep. viii. As we find no error apparent of record which we would be authorized to consider in the absence of an assignment, the judgment rendered by the court below must be affirmed.

STEEL v. METCALF et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

ABATEMENT OF ACTION—EXECUTION—UNLAWFUL SEIZURE—DAMAGES.

1. Where, during the pendency of an action by a husband and wife against a sheriff for damages for the seizure under an order of sale of a certain pair of horses, the husband dies, a plea in abatement on the ground that the children of the deceased were necessary

parties was properly overruled, inasmuch as the property seized was exempt from execution. *Craddock v. Goodwin*, 54 Tex. 578, followed.

2. Where an execution was addressed to the sheriff of one county, the process was void on the face in the hands of the sheriff of another county, and if, knowing this, he caused the property to be seized willfully, he was liable, not only for actual, but also for exemplary, damages.

3. Where plaintiff's horses were unlawfully seized at a time when plaintiff could not procure other means of cultivating his crop, and thereby it was damaged in excess of the value of the use of the horses, the damage to the crop was the proper measure; but, if plaintiff could have procured other horses, the measure of recovery would be the value of the use or hire of the horses during the time he was deprived of them.

Appeal from Bosque county court; W. B. Thompson, Judge.

Action by M. Steel against John N. Metcalf and others to recover damages for the alleged wrongful taking possession of certain property under an order of sale. Judgment was entered in favor of defendants, and plaintiff appeals. Reversed.

Lockett & Lockett, for appellant.

STEPHENS, J. The sheriff of Bosque county, through his deputy, under an order of sale directed to the sheriff of Coryell county, took from the possession of appellant and her husband two certain horses belonging to them as property exempt from execution. This suit was brought against the sheriff and his official bondsmen to recover damages, both actual and exemplary. Pending the suit the husband died, and its prosecution was continued by appellant. The plea in abatement, on the ground that the children of the deceased were necessary parties, was properly overruled, inasmuch as the property was exempt from execution. *Craddock v. Goodwin*, 54 Tex. 578.

There was error, however, in instructing the jury that the writ addressed to the sheriff of Coryell county would justify the seizure by the sheriff of Bosque county of the horses in question. The process in the hands of the latter sheriff was void on its face, and if, knowing this, he caused the property to be seized willfully and oppressively, he was liable, not only for actual, but also, in the discretion of the jury, for exemplary, damages.

There was error in submitting, as the measure of actual damage, both the value of the horses' hire during the time of their detention and also the loss to the crop on account of appellant's being deprived of their use. If they were seized at a time when appellant and her husband, under the circumstances, could not procure other means of cultivating their crop, and thereby the same was damaged in excess of the value of the use of the horses, the damage to the crop was the proper measure; but, if appellant and her husband could have procured other horses in the mean time, it was their duty

to have done so, in which case the measure of recovery would be the value of the use or hire of the horses during the 15 days they were deprived of them. This last measure might not be the correct rule for a long period of detention. The above case of *Craddock v. Goodwin* will furnish valuable suggestions on the question of the measure of damages. The judgment will therefore be reversed, and the cause remanded for a new trial.

HEAD, J., not sitting.

GULF, C. & S. F. RY. CO. v. MOSS.

(Court of Civil Appeals of Texas. Oct. 11, 1891.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action to recover for personal injuries sustained by being struck by a locomotive at a crossing, plaintiff testified that, a few minutes before he was injured he crossed the same track, and looked and listened for trains, and saw one about 250 yards from the crossing heading towards it, but standing still; that on recrossing the track, at which time he was injured, he listened for trains, but did not look, though there was nothing to obstruct his view, and he knew a strong wind was blowing from a point which would tend to prevent his hearing a noise from the direction in which he had only a few minutes before seen a train headed. *Held*, that plaintiff was guilty of contributory negligence.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Action by J. H. Moss against the Gulf, Colorado & Santa Fe Railway Company to recover damages for personal injuries. Judgment was rendered in favor of plaintiff, and defendant appeals. Reversed.

Alexander & Clark and J. W. Terry, for appellant. Lockett & Kimball, for appellee.

HEAD, J. Appellee instituted this suit, as plaintiff in the court below, against appellant, as defendant, to recover damages for personal injuries received from a collision with one of its locomotives while attempting to cross its track. His account of the occurrence is as follows: That on the morning of Sunday, September —, 1880, he went out to defendant's depot at East Meridian to get some express packages which he expected to receive there; that said depot is located on the east side of the railway track, and that Meridian, from which he came, is situated west of said track; that he was obliged to cross said track to reach the depot, and that he crossed it in front of the passenger depot, at the point where passengers and other persons necessarily going to and from said depot usually cross said track; that immediately before he crossed said track he looked up the track in a northerly direction, and saw a freight train standing on the main track, about 250 yards above the place where he was

crossing; that said freight train was heading in the direction of said depot, and was standing still; that he crossed the track, and went to the door of defendant's depot, and asked A. J. Stephens, defendant's porter, to hand him some small express packages; that said Stephens handed him said packages over the counter; that he immediately started back to recross the track; that said door of said depot is about 10 feet distant from said track, and that said counter is 3 or 4 feet inside said door; that, as he approached said track to recross it, he listened for the train, and for the bell and whistle of the engine, before starting across it; that there is a public road crossing at the north end of said depot about 70 feet above where he started to recross said track, and also another public road about 50 yards above the first-mentioned crossing; that he would have heard the bell or the whistle of the engine if any had been sounded, but that there was no bell rung and no whistle blown; that there was a platform about 70 feet long and 4 feet high between the door of the depot and the point where he saw the train standing when he first crossed said track; that when he left said door to recross said track he could have seen said train over said platform had he looked in its direction; that there is a space between said platform and said track about 4 feet wide, which at the time was unobstructed, and that when on this space there was nothing to obstruct his view, and that he could from this point have seen said train had he stopped and looked; that he remembers nothing to obstruct his view over the platform; that he did not look up the track for the train, but relied on his sense of hearing, which is good; that he crossed the track obliquely in recrossing it, going in a southwesterly direction; that he was blind in his right eye, and could not have looked or seen up the track without turning his head, so as to have used his left eye; that when he got upon said track he did not stop to look for said train, but that he listened for it; that he heard no signals of the engine, and heard no noise of train, until, when nearly across the track, he heard a rattling sound; that he looked around, and saw the pilot of the engine just at him, and that, just as he looked around, it struck him, and knocked him off the track; that he was knocked senseless, and did not come to himself until 8 or 9 o'clock that evening; that he had a gash cut in the back of his head, just above his neck, and was badly bruised in the face, and his thumb was knocked out of joint; that he suffered from his injuries for eight weeks; that his neck remained stiff, so that he could not raise his head, for four weeks, and until a rising formed and broke there; that his thumb is still stiff; that Dr. Lumkin told him he must not attempt to attend to his business until his neck was well; that he was able to come to

his saloon in about five or six days, but was not able to attend to any business for six weeks; that he paid Dr. Lumkin for medical attendance about \$50, and Dr. Olive about \$5, and that he paid a drug bill of about \$5; that he paid a clerk at the rate of \$50 a month to run his business while he was unable to attend to it himself; that when he first went to the station he left his horse hitched to defendant's telegraph post, some 10 or 15 steps from the door of the defendant's office at said depot, and about 30 feet southwest of said door; that he noticed a strong south wind when he first went to the depot that morning, and that before he crossed said track he knew there was a hard south wind blowing; that he was well acquainted with defendant's depot and grounds.

We are of opinion that appellee's own evidence makes a plain case of contributory negligence on his part, without which the injuries complained of would not have been received, and, as there is nothing in the record which in any manner rebuts this, the court should have granted appellant's motion for a new trial, upon the ground of the insufficiency of the evidence to sustain the verdict. We cannot hold one to have been himself in the exercise of due care who knowingly attempts to cross a railroad track without looking to see if cars are approaching, even though he says he listened for them. By listening he shows his attention was attracted to the danger, and his testimony also shows that he at that time knew a strong wind was blowing from the direction which would tend to prevent his hearing the noise from a train approaching from the north, where he had only a few moments before seen one standing, headed in his direction. Under these circumstances, he should have looked, as well as listened, and we think a man of ordinary prudence will invariably do this when he knows he is about to cross a railroad track. The judgment of the court below will be reversed, and the cause remanded for a new trial.

EVANS v. TEXAS PRINTING & LITHOGRAPHING CO.

(Court of Civil Appeals of Texas. Oct. 12, 1893.)

APPEAL—ASSIGNMENT OF ERRORS—SUBSCRIPTION TO CAPITAL STOCK—SATISFACTION.

1. An assignment of error that "the court erred in sustaining exceptions to the two special answers of defendant" is too general to require consideration, it appearing that there were two special exceptions and two special answers.

2. Where, in an action on a subscription contract to the capital stock of a corporation, the petition alleged that defendant, acting through his father and agent, executed the contract, it was not error to reject evidence offered by defendant to prove that the other sub-

scribers to the capital stock of plaintiff knew the stock was subscribed as a gift by his father to defendant.

3. Plaintiff having alleged that defendant approved and adopted the acts of his father in signing his name to the contract, it was not error to admit the subscription list in evidence.

4. It was proper to admit testimony to the effect that the signature of defendant to the subscription list was in the handwriting of his father.

5. The refusal of a charge that, before plaintiff can recover on the contract, it must prove that defendant knew it was claiming a personal liability against him, and that with such knowledge he ratified the same, is no ground for reversal, though the charge was abstractly correct, when it appears that the record excludes all reasonable doubt that defendant knew plaintiff was claiming a personal liability against him, and that with such knowledge he ratified the act out of which the liability grew.

Appeal from district court, Tarrant county; R. E. Beckham, Judge.

Action by the Texas Printing & Lithographing Company against Thomas O. Evans to recover on a subscription contract. Judgment was rendered in favor of plaintiff, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by TARLTON, C. J.:

This appeal is from a judgment for the sum of \$5,000, and interest, recovered by the appellee, a corporation, from the appellant. The amount thus recovered is alleged to be due upon a certain subscription contract, below set out. It is alleged in the plaintiff's petition that the defendant, T. O. Evans, "acting by his father and agent, Sam Evans," executed the contract. The defendant filed a plea of "non est factum." In reply to this plea, the plaintiff averred in a supplemental petition that if the defendant did not sign his name to the contract, or authorize any one to sign it for him, he afterwards, with full knowledge that it had been signed, ratified and adopted the act of his father in signing it; that, as subscriber to the capital stock of the company, he met with the other subscribers in the organization of the Texas Printing & Lithographing Company; that he was, with his knowledge and consent, elected a member of the board of directors of the company, and with his knowledge and consent was elected by the board treasurer of the corporation; that he attended meetings of the board, and in many ways and by divers acts approved the signing of his name by his father.

We find the following facts: The instrument declared upon is as follows: "April 16, 1888. We, whose names are hereunto subscribed, agree among ourselves to form a private corporation under the laws of the state of Texas, to be named the 'Texas Printing and Lithographing Co.,' to be chartered with an authorized capital stock of one hundred thousand dollars, and, whenever as much of said stock has been subscribed as twenty thousand dollars, we, each for himself, agree to pay to said company, whose charter shall then be filed, the amount

set opposite his name, in such installments as the board of directors shall require. The purposes of said corporation shall be 'the transaction of a printing and publishing business, and in connection therewith the sale of goods, wares, and merchandise of a stationery and blank-book manufacturing business,' and said business shall be located at the lower end of Main street, Fort Worth." Appended to this instrument, under the word "Names," are nineteen signatures. These include the signature "T. O. Evans," opposite to which are the figures "\$5,000." The total sum purporting to be subscribed is \$27,300. The name "T. O. Evans," with the amount opposite thereto, was signed by Sam Evans, the father of the defendant, the latter saying at the time that he "would sign Tom's name, and that he would pay it for him, or aid him in paying it, or words to that effect." The defendant's name was thus signed without his authority, but afterwards, with knowledge that it had been so signed, he approved and ratified it. Thus, the charter of the corporation, dated April 16, 1888, the board of directors named therein including the name of defendant, having been forwarded to the secretary of state, a telegram was received from this officer on May 2, 1888, to the effect that it had been duly filed in his office. Accordingly, on that day, a meeting of the subscribers to the capital stock of the corporation was had at the office of Evans, Zim & Evans, (of which firm defendant was a member,) for the purpose of organization. The defendant was present at this meeting, and participated in its deliberations. The subscription list was examined, and it was found that \$23,000 had been subscribed to the capital stock of the company. The defendant was, without objection, elected a member of the board of directors. On the same day, after adjournment of the meeting of stockholders, a meeting was had of the directors, the defendant present and participating. He was here elected, without objection, treasurer of the company. At subsequent meetings of the stockholders, on May 4, 1888, and of the directors, on May 4 and June 19, 1888, he was present and participating. The defendant in no way indicated an unwillingness to pay the subscription until about October 10, 1888, when he declined to execute the required bond of \$10,000 as treasurer, and declined to pay the subscription, on the ground, not that he repudiated the signature, but, as he states, because he "did not like the way the business of the concern was being carried on or conducted."

M. D. Priest, for appellant. Hunter, Stewart & Dunklin and Drew Pruitt, for appellee.

TARLTON, C. J., (after stating the facts.)

1. We decline to consider appellant's first assignment of error, that "the court erred in sustaining exceptions to the two special

answers of defendant." There were two special exceptions and two special answers. The assignment is too general to require consideration. *Cannon v. Cannon*, 66 Tex. 682, 3 S. W. Rep. 36.

2. The court did not err in sustaining objections to evidence offered by the defendant whereby he sought to prove that the other subscribers to the capital stock of the plaintiff knew that the stock was subscribed as a gift by his father, Sam Evans, to the defendant. Such an exercise of generosity on the part of the father to the son was a matter of exclusive concern to the two, and could not affect the liability of the son on the subscription contract if he was a party to the contract.

3. The court did not err in admitting the subscription list in evidence. In connection with the facts showing ratification, it was clearly pertinent, under the plaintiff's allegations that the defendant approved and adopted the acts of his father in signing his name to the contract.

4. The court correctly admitted the testimony of the witnesses John D. Templeton and others to the effect that the signature of the defendant to the subscription list was in the handwriting of the father, Sam Evans. This evidence conformed to the allegations of the plaintiff that the defendant, "acting by his father and agent, Sam Evans, entered into and executed" the subscription contract.

5. We overrule the seventh assignment of error, in which it is urged that the court should have granted the following special charge: "Before the plaintiff can recover in this case, it is necessary for him [it] to prove that he [defendant] knew that plaintiff was claiming a personal liability against him, and with such knowledge he ratified the same." If the substance of this instruction was not already included in the court's general charge, (which we find it unnecessary to decide,) its rejection, under the undisputed evidence, could not have injured the defendant. The record excludes all reasonable doubt that the defendant knew that plaintiff was claiming a personal liability against him, and that with such knowledge he ratified the act out of which the liability grew. The refusal of a charge, abstractly correct, which, if it had been given, could not, under any aspect of the case, have correctly affected the verdict for the party asking it, affords no ground for reversal. Similar reasoning requires us to overrule appellant's tenth assignment, in which he complains of the court's charge with reference to ratification and notice on the part of the defendant.

6. Our conclusions of fact indicate that we are unable to agree with appellant in his ninth assignment, "that there was no testimony upon which to predicate" a charge of ratification. The judgment is in all things affirmed.

BRANCH v. HOWARD et al.
(Court of Civil Appeals of Texas. Oct. 12, 1893.)

NOTES—CONSIDERATION—PAYMENT.

1. As between the original parties to a note the maker is not bound by the consideration expressed in the note, but will be allowed to show the real consideration thereof.

2. Where a note is given to indemnify the payee against liability on a bond executed by him, such liability is a good consideration for the note, though no damage had accrued on the bond at the time the note was made.

3. Where a note is given to secure money advanced by the payee, and the amount advanced has been repaid, the note, as to the original parties to it, is discharged, notwithstanding that the consideration therein expressed exceeds the amount repaid, and though a portion of amount was repaid by a person other than the maker.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Wharton Branch against T. T. Howard and others to enjoin the sale of land held under a deed of trust given to secure a promissory note. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

Howard Finley, for appellant. A. B. Beutell, for appellees.

GARRETT, C. J. This suit was instituted by Wharton Branch, the maker of a promissory note, against T. T. Howard, the payee thereof, and A. B. Beutell, substitute trustee, under a deed of trust executed by Branch to B. P. Cooper, as trustee, to secure the payment of said note, in order to enjoin a threatened sale of the land, incumbered by the deed of trust, on the ground that the said note had been fully paid off, satisfied, and discharged; also that it was barred by limitation. Appellant testified that the note was executed by him with the deed of trust on the land in order to indemnify the appellee Howard against loss by reason of his having incurred liability on behalf of one Fred Barnard in and about litigation concerning a tract of land for which Barnard had sued L. & H. Blum and others, which included his liability on an injunction bond in the United States court at Galveston, and moneys advanced by said Howard to satisfy an execution from the federal court, which had been levied on the land. That Howard had taken a conveyance of the land from Barnard, and at sheriff's sale, to protect himself, but became fearful that Barnard would ultimately lose the land, and leave him without security, and threatened pending litigation to sell the land for reimbursement of the moneys expended and to protect himself; and Branch, who was Barnard's attorney, in order to indemnify Howard against loss, executed the note in question, and also at the same time executed the deed of trust on land of his own in order to secure it. He further testified that all of the

moneys so advanced by Howard had been refunded to him, and that his obligation on the bond in the litigation had been discharged by a final judgment in the case of *Barnard v. Blum*, and the payment of all costs therein. His evidence was supported by vouchers and other proof, which showed that all the money advanced by Howard had been refunded to him, and that he was under no further obligation by reason of his suretyship for Barnard. On the other hand, Howard claimed and testified that the note had nothing to do with his interest in the land sued for by Barnard, and that it was for money due him by Branch. Among the payments by Branch was the balance due Howard upon moneys advanced by him pending the litigation, amounting to \$312.45, which was paid to him by Cooper, who was the agent of the owners for the sale of the Barnard land, at which time Howard conveyed his title to the land to Cooper, to enable him to make the sale thereof for the owners. Other payments by Branch to Howard were shown and allowed as credit on the note, which also appeared to have been credited on the sum advanced by Howard for Barnard's benefit. The court submitted the case to the jury on the following charge: "The eight hundred dollar note executed by Branch to Howard, and the deed of trust executed by Branch to secure the payment of said note, are prima facie evidence of an indebtedness by Branch to Howard for the \$800 note and interest, subject to the indorsed credits of \$240 and \$75 of date May 21, 1887; and the burden of proof is on the plaintiff, Branch, to prove that there were other payments and credits which the note is entitled to. Branch cannot dispute the \$800 consideration stated in the note. You are the judges of the credibility of the witnesses and of the weight of the evidence, and determine from the evidence what payments and credits the note is entitled to, and your verdict will not be general in favor of either of the parties, but your verdict will simply be answers to the following questions, and you will write out your answers to the following questions, and number your answers to correspond with the number of the question: (1) What is the amount of the indorsed credits on the back of the note, and the date of the indorsed credits? (2) What other payments and credits is the note entitled to, stating the amounts and dates? (3) Should the \$312 which Howard received from Cooper on the 28th of October, 1891, be allowed as a credit on the \$800 note? (4) Has the \$800 note and interest been fully paid off?" The answer to question No. 1 showed the credits correctly that were indorsed on the note. Answer to No. 2 showed credits for money paid directly by Branch to Howard, but these credits also appeared in the statement of the account for Howard's advances in the litigation. Questions Nos. 3 and 4 were answered "No."

Appellant complains of the charge of the court in which the jury were instructed that appellant could "not dispute the \$800 consideration stated in the note." Such instruction was error. The consideration of a note, as between the original parties thereto, may be inquired into, and it may be shown that it has failed, either in whole or in part. Evidence was properly admitted which tended to show that the consideration of the note in question was the indemnification of Howard against loss by reason of his advances and suretyship for Barnard in and about his suit for the recovery of land. A note based on such consideration is a valid contract, even if the indemnitee has not been damaged at the time; but it appears that at the time the note and deed of trust were executed Howard had already advanced and paid for Barnard certain sums of money. If Branch's defense should be found by a jury to be true, the note would be held to be supported by a good consideration; but Howard could not recover for any greater amount than he has paid, and, if the evidence shows that such sums have been repaid to him, then the note executed by Branch has been discharged. It will be deemed that the consideration for the note beyond that has failed. *Haseltine v. Guild*, 11 N. H. 390. The issue should have been submitted to the jury; and if they had found that the consideration of the note was as contended by Branch, then he should be charged with only the amount paid by Howard on account of the litigation mentioned, and should be credited with all sums paid to Howard on that account, including the \$312.45 paid by Cooper. We deem it unnecessary to notice the other assignments of error. For the error indicated the judgment of the court below will be reversed, and the cause remanded.

WARD et al. v. GOGGAN et al.

(Court of Civil Appeals of Texas. Oct. 12, 1893.)

GARNISHMENT—INSURANCE ON EXEMPT PROPERTY.

Money due from a policy of fire insurance, taken by a debtor for his own protection, for loss of personal property which is exempt from execution, is not subject to garnishment, even where the creditor has a lien on the property destroyed.

Appeal from Galveston county court; William B. Lockhart, Judge.

Action by Thomas Goggan & Bro. against A. J. Ward and others to recover money due. Garnishment proceedings were instituted against the Phoenix Insurance Company to recover money due on a fire insurance policy. A bond was given by defendant Ward to release the garnishment, and judgment was rendered against defendant and his sureties, from which judgment defendants appeal. Reversed.

James B. & Chas. J. Stubbs, for appellants.
Labatt & Labatt, for appellees.

PLEASANTS, J. This is an appeal from the county court of Galveston county. The appellees, creditors of the appellant A. J. Ward, instituted garnishment proceedings against the Phoenix Insurance Company, as the debtor of Ward, and the latter, with John N. Gilbert and L. R. Levy as his sureties, replevied the debt due him from the insurance company, and, in defense to appellees' garnishment, answered that the money due him was the insurance upon household furniture and other exempt property insured by him in said company, and which property had been accidentally destroyed by fire, and that said money was exempt from garnishment. Upon trial of the case, judgment was rendered for appellees against Ward and his sureties upon his replevy bond for their debt. The piano was insured with the household furniture, and it is admitted that appellees held a valid lien on it for the payment of their debt; and the sole question submitted by counsel for our decision is, does the law protect from garnishment, at the suit of a creditor, money due his debtor for loss of personal property upon policy of insurance against fire taken by the debtor, the property itself being exempt, by law, from execution? While this precise question has never, we believe, been decided by the supreme court of this state, we have no hesitation in saying that the question must be answered in the affirmative. It is well-established law that money due for loss by fire of the dwelling upon a homestead is protected from the claims of creditors, and even from the claim of a creditor who held a mechanic's lien upon the dwelling. *Vide Cameron v. Fay*, 55 Tex. 59. The general rule is that, when exempt property is involuntarily exchanged, the newly-acquired article becomes exempt, whether it were so or not prior to such exchange. The creditor can lose nothing by the exchange unless he have a lien upon the property, and, if he fail to insure himself against loss, it is his, and not the debtor's, fault; and we can see no reason why the law should permit him to reap benefit from the prudence of his debtor, to the loss and injury of the latter. The debtor in this case was under no obligation to his creditor to insure the property. If it be the policy of the law to protect, from the claims of creditors, money due as insurance upon the dwelling house of a family, it logically follows that like protection should be given to money due upon insurance taken upon personal property situate in the dwelling, and necessary for the comfort of the family, and which is itself exempt from forced sale. It is not our province to sit in judgment upon the wisdom or justice of our exemption laws. That is a matter foreign to the question presented for our consideration. In reaching

our conclusion we have, we think, followed the judicial trend, not only of this state, but of a great majority of the states, in which this subject has been considered and decided. The only decision we have found which is not in harmony with the one we make in this case is that cited by the appellees from the supreme court of New Hampshire. The courts of that and of several other of the New England states have construed strictly laws exempting property from execution, while in this, as well as in most of the states of the Union, such laws have received a liberal interpretation. In the language of Ex Chief Justice Willie, (*vide Schneider v. Bray*, 59 Tex. 668,) in cases of involuntary exchange of property the newly-acquired article becomes exempt, whether it is of a class originally protected from execution or not, as, when exempt property is destroyed by fire, insurance money due for the loss of property is exempt; and in such cases it makes no difference whether the article destroyed be a piece of personal property or the dwelling house upon the homestead. The judgment of the lower court is reversed, and judgment is here rendered for appellants, that appellees take nothing by their garnishment, and that appellants recover their costs in this and the district court.

TAYLOR et al. v. FELDER.¹

(Court of Civil Appeals of Texas. Oct. 12, 1893.)

CONVERSION—EVIDENCE—DISTRESS WARRANT—WASTE.

1. In an action by a landlord for conversion of crops upon which he has a lien for rent, it is not necessary for him to show that he was entitled to the possession of the property at the time of the conversion.

2. Where a distress warrant is sued out to enforce a landlord's lien on crops which have been removed from the rented premises by one who has purchased from the tenant, the time within which the warrant can be levied is determined by the issue of the warrant, and plaintiff is not required to file his petition until the appearance day of the next term of the court to which the writ is returnable.

3. The levy of a distress warrant has not the effect prima facie of satisfying the debt so as to put on plaintiff the burden of showing that the property levied on has not been wasted, and, if defendant claims waste, the burden is on him to prove it.

4. While, in an action by a landlord for conversion of crops sold by the tenant to a third person, and upon which the landlord had a lien for rent, the defendant cannot set up as a defense that the landlord has not exhausted his claim from the crops remaining in the hands of the tenant, still, where the landlord actually lives on such crops, he is bound to see that the property is properly cared for, and defendant is entitled to credit for any loss on same caused by the landlord's negligence in regard thereto.

Appeal from district court, Wharton county; W. H. Burkhart, Judge.

Action by M. M. Felder against W. T. and S. T. Taylor and another to recover rent

¹ Rehearing denied.

of land and for conversion. Judgment was rendered for plaintiff, and defendants W. T. and S. T. Taylor appeal. Reversed.

Pearson & Ballowe, for appellants. G. G. Kelly, for appellee.

WILLIAMS, J. Appellee Felder rented to J. W. Morgan for the year 1891 a farm situated in Wharton county, for the rent of which Morgan executed his note to appellant for \$500. During the year appellee advanced to Morgan bacon of the value of \$73.20. During the months of August, September, and October, 1891, without appellee's consent, Morgan gathered, removed from the rented premises, and sold to appellants, cotton which he had produced thereon. About November 8th, 1891, appellee, who lived in Washington county, went down to Wharton county, and demanded of Morgan the sums due for rent and advances. The latter expected appellants to pay appellee out of the cotton which had been delivered to them, and requested them to do so, but they refused. Thereupon, on the 8th of November, 1891, appellee sued out a distress warrant against Morgan, and caused the officer in whose hands it was placed to demand of appellants that they point out, to be levied upon, the cotton which they had purchased from Morgan, or to furnish information by which it might be identified and seized, all of which appellants declined to do, having shipped the cotton, and converted it to their own use. Appellee caused the corn and cotton remaining on the rented premises, most of it still standing ungathered in the field, to be levied upon under the distress warrant, and on November 27th filed in the district court to which the writ was returnable his petition against Morgan and appellants, by which he sought judgment against the former for the sum due for rent and advances, and against the latter for the value of the cotton converted by them, or such portion of it as was necessary to satisfy his claim. Subsequently, he filed a supplemental petition, alleging the amount which had been realized from the property levied on under the distress warrant, and asking judgment for the balance of the debt originally sued for remaining after deducting such amount. It was stated in the plea that by agreement between plaintiff, the sheriff, and Morgan the cotton levied on had been sold for plaintiff's account, and the corn delivered to him at an agreed price, and that Morgan had thus become entitled to the credit allowed. The defendants' pleadings raised the questions discussed in the opinion.

The first point raised by the brief of appellants arises from the overruling of the exceptions to the petition, based on the ground that it did not show that plaintiff was entitled to the property. We deem it well settled that a lien holder may maintain an action for

damages against one who wrongfully converted the security. That a landlord may do so is settled by the decisions in this state. It is not essential that he have the right of possession. *Templeman v. Gresham*, 61 Tex. 50. The plaintiff brought his case within the principle, both by his allegations and proof. It is claimed by appellants that appellee had lost his lien on the cotton received by them, because it had been removed from the rented premises more than a month before they were sued. It is true the petition in which they were joined in the suit was not filed until November 27th, and the evidence showed that appellants had received all of the cotton before October 27th. But the proceedings to pursue and subject the property were commenced by the suing out of the distress warrant, which was done on the 8th of November. This was sufficient to prevent the running of the period limited by the statute. The plaintiff in such a case is not required to file his petition at the beginning of the proceeding, but may wait until the appearance day of the next term of the court to which the writ is made returnable; and, as the distress writ may be levied on the property wherever and in whatever hands it may be found, the suing of it out against the tenant is, in our judgment, all that the statute contemplates in order to prevent the loss of the lien by lapse of time. When the landlord pursues this course, and is prevented from reaching the property by the party who has converted it, he may properly join such party in his suit against the tenant, as has been done. *Templeman v. Gresham*, supra.

It was not error to refuse the requested charge that, if the cotton was converted prior to October 27th, plaintiff had lost his lien. At the trial it appeared that after the levy of the writ an agreement was made between the sheriff, the plaintiff, and Morgan that the crops should be left in the charge of the latter, and that he should gather them, and deliver the cotton to the sheriff, to be shipped for plaintiff's account, and should deliver the corn to the plaintiff. The property levied on was valued by the sheriff at \$1,046, and both Felder and Morgan at the time of the levy estimated it at considerably more than was received by plaintiff and applied on his debt. There was evidence to the effect that after the levy, and while Morgan had charge of the crops under the stated agreement, stock depredated upon and destroyed a portion of the corn, and that Morgan fed his stock from it. The expense of gathering and selling was stated in the supplemental petition.

The appellants requested the following special charges, which were refused by the court, and none were given submitting to the jury the issues thus sought to be presented: "If you believe from the evidence in this case that under the distress warrant the sheriff

of Wharton county, by his deputy, Hughes, seized and took into his possession personal property, viz. corn and cotton, of the defendant Morgan of sufficient value to pay said plaintiff's debt, and by the careless management or improper attention of said sheriff, or the party placed in charge of said property, the said property depreciated in value, or was lost or destroyed, in whole or in part, then the plaintiff or said sheriff is chargeable with said loss, and defendants Taylor will be entitled to credit (if you find against them) on the amount so found for the value of such loss." "When personal property—for instance, corn and cotton—is seized under a writ issued for the purpose of collecting or securing the payment of money, and is of sufficient value to discharge the claims sought to be collected or secured by such seizure, it is prima facie evidence of the satisfaction of payment of said claim, and the burden of proof is on the party seeking to avoid the said result of said seizure of said property to show that it was properly applied, and did not discharge the debt. Therefore, if you believe from the evidence that personal property of value sufficient to have paid off and discharged said debt of plaintiff for rents, etc., was seized, unless the plaintiff has by the preponderance of evidence deemed by you to be credible shown that said property was not of value alleged in the return of said writ," defendants will be entitled to credit therefor. In support of their contention that the refusal of these charges was error, appellants' counsel cite authorities as to the effect of the levy of an execution upon personal property, which undoubtedly sustain, as the law applicable to such levies, the rule contained in the last of the above charges. *Freem. Ex'ns*, 269, and authorities cited. The same rule has been recognized by our supreme court. *Bryan v. Bridge*, 10 Tex. 149; *White v. Graves*, 15 Tex. 187; *Garner v. Cutler*, 28 Tex. 178; *Cornellius v. Burford*, Id. 206, 207. The rule that a levy upon personal property operates as a satisfaction of the judgment is said not to apply to levies under attachments, but only to those made by virtue of executions. *Drake, Attachm.* § 222; *McBride v. Bank*, 28 Barb. 476; *Maxwell v. Stewart*, 22 Wall. 77. In the latter case it is said: "A seizure of personal property under an order of attachment issued during the pendency of an action is not necessarily a satisfaction of the judgment when afterwards obtained. Such a seizure is made for the purposes of security, and if the property is retained in the possession of the sheriff he will be held responsible for the exercise of ordinary care for its preservation. If wasted, lost, or destroyed by his negligence, he must account, and the amount for which he is liable on such account will, when ascertained, be applied towards the satisfaction of any judgment that may have been ob-

tained. To that extent the plaintiff is made responsible for the sheriff, but such an application can only be made upon a proper showing by the defendant. There is no presumption which throws the burden of proof upon the plaintiff." The opinion in the case of *Heilbronner v. Douglass*, 45 Tex. 406, might seem at first sight to give to levies under executions and attachments in this respect the same consequences; but that case in its facts falls within the decision from which the above quotation is taken, and is no more than an application of that rule. The same observation is true of the decision in the case of *Farrar v. Talley*, 68 Tex. 352, 4 S. W. Rep. 533.

We think the rule laid down by the supreme court of the United States is the just one with reference to levies under attachments and other mesne process of similar character, including distress warrants; and we cannot, therefore, hold that the second of the special charges above quoted should have been given, since it gave to the levy of the distress warrant the effect, prima facie, of a satisfaction of the debt, and put upon plaintiff the burden of showing that the property had not been wasted, but properly preserved and applied. The true rule required the defendants, if there had been waste or loss of the property through the improper action or lack of due care on the part of the plaintiff or the sheriff, to have developed the facts which entitled them to a satisfaction or reduction of the plaintiff's claim. As we have stated, there was evidence which tended to show negligence and waste in the management of the property, and the first of the requested charges sought in a proper manner the submission of this issue to the jury, and should have been given, if the appellants were in an attitude to invoke the rule there stated. As before seen, the defendant Morgan was a party to the agreement by which the property was left in his care, and if there was waste of it he was responsible for it. He cannot take benefit from his own dereliction, and is not entitled to any reduction of his debt because of any failure to realize the full value of the property seized. With appellants it is otherwise. They were not parties to the agreement, and were in no way responsible for the manner in which the property was dealt with after the levy. No right of theirs can be taken away by an agreement to which they were not parties, nor by conduct of others in which they did not participate. By their purchase of the cotton they acquired all the rights of the tenant therein, and when sued by the landlord for the value of such cotton they could properly make any defense which the tenant could have made, unembarrassed by the agreement and conduct of the latter subsequent to such purchase. They held the cotton, which they bought subject to the landlord's lien, and, had he proceeded directly

against them for its value, in order to satisfy his claim for rent and advances without pursuing other property of the tenant, they could not have required him to exhaust the property remaining in the hands of the tenant subject to his lien before reaching the fund held by them. *Wilkes v. Adler*, 68 Tex. 690, 5 S. W. Rep. 497. They acquired no right to make such a defense by their purchase from the tenant, because the latter had not such right. The landlord, having a lien on all of the property, could not have been forced, either by the tenant or purchaser from him, to select one class of property rather than another out of which to seek satisfaction. But when the landlord actually levied upon property of the tenant he was bound to see that it was properly handled and realized; and if any loss occurred, either through his own negligence or that of the sheriff, the tenant, but for the fact that he was precluded by his own conduct from claiming it, would have been entitled, upon showing the facts, to have his debt credited with the amount of such loss. In such a proceeding it is the duty of the plaintiff to the defendant to see that the property levied upon is properly treated and applied to the discharge of the debt; and a like duty extends to any third party who has bought from the tenant property charged with plaintiff's lien, which he seeks to subject to his debt. He cannot free himself from this duty to third persons by an agreement with the defendant in the writ. The tenant may preclude himself from complaining, but cannot preclude third persons, by his conduct, transpiring after their rights have grown up. The plaintiff has no more right to allow the defendant to waste the property to the prejudice of those whom he knows to have acquired the defendant's rights than to allow such waste to be done by the sheriff or others to the prejudice of the defendant. The first of the charges quoted above should have been given. The other alleged errors are not likely to occur at another trial. For the error pointed out the judgment is reversed, and the cause remanded.

BROWN et al. v. SHELTON.

(Court of Civil Appeals of Texas. Oct. 12, 1893.)

APPEAL FROM JUSTICE—BOND—REAL-ESTATE AGENTS—COMMISSIONS.

1. On an appeal to the county court from a judgment of a justice's court in favor of defendant, a bond which recites that the judgment was against plaintiff for the costs of the suit sufficiently described the judgment, though it fails to recite the further provisions of the judgment that the plaintiff take nothing by his suit, and that defendant go hence without day, and fails to give the number of the cause in the justice's court.

2. Where such bond states that defendant gave notice of appeal, but the language thereof and the record show that it was intended to

describe the plaintiff as appellant, the variance is not material.

3. A real-estate broker is not entitled to commissions on a sale of land where the purchaser bought solely upon his own information, after negotiating with the owners, and was not influenced by the broker, though the broker made efforts to sell the land to such purchaser.

Appeal from Brazoria county court; A. R. Masterson, Judge.

Action by W. J. Shelton against Brown & Perry to recover commissions on sale of real estate. Judgment was rendered in the justice's court, and, on appeal to the county court, judgment was rendered for plaintiff, and defendants appeal. Reversed.

L. R. Bryan, for appellants.

WILLIAMS, J. Appellee sued to recover of appellants a sum of money which appellee claimed appellants owed him upon a sale of land made by him as their agent. Judgment was rendered in the justice's court for defendants, from which plaintiff appealed to the county court, where a judgment was rendered in his favor, from which this appeal is prosecuted. A motion was made in the county court to dismiss the appeal because the bond misdescribed the judgment, which motion was overruled. This ruling was not error. The bond sufficiently described the judgment so as to identify and distinguish it from all others, and this was sufficient. The bond recited that the judgment was against the plaintiff for costs of suit, which was correct. But the judgment further ordered that the plaintiff take nothing by his suit, and that the defendant go hence without day. The failure of the bond to mention this part of the judgment, and to give the number of the cause in the justice's court, is not fatal to it where, as in this case, other particulars are given which are accurate, and enable us to see that this judgment, and no other, is meant. The recital in the bond that "defendant" gave notice of appeal is shown by the language preceding and following it, as well as by the record, to have meant "plaintiff."

We are of the opinion that the court should have admitted the part of the testimony of Brown, the exclusion of which is complained of in the second assignment. It was neither hearsay nor irrelevant, but was a conversation between all of the parties to the transaction, about which Shelton had already testified, giving a version differing somewhat from that offered to be shown by Brown. It bore directly upon the points in controversy, and might have thrown light upon them.

We are further of the opinion that the verdict is unwarranted, by the evidence. It appears affirmatively that, whatever efforts plaintiff may have made to sell the land to Hopkins, the latter bought solely upon his own information and negotiations with defendants, and was not influenced by Shelton. There is no conflict of testimony upon this

point, though there is a difference between the testimony of Hopkins and Shelton as to some things that transpired between them; but Shelton's testimony does not conflict with Hopkins' statement concerning his purchase, and the inducement which led him to make it. For the reasons indicated, the judgment is reversed, and the cause remanded.

MOORE et al. v. KING.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

CONVERSION—DAMAGES—LOSS OF USE.

In an action for the conversion of personal property, it is proper to award damages sufficient to compensate plaintiff for the loss occasioned by the detention of the property, in addition to the value thereof, when an award of the value, with interest thereon, is insufficient for the purpose.

Appeal from McCulloch county court; G. L. Beatty, Judge.

Action by J. F. King against Moore, McKinney & Co. for conversion. From a judgment for plaintiff, defendants appeal. Affirmed.

F. M. Newman, for appellants.

FISHER, O. J. We have carefully considered all the questions presented by the various assignments of error, and conclude that there is no error in the judgment of the court below, and it is therefore affirmed.

There is one question presented in the record that we deem important to discuss. The action is for damages for the wrongful conversion of a wagon, the property of the appellee. The jury, by their verdict, found \$100 as actual damages. In addition to an item of exemplary damages, the petition laid the claim for actual damages at the value of the wagon and its use up to the time of trial. The finding of the jury eliminates any question of exemplary damages. The court below instructed the jury, upon the issue as to actual damages, that they may consider the value of the wagon at the time of its conversion, together with the reasonable value of its use for the time so converted. The conversion in this case was complete; there was no return or recapture of the converted property. In arriving at the amount of the verdict, the jury evidently considered the value of the use of the wagon, as the evidence shows that it was only worth about sixty or seventy dollars at the time of the conversion. The assignment of error questions the charge of the court in authorizing the jury to consider the value of the use of the wagon as a part of the damages that the plaintiff may recover. This is the question that we purpose to discuss.

It is an axiom of the law that a party injured is entitled to damages commensurate with the injury sustained. The exceptions to this rule exist in those cases of *damnum*

absque injuria, and when a state of facts exists that entitles the injured party to exemplary damages. The damages recoverable must be either the necessary result of the act complained of, or that arise as the natural and probable consequences of the particular act or acts that occasion the harmful results; and, in ascertaining the result of these acts, the purpose of the law is to give exact compensation for those consequences that are traceable as the necessary, natural, or probable fruits of the wrongful act. In applying these principles of law to the given case, the courts should not be bound by an inflexible and unvarying rule as to the measure of damages that should apply alike in all cases, but, keeping in view the just principle of compensation, the measure of damages should be adjusted to the facts of the particular case, so that the trespasser and tortfeasor will be held responsible, not only for the necessary result, but the natural and probable consequences of his act. Full indemnity for the injury sustained is what the law exacts. Hence it is difficult and unwise to attempt to lay down a rule of damages that should apply alike to all cases of trover or conversion. The general formula as to the measure of damages prescribed by the books in actions of conversion, where the conversion is complete, is the value of the property converted, with legal interest from the time of the conversion. In applying this measure of damages, some of the courts differ as to when the value is to be determined; some holding that it is to be ascertained at the time of conversion, and others holding that the trespasser shall be charged with the highest value shown to exist between the time of conversion and the trial, provided the action is prosecuted with reasonable diligence. The rule quoted may be the general rule, but it by no means follows that it is an inflexible rule, and should be applied in all actions of conversion. As said by Justice Nott, in *Hatton v. Banks*, 1 Nott & M., 223: "Damages for detention may be given according to the nature of the thing converted. The defendant is not to be benefited by his own wrong." The general rule may find application in a great variety of cases, but we do not think it is inflexible. It has, like all rules, exceptions that are as important to be observed as the rule itself. The theory upon which the general rule rests is that the value of the property converted is equal to the property itself, and the interest on that value is the legal damages for withholding it. The justification of this rule, if applied alike to all property converted, may find support in a legal fiction, but, as a matter of fact, an application of the rule in a great variety of cases of conversion would practically deny the owner just compensation, and would relieve the trespasser, to some extent, of the natural and probable consequences of his wrongful act, and permit him to reap a profit from his wrong.

doing at the expense of the owner. As aptly said by Justice Warner, in the case of *Schley v. Lyon*, 6 Ga. 534: "The principle on which the courts proceed in awarding damages in actions for trover is that the plaintiff is entitled to full indemnity for the injury sustained by reason of the wrongful conversion of his property; that the defendant shall not derive any benefit from his wrongful act." The very fact that interest upon the value is allowed—which is now generally admitted by all of the authorities—is upon the theory that it is equivalent to the use of the property detained. When the facts of the given case show that just compensation for detention or use of the property is more than the rate of interest allowed by the general rule, why should not the reason for an application of the general rule cease, and that value of detention and use of the property be ascertained to the extent that compensates the injured party, and which results as the proximate consequences of the trespasser's wrongful act? The very facts of this case are an apt illustration of the propriety, in some cases, of extending the measure of damages beyond that prescribed by the general rule. In this case the plaintiff was deprived of a wagon worth about \$70, with a use per day, as shown by the evidence, of the reasonable value of about 75 cents. The trespass was committed on the 4th day of January, 1892, and the judgment was rendered on February 26, 1892. Giving the plaintiff in this case the value of the wagon, with legal interest on that amount, would certainly not be compensation for the loss sustained by reason of the wrong committed. The use that he is deprived of is almost as valuable as the thing itself; and that value of the use, with the property itself, is conferred upon the wrongful trespasser, if the plaintiff is confined in his recovery to the value and interest. Such a rule would not only deprive the plaintiff of his property, but would permit a trespasser to profit by his own wrong, and it would afford a profitable enterprise to such wrongdoers in obtaining wrongful possession of property especially valuable for its use. When the conversion is complete, the owner is not bound to receive back the property converted, if tendered by the trespasser, but a tender by the trespasser, and a redelivery to the owner, of possession, are facts that may be considered in mitigation of the damages. 4 Amer. & Eng. Enc. Law, p. 125. If the property is legally tendered the owner in as good condition as when converted, or possession is redelivered to him, we think from this time such facts may be considered in abatement of the damages for the use of the property. Thus, it will be seen that the trespasser has it within his power to partially undo his wrong; and when he retains possession, and refuses and fails to do that which will decrease his liability for the consequences that his wrongful act have forced

upon the owner, he certainly should not be heard to complain if he is charged with the value of the use of the property that belongs to another, and which he is presently enjoying. But, on the other hand, in adjusting the rule so that it may apply fairly to both parties, it may be proper to limit the amount of the recovery of the plaintiff for the use of the property to the value of the use from the time of the conversion up to the time of the recovery of his judgment, provided he has exercised reasonable diligence and dispatch in the prosecution of his demand. If, by his fault, the prosecution of his recovery has been unreasonably delayed, it might be inequitable to charge the defendant with the value of the use for this period. But, however, we do not decide this question at this time, as it is not necessary that we should do so in disposing of the case before us.

Upon the main question that we have been discussing, the court in the case of *Craddock v. Goodwin*, 54 Tex. 588, uses this language: "It is not, perhaps, possible to lay down a rigid and unbending rule, applicable to all cases. It must of necessity, as we have said, vary with the character of the property, and somewhat with the peculiar circumstances of the case. The thing to be kept in view is that the party shall be compensated for the injury done. Where money or goods having a price in the market are the subject of the wrong, the value, and the value of the use of which the party has been deprived, in the shape of interest, would be adequate compensation. It is but the application of the same rule which permits the recovery of the hire, as for the use of horses or work animals. Very clearly the seizure of the plaintiffs' plow animal or work horse in this case would be very poorly compensated for by the payment of interest for the time which they had been deprived of them, and then only, but it is equally clear that their value and hire, measured by the month or the year, for the long period since their seizure to the time of trial, would be absurdly excessive. We think no more equitable rule can be adopted in determining the plaintiffs' actual damages than to allow in any event, if plaintiffs made out a case for actual damages, an amount not less than the value of the property, with interest to the time of trial; but the jury should also take into consideration the value of the use or hire of the animals seized for the whole time of which the plaintiffs have been deprived of them, and allow such an amount for actual damages as will compensate the plaintiffs, whether computing it by the rule of interest, or that of hire or value of the use, as may seem to them most adequate to that result." The following authorities bear upon the question, and in some degree support the views here expressed: *Schley v. Lyon*, 6 Ga. 535; *Hair v. Little*, 28 Ala. 248; *Starkey v. Kelly*, 50 N. Y. 677; *Shotwell v. Wendover*, 1 Johns. 65; *Davenport v. Ledger*, 80 Ill. 578;

Ewing v. Blount, 20 Ala. 694; Banks v. Hatton, 1 Nott & M. 221; Haviland v. Parker, 11 Mich. 103; McDonald v. North, 47 Barb. 531; Craddock v. Goodwin, 54 Tex. 584; Carter v. Roland, 53 Tex. 548; Pridgin v. Strickland, 8 Tex. 427. There are a line of cases found in the reports that limit the recovery of the owner to the value of the property, and interest, upon the theory that the effect of the action seeking a recovery of damages by the plaintiff for the conversion operates as a change of the property and a sale of the chattel to the defendant, and that, electing to sue for the damages, the plaintiff waives the tort, and treats the conversion as a sale.

Here we encounter another legal fiction, which we think would be more honored in the breach than in its observance, and upon which some of the courts have been wrecked in their effort to award compensation to the plaintiff for the wrongs of a trespasser. It is not the act of instituting the suit seeking damages resulting from the trespass that vests the title in the trespasser, nor is this result accomplished, even upon obtaining judgment, as nothing short of compensation paid, or the satisfaction of the judgment, will lodge the title to the thing converted in the trespasser. The owner, by bringing his suit, does not waive any other right he may have, nor is he by that act less entitled to the enjoyment of the use of his property of which he is deprived without his consent. If he regains possession, either by his own act or by voluntary surrender by the defendant, that fact does not destroy his right to recover for his damages sustained by the original wrongful taking, but such possession regained is considered in mitigation of the damages sustained. In *Lovejoy v. Murray*, 3 Wall. 16, the supreme court of the United States, speaking through Justice Miller, by unanswerable reasoning, thus disposes of this question: "If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment without satisfaction is no bar, to look at the question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial, and unsatisfactory reasoning. We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of transit in rem judicatum; for while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter. In reference to the doctrine that the judgment alone vests the title of the property converted in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally in-

capable of being maintained on principle. The property which was mine has been taken from me by fraud or violence. In order to procure redress, I must sue the wrongdoer in a court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment—a decision that I am entitled to the relief I ask—the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice. It is said that the judgment represents the price of the property, and, as plaintiff has the judgment, the defendant should have the property. But, if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. But, in all such cases, what has the defendant in such second suit done to discharge himself from the obligation, which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his cotrespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his cotrespasser or a release to his cotrespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected, in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such. We are therefore of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment."

It is also said by some courts that, in order to hold the trespasser bound for consequential damages, he must have notice or knowledge of facts that make the article or property converted especially valuable by reason of its use to the owner. We will not undertake to say that this rule should be invoked in favor of any one who is an undoubted wrongdoer, nor will we deny that it may, in some cases of technical conversion, be applied. But, quære, upon what principle is a notice necessary to a man who ex hypothesi is a wrongdoer? Every trespasser must know the necessary, natural, and probable consequences of his wrongful act, and for these consequences he is liable. It follows, as a natural sequence, that he must know that property ordinarily adapted to

certain purposes is valuable to the owner for that purpose, and, as to the amount of value, he should know that the owner is entitled to recover what may be shown to be the reasonable value of its use. But further, in cases of this kind, where the conversion consists in the wrongful withholding from another property to the possession of which he is immediately entitled, no notice to the wrongdoer should be necessary to affect the value, although it might affect his conduct. The present value—the actual value at the time of the conversion and wrongful withholding—is fixed by the circumstances then existing. The specific character of the property and the ordinary use to the owner are the circumstances that show its value, and for this the trespasser should be liable. The judgment of the court below is affirmed.

COMPTON v. ASHLEY.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

WRIT OF ERROR—TIME FOR SUING OUT.

Rev. St. art. 1389, enacted before the creation of the court of civil appeals, provided that a writ of error might be sued out at any time within two years after final judgment. Act 1892, taking effect September 1st. (Gen. Laws 1892, c. 15,) provided that a writ of error to the court of civil appeals might be sued out at any time within 12 months of final judgment. *Held*, that this latter act should be so construed as to allow a writ of error to such court, from a judgment rendered before the date of the taking effect of the act, to be sued out at any time within 12 months of such date, provided that it be done within 2 years from the rendition of the judgment.

Error from Coleman county court; H. A. Orr, Judge.

Motion by M. C. Ashley to dismiss writ of error sued out by Mary E. Compton, executrix. Motion denied.

Sims & Snodgrass, for defendant in error.

COLLARD, J. The final judgment in this cause was rendered in the court below, as shown by the record, on the 13th day of October, 1891, and the petition and bond for writ of error were filed on May 5, 1893. We are asked to dismiss the case because the petition and bond were filed more than one year after the rendition of the judgment. The statute, before the creation of the courts of civil appeals, provided that a writ of error might be sued out at any time within two years after final judgment was rendered, and not thereafter, except in the case of infants, married woman, and persons of unsound mind, who were allowed two years after their disabilities were removed in which to sue out the writ. Rev. St. art. 1389. The act of the called session of the legislature upon the same subject, which took effect September 1, 1892, provided that a writ of error to the court of civil appeals might be sued out at any time

within 12 months after final judgment, and not thereafter; there being no saving clause for infants, married women, and persons of unsound mind. We think the late act of the legislature should be so construed with the law as it was before as to entitle a party, otherwise entitled, to sue out a writ of error to this court at any time within 12 months from the time the act took effect, provided it be done within 2 years from the rendition of the judgment. The act should not be held to retroact and bar the right to the writ in cases where 12 months, and not 2 years, had already expired before the act took effect; that is, to bar all cases where 12 months had passed before the act took effect. The legislature has expressed no such intention. If this be true, that in a case where 12 months, and not 2 years, had expired, the cause would not be barred, it would also be true where 12 months had not expired before the law commenced to operate. We could not have two rules of construction for the same act. It was certainly not the intention to bar causes 12 months old at the time the law took effect. The new law should be construed in connection with the old law, to affect existing rights from the time it begins to operate, subsequent rights from the time they arise, but of course not to extend the time limited by the former law. *Stephenson v. Stephenson*, (decided by supreme court of Texas at Austin, April 6, 1893,) 22 S. W. Rep. 150.

The bond for writ of error was approved and filed May 5, 1893, and the citation was served upon the defendant in error, M. C. Ashley, in person, on the 3d day of June, 1893, before his death, on the 10th day of June, 1893. The cause does not abate by such death. Gen. Laws 1892, pp. 30, 31, § 30. The motion to dismiss is overruled.

BUTLER et al. v. SANGER.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

TRUST DEED—PREFERENCE OF CREDITORS—SURETIES—ATTORNEYS' FEES.

1. A deed of trust for the purpose of preferring certain creditors of the grantor, when acted on by the trustee and beneficiaries, constitutes a contract resting on mutual promises, and is therefore supported by a consideration.

2. A surety is a creditor of his principal, and where the principal becomes insolvent before the debt matures he may prefer the surety to the amount thereof.

3. Where a debtor, for the purpose of securing certain debts, conveys in trust property less in value than the amount of such debts, a provision in the trust deed authorizing the trustee to sell at either public or private sale, and to employ clerks and attorneys to assist and advise him, will not affect the validity of the trust deed as to unsecured creditors, since they could not be injured by it.

4. A provision in a trust deed for the benefit of creditors, directing payment of a stated sum to an attorney for services in drawing the deed and in the execution of the trust, is valid unless such sum is unreasonable in amount.

Appeal from district court, McLennan county; A. C. Prendergast, Special Judge.

Trial of right of property between Philip Sanger, claimant, and Butler, Clapp, Wents & Co. and Teft, Weller & Co., attachment creditors. There was a judgment for the claimant, and the attachment creditors appeal. Affirmed.

The other facts fully appear in the following statement by FISHER, C. J.:

A. S. Haber was a retail merchant on the 15th day of May, 1889. Being at the time insolvent, and indebted to appellants, he executed a conveyance of all his property subject to execution, consisting of a stock of merchandise at Waco, and all his store fixtures, safe, and furniture, notes and accounts, choses in action, etc., to Sam Sanger, trustee, for the benefit of certain preferred creditors other than appellants. Among other preferred claims was one for \$250, alleged to be due the law firm of Alexander, Winter & Campbell, for their services in preparing said conveyance and in advising the trustee as to his powers and duties in the administration of the fund. The preferred debts aggregated about \$10,000. Some days afterwards the trustee sold at private sale, to Philip Sanger, one of the preferred creditors, the entire stock of merchandise for the sum of \$8,500 cash, and he went into possession. Appellants sued out and levied attachments aggregating in amount \$3,901.21 on said stock. Philip Sanger claimed the stock, and gave bond, waived inventory, and this suit is a trial of the right of property under the statute. The goods were valued at \$3,500 by the officer. Issues were submitted and joined. Appellants sought to impeach said conveyance, and, among other grounds, alleged fraud, and an intent to hinder and delay appellants; that it was made voluntarily, without request or consideration; and that many of the preferred claims, including that of Philip Sanger, were fictitious, and that the debt of Alexander, Winter & Campbell was not a proper charge against the trust fund, and was void. The case was tried before the court, who found on all the issues for appellee, filed his conclusions of law and facts, and rendered judgment for appellee, to which appellants excepted and gave notice of appeal.

We find the following facts: (1) A. S. Haber was a retail merchant, and on the 15th day of May, 1889, he was practically insolvent. On that day he executed and delivered a deed of trust to Sam Sanger, as trustee, conveying all his stock of merchandise, accounts, notes, and store fixtures, which embraced all of his property, in trust for the benefit of certain preferred creditors named, as follows: Philip Sanger, \$3,000; Mrs. Jeannette Haber, \$2,200; Waco State Bank, \$650; B. Frelich & Co., \$343.50; Slayden-Kirksey Woolen Mills, \$48; Sam Sanger, \$925; Sanger Bros., Dallas, \$870; Sanger

Bros., Waco, \$970.16; John T. Walton, \$930; Alexander, Winter & Campbell, \$250. The aggregate amount of such preferred debts is \$10,286.66. The instrument also provided for the payment of the interest due on these debts. The instrument provides that Sam Sanger, trustee, shall take possession of said property for the use and benefit of the preferred creditors, and shall proceed to take an invoice of said property, and, without unnecessary delay, sell the said property at public or private sale for cash, either by wholesale or retail, and that he shall proceed with due diligence to collect the notes and accounts. (2) All the debts secured by the deed of trust were legal and valid debts against Haber at the time of the execution of said instrument. The debt of Alexander, Winter & Campbell was a reasonable attorney's fee for services in drawing and preparing the trust deed so executed by Haber, and for services and advice to the trustee in regard to the proper execution of the trust. The debts to Philip and Sam Sanger arose out of the fact that they were sureties on the paper of Haber for the amount stated. They had not paid the debts when the deed of trust was executed, and the debts at that time were not due. In this connection we also find that Haber, at the time of the execution of the deed of trust, had no other property than the goods conveyed, and that the proceeds of the sale of the goods by the trustee were applied to the payment of these debts, and that at said time the Sangers were solvent, and responsible for the debts upon which they were sureties. We also find that the amount of the debt to Alexander, Winter & Campbell was reasonable for the services rendered. The only consideration for the execution of the deed of trust was to secure the payment of the debts mentioned, and that in the execution thereof Haber's purpose was not to defraud his other creditors, but was simply in good faith to secure the claims of the preferred creditors. (3) May 24, 1889, for the sum of \$8,500, the trustee sold the goods and property described in the deed of trust to Philip Sanger; the trustee at the time being in possession of said goods under said deed of trust. Prior to the sale to Philip Sanger, the trustee sold about \$300 worth of the goods. The goods sold for a fair price, and the proceeds thereof were paid on the secured debts. (4) The amount of debts secured and preferred by the deed of trust was about \$10,286, with interest; and we find that the value of the goods and property transferred by the deed of trust did not exceed in value more than about \$9,000. (5) We find that Philip Sanger, by virtue of his purchase of the property, acquired a good title, superior to any claim of the appellants. (6) The appellants were creditors of Haber at the time the deed of trust was executed, and their claims were legal and valid debts against him, and upon which

they have obtained judgments; and, at their instance, during the pendency of their suits against him, writs of attachments were issued, and, after the purchase of the goods by Philip Sanger at the trustee's sale, were levied upon the property conveyed by the deed of trust.

Robertson & Davis and Stanley, Spoons & Meek, for appellants Alexander & Campbell, for appellees.

FISHER, C. J., (after stating the facts.) Appellants' first assignment of error is too general to require us to consider it, but we can say that we think the finding of the court below as to the validity of the deed of trust is supported by the facts. Our findings of fact dispose of this assignment.

In reply to the second assignment of error,—if the appellants are serious in urging it,—we clearly think that the deed of trust is supported by a consideration. A debtor may in good faith voluntarily prefer some of his creditors; and when he executes a deed of trust looking to that end, transferring his property for such purpose, and the trustee and the beneficiaries act upon the instrument, and accept its benefits, this, between the parties, constitutes a contract resting upon mutual promises that may result in a benefit and advantage to one of the contracting parties or a loss to the other. Such is this instrument. *Lane v. Scott*, 57 Tex. 372.

The fourth error assigned urges the invalidity of the deed of trust, or so much thereof as secures the debts of Sam and Philip Sanger, for the reason that, they being sureties of Haber upon debts that were not due, their liability was contingent, and only became fixed when default was made by their principal, and that a conveyance to a surety of property of the insolvent debtor authorizing them to convert it into money is fraudulent as to other creditors. The facts in the record clearly show that Haber's purpose was to secure the Sangers as sureties upon his paper. He at the time was insolvent, and realized his inability to meet the paper when it matured. The Sangers, as to the debts upon which they were sureties, were liable for the payment thereof. This liability was certain, and in no sense contingent, in so far as their liability existed as original promisors to the payees of said paper. When the paper matured, the holders could unquestionably demand and seek payment from the sureties. The inability of the principal debtor to pay would not relieve the surety, and the only event that would discharge them would be some act of laches or negligence upon the part of the creditor, which the law will not presume has occurred or will occur. Nothing of the kind is shown in this case. But, assuming that the surety's liability was contingent, he nevertheless was a creditor of

the debtor from the time he placed his name upon the paper, and was a debtor of his principal's creditor from that time, and was bound for the debt. *Walt, Fraud. Conv.* (2d Ed.) § 90. We have not been able to find where the debtor has ever been denied the right of indemnifying his surety against loss, even though his liability may be contingent. "It is settled law that the principal may lawfully indemnify his surety against loss in consequence of his suretyship; and when such indemnity is executed in good faith it is superior to the claims of existing creditors that are not previously secured by a lien upon the same property. The liability of the surety for the debt of his principal before he has made any payment on account thereof is a sufficient consideration for the execution of the instrument that creates the indemnity in his favor." 1 *Brandt, Sur.* §§ 218, 219. The surety may, before the payment of the debt for which he is bound, foreclose the indemnity in his favor. Especially is this true when the debtor contracts or consents that he may do so, or when the debtor is insolvent. *Id.* §§ 221-224; *Marsh v. Hubbard*, 50 Tex. 207.

We suggest another view of this question, which, in our opinion, supports the deed of trust. It is not denied but that the deed of trust would have been valid if it had directly named the creditors—for whose claims the Sangers were sureties—as the beneficiaries entitled to the security. If the deed of trust had been executed directly to them to secure their debts, it would, if not for other reasons objectionable, have been a valid and legal incumbrance upon the property; and if the debtor executing the instrument by its terms consented—as he did in the deed of trust before us—that the beneficiaries may sell the mortgaged property prior to the maturity of the debt, and apply the proceeds to the payment of it, the trustee would have been empowered to so sell, although the debt was not due. But when the instrument is directly executed to the sureties, creating the lien as an indemnity in their favor, equity by subrogation creates a right in favor of the creditor as a lienor upon the property incumbered equal to that created by the contract of indemnity with the surety. The contract of indemnity, so far as the lien is concerned, results not only to the benefit of the surety, but also to the creditor. Whatever at one time may have been the diversity of opinion in the courts upon this question, we believe the weight of authority for the better reason so establishes this right in the creditor. "As a general rule, when a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such prin-

cial creditor did not act upon the credit of such security in the first instance, or even know of its existence. The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be available by the creditor, although unknown to him. The right of the creditor is the same when the security is a mortgage or other lien given the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that the indemnity should be given." 2 Brandt, Sur. (2d Ed.) §§ 324, 325, and authorities there collected; 3 Pom. Eq. Jur. § 1419. This rule does not conflict with the case of *Manufacturing Co. v. Powell*, 78 Tex. 53, 14 S. W. Rep. 245. Thus it will be seen that the security created by the deed of trust practically inured to the benefit of the creditors of the secured debts. It was a trust in their favor, as well as the sureties'. They could in equity have enforced it. And the facts showing that the trustee and the sureties have voluntarily done what a court of equity would have compelled,—that is, applied the mortgaged property to the payment of the creditors' debts,—we fail to see any valid ground of complaint that can be urged by the appellants.

In reply to the ninth assignment of error, we do not see how the provision in the deed of trust that empowers the trustee to sell at either public or private sale, and to employ clerks and attorneys to assist and advise him in the execution of the trust, will per se render it void. These provisions may or may not be reasonable in the execution of a trust. It depends upon its character and purpose and the general scope of the trust and the character of the property to be administered. In view of the character of the property conveyed and the purpose of the trust, we believe this provision in the instrument does not appear from the evidence to be either unreasonable or a badge of fraud. But, in view of the fact that the property conveyed was less in value than the legal debts secured, we do not see how the appellants can complain or be injured, even though such a provision in the deed of trust should be held illegal. It could not have the effect, by force of such a provision, to render the instrument void, but would simply be, if anything, a badge of fraud that may be explained away. The fact that the property incumbered is of value less than the debts, and they be legal and valid, and the purpose be to in good faith secure them, we do not see how such a provision would render the contract fraudulent as to other creditors, or have the effect, in contemplation of law, to hinder and delay the collection of their claims. *Bank v. Marshall*, 1 Tex. Civ. App. 711, 23 S. W. Rep. 246.

The appellants contend that the deed of

trust is void because Haber, the insolvent debtor, could not, at the execution of the deed of trust, create a debt, and provide for its payment out of his property, in favor of Alexander, Winter & Campbell for attorney's fees in executing the instrument. Two hundred and fifty dollars is the amount secured to Alexander, Winter & Campbell for their services in writing and drawing the instrument creating the trust, and for professional services as attorneys, rendered in the execution of the trust. It is not pretended that this amount is unreasonable. The law authorizes an insolvent debtor to prefer his creditors to the exclusion of others, and to create an incumbrance upon his property for their security. It is usual and customary, in the exercise of this privilege, in creating the estate in the preferential creditors, to do so by an appropriate instrument in writing to that effect. It is also usual and customary in the creation of these estates that the labor of drafting the instrument and determining the legal and proper manner of its execution is put in the hands of those that are supposed to be skilled in these matters. It is well known that the performance of this service is peculiarly within the province of the attorney and counselor at law, and he is generally esteemed the one who is skilled in the performance of this work; and the very nature and character of the instrument to be executed suggests that this skilled service is necessary in order that the estate sought to be created may be done in a legal way. Adjudicated cases upon the construction of instruments of this character have doubtless advised the profession that it is not only doubtful if the ordinary layman has the requisite skill and learning to properly draft such documents, but their proper and legal execution often falls when attempted by those learned in the law. The power in the insolvent debtor to execute the trust implies the power and authority to execute such an instrument as would create it, and to resort to the methods and expedients usual in such cases. The authority to employ the attorney for this purpose as one of its incidents implies the power to pay him. This payment can be made—so that the amount is reasonable—out of any unincumbered property owned by the debtor. *Baldwin v. Peet*, 22 Tex. 720; *Hill v. Agnew*, 12 Fed. Rep. 230; *Bump, Fraud. Conv.* (3d Ed.) pp. 423-425. The expenses for the services of the attorneys incurred by the trustee in executing the trust, if reasonable, are proper items of cost to be charged against the fund. The law implies the right in the trustee or assignee in the performance of the trust of the incurrence of reasonable expenditures for the services of attorneys when needful to a proper execution of the trust. *Burrill, Assignm.* (5th Ed.) § 417; *Bump, Fraud. Conv.* (3d Ed.) pp. 423-425, 572. The judgment of the court below is affirmed.

CAROTHERS v. PRESIDIO COUNTY.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

COUNTY TREASURER — COMMISSIONS — FAILURE OF COLLECTOR TO TURN OVER TAXES — ACTION ON OFFICIAL BOND — LIABILITY OF COUNTY.

It being the duty of the tax collector to turn over to the county treasurer the taxes collected by him, and the treasurer being entitled to retain his commissions out of such funds, the treasurer can, on failure of the collector so to do, sue the collector and his bondsmen for such commissions, though the statute requiring the bond provides for no such suit, and this though the county attempts to release the bondsmen; and therefore the treasurer has no cause of action against the county by reason of such release, and of the county's refusal to compel the collector to pay to the treasurer the taxes collected.

Appeal from district court, Presidio county; T. A. Falvey, Judge.

Action by L. B. Carothers against Presidio county for commissions of plaintiff as county treasurer. A general demurrer to the petition was sustained, and plaintiff appeals. Affirmed.

W. O. Read, for appellant.

JAMES, C. J. This cause was disposed of in the district court by a general demurrer to plaintiff's petition, which the court sustained. The following is the petition:

"The state of Texas, Presidio county. District court, September term, 1890. To the Hon. Judge of Said Court: Your petitioner, L. B. Carothers, plaintiff herein, complaining of Presidio county, defendant herein, represents to the court that plaintiff resides in the county of Jeff Davis, in the state of Texas, and that defendant is a body politic and corporate under the laws of said state, and that S. F. Adams is county judge thereof. For cause of action plaintiff says that heretofore, to wit, on the 4th day of November, 1884, he was duly elected to the office of county treasurer of said Presidio county, and afterwards, on the 12th day of November, 1884, qualified as such treasurer by taking the oath of office and giving the bonds required by law, and then and there entered upon the duties of said office, and continued to discharge the same until about the 25th day of February, 1886, when by an order of the district court of said Presidio county he was wrongfully and unlawfully removed from said office, and was so removed from said office until the 10th day of December, 1886, when said decree was by the supreme court of Texas, on appeal thereto, reversed and set aside. That by virtue of his election and qualification to said office as aforesaid plaintiff was entitled by law to receive all the fees and emoluments pertaining to said office for a period of two years from the date of his election, and until the qualification of his successor in said office; and that his successor did not qualify as such county treasurer until the 19th day of January, 1887.

That during the said term plaintiff held said office of county treasurer, and the term he was removed therefrom as aforesaid, to wit, from the 12th day of November, 1884, until the 19th day of January, 1887, C. L. Nevill was the qualified and acting sheriff and tax collector of deft. county; and that S. A. Thompson, Jas. Dawson, J. A. Wedel, John G. Davis, Jas. Sender, and John D. Davis were sureties on his official bond to said county as collector of taxes thereof during said period of time. Plaintiff further avers that during the fiscal year beginning October 1, 1885, and ending September 30, 1886, the said C. L. Nevill, as collector of county taxes for defendant county, collected ad valorem and poll taxes for said county due for the year 1885, amounting, in the aggregate, to the sum of twenty thousand five hundred and fifty-six and 49-100 dollars, and that between the 1st day of October, 1885, and the 31st day of December, 1886, the said C. L. Nevill, as collector of taxes for said county, collected county occupation taxes amounting, in the aggregate, to the sum of one thousand dollars. That between the said last-named dates the said C. L. Nevill, as sheriff of deft. county, collected fines and forfeitures due said county, amounting, in the aggregate, to the sum of one thousand dollars. That the said C. L. Nevill failed and refused to pay over said moneys, or any part thereof, to pltf., as he was required by law to do, but wrongfully and unlawfully withheld the same, and has since continued to unlawfully and wrongfully withhold said moneys in his own hands, and has refused, and still refuses, to pay plaintiff his commission thereon, to which he was and is entitled by law, by virtue of his said office of county treasurer of deft. county, as aforesaid. Plaintiff further alleges that he was, as such county treasurer, entitled to receive and disburse all of said moneys, and was and is entitled to commissions thereon as follows:

For receiving \$20,556 49/100 @ 2 1/2 %..\$	514 17
For disbursing \$20,556 49/100 @ 2 1/2 %	514 17
For receiving \$1,000.00, occupation taxes, @ 2 1/2 %	25 00
For disbursing \$1,000.00 @ 2 1/2 %	25 00
For receiving \$1,000.00, collection on fines and forfeitures, @ 2 1/2 %	25 00
For disbursing \$1,000.00 @ 2 1/2 %	25 00

Amounting in aggregate to.....\$1,128 34

"That it was by law made the duty of C. L. Nevill, as sheriff and tax collector of deft. county, to pay over to plaintiff all of said moneys as the same were by him collected, and it was by law the duty of the county commissioners' court of said Presidio county to require the said C. L. Nevill to pay over to plaintiff all of said moneys as the same were collected, and that the said C. L. Nevill failed and refused to pay over said moneys, or any part thereof, as he was required by law to do, and that said commissioners' court failed and refused to require and compel him to

pay over to plaintiff, as county treasurer, said moneys, or any part thereof, as it was by law their duty to do. That during the aforesaid fiscal year, and until the 19th day of January, 1887, the said Presidio county was indebted largely in excess of the aforesaid sums of money, and that all of said moneys would have been disbursed by plaintiff during his said term of office if the said C. L. Nevill, as he was required by law to do, had paid the same over to him as such county treasurer. Plaintiff further alleges that the commissioners' court of said Presidio county, on or about the 5th day of September, 1888, by an order made and entered on the minutes of said court, under an agreement between said court and the aforesaid sureties on the said C. L. Nevill's bond, as collector of taxes of said Presidio county, except John D. Davis, who was then and is now notoriously insolvent, accepted the notes of each of said sureties, to wit, S. A. Thompson, J. A. Wedel, John G. Davis, Jas. Dawson, and Jas. Sender, each for the sum of five hundred dollars, with 8 % interest from the 27th day of August, 1888, and due and payable on the 27th day of August, 1890, and then and there, in said order, in consideration of the execution and delivery of said notes by said sureties on said bond, agreed to release, and did release, each and all of said sureties on said bond from any and all further liability on the aforesaid bond of the said C. L. Nevill, as collector of taxes of said Presidio county, by which action of said court, the said C. L. Nevill being then, and now is, notoriously insolvent, the said Presidio county then and there became liable, bound, and in law promised to pay plaintiff the aforesaid sums of money due him as commissions as aforesaid, together with accrued interest thereon. That on the 26th day of February, 1890, plaintiff, by his attorney, presented all of the aforesaid claims for commissions to the Hon. commissioners' court of said Presidio county in open court, and then and there requested said court to audit and pay plaintiff said claims, which claims said court then and there refused to consider and audit, or to audit or to agree to pay any part thereof; and again, on the 30th day of June, 1890, plaintiff, by his attorney, presented said claims for commission to said commissioners' court of said county in open court, and requested said court, by written application thereto, to commence and prosecute suit against the said C. L. Nevill, and the aforesaid sureties on his bond, as collector of county taxes of said Presidio county, in the name of said Presidio county, for the use and benefit of plaintiff for the aforesaid commissions due plaintiff, as aforesaid, by virtue of his said office of county treasurer of said county, or to audit and pay off and discharge said claim due plaintiff as aforesaid, when said court refused to consider application, or to take any action in reference thereto, by

which action of said court in refusing to consider application, and to act as therein requested, said Presidio county became liable, bound, and in law promised to pay plaintiff the aforesaid sums of money due as commissions as aforesaid, with all accrued interest thereon. That said sums of money have long since been due, and though payment thereof has often been demanded of defendant, to pay the same, or any part thereof, defendant has wholly failed and refused, and still fails and refuses, to plaintiff's great damage. The premises considered, plaintiff prays that defendant be cited in the term of the law to answer this petition, and that upon the trial thereof he have judgment for the aforesaid sums of money alleged to be due him, with interest thereon from the 1st day of January, 1887, and all costs of suit, and for general and special relief."

Conclusions of Law.

The county, it seems, had nothing to do with the removal of plaintiff from his office; nor has the county received from the collector or his sureties any of the money upon which plaintiff's commission is calculated. We see no reason for holding the county responsible to the treasurers for commissions, unless it were shown that the county received the same, or, not receiving the same, did some act which was the proximate cause of plaintiff's commission being lost to him. The allegation in the petition that the county commissioners failed and refused to compel the collector to pay over to plaintiff, as county treasurer, said moneys, or any part thereof, if true, would not render the county responsible for plaintiff's commissions, for the treasurer, during all the time he was qualified and was the proper officer to receive these funds, had the right to institute a suit against the collector for that purpose, and it is evident, while he had the equal right with the commissioners to institute such proceedings, he could not complain of their failure to do so. *McConnell v. Wall*, 67 Tex. 323, 3 S. W. Rep. 287. It is further alleged by plaintiff that on September 5, 1888, the county commissioners' court, by an order entered in its minutes, under an agreement between said court and five of the six sureties on the collector's bond, (the collector and the other sureties being then insolvent,) accepted the notes of each of said sureties for \$500 each, payable August 27, 1888, with 8 per cent. interest per annum, and in consideration thereof agreed to and did release each and all of said sureties from any and all further liability in said bond, and by reason of this act the county then and there became liable to plaintiff for his commissions.

The question arises whether the legal consequence of such action is as declared by plaintiff. Our statutes make it the duty for the collector to pay over these moneys to the treasurer, and it was the treasurer's

right from these moneys to retain his proper commissions. The bond of the collector was conditioned for the faithful performance of the duties of his office. The treasurer thus derived his compensation from the moneys required to be paid over to him by the collector, and the collector and his sureties, having full knowledge of this condition of things by the state of the laws in force at the time of executing the bond, knew that the conversion of the money by the collector would result in loss to the treasurer in respect to his commission. The commissions did not go to the county, and the county did not have any direct interest in them. They were the property of plaintiff. The defalcation of the sheriff, therefore, considered in connection with the other matters alleged in the petition, had the effect of working an injury to the treasurer.

The next question which seems material for us to determine is whether or not the treasurer, to the extent of his injury, had a right to proceed upon the bond against the collector and his sureties. We believe that he had. While the statute in reference to collectors' bonds does not expressly authorize suit by any person injured in his own name for a breach thereof, as it does in the case of sheriffs' and county clerks' bonds, still, under the general principles governing official bonds, we are of opinion that suit will lie against an officer on his official bond, by a party who can show that he has suffered damage by a breach thereof. In *Murfree on Official Bonds* (section 323) it is stated: "It is usually provided in statutes authorizing official bonds to be required of state, county, or municipal officers that suits may be brought upon them in the name of the official obligee, 'upon the relation' or 'to the use' of the party injured by the breach of the bond, or interested in its enforcement. Whenever, however, this express provision is omitted in the statute itself, the deficiency is supplied by the construction given to such statutes by the courts whenever a proper case for such ruling is presented. * * *

The laws which provide for the execution of bonds similar to the one before us do not require them for the purpose of protecting the rights of the state (county) alone. They are also designed to secure the faithful performance of official duties in the discharge of which individuals and corporations have a deep interest, and therefore they should have the privilege of suing on such bonds for injuries sustained by them through the negligence or misconduct of the officers. There is no doubt that it is incumbent on the party suing on the bond to show that he has an interest in it before he can recover in a regular trial prosecuted to verdict." Expressions of our own court are to the same effect. *Crews v. Taylor*, 56 Tex. 465. We can readily see how the facts alleged show damage to plaintiff by reason of the

breach of the bond complained of, and a damage peculiar to him, and it seems to us a case which entitled him to an action upon the bond. Of course, there being no law providing that he could bring such suit in his own name, as with sheriffs', county clerks', and other bonds, it would have been necessary for him to sue in the name of the county "for his use," and to the extent, only, of his injury, and, as in other cases, the right to recover against the sureties would be limited to the penalty of the bond.

There was no obligation resting on the county, if, in the management of its financial affairs, it deemed it inadvisable, to bring suit on the collector's bond, and the failure to do so would not, of itself, subject the county to liability for the treasurer's commissions; and this is clearly so when the latter himself could have maintained suit for these commissions against the collector and his sureties, so far as his interest was made to appear. The county, however, might have become liable for these commissions if it had received the money; that is to say, it could probably have been held to account to the plaintiff for his proper percentage on all sums actually collected upon the collector's bond. But there is no allegation that the county ever received a dollar from that source. In our opinion, the county, in the alleged settlement with the sureties, did not, and could not, affect any right the plaintiff had to recover of the sureties for what damage he had suffered from the breach of the bond. The sureties could not have pleaded the settlement with the county as a defense against such an action by plaintiff against them. Plaintiff could not in any event have, under his allegations, a cause of action against the county for more than the percentage on the \$3,500 in notes taken from the sureties, and he would probably not have this until the county had derived money from the notes, and the commission in the entire amount of these notes was not sufficient to give the district court jurisdiction. We see no error in the ruling of the district court, and the judgment is affirmed.

BAKER et al. v. COLLINS et al.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

HOMESTEAD—RIGHTS OF MORTGAGEE—FORECLOSURE.

1. Where a purchaser of land executes his notes for the deferred payments, which expressly retain a vendor's lien, the fact that he uses the premises as a homestead for his family will not invalidate a mortgage executed by him alone to secure other notes given by him in renewal of the vendor's lien notes which he was unable to pay at maturity.

2. The holder of an absolute deed given to secure the payment of a debt has a right to take possession of the premises on their abandonment by the debtor, and cannot be ousted

by subsequent purchasers from the debtor until his debt is satisfied.

3. In trespass to try title against a mortgagee in possession, brought by the purchasers of the equity of redemption, plaintiffs cannot object for the first time on appeal that the mortgage cannot be foreclosed, as prayed for by defendant, because the mortgagor was not made a party, where no personal judgment was rendered against him, or could be on account of his nonresidence.

Error from district court, Guadalupe county; George McCormick, Judge.

Trespass to try title by Baker & Terrell against Collins & Willmann. From a judgment in defendants' favor, plaintiffs appeal. **Affirmed.**

John Ireland and W. R. Neal, for plaintiffs in error. Burges & Dibrell, for defendants in error.

NEILL, J. Action of trespass to try title, brought March 21, 1888, by plaintiffs in error against defendants in error. The petition of plaintiffs was in the ordinary form. Defendants answered by special plea that Willmann was in possession of the premises through his codefendant Collins as his tenant, under a conditional deed made to him by John E. Edmonds on the 13th day of January, 1885, which by its terms was to become absolute upon the failure of Edmonds to pay him \$1,433.85 on the 1st of January, 1886; and that Edmonds, in December, 1886, abandoned the premises, and left the state of Texas, and went to the state of New York, where he has since resided with his family, whereupon defendant took possession of the premises, and has since remained in possession by virtue of said instrument of January 13, 1885. That the deed had become absolute by the failure of his grantor to perform said condition. That the sum of money mentioned in said deed was for a part of the unpaid purchase money owed by Edmonds for the land sued for; and that, if the said instrument should be held in effect a mortgage, such mortgage, as well as his equitable lien on the land for said purchase money, be foreclosed, and the premises decreed sold for the payment of said sum. The plaintiffs, by supplemental petition, pleaded that if such instrument was intended as a mortgage it was void, for the reason that at the time it was executed the land was the homestead of Edmonds. That, if a mortgage, it could not be foreclosed without making Edmonds a party to the suit. That the sum of money mentioned in said instrument was for personal property as well as land, and, as it could not be ascertained how much was for the land and how much for the personalty, it was impossible to fix the amount for a foreclosure of the lien; and that the debt was barred by the statute of limitation. The case was tried without a jury, and the court found the instrument referred to to be a mortgage given for the purchase money prior to plaintiffs' purchase of the equity of redemption, and decreed that the lien be foreclosed, and

the land be sold, and the proceeds applied to the payment of \$1,650, which was found to be due the defendants; and that, if it brought more than enough to satisfy said sum, such excess should be paid to the plaintiffs. It was also found that Baker & Terrell had the equity of redemption, and that, by paying off and discharging the amount due on the premises before sale, they should recover. From this judgment the writ of error was sued out.

Conclusion of Facts.

(1) On the 20th day of September, 1882, Margaret S. and J. C. Morris purchased the land in controversy from W. H. McClaugherty, and executed their note for \$700 for the balance of the purchase money, and in the deed and note expressly retained a vendor's lien on the land. (2) On November 10, 1883, W. H. McClaugherty, for a valuable consideration, transferred the note to Frank Saunders. (3) On December 24, 1883, Margaret S. and J. C. Morris sold the land, together with some personal property, to J. Brady, P. Finnigan, and J. E. Edmonds, for \$2,600, of which sum of money \$1,250 was paid cash, and the balance stipulated to be paid as follows: The sum of \$450 due on the 1st of January, 1885, \$450 due January 1, 1886, both of which notes bore interest from the 1st day of January, 1884, at the rate of 10 per cent. per annum; and the further sum of \$450 to be paid by the grantee to Frank Saunders in discharge of said note assigned to him by McClaugherty. (4) The defendant in error Joseph Willmann, on the 11th of March, 1884, purchased the two notes of \$450 each executed to Morris by Edmonds, Brady, and Finnigan for the purchase money of the land in controversy, and on the 17th day of January, 1885, he purchased from Frank Saunders the note of \$450, made by Morris and wife to McClaugherty, and assumed by Edmonds, Brady, and Finnigan when they purchased the land. (5) On June 28, 1884, Finnigan conveyed his interest in the land to Edmonds, and afterwards Brady sold his interest to him, Edmonds assuming the deferred payments of the purchase money evidenced by said notes. (6) On January 13, 1885, Edmonds, being unable to pay Willmann the money then due him on said notes, executed him a note for \$1,433.85, which included the interest to January, 1885, in lieu of the original note, which note was payable January 1, 1886, with interest, payable annually, at the rate of 12 per cent. per annum from January 1, 1885, and provided that, should the interest not be paid when due, it should become a part of the principal, and bear interest as the note, and that, if the note was collected by legal proceedings, 10 per cent. attorney's fees should be added. At the same time Edmonds executed to Willmann an instrument purporting to convey the land in controversy, to become absolute in the event Edmonds failed to pay said sum of \$1,433.85 and interest, or any part of

the same. (7) Edmonds failed to pay the note when it fell due, and in December, 1888, moved from the state of Texas, with his family, to the state of New York, where he has ever since resided; whereupon Willmann took possession of the premises by virtue of said instrument. (8) On January 26, 1887, J. E. Edmonds conveyed the land to G. L. Baker and Henry Terrell by an absolute deed. (9) At the time Edmonds acquired the property, and when he executed the instrument of conveyance to appellee, he was a married man, but his wife was dead when he made the deed to Baker & Terrell.

Conclusions of Law.

The record shows conclusively that the three notes of \$450 each, for which the note of January 13, 1885, for \$1,433.85, was given in substitution, were given for a part of the purchase money of the land in controversy, and that a vendor's lien was expressly retained in them and the deed to secure their payment. That personal property was also conveyed at the same time did not operate so as to destroy the vendor's lien that attached to the land by operation of law, and certainly could not prevent the parties from expressly contracting that such lien should be retained on the realty. The lien attached to the land prior to Edmonds' homestead right in it, and such right was subordinate to such incumbrance. The rule is well settled in this state that when a homestead right attaches to land charged with preceding equities and incumbrances the husband, if he acts in good faith, has the right to adjust those equities and incumbrances, and in such adjustment substitute for them a new lien. *Clements v. Lacy*, 51 Tex. 151; *Gillum v. Collier*, 53 Tex. 592; *De Bruhl v. Maas*, 54 Tex. 474; *Hicks v. Morris*, 57 Tex. 662; *Morris v. Geisecke*, 60 Tex. 635. Therefore, when Edmonds was unable to meet the payment of the notes when they fell due he was authorized to adjust the matter by giving a new note with increased interest, and secure the same by a mortgage on the premises; such new note being a vendor's lien for the purchase money, and the extension of the time of payment was a sufficient consideration for the increased interest and the attorney's fees provided for. The instrument asserted by appellee as a conditional deed was, in effect, a mortgage, for the relation of debtor and creditor existed between the parties at the time of its execution. Neither the debt nor any part of it was extinguished. The instrument was intended by the parties simply to secure the debt, and not to pass the title to the land. *Alstin v. Cundiff*, 52 Tex. 462; *Loving v. Milliken*, 59 Tex. 423; *Gibbs v. Penny*, 43 Tex. 560; *Hart v. Eppstein*, 71 Tex. 752, 10 S. W. Rep. 85; *Gray v. Shelby*, 83 Tex. 408, 18 S. W. Rep. 809. When Edmonds abandoned the premises appellee had the right to take possession thereof, and hold

the same subject to the payment of his debt against Edmonds or his vendee. Willmann in the exercise of such right, was in possession when the suit was instituted and the case tried, and he could not be ousted of his possession by appellants until his mortgage was satisfied. *Duke v. Reed*, 64 Tex. 715; *Loving v. Milliken*, 59 Tex. 426; *Bosse v. Johnson*, 73 Tex. 608, 11 S. W. Rep. 860. The appellants never denied that appellee was in possession under said instrument, but showed it to be a mortgage, seemingly apprehending that by proving it to be such they would be entitled to recover the property. And they would, if they had discharged or tendered payment of the mortgage debt. This they never did, and do not want to do, for the judgment of the court below gives them ample opportunity of doing so. By the judgment they are accorded every right they are entitled to, and by doing what the law as well as equity and good conscience requires they can obtain possession as well as title to the land as against the appellee under the judgment rendered. Under these circumstances, ought they be heard to complain, and urge for the first time before this court, that the mortgage could not be foreclosed without making Edmonds a party to the suit? True, in order to affect Edmonds by the foreclosure proceedings, he should have been made and was a necessary party. *Black v. Black*, 62 Tex. 297. But the judgment does not affect him, and does not pretend to. His right in the property and to dispute the debt is now what it was before the judgment was rendered. But what is his right in the land if the appellants, as they claim, have an absolute deed to it? None. It would be immaterial to him, so long as a personal judgment was not rendered against him, for what amount a lien was foreclosed on it, for it would in no event affect him. When a foreclosure of the mortgage was prayed for as against appellants in the lower court they never excepted to appellees' answer, in which the relief was asked upon the ground that Edmonds was a necessary party to the proceeding; nor did they plead in abatement the absence of a necessary party, nor ask the court to withhold the matter of foreclosure from the jury, nor ask for a new trial upon the ground that a necessary party had not been made. They took their chances of a verdict on the issues as presented, and for the first time raise the question in this court that Edmonds should have been made a party. After Edmonds abandoned the state, and became a citizen of New York, constructive service was the only kind that could be obtained on him, which would not authorize a personal judgment against him for the debt secured by the mortgage. *Pennoyer v. Neff*, 95 U. S. 715.

In the cause of *McKeen v. Sultenfuss*, 61 Tex. 325, the court held that the mortgagor who had received his discharge in bank-

ruptcy, and therefore no longer liable for the debt, was not a necessary party to a suit to foreclose a mortgage in the form of a deed, made by him to secure a debt for which a decree of foreclosure was prayed on land, for the reasons that no judgment could be rendered against him for the debt, and, as he had conveyed all his right to the property to one of the parties, he had no interest whatever in the subject-matter of the suit. This case shows that a mortgagor is not in every instance a necessary party to a foreclosure, and that a decree in his absence is not void. The case cited is similar to the one in hand, and the principle that made it unnecessary to make the mortgagor a party in that case obtains in this. In that case the judgment for the debt could not be obtained against the mortgagor because he had been adjudged a bankrupt. In this, such judgment could not be obtained against Edmonds for the reason he was beyond the limits of the state, and jurisdiction could not be obtained over his person. We think that if the question as to the right of the court to decree a foreclosure without Edmonds being made a party had been raised in the court *quo in* the proper way by appellants, they would have had the right to have him brought into court if personal service could have been obtained on him; but, as the question was not made, and the judgment is not void, and is as favorable to appellants as they were entitled to, we do not believe the judgment should be reversed on that account, and therefore we affirm it.

INTERNATIONAL BLDG. & LOAN ASS'N v. FORTASSAIN et ux.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

RECEPTION OF EVIDENCE — MECHANIC'S LIEN — USURY—RECOVERY BACK—RELEASE—APPEAL.

1. Where the trial judge permits a written contract to be read to the jury, subject to a charge to be given, and he gives no charge in reference to it, the contract is in evidence; and an assignment of error to the alleged refusal of the court to admit it in evidence is not well taken.

2. A building and loan society organized for the purpose of loaning money to stockholders on their stock and on real-estate security is not entitled to a mechanic's lien on the homestead of a stockholder for money loaned to him, which he has used in the construction of a building on his land.

3. A party cannot, on appeal, take an advantage of an error in an instruction in his own favor.

4. The right of a borrowing stockholder to recover back usurious interest paid to a building society is waived by his subsequent execution of a contract releasing the society from any and all claims.

5. A reduction in the amount of premium that a borrowing stockholder is to pay a building society for a loan is a sufficient consideration to uphold a contract releasing his right to recover back usurious interest theretofore paid.

6. The fact that the contract of release also provides for the payment of usurious interest will not preclude the stockholder from en-

forcing the contract against the society, since the defense of usury is personal to the borrower.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by the International Building & Loan Association against Peter Fortassain and wife to recover money owing to plaintiff, and to foreclose a builder's lien. From a judgment in defendants' favor, plaintiff appeals. Reversed.

C. H. Clifford and B. L. Aycock, for appellant. H. A. Maydole, for appellees.

JAMES, C. J. This was a suit by the International Building & Loan Association against appellees to recover \$1,253.80, with foreclosure of a builder's lien on real property in San Antonio, Tex. Plaintiff alleged, in substance, that defendant Peter Fortassain was the owner of 11 shares of stock of plaintiff's corporation, and by virtue thereof he was entitled to advancement of money from the corporation, which sum of money would be paid off by said shares when they matured. That he (Fortassain) bid a premium for a loan. That an arrangement was then made whereby the association was to build a house for said Fortassain, and furnish material therefor to the value of \$1,000; that said Fortassain and his wife would keep said shares paid up at the rate of \$1 a month for each share, and, in addition, \$11 a month interest on the money so advanced; also that they would keep the property insured against fire for plaintiff's benefit and pay all taxes until maturity of the shares; and, in default in the payment of the monthly payment, defendants were to pay a fine of 10 cents on each dollar so unpaid, and in the event insurance and taxes, or either of them, were not paid, the association should pay same, and charge to defendants. That a written contract embodying said terms was executed by said Fortassain and wife and said association, duly acknowledged by all parties, including the wife, and duly recorded on July 21, 1884, whereby said association was given a mechanic's and builder's lien on the property improved. Plaintiff alleges performance on its part of the contract; also, that on June 3, 1887, said Peter Fortassain entered into a supplemental contract with plaintiff whereby he reaffirmed the above contract, delivered to plaintiff one of the ten shares of stock, and in consideration thereof the monthly payments were reduced from \$22 to \$20. That, after said supplemental contract, defendants, on June 17, 1887, made default in the monthly payments, and have paid nothing since. That fines resulting from such defaults, and not paid, amount to \$33. That plaintiff has had to pay insurance and taxes on the property amounting to \$84.80. The original contract of 1884 provides that the by-laws are made a part of the contract, and one of the articles thereof provides that default for

three months in the payment of interest and dues would authorize the corporation to compel payment of principal, interest, and fines by proceeding on the securities. That said contract also provides for reasonable attorney's fee in case of legal proceedings, alleged to be \$200; and that suit had been ordered by the directors. Plaintiff asked for judgment for the \$1,000 advanced, and for the premium of \$531 for the use of the money during 4½ years, to which plaintiff was entitled by virtue of its by-law which reads: "Should any borrower desire to repay the association the money advanced in order to redeem his shares, he shall repay to the association the money actually received, and one-eighth of the premium for which said loan was made, for each year, or fractional part thereof, each borrower has had the use of the money." Also asked for unpaid dues and interest amounting to \$320; for fines, \$20; for taxes, \$61.80,—making a total of \$1,968.80, less the withdrawal value of the 10 shares of stock, alleged to be \$715. The defendants pleaded, in substance, the following matters: A general denial; that plaintiff never built the home nor furnished the material therefor; denies that plaintiff was a contractor or builder, but was a money lender only; that the property was their homestead on July 17, 1884, and has since been their homestead, etc.; that the contract of 1884 was usurious.

The first assignment of error complains of the refusal of the court to admit in evidence the supplemental agreement. We find, on examination, that the judge allowed it to be read to the jury, subject to a charge he would give, and afterwards gave no charge in reference to it. The document was therefore not excluded, and this assignment is not well taken.

The fourth, fifth, and sixth assignments of error bring into question the correctness of certain charges that were given touching the lien claimed by plaintiff. Paragraph 3 stated it to be necessary for the jury to inquire into the character of the plaintiff's business,—as to whether they are mechanics and builders, or whether they are a corporation organized for the purpose of buying and selling real estate, and loaning money on real-estate security; "And you are charged that if you believe from the evidence submitted to you in this case that plaintiff's business is that of loaning money to stockholders * * * upon their stock and upon real-estate security, and if you further believe from the evidence that the real and only transactions between plaintiff association and the defendants was the sale by plaintiff to defendants of eleven shares of its capital stock, and thereafter that plaintiff loaned to defendants \$1,000, that then, in such event, no lien would attach to defendants' homestead in favor of plaintiff; and if you so believe you will find in favor of defendants upon their plea of homestead

rights." In another portion of the charge the court stated: "You are further instructed that any person may fix and secure a lien of above description provided (he) by the means agreed upon between the parties the improvement is made in accordance with the contract; and it matters not whether such erection is actually made by the person himself or by his employees. * * * But if, on the other hand, you do not believe that the plaintiff erected, or caused to be erected, the improvements in question, you will find a verdict that the sum of money in said contract mentioned is not secured by a lien on the premises in question." The question of whether or not the premises were the homestead of defendants was properly submitted, and the due registration of the contract of 1884 was not in issue. We perceive no error in these charges, taken together. The contract being signed by the husband and wife and recorded, the plaintiff was entitled to a lien if it had constructed or had caused the improvements to be constructed in accordance with the agreement; otherwise, if it had been a mere loan of \$1,000 to defendant. The charge presented both sides of this issue, and we believe correctly.

The seventh assignment of error is based on the following clause in the charge: "The contract of July 17, 1884, in evidence, is a valid contract, and binds the wife as well as the defendant P. Fortassain, as a lien in favor of plaintiff for so much of the unpaid principal, * * * after deducting such sum as you find was paid of usurious interest, as hereinbefore defined, if any." The only objection urged in reference to this charge is that the verdict was not responsive to it, as under it the jury should have found a verdict in favor of plaintiff as to the existence of the lien. The charge was incorrect so far as it states that the lien existed by virtue of the writing alone, but this error was altogether in appellant's favor, and no error in the verdict could have been produced by it that was not beneficial to him; consequently he is not in a position to complain of it. In the verdict found there was no lien. The jury could not have been misled by the charge.

As stated before, the court gave no charge in reference to the supplemental contract between the association and P. Fortassain; but it appears that the following charge was asked by plaintiff, and refused: "In the event you find from the evidence that the money mentioned in said contract, and admitted to have been received by him, was a loan to Peter Fortassain, and he received the same, and it was not used as alleged in plaintiff's petition, then the defendant Peter Fortassain would be liable for any sum of money still due by him, and he, by his contract of May 23, 1887, waived his right of action or defense of usury by said contract, which is in evidence before you to show such individual waiver, you will find for the plain-

tiff for such sum as against P. Fortassain alone, and not credit him with any money paid as interest on the loan." The defendant's answer admitted that the \$1,000 has been received by Fortassain, and the above charge should have been given if the said supplemental agreement had the legal effect of settling, between the parties, Fortassain's right to recover the usury that had been paid by him. There can be no question that at the time he executed the supplemental instrument he possessed this right, and it was such a right as he could have assigned or could have released to the creditor upon a valuable consideration. We understand the case of *Stout v. Bank*, 69 Tex. 302, 8 S. W. Rep. 808, as in point upon this question. The payments that had been made were expressly for interest, (in this case the principal was not due,) hence the rule of law requiring payments made generally upon a debt tainted with usury to be credited on the principal does not apply. The defendant was entitled to recover the interest he had voluntarily paid, or, more properly speaking, in this case he had the right to have it credited upon his debt; but the law did not stand guard over him to see that he asserted this right, and if he chose to part with it in favor of the creditor, for a valuable consideration, he could do so. By the terms of the supplemental instrument he released the association from any and all claims whatsoever not therein specially provided for, which is comprehensive enough to include a release of this claim. In said instrument it is provided that the monthly dues and interest were reduced to \$20 per month, and the obligation reduced in amount from \$2,200 to \$2,000, and the original recorded contract was otherwise reaffirmed in all its terms; and it also evidenced that Fortassain relinquished and canceled one of his eleven shares of stock. The original contract was in fact for \$2,223, payable at the maturity of second series of plaintiff's stock, which maturity is fixed by the testimony at $7\frac{1}{4}$ years. It is difficult to find any consideration for this contract. The reduction in the monthly payments was no consideration that can be recognized, as the amount remitted was something which the association could not legally demand on account of usury, and the defendant was entitled to such abatement independently of the instrument. But we find that the by-laws of the association are a part of both contracts, and one of these (by-law No. 13) entitled Fortassain, if he desired to repay to the association the money advanced in order to redeem his shares, "he shall repay to the association the money actually received, and one-eighth of the premium for which the loan was made, for each year, or fractional part thereof, each borrower has had the use of the money." It appears that the \$2,223 stipulated in the original contract to be paid was composed of \$1,000 actually

received, and \$1,200, or the balance, which was premium, as stated by plaintiff's secretary; and in the supplemental instrument the premium was diminished to \$1,000, and thus would appear to give Fortassain the right to redeem his shares on better terms than he formerly had, as one-eighth of \$1,000 was less onerous than one-eighth of \$1,200, and, if the contract has any consideration to sustain it, it must be with reference to this. It seems to us that this more advantageous privilege was a valuable concession or consideration, and saves the instrument from being a nudum pactum. An obligation to pay a greater sum than that actually received, with interest on that actually received at the highest conventional rate, is usurious. *Association v. Lane*, 81 Tex. 370, 17 S. W. Rep. 77; *Gilder v. Hearne*, 79 Tex. 120, 14 S. W. Rep. 1031. Hence this supplemental contract appears to be usurious in respect to the \$1,000 excess promised to be paid, together with the interest expressed; and it would seem at first blush that the provisions of the said by-law whereby the borrower could at any time redeem his shares by paying the \$1,000 received by him, and one-eighth of the \$1,000 "premium" per annum for the years he had had use of the money, would secure him no right that he could enforce, for the reason that, the "premium" being usury, the payment of one-eighth, or any other part thereof, would be founded on a usurious provision of the contract. But we are of opinion that he could have enforced this right, and if he desired at any time to pay the money received by him, and one-eighth of this premium, as permitted in the said by-law, he could, notwithstanding the premium and the portion thereof he proposed to pay was usurious, compel compliance on the part of the association with the terms of the by-law. The rule is that the fact that a contract is usurious can only be set up by the borrower. It is personal with him, and, if he sought the benefit of this by-law, and was willing to comply with its terms, the association could not deny him the privilege on the ground of usury. 2 Pom. Eq. Jur. § 937. We therefore conclude that the modified or supplemental instrument was supported by a consideration; and it follows, from what has been said before, that Fortassain thereby parted with his right to recover the usurious interest he had paid, or to have it credited upon what he still owed the association. The charge, as asked, might be construed to have required the jury to find interest against Fortassain from and after the supplemental contract, when this contract was usurious, according to the decisions above cited; but we notice defendant interposed no plea of usury respecting this particular contract, and, as the case was presented, we believe the charge ought to have been given.

There were no pleadings on the part of

defendant alleging that the second agreement was procured to be executed by fraud or mistake, and as long as it was not challenged on these grounds, and was not without a consideration, plaintiff was entitled to have the charge he asked given, and, if not precisely correct in all respects, it was sufficient to require the giving of a proper charge on that view of the case. Therefore the judgment is reversed, and the cause remanded.

SAN ANTONIO & A. P. RY. CO. v. LONG.¹
(Court of Civil Appeals of Texas. Oct. 18, 1893.)

NEGLECT—PROVINCE OF COURT AND JURY—HARMLESS ERROR.

1. Since, under the Texas practice, the trial judge is prohibited from invading the province of the jury in weighing the evidence, it is error for him to instruct that a railroad company which permits weeds to grow on its roadbed so as to conceal it from view is guilty of negligence, as matter of law, rendering it liable for injuries to a passenger caused by the collision of the train with a cow, whose immediate approach to the track was concealed from the trainmen by the weeds.

2. Such an instruction cannot be considered harmless error where defendant's engineer testified that the accident occurred on a dark, drizzly night, near a curve, and that it would have been difficult for him to have discovered the animal if no weeds had been growing there.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Edward O. Long against the San Antonio & Aransas Pass Railway Company for personal injuries. From a judgment in plaintiff's favor, defendant appeals. Reversed.

William Aubrey, for appellant. Tarleton & Keller, for appellee.

FLY, J. E. O. Long, the appellee, filed suit for \$16,200 against the San Antonio & Aransas Pass Railway Company. He claimed in his original petition that on September 22, 1888, he was being transported as a passenger upon one of appellant's coaches, over its line of railway from San Antonio to Kerrville, and upon reaching a point in Kendall county on the line of said railway the train upon which appellee was being transported ran over a cow, was derailed, and the coach in which he was seated upset, causing a violent collision of appellee's person with the interior arrangements of the coach, thereby, as he alleged, inflicting serious and permanent mental and bodily injuries upon appellee. Appellee alleged in his original petition that at the time of the accident he was a druggist and pharmacist, and that by reason of his alleged injuries he had become incapacitated to pursue his vocation, had suffered great injury to his nervous system, and had been partially deprived of his memory and continuity of recollection. The alleged negligence of appellant, for which ap-

pellee sought to hold it liable, consisted: (1) Of the alleged improper use of the air-brake apparatus of the train on which appellee was being transported, rendering the stoppage of the train by means thereof impracticable. The alleged impropriety of the use consisted of the interposition between the engine and passenger coach of a freight car unprovided with air brakes. (2) Allowing weeds to grow to a great height upon the roadbed, concealing from the view of the engineer the cow, which was the immediate cause of the accident. (3) The maintenance of fencing at the point of the accident in such a way that the intersection of such fencing with the roadbed made a narrow, triangular space, towards which cattle grazing near thereto would flee from trains approaching from above the same, and cross the railroad obliquely before reaching, and to avoid such space. Appellant filed its answer, excepting generally and specially to appellee's petition, pleaded not guilty, and general denial. The cause came on for trial, and, appellant's said exceptions having been presented to, were overruled by, the court. After the trial had commenced, appellee filed a trial amendment, wherein he alleged that he was by occupation a pharmacist and druggist, earning \$200 per month, and at the time of the injuries complained of was engaged in selling surgical instruments, said occupation being alleged by him to be a branch of and connected with his calling as a druggist and pharmacist, and was earning from this source \$200 a month. The appellee in this amendment sought to recover the additional sum of \$3,000 damages arising from his alleged incapacity for pursuing the last-named employment, induced by his injuries. Appellant filed exceptions to the trial amendment, which were presented to, and overruled by, the court. After the filing of the trial amendment and the overruling of appellant's exceptions thereto, appellant withdrew its announcement of readiness for trial, and presented its motion for a continuance, claiming to have suffered a surprise from the change in appellee's pleading after the trial had commenced, and after the original pleading had been sustained upon exceptions urged against the same; that it was not prepared to meet the new and additional facts pleaded by appellee, and could not safely proceed further in the trial at that time. This motion was overruled. Appellee recovered a judgment against appellant for \$9,200.

It was perhaps error to permit the so-called "trial amendment" to be filed after the taking of testimony had begun, and if it was not, the defendant having made a proper showing for continuance on the ground of surprise, it should have been granted; but, as this error cannot arise on another trial, it is unnecessary to discuss it. In the fourth clause of the charge of the court the jury was instructed: "It was the

¹ Rehearing denied.

duty of defendant company to keep its track, roadbed, and embankments free of grass, weeds, or other obstructions; and if you believe from the testimony that defendant company permitted weeds to grow on its track, roadbed, or embankment at the place of accident, in such a manner as to conceal the track, roadbed, or embankment from view, and you further believe that such wreck was caused from the cars running over an animal, whose immediate approach to the track was concealed from the trainmen by said weeds, then the defendant was guilty of negligence, and you will find for the plaintiff, if he was thereby injured." The submission of this instruction by the trial judge to the jury is assigned as error. Negligence may, for convenience, be divided into two classes: that which the law declares to be negligence, and that to be found from the facts in the given case. Whenever the law imposes a duty, and the infraction causes damage to some other person, upon proof of an infraction of the law and the resultant damage the negligence would be a matter of law. But where the facts do not show an infraction of a positive statute, then the question of whether a certain act was negligence becomes a matter of fact to be determined from the proof by the jury, and the judge would not have any authority to declare that the doing of certain acts not prescribed by statute was negligence, unless there was overwhelming uncontradicted proof of the negligence; and even in that case it would be safe to allow the jury to infer the negligence. For instance, in our state the statute requires that when trains on one railroad approach the crossing of another they must come to a full stop, and a failure to do this would be statutory negligence, and the judge, upon proof of the failure to comply with the statute, would be authorized to charge the jury that it was negligence. There has been considerable diversity, if not obscurity, of opinion as to when negligence is a question of law or fact, and as to the duty of trial judge in charging on it. It has in some instances been held that where the judge is convinced that there are no facts proven that make out a case of negligence, then he has the authority and power to instruct a verdict for the defendant. *Shear. & R. Neg.* § 11; 2 *Thomp. Neg.* p. 1237. The rule, we think, is well stated as follows: "Upon any given state of facts it is for the judge to say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred. Where, on the other hand, there is conflicting evidence on a question of fact, or there are two different, yet reasonable, views which may be taken, the judge, whatever may be his opinion as to the value of the evidence, must leave it to the jury. The duty of the judge is to declare negatively that there is no evidence to go to the jury, but not affirmatively that a certain issue is proved." *Whit. Smith, Neg.* p. 40. It will be seen by a pe-

rusal of the authorities that the cases are comparatively rare in which the question of negligence is declared to be one of law, the general rule being that negligence is a question of fact to be determined by the jury. *Railroad Co. v. Delahunty*, 53 Tex. 212.

In the case we are considering, the issue presented by the pleadings and the proof was whether or not the personal injuries received by plaintiff in a wreck on defendant's road were the result of the negligence of defendant in permitting high weeds to grow in such proximity to the track as to obstruct the view of the engineer so that he did not see a cow upon the track until the engine was too close to it to stop the train, and the train in consequence ran over the cow, and was thereby derailed. Unless the statute of Texas provide that a railroad company must not permit weeds to grow on its roadbed and embankment, then the question of whether it was negligence would be one of fact to be determined by the jury. It may be strongly apparent to common sense and reason that it would be negligent to allow weeds to grow about a railroad track in such thickness and rankness of growth as to form a jungle from which cattle could, unseen, spring upon the track at the most unseasonable and dangerous times; but the question is addressed to the reason and common sense of the jury, and not to those of the judge. Under our system of jurisprudence the juries have a province in the courts allotted to them in which they are sovereign, and ordinarily the judge has no more authority to invade their dominion than they would have to enter the territory of law occupied by him alone. This is a wide departure from the common law, but it is statutory, mandatory, and peremptory. "The judge is forbidden by law either to aid a jury, or to infringe upon their province in weighing the evidence or in deciding upon the facts in every case submitted to them. It presupposes that the jury are as competent to find the facts as the judge is to declare the law." *Railway Co. v. Murphy*, 46 Tex. 357; *Railway Co. v. Hill*, 71 Tex. 450, 9 S. W. Rep. 351; *Campbell v. Trimble*, 75 Tex. 271, 12 S. W. Rep. 863; *Cooley. Torts*, 800 et seq. In the case of *Railway Co. v. Hill*, above cited, the supreme court says: "While the opinion in the *Murphy Case*, above cited, has not received the unqualified sanction of the courts, yet it has been substantially followed. We have been cited to no case where it had been held competent for the court to charge upon any particular combination of facts as constituting negligence, save when so declared by law." The *Murphy Case* is also cited approvingly in the case of *Campbell v. Trimble*, above cited. Counsel for appellee cites us to cases, and argues that where a fact is proved, and there is no rebutting testimony, the court can assume it as a fact in the instructions to the jury. This is undoubtedly

true, but in the charge above copied there is no assumption of the existence of facts, but an assumption of what as a matter of law those facts prove, and the jury is told that, if certain facts are proved, they constitute negligence, and they will find for plaintiff. This doubtless would be a good charge under English law, but it is erroneous under the statutes and decisions of Texas. The jury has nothing left to do under the charge but to find that weeds grew on the roadbed and obstructed the view of the trainmen, and the cow went on the track under cover of the weeds, and the train ran over her and was derailed and plaintiff was hurt, and assess the damages. They have nothing to do with negligence; the court has decided it. The charge was an invasion of the province of the jury, and erroneous.

The next question to be considered is whether the error in the charge was a material one, and prejudicial to the defendant, and whether the evidence was all one way and uncontradicted, so much so that it would have been reasonably impossible for the jury to have arrived at any other verdict. The evidence clearly, by a number of witnesses, showed that the weeds were allowed to grow rank and dense, close to the track; that the cow was on or very near the track and engine when first seen; that the engine struck and ran over the cow; that the engine passed over safely, but the passenger coaches were derailed, and the plaintiff seriously and permanently injured; that a cow trail crossed the track where the cow was killed, and cows were in the habit of crossing there, and skeletons of cows were seen near the place of the accident. Had this been all of the testimony, we would not hesitate to say that the charge, though erroneous, could not have injured the defendant. But the engineer, a witness for appellant, swore that his run was between San Antonio and Kerrville. That he had been on the run for a year and six months. That he made a round trip a day over the road on which the accident occurred. That special engineers had made a run over the road once or twice a month, with which exception he did all the running. That he was running the engine attached to the wrecked train. That the appliances were in first-class order. The train had air brakes, and they in good shape. That the wreck was caused by a cow. That the train was running 19 miles an hour, the schedule time being 22 miles an hour. The road was on a curve and embankment, and just over the bridge at the curve was where the cow was struck. That when he first saw the cow she was about 8 or 10 feet from the track. That he applied the brakes. That it was a dark, drizzly night. That his engine had not struck nor killed any cattle at that locality, with him or any one else, so far as he knew. That the place of the accident was a little cut-off place, and he had never seen

any cattle there before. That he had never noticed any marks along there that indicated that it was a usual passway for cattle. That it was hard to tell whether he could have seen the cow sooner if there had been no weeds there, and it had all been smooth, and whether he could have seen her in time to put on the brakes, and have prevented the accident. That he could not have seen the cow down there in weeds at night, because it was a curve. That he could not have discovered a cow very far on a night like that, and that it was such a peculiar place, right across a trestle, and a curve there, and a dark, drizzly night. This witness was, it is true, contradictory in some of his statements, and his testimony presented but slight defense to the charge of negligently permitting weeds to grow on the track, and thereby causing the injury to plaintiff; but meager and unsatisfactory as it was, under our statutes and decisions it became a question of fact for the jury to determine from all the testimony the question of negligence. The determination of it was taken from the jury by the court, and no other section of the charge corrects the error. We have carefully and laboriously considered the evidence in this case, and have consulted all the authorities on the subject within our reach, and, in view of the ample facts to sustain the verdict, and the magnitude of the interests at stake, we have hesitated long before rendering this opinion; but, being convinced that there is error in the judgment, our duty is plain, and the judgment is reversed, and the cause remanded.

PRICE v. HORTON et al.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

PRINCIPAL AND SURETY—RIGHTS INTER SE—DEPOSITIONS—EVIDENCE.

1. If a surety discharges his obligation for a less sum than its full amount, he can only claim against the principal the actual sum paid.

2. When a surety who has discharged his obligation by paying a less sum than its full amount, by falsely representing that he has paid more, induces his principal to pay him the larger amount, the principal may recover back the excess.

3. Where, after depositions offered by defendant have been suppressed because of a defective certificate, defendant, without objection by plaintiff, withdraws them, by leave of court, and has the certificate corrected, plaintiff is not entitled to have them suppressed when again offered, on the ground that their withdrawal and correction was unauthorized.

4. Letters written by defendant tending to prove plaintiff's claim are admissible against him.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by J. E. Price against Horton & Maltsburger. From a judgment for defendants, plaintiff appeals. Affirmed.

Tarleton & Keller and Lane & Mayfield,

for appellant. Oscar Bergstrom and L. N. Walthall, for appellees.

NEILL, J. Appellant brought this suit against appellees, and alleged in his petition that on the 24th day of June, 1885, Horton & Maltsberger as principals, and he as surety, executed to Pauline & Deacon their promissory note for \$1,255, payable 90 days after date, with interest at the rate of 10 per cent. per annum; that upon maturity of the note the principals failed to pay any part of it except the sum of \$400; that he was compelled to pay the same, except \$400, by reason of which appellees were indebted to him in the sum of \$875, with 10 per cent. interest thereon from date of said note, for which he asked judgment. The appellees, by special plea, averred that they failed to pay the note upon its maturity, whereupon appellant obtained from the owners full satisfaction thereof by paying the sum of \$421; that thereafter he fraudulently induced them to believe that he had paid the full face value of the note, with interest, as well as an additional sum of 10 per cent. for attorney's fees, and that by reason of such fraud they were induced to pay him the sum of \$2,120, when in fact they were only indebted to him in the sum of \$421, by reason of which they alleged appellant was indebted to them in the sum of \$1,699, for which amount they prayed judgment, with interest at 8 per cent. from the 1st day of January, 1886. The case was tried by a jury, who returned a verdict in appellees' favor for \$800, with interest at 8 per cent. from January 1, 1886, upon which the judgment was rendered from which this appeal is prosecuted.

Conclusions of Facts.

(1) On the 24th day of June, 1885, the appellees as principals, and appellant as surety, made their note to Pauline & Deacon for \$1,255, payable 90 days after date, with interest at the rate of 10 per cent. per annum. (2) The evidence sustaining the verdict (if it is to be sustained) upon appellees' special plea is: First. The note was placed in the hands of an attorney for collection, who sued on it prior to the time appellant claims to have paid it. While the suit was pending, the attorney offered Price the note for 50 cents on the dollar, which he declined. After the attorney learned that the note was settled by Price, he asked him if he had done any better in the settlement than he (the attorney) had offered, and Price replied that he had done better. Second. Deacon, one of the payees, proposed to sell the note to D. Sullivan, who declined to buy it, but, upon speaking to Price about it, loaned Deacon \$300 on it, and kept the note until he received an order from Deacon instructing him to deliver it to Price on the payment of the amount (\$300) loaned Sullivan. Price

paid him the amount, and he delivered the note to him. Deacon lived in Burney, Tex., after the suit was brought, and his testimony was not procured by either party, nor was the testimony of Pauline. Fourth. After appellant procured the note, he represented to appellees that he had paid the note in full, and upon such representation they paid him, in money, and property at values agreed upon, \$2,100. (3) We conclude, from the evidence recited in our second finding of facts, that Price never paid exceeding \$600 for the note; and (4) appellees paid Price, in excess of the amount paid by him on the note, \$1,500.

Conclusions of Law.

If a surety discharges an obligation for a less sum than its full amount, he can only claim against the principal the sum so paid; (*Southall v. Farish*, [Va.] 7 S. E. Rep. 534; and when a surety has discharged a debt by payment of a less amount than due, and has, by falsely representing that he has paid a greater amount, induced his principal to pay him a larger sum, the principal obligor is entitled to recover from such surety the difference between the amount actually paid in discharge of the obligation and the amount paid by him to the surety. The depositions of J. H. Horton were taken by the defendants, and on motion of plaintiff were suppressed, on the ground that the certificate of the officer taking them was defective. The defendants then asked and obtained leave of the court to withdraw the depositions for the purpose of having the officer correct his certificate. No objection was made by appellant at the time this order was granted. If he deemed it improper, he should have resisted the application, and excepted to the action of the court in allowing the depositions to be withdrawn for said purpose. Instead of doing so, he waited until the depositions were again returned to the court with the proper certificate, and moved the court to suppress them upon the ground that the action of the court in permitting their withdrawal and correction of the certificate was unauthorized. There was no error in the court's refusal to suppress the depositions under these circumstances. It would seem that the court had the power to authorize the deposition to be withdrawn, and the certificate of the officer corrected. (*Creager v. Douglass*, 77 Tex. 483, 14 S. W. Rep. 150. Certain letters written by appellant to J. H. Horton were read in evidence, over his objections, by appellees, and he assigns the action of the court in admitting them as error upon the ground that they were irrelevant, and calculated to prejudice the jury against him. These letters were written in course of correspondence between the appellant and Horton in relation to the note and its payment, and tended to show that Price claimed that he paid the note in

full, and was endeavoring to induce appellees to pay him the entire amount claimed by him to have been paid. If they placed him in an unfavorable light before the jury, he was responsible for it, and should not be heard to complain of it. The evidence to establish that appellant did not pay the full face value of the note was sufficient to support the verdict. There is no error in the proceedings, and the judgment will be affirmed.

GALVESTON, H. & S. A. RY. CO. v. BRIGGS.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCES—EVIDENCE—DEPOSITIONS—MOTION TO STRIKE OUT—INSTRUCTIONS.

1. In an action for personal injuries, caused by a defective drawbar in a freight car, evidence that after the accident defendant changed the old style of drawbars for another kind is inadmissible.

2. Where a witness qualifies as an expert, and states that certain indentations on a drawbar were made by a round instrument, he should be allowed to state what, in his opinion, that instrument was.

3. A notice from plaintiff to take a deposition and the interrogatories showed that the witness resided in Texas. Afterwards plaintiff procured a commission to issue to the District of Columbia, to which the witness had removed, of which fact defendant had no knowledge until after the trial began. The day after the deposition was returned, plaintiff took it from the clerk's office, and kept it until the trial. Defendant did not know of its return until after the trial began. *Held*, that defendant had shown no such diligence in the matter as entitled him to have the deposition stricken out at that time.

4. A report of the accident, not discovered until the trial, cannot be used to impeach the evidence contained in a deposition, no foundation for such use being laid in the interrogatories filed.

5. It is error for the court to group certain facts, and instruct the jury that from such facts, if they are found to exist, negligence follows.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Charles F. Briggs against the Galveston, Houston & San Antonio Railway Company to recover for personal injuries. Verdict and judgment for plaintiff for \$30,000. Defendant appeals. Reversed.

Upson & Bergstrom, for appellant. McLeary & Fleming, for appellee.

JAMES, C. J. This suit was by Charles F. Briggs, a brakeman, to recover damages of appellant for injury received while coupling cars on defendant's line at the town of Schulenburg. The prayer for damages, as it stood when the trial began, was for \$41,000, and the nature of the occurrence was that, while plaintiff was engaged in coupling a Galveston, Houston & San Antonio Railway car with a Morgan car, the former being the moving, and the latter the stationary,

car, the drawhead of the latter rode the drawhead of the former when they came together, and, as plaintiff undertook to escape, his right leg was cut off near the knee, it being run over by the wheel of the moving car, caused in his effort to escape, by his foot being caught by the brake beam of the moving car, it being too low, and there being no handholds on the car by which he could have caught to save himself from falling. The verdict was for \$30,000.

The first and second assignments of error are not well taken. The testimony of witness Cartwright was the statement of an eyewitness, and it was more a recital of what came under his personal observation than of conclusions. The answer of the witness Schaefer was likewise as to a fact rather than an opinion. It is not necessary to notice the fifth and seventh assignments of error, inasmuch as the case will have to be reversed on other grounds, and it is apparent that the questions presented by these assignments will not arise on another trial.

Appellant's fourth assignment of error is as follows: "The court erred in permitting plaintiff to prove on the trial by the witness Cade that the defendant, since the accident complained of by plaintiff, in building new cars and in repairing old ones puts handholds on the ends thereof, and in repairing its Morgan cars defendant takes out the old style drawhead and puts in a new one, of a different kind, over the objection of defendant that the same was irrelevant and improper evidence to be used against defendant, to show negligence or otherwise." The question and answer referred to by this assignment are as follows: "Does the defendant, in building new cars and in repairing them, now have handholds put on the end of them? And does not the defendant now, when it repairs one of its Morgan cars, take out the old style drawhead, and put in a new one, of a different kind?" The answer was: "It did, in order to get the cars of a uniform standard." The object of this evidence was thereby to show negligence or want of proper care on the part of defendant in furnishing safe cars and appliances to its employees at the time of this injury. This was not a legitimate method of proving such fact. Railways are expected to adopt all new and useful devices and improvements relating to their equipment, especially such as promote the safety of operatives and passengers; and it would be inconsistent with this evident obligation to the public and its servants to allow such acts to be used as a confession of previous negligence. The cases cited by appellant sustain their contention, and this error alone necessitates a reversal of the judgment. *Railway Co. v. Hennessey*, 75 Tex. 158, 12 S. W. Rep. 608; *Railway Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336.

The eighth assignment discloses no error.

A question propounded to plaintiff, "Was that the usual position that brakemen occupy in coupling a stationary and a moving car?" was not objected to as being leading, and its subject was a matter of pertinent inquiry, affecting the issue of contributory negligence.

The ninth assignment presents nothing substantial.

We believe, in respect to the tenth assignment, that the witness Cade, having sufficiently qualified, should have been allowed to state what the indentations on the deadwood of the car appeared to have been made by. He had stated they had the appearance of having been made by a round instrument, and it would not have been improper to allow him to go further, and state his opinion as to what was the object that produced them.

The third assignment of error presents the question of whether or not a certain deposition—that of plaintiff's witness Claude Howard—should have been excluded, for reasons that go to the manner and form of taking the same, notwithstanding the objection was first made during the trial. The condition of the deposition was such as would have suppressed it if the objection had been raised before the trial. The reasons assigned why the court should have excluded it on the trial are, in substance, these: The notice attending the interrogatories as served on defendant's counsel showed that the witness resided in Bexar county, Tex. They were crossed by defendant, and afterwards plaintiff's counsel filed with the clerk an application for a commission to issue to the District of Columbia, stating that the witness had removed to said District, and obtained a commission accordingly; that defendant had no knowledge of such application until after the trial had begun; that when the deposition came, on October 28, 1890, plaintiff's counsel on the following day took the same from the clerk's office, and retained it until after the trial had begun; that defendant and its counsel knew nothing of its having been taken and returned until after it was produced on the trial as aforesaid, and hence had not had an opportunity of making the objections before the trial. These grounds were fully verified by affidavit of counsel for defendant, presented with the motion to strike out the deposition. While we do not doubt the propriety of hearing a motion of this nature after the trial has begun, when good ground is shown why the objection was not made at the time enjoined by the statute, we do not consider these grounds as sufficient. If it had been made to appear that plaintiff's counsel had by some word or act led opposing counsel to believe the deposition had not been returned, the case would have been different. Nothing of this kind was shown. On the contrary, the defendant's counsel, having filed cross interrogations to this witness, knew that steps were in progress for taking

his deposition, and naturally should have made some inquiry before the trial concerning it. Inquiry of the clerk must have informed them of its existence, and where it was. We therefore do not believe the terms of their application placed them in an attitude to demand a relaxation of the statutory rule.

After the deposition had been admitted and read, defendant's counsel offered the written report of the accident that had been made by said witness Claude Howard, to contradict his answers contained in the deposition. No predicate had been laid for this impeaching testimony, and the reason urged in favor of its admissibility was that the report was not discovered until after the trial had commenced, and the witness' deposition offered in evidence, and for that reason defendant had not propounded questions to the witness on the subject. The report was clearly inadmissible under the circumstances as shown.

The remainder of the assignments of error go to the charges of the court. By the first, eighth, tenth, and twelfth clauses of the charge the jury are informed that certain facts, if found from the evidence, would constitute negligence on the part of defendant. Negligence is as much a fact to be found by the jury as the facts out of which it proceeds, and it is improper in any case to give in charge to the jury that certain facts constitute negligence, unless by statute that effect is attached to these facts. It is true that such an error in a charge would not occasion a reversal if no other conclusion than the verdict found could reasonably follow from such facts under any and all circumstances, for it would then be harmless. But this cannot be in a case like this, when the testimony is conflicting in many material points. In *Railway Co. v. Gasscamp*, 69 Tex. 547, 7 S. W. Rep. 227, the rule is stated that, whether an act be negligent or not depends upon the circumstances attending it, and the question is for the determination of the jury. In *Railway Co. v. Hill*, 71 Tex. 459, 9 S. W. Rep. 351, this language is used: "We have been cited to no case where it has been held competent for the court to charge upon any particular combination of facts as constituting negligence, save when so declared by law." See, also, *Railway Co. v. Lee*, 70 Tex. 501, 7 S. W. Rep. 837; *Calhoun v. Railway Co.*, 84 Tex. 229, 19 S. W. Rep. 341; *Railway Co. v. Murphy*, 46 Tex. 367. In the case of *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. Rep. 963, the question of what is and what is not a proper charge is elaborately discussed. The court says: "In cases in which the evidence justifies it, a court may instruct that from facts in evidence, if believed by the jury to be true, they may or may not presume the existence of another fact, if in their judgments this be authorized from a careful consideration of the evidence before them. This

would not be objectionable, and sometimes may be proper; but in all cases the existence or nonexistence of the facts the evidence tends to prove, if there be a conflict, as well as the existence or nonexistence of the fact to be inferred from other facts, must be left to the determination of the jury." This would seem to permit a court to state that from certain facts in evidence, if the jury find them to exist, they may infer the other fact of negligence, taking into consideration not only the fact stated, but all the other facts and circumstances affecting the case. This will readily be seen to be altogether different from grouping certain facts, and instructing the jury from such facts, if they are found to exist, negligence follows. And we do not believe such error is remedied by the court in another portion of its charge, (charge No. 9,) where it is stated that "it devolves on plaintiff to prove, and you must be satisfied from all the evidence before you, that one or both of defendant's cars were defective, as hereinbefore stated and complained of by plaintiff, and were therefore not reasonably safe to couple together, and that such defect or defects caused plaintiff's injury, without any negligence on his part which contributed thereto; and it devolves on plaintiff to further show, and you must be satisfied from all the testimony before you, that to have in use such defective car or cars, if any, at the time and place and under the circumstances complained of by plaintiff, was negligence on the part of defendant,—that is to say, you must be satisfied from the evidence that the defendant failed to exercise ordinary care in providing said car or cars for use on its road; otherwise the plaintiff cannot recover, and your verdict will be for defendant. By 'taking care' is meant such care as a person of ordinary care and prudence would exercise under similar circumstances." We doubt whether, after instructing the jury in three or four separate charges that certain facts would constitute negligence, the court would be able to undo the effect of this by declaring that the question of negligence, under all the facts and circumstances of the case, was nevertheless for the jury to determine. The duties of railway companies in respect to furnishing their employees with safe machinery in connection with their employment, and with respect to the inspection of their own and other cars upon their lines, were, in our opinion, correctly stated in charges 1, 2, 3. Nor do we believe that any of the remaining charges are erroneous, except the fourth charge, which reads as follows: "When the drawhead of two cars belonging to another company or to the same company is lower on the one car and is higher on the other car, so that when they come together one rides or overlaps the other, the master is responsible for an accident, caused by a failure to discover and remedy such defect." It appears that there was a conflict in the evidence as to whether the

drawheads were capable of passing each other, and there was evidence tending to show that the moving car, being heavily laden, was depressed thereby, and this rendered the drawheads more liable to pass each other. If the cars, when not loaded, were such that the drawheads rode each other, this would be a patent defect; but if the riding or overlapping of the drawheads was due to the loading of one of the cars, this might be considered only a latent defect, and this charge should, in view of the evidence, if given at all, have been qualified, in order not to be misleading.

The question touching the amount of the verdict need not be discussed in view of the disposition we make of the case. The judgment is reversed, and the cause remanded.

LOUISVILLE & N. R. CO. v. RAINS.

(Court of Appeals of Kentucky. Dec. 14, 1893.)

INJURY BY NEGLIGENCE OF COEMPLOYEE.

In an action by an engineer for injuries received by jumping from a train to avoid running into a wreck on the track, plaintiff can recover if, by reason of failure of those in charge of the wreck, plaintiff was placed in a position which seemed to him one of immediate danger, and he jumped to avoid such danger, as an ordinarily prudent engineer would have done under the circumstances.

Appeal from circuit court, Lincoln county.

"Not to be officially reported."

Action by Thomas Rains against the Louisville & Nashville Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

J. W. Alcorn and Edward W. Hines, for appellant. W. O. Bradley, M. C. Saufley, and W. G. Welch, for appellee.

PRYOR, J. In this action is involved the right of recovery by the engineer (Rains) of one train for the negligence of those in charge of another train, both trains running on the road of the appellant, under the same employment. The two were freight trains, running in the same direction. The train in front was severed in some way, leaving the cars motionless; and the train behind, approaching, ran so near the standing cars of the front train as to indicate great peril to the engineer, who, to save himself from injury, after reversing his engine and giving the signal for brakes, jumped from his train, and was seriously injured. The rules of the company require that when a train is delayed by accident or an obstruction, where there is a curve or down grade in its rear, and such accident occurs in the night, it shall be the duty of the flagman to go back 35 telegraph poles, or 2,100 yards, and place down two torpedoes; and also place, 480 yards from the delayed train, a single torpedo. The explosion of the two torpedoes means that there is an obstruction in the road; "take your train in hand." The ex-

plosion of the one torpedo is, "to stop at once." The testimony for the appellee conduces to show there was no explosion of the torpedoes until within six telegraph poles of the standing train. It was night, and perfectly still, and the explosion of the two torpedoes was the signal only that an obstruction was ahead, and if given when it should have been, all danger would have been averted. It is proper to say that the conductor and brakeman on the delayed train both swear, or the brakeman at least, that the torpedoes were placed at the proper distance, and, if so, the signal was sufficient to apprise the appellee of his danger, and in time for him to stop the train, and prevent placing his life in imminent peril. With this conflicting testimony the case went to the jury, and the only question necessary to be considered in this case arises from the instructions.

The court said to the jury: "It was the duty of those in charge of the broken train to give to a train approaching from the rear all signals which experience and ordinary prudence required, in order to warn those approaching of the danger; and if the jury believe those in charge of the broken train negligently failed to give such signals, and by reason of such failure the plaintiff was placed in a position which to him, in the exercise of a reasonable discretion as engineer, under all the circumstances, seemed one of immediate danger, and that he jumped from his engine to avoid such danger, even though the same might not have been real, and that in such jumping he acted as an ordinarily prudent engineer would have done under the circumstances, and that he was injured thereby, the jury shall find for the plaintiff." This instruction, it seems to us, embraces the law of the case, and the instruction offered by the defendant and refused is the converse of the proposition presented in the instruction given for the plaintiff, and may be said to be as favorable to the plaintiff as the one given; and its refusal was certainly not to the prejudice of the defendant, as it is conceded in the instruction asked that if the signal was not placed so as to give timely notice of the approaching train the company is liable. Negligence is both a question of law and fact, and, if the facts established by the plaintiff are conceded to be true, the court would in this case, as a matter of law, adjudge the company, through its agents, guilty of gross neglect; and, if the facts established by the testimony of the defendant are conceded, the court, as a matter of law, would have given a peremptory instruction. The evidence being conflicting, it was with the jury to say whether or not the plaintiff could recover. Some confusion seems to have originated in this case as to the liability of the appellant for an injury to an employe engaged in running one train by the ordinary neglect only of an employe in another and different train, but both engaged in the same service. The

petition in this case alleges gross neglect, and this is the degree required to be shown before a recovery in a case like this can be had. This court has held, and such is the law, that under the general allegation of negligence in common-law actions for injuries you may establish the degree by proof, and it is not necessary to allege this degree, whether gross or ordinary, in order to make a cause of action, the averment of negligence being sufficient. This court has also held in numerous cases beginning with the case of *Railroad Co. v. Collins*, 2 Duv. 114, that a railroad company is liable for the gross neglect of a superior by which a subordinate is injured when in the same department of service, but for ordinary neglect the company is not responsible. Nor is it material whether the subordinate employe is injured by the neglect of a superior on the same train of cars. If injured, gross neglect must be shown before a recovery can be had. The rule was modified to some extent, or rather enlarged, in the case of *Railroad Co. v. Robinson*, 4 Bush, 507, where the brakeman was injured by the neglect of the engineer. They were not associated in the same kind of service, but were both employed by the company, and engaged as employes in the running operations of the road; and this court, following the rule in the *Collins Case*, held the company liable for gross neglect only. In the case of *Railroad Co. v. Cavens*, 9 Bush, 559, Cavens, an engineer on a freight train, was killed in a collision of trains, caused by the negligence of the conductor of another freight train. The action was for willful neglect, and no other, and the contention on the part of the company was that, as the two occupied the same position in a common service, they were not the agents of the company, but the agents of each other. The court, in the opinion in that case, answered this argument by saying that a different rule prevailed "where one occupies such a position in the service with reference to his collaborer as precludes him from having any control over his actions, or the right to advise even as to the manner in which the service or labor is to be performed." There was no question as to the degree of neglect raised, nor was it contended that a recovery could be had without showing willful neglect; and the language used in the opinion must be considered with reference to the question discussed. It was whether a servant on the one train could recover for an injury caused by the neglect of a servant on another train. It was held that this could be done, and the cases in 2 Duv. and 4 Bush both referred to as sustaining the view presented in the case being considered. The case of *Railroad Co. v. Cavens* only follows the doctrine of former cases, and recognizes the rule that the company is liable for gross neglect, only where a servant is injured by the neglect of another servant in the same department of service, although on different

trains. The authorities have been reviewed in the recent case of *Volz v. Railway Co.*, (Ky.) 24 S. W. 119, (marked for publication.) As gross neglect was found to exist in this case by the verdict rendered, and that verdict is sustained by the evidence, the judgment is affirmed.

CARTER v. McDANIEL.

(Court of Appeals of Kentucky. Sept. 21, 1893.)

DOWER—REVERSIONARY INTEREST—SEISIN—MORTGAGE.

1. Where there is no seisin in fact or in law by the husband at any time during marriage in a remainder or reversionary interest, his widow is not entitled to dower therein.

2. Possession by a son of a portion of his father's land at the time of its allotment to his mother as dower is not such a seisin as will entitle his widow to dower, where he dies before the mother.

3. A mortgage by an heir on his undivided interest in his father's land includes any and all interest which he owns therein, whether in possession, reversion, or remainder.

Appeal from Louisville law and equity court.

"To be officially reported."

Action by Daniel Carter against Mary A. McDaniel to foreclose a mortgage. From a judgment in defendant's favor, plaintiff appeals. Reversed.

Lieber & Lincoln, for appellant. James P. Gregory and R. Reid Rogers, for appellee.

BENNETT, C. J. Harrison McDaniel died intestate in 1875, leaving Ashtrene McDaniel, his widow, and James T., Ida Mary, and Wesley McDaniel, children. Harrison McDaniel's administrator filed a suit for the settlement of his estate as insolvent. Ashtrene McDaniel, the widow, intervened by cross petition, asking the allotment of dower in her deceased husband's land. About 48 acres were allotted to her, and the balance of the land was sold to pay the debts of the deceased. After the allotment of dower the widow sold the same to the appellant, Carter, who held the possession of it until her death, which was in 1890. He also held the possession of it after her death. In 1876, James T. McDaniel mortgaged his undivided interest in said land to the appellant to secure the payment of \$100, and interest at the rate of 10 per cent. At the time of the allotment of dower said James was in the possession of said tract of land, and was forced to surrender the possession of the dower right by order of the court. His death occurred before that of Mrs. Ashtrene McDaniel, the appellant being in the possession of the dower land at the time. To the appellant's suit to foreclose said mortgage, the widow and heirs of James T. McDaniel resisted his right to recover, the widow claiming dower and the heirs their inheritance, and that the appellant was liable to them for rents. A trial of the case resulted in the dis-

missal of the appellant's petition, and judgment over against him for rents.

The objection to the mortgage that the dower interest is not sufficiently described is not well taken, for the mortgage does mortgage James T. McDaniel's undivided interest in his father's land, which includes any and all interests that he owned therein, whether in possession, reversion, or remainder. Was the widow of James McDaniel entitled to dower in the said reversionary interest of her husband? It is well settled by this court that where there is no seisin in fact or in law by the husband, at any time during marriage, in a remainder or reversionary interest, his widow is not entitled to dower therein. See *Butler v. Cheatham*, 8 Bush, 594, and the cases there cited. But the widow contends that, inasmuch as her husband held the possession of the land before dower was allotted, that fact entitles her to dower. We do not think so, because he held the possession subject to the superior and paramount right of the widow to the possession of any part of the land that might be assigned to her as dower; and, when she obtained the possession of the same by virtue of this paramount right, the inchoate right to dower therein ceased. He stood in the same attitude that he would have done if he had lost the right of possession by a superior title. The appellant having held the possession of the dower after the death of Mrs. Ashtrene McDaniel, he is responsible to the heirs of James McDaniel for the rent of the same as long as he held it after her death. The case is reversed, with direction to subject one-third of the dower interest to the appellant's mortgage debt, and, if he has lost the right to interest on the debt, to disallow the same, and to disallow the widow's claim to dower, and to offset the appellant's debt with the amount of rent that may be due the heirs, and for further proceedings consistent with this opinion.

JOHNSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 23, 1893.)

HOMICIDE—SELF-DEFENSE—CONTINUANCE—IMPEACHING ABSENT WITNESS.

1. On a trial for murder, it appeared that defendant feared that deceased would report him to the federal marshal for carrying on an illicit still, and that each had threatened to kill the other. On the day of the homicide, deceased, wholly unarmed, was with others at defendant's still, and defendant two or three times challenged deceased to strike him. Deceased finally did so, knocking him down, but made no attempt to do anything further, when defendant, lying on his back, fired his pistol, killing deceased. *Held*, that an instruction that the killing was not justifiable, on the ground of self-defense, if defendant brought on the difficulty with deceased, "and sought his life," was not misleading as authorizing the jury to convict if the difficulty was brought on by defendant innocently, and with no felonious or unlawful intent.

2. The fact that defendant was on his own premises at the time of the homicide does not render erroneous an instruction that the killing was not justifiable on the ground of self-de-

fense unless defendant had no safe means, or apparently safe means, of protection, but to kill deceased, since the jury, in finding defendant guilty of murder, though he had been knocked down by deceased, must have believed that he was never in any danger from which he was required to escape.

3. A continuance in a capital case on the ground of the absence of a witness is properly denied where four years have elapsed between the finding of the indictment and the trial, and the affidavit as to what the absent witnesses would testify is admitted as a deposition.

4. Where the affidavit as to what an absent witness would testify to is admitted in evidence as a deposition so as to prevent a continuance, the reputation of the absent witness may be impeached by the commonwealth.

Appeal from circuit court, Pike county.

"To be officially reported."

Joseph Johnson was indicted and convicted of murder, and appeals. Affirmed.

Stewart & Stewart, for appellant. Wm. J. Hendrick, for the Commonwealth.

HAZELRIGG, J. The appellant was indicted for the murder of William King at the February term, 1880, of the Pike circuit court. At the March term, 1883, he was put upon trial, convicted, and sentenced to the penitentiary for life. Assigning various errors, he has appealed to this court. It appears that the accused had a stillhouse where he made brandy. King was his neighbor, and appears to have frequented the place; at times getting something to drink, and at other times falling. Appellant was in dread lest King would report him to the marshal, and the proof is abundant that he had on several occasions threatened to kill the deceased. On the day of the killing, when he saw King coming, he said, "There comes a d—d dangerous man;" alluding, as we gather from the proof, to the danger of being reported to the marshal. Several persons had gathered there on that occasion, (Sunday morning,) and were engaged in drinking brandy. Appellant said, during the morning, that "that day's work would ruin him." He was also heard to say, that morning, "I'll be d—d if Bill King shall bother me any more." He got into a row with one Maynard, in which King acted as peacemaker. He said to King that "if he was a friend of Maynard, he was no friend of his." King answered that he was a friend of both. He "gave King the d—d lie" twice or more. This was down at a gate some distance from the stillhouse. Appellant then invited King to go and get a drink, and they walked off arm in arm,—both drunk or drinking; and so, indeed, were all the parties present. Johnson had a gun and a pistol. King was wholly unarmed. After getting perhaps a hundred yards from the gate, Johnson was seen to pat his cheek at King, and was heard to say, by one witness nearer than the others, "Hit me if you dare." He did this two or three times, when King knocked him down with his fist, and was standing over him quietly, with his head

hung down, but making no demonstration or effort to do anything further. He had nothing in his hands. Johnson after falling, and while on his back, fired with his pistol, striking King in front, who thereupon fell. He died the next morning. The defendant proved that, on several occasions previous to the killing, King had threatened to kill him, and on one or two occasions had made some effort to do so, and on the day of the trouble called him a d—d liar. He testified that King knocked him down, and he knew nothing for a short time, and when he recovered consciousness he saw King stooping over him, with a rock in his hand, in a threatening attitude; and is corroborated by his daughter, and perhaps another witness. This is not corroborated, however, by the other witnesses.

The appellant complains of all the instructions given, but most seriously of the qualification of his right of self-defense as given in the fourth. By the first, second, and third instructions was given the law as to murder, manslaughter, and what the finding should be in case of doubt as to the degree of guilt. By the fourth they were told that mere threats made by the deceased to take the defendant's life would not excuse or justify the defendant in taking the life of King, unless they should believe from the evidence that at the time Johnson killed King, if he did kill him, defendant believed, and had reasonable grounds to believe, that King was about to carry out said threats, and take his life, or inflict on him great bodily harm, and that there were no other safe means, or apparently safe means, of protection or escape, but to kill King; and if the jury so believe and find, they should excuse him, on the grounds of self-defense and apparent necessity, and find him not guilty. "unless the jury should further believe from the evidence that, at the time of the killing of King, the defendant brought on the difficulty with him, and sought his life; and, if they should so believe, they cannot excuse or acquit him upon the grounds of self-defense or apparent necessity." In a subsequent instruction the law as to reasonable doubt was given.

It is contended that this court, in Allen v. Com., 9 S. W. Rep. 708, held that the jury should be required to believe beyond a reasonable doubt "that the accused willfully brought on the difficulty with the deceased, for the purpose and with the formed design to kill him, or inflict serious injuries on his person, before they were authorized to deprive the accused of his right of self-defense." It is argued that the difficulty may have been "brought on" with no felonious or unlawful intent, or even innocently; and such, indeed, has been the criticism of this court, in several recent cases, on both the form and substance of instructions similar to this one. The expression "brought on" has been said to give the jury too much latitude; to leave out of view the intention

upon the part of the accused, and the manner of bringing on the difficulty. In quite a recent case it was held to be probably prejudicial to the rights of the defendant, because he had gone to the house of the deceased, when an altercation occurred, which finally resulted in the defendant killing his antagonist. It was thought the court indicated to the jury by his merely going there, innocent though he was of any intention to harm the deceased, that this was "bringing on" the difficulty, in the broad meaning of the instruction. Therefore it was said that the intention with which the difficulty was brought on must be submitted to the jury. That intention must be to kill or seriously injure, and must be confined to the immediate occasion of the killing. In the present case the jury were required to believe that the accused brought on the difficulty at the time of the killing, and was then and there seeking the life of the deceased, before they could deprive him of the right of self-defense. There was no circumstance in proof, prior to the killing, in which the accused figured as an innocent factor, and yet which might have been thought by the jury to have brought on the difficulty, and by which the jury might have been misled. The felonious intent with which the difficulty must be believed by the jury to have been brought on sufficiently appears from the use of the terms "and sought his life." And, manifestly, these terms were not misunderstood. Though not strictly or legally so apt, they are suggestive, to the ordinary mind, of most nefarious design. To seek a man's life is the embodiment of criminal intent, and suggestive of the foulest assassination. And that the accused thus "sought the life" of King at the time of killing him the jury are told to believe before depriving him of the right of self-defense. Moreover, when the commonwealth established the fact that the accused had threatened to take the life of the deceased, it was not then a question merely of his necessary self-defense that was before the jury. His whole previous conduct towards the deceased, and declarations concerning him, were under scrutiny; and by these evidences of hostility and enmity the intention of the accused was properly gathered at the time of the fatal meeting. Under the facts submitted to the jury in this case, we think it impossible for the jury to have been misled by this instruction. By a subsequent and independent instruction the defendant was given the usual law of self-defense without qualification.

It is further urged, on the authority of *Bledsoe v. Com.*, (Ky.) 7 S. W. Rep. 884, that the instructions should not have been qualified by the expression, "other safe, or apparently safe, means of protection or escape;" that as the killing was on the premises of the accused, as in the *Bledsoe Case*, he was not bound to flee, but had the right to stand

and defend himself. But the merest glance at the evidence will show that these words of qualification were not misleading. If ever applicable, it was when the defendant was on his back on the ground. If there was ever a time when he was in danger, or could have reasonably believed himself to be in danger, it was when he was knocked down; and there was then, manifestly, no possible avenue of escape from the danger. It is evident the jury thought that he was never in any danger from which he was required to escape, and so found him guilty of murder.

Instruction 6, as to the jury judging of the character and credibility of the witnesses, was not prejudicial. The effort of the commonwealth to impeach the character of some of the defendant's witnesses, while it affected their general moral character to some extent, resulted in establishing overwhelmingly their reputation for truth and veracity.

The motion for a continuance was properly overruled. The indictment was found in February, 1889, and the defendant was brought to trial some four years thereafter. The affidavit disclosing what the absent witnesses would testify was read as a deposition. Nor did the court err in allowing the commonwealth to impeach or attempt to impeach the reputation of the absent witnesses. Their testimony was placed on the same footing as that of witnesses who were present, and their characters subject to the same tests. We think that the defendant obtained a fair trial, and the judgment is affirmed.

SNELLBAKER v. PADUCAH, T. & A. R. CO.

(Court of Appeals of Kentucky. Sept. 30, 1893.)

CARRIERS—EJECTION OF PASSENGER—REFUSAL TO PAY EXTRA FARE.

1. The rules of a railroad company required passengers without tickets to pay 25 cents extra fare, to be refunded on presentation to a ticket agent of a "rebate check" to be furnished to the passenger by the conductor when he collected the cash fare. *Held*, that a passenger who, with knowledge of such regulation, enters a train without purchasing a ticket when he has opportunity so to do, cannot recover for his expulsion from the train, without rudeness or violence, for his failure to pay the extra fare.

2. Where a passenger could have purchased a round-trip ticket at the station where he took the train, the fact that there was no ticket station at his point of destination, thus preventing him from buying a ticket home, does not excuse his refusal to pay the extra 25 cents.

Appeal from court of common pleas, McCracken county.

"To be officially reported."

Action by W. H. Snellbaker against the Paducah, Tennessee & Alabama Railroad Company for ejection from one of defend-

ant's trains. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

C. H. Thomas, for appellant. Reed and Husbands & Husbands, for appellee.

HAZELRIGG, J. Upon his refusal to pay the conductor of the appellee 25 cents in addition to the usual fare between the station at which he took passage and that of his destination on the line of appellee's road, the appellant was ejected from the passenger coach of the appellee. He sued for damages, and upon a trial of the case the jury found a verdict for the appellee. The appellant's motion for a new trial, based upon various grounds, having been overruled, he has appealed to this court.

The facts established by the proof and necessary to be considered by us in testing the accuracy of the instructions of which the appellant seriously complains, are about these: Upon the completion of its road, in 1890, the appellee established a number of stations between Paducah, in this state, and Paris, Tenn., these being its terminal points. Some of these were ticket stations and others not, being known as mere "flag stations." A rule or regulation was promulgated when it began business, and of which notice was given, to the effect that passengers entering the train without tickets would be required to pay 25 cents extra fare. This sum, however, was to be refunded to them upon presenting to any ticket agent on the road what was called a "rebate check," which was to be furnished the passenger by the conductor when he collected the cash fare. Of the location and nature of these flag and ticket stations and of this rule of the appellee the appellant, from the proof, had ample knowledge. He was a large lumber dealer, quite a traveler, and from his own statements had studied this rebate question. In a discussion with some of the employes of the appellee a few days only before he embarked on the trip resulting in his expulsion from the train, he had declared that the rebate system was unlawful, and that every man who had been put off for nonpayment of this excess had recovered damages. Round-trip tickets were kept for sale at Paducah and other ticket stations for all points on the road, and of this the appellant must have known, as he had traveled over this road, and on divers occasions had gone out from Paducah to flag and ticket stations thereon, using on one or more trips "the rebate check." He resided at Paducah, and on the morning of June 4, 1891, bought a ticket to Oaks, the first station south of that city, and some 9½ miles distant. Upon his request he was allowed, without further charge, to go on to Burkholder's mill, about 1½ miles further, where a large sawmill was being operated, and where he had business. After transacting

his business, he started to walk back to Oaks, the regular flag station, when he was informed by Judge Burkholder that he intended flagging the train at the mill, and he could there take passage. He did so, and when he was approached on the train for his fare he offered the usual sum to the conductor. Some discussion occurred, the conductor explaining his situation, and the necessity for obeying the rules of his superior officers, and the appellant insisting that he knew the law of the case, and his rights in the premises. The dispute ended in the courteous expulsion of the appellant from the train, without rudeness or violence beyond the gentle laying of the conductor's hands on the appellant's arm, and politely helping him down the steps of the train at or near Oaks, from which point the appellant walked to Paducah, and instituted his action. Upon this state of case the court instructed the jury to find for the plaintiff, unless they believed from the evidence that the appellee had adopted the rule or regulation the nature of which we have explained, and that return or round-trip tickets were kept for sale at Paducah for Oaks, and that the appellant, prior to his trip, knew of the rule and of the fact that such tickets were kept; in which event they were to find for the appellee. An additional instruction, defining the measure of damages, was given, and one charging them to find only actual damages if they believed that the appellant had purposely taken passage on the train in order to be ejected, and for the purpose of instituting suit. The first instruction is the only one we need notice.

If the appellant, before starting on his trip, knew that he would be required to pay 25 cents extra upon being found without a ticket, either as he went to or returned from Oaks, and that he could purchase at Paducah, if he desired, a ticket to Oaks and back, and thus avoid this deposit of 25 cents, upon what principle shall he be allowed to complain of his failure to buy a return ticket? Certainly upon none, unless the requirement of the regulation is unreasonable. Whatever knowledge may be attributed to him of the location of these stations and of the rules and regulations of the company, he is not bound to comply with them if they are oppressive, or unreasonably inconvenient to him; but what is there unreasonable or oppressive in this rule? The passenger does not in fact pay a cent additional fare, and this inconvenience of presenting his "rebate check" at the end of his journey and getting his money is not more than the inconvenience of paying his money and getting his ticket when he starts on his trip; and that he may be required to so purchase his ticket before entering the train is admitted on all hands. Even additional fare is allowed to be collected and retained if a passenger fails to provide himself with a ticket

when he can do so. It constantly occurs that when round-trip tickets are on sale, and a careless passenger fails to buy one, and his cotraveler does buy, the one pays more than the other for being carried the same distance. In this case the appellant actually paid no more, and only subjected himself to a very slight inconvenience; while to the road the rule was obviously of great pecuniary importance. But it is urged that, there being no ticket station at Oaks, the appellant could not have bought a ticket en route home, and ought not to be inconvenienced by not having one. The answer is, there was a station at the starting point, at which, by the purchase of a ticket, the supposed inconvenience could have been provided against. We are not considering a case where a passenger has not had an opportunity to provide himself with a ticket. The Oregon and Pennsylvania cases relied on by appellant were such cases. On many of the great trunk lines of the country the collection of this excess is omitted under the express provisions of the regulation when passengers are taken on at "nonticket" stations, or when children or infirm persons are traveling alone, and do not have money sufficient to pay the excess. There are no circumstances surrounding the appellant which render the application of this rule to him unreasonable or harsh. Ordinarily, a prompt compliance with the reasonable requests of these carriers conduces largely to the safety of the traveler; and we hesitate to interfere with rules which, by facilitating the business of the company, inures in the end to the benefit of the public. The burden of proof was properly placed on the company. It admitted the expulsion, and pleaded facts authorizing it, which were denied by the plaintiff. The rulings of the court as to the pleadings and on the competency of the proof were substantially correct. On the whole case, upon the law and the facts as they appear in this record, the finding of the jury could not have been otherwise. Judgment affirmed.

BRILL v. RACK.

(Court of Appeals of Kentucky. Oct. 8, 1893.)

CANCELLATION OF CHATTEL MORTGAGE—FRAUD.

A chattel mortgage given to secure the price of a stock of goods sold by the mortgagee to the mortgagor cannot be set aside on the ground that the sale was procured by the fraud of the mortgagee, where no attempt is made to rescind the sale itself.

Appeal from chancery court, Pendleton county.

"Not to be officially reported."

Action by George Brill against Fred Rack to cancel a chattel mortgage. From a decree in defendant's favor, plaintiff appeals. Affirmed.

John H. Barker, for appellant. Leslie T. Applegate, for appellee.

BENNETT, C. J. The appellant bought the appellee's bakery and fixtures at an agreed price, and gave his note for the deferred payment, and executed a mortgage on said bakery and fixtures to secure the payment of the note. This suit is brought to set aside the mortgage upon the ground that the contract was obtained by the appellee's fraud; but the mortgage is not attacked as having been obtained by fraud. The sole question is, can the mortgage be set aside upon the ground that the contract was obtained by fraud without also seeking to set aside the contract, but permitting it to stand in full force? The mortgage was given to secure the payment of the debt, and, as long as the debt stands in full force, the security ought likewise to stand in full force, unless that is attacked for fraud. To allow the appellant's contention, the case would stand thus: The contract would stand in full force, and the mortgage would be set aside, and the appellant would dispose of the mortgaged property, and the appellee go whistling for his money. The judgment is affirmed.

YOUNG et ux. v. MOREHEAD et al.

(Court of Appeals of Kentucky. Oct. 8, 1893.)

WILL—NATURE OF ESTATE DEVISED—DOWER.

1. A will devised to testator's wife "one-third of my entire estate, real and personal,—that is, she is to have all the land during her life,"—and directed that, "the remaining two-thirds of my estate" should go to his son, and declared that "my will is, at the death of my wife, then all her aforesaid part to go to my son." *Held*, that the words "she is to have all the land during her life" enlarged testator's seeming intention of giving her only a one-third interest in the realty; that she took a life estate in all of testator's land, with remainder on her death to the son; and that the devise of the remaining two-thirds to the son applied only to the personality.

2. Where a remainder-man dies before the life tenant, his widow is not entitled to dower, as he never was in possession of the remainder interest.

Appeal from circuit court, Allen county.

"To be officially reported."

Action by Thomas L. Young and wife against T. J. Morehead and others for the recovery of dower in behalf of Mrs. Young. From a judgment in defendants' favor, plaintiffs appeal. Affirmed.

Porter & McQuown, for appellants. W. E. Settle and John E. Du Bose, for appellees.

HAZELRIGG, J. If, under the will of Alexander Stephens, who died in Allen county in 1852, his widow took an estate for life in his realty, then the son of the testator, who died before the widow, was not seised of any part thereof, and his (the son's) widow is not entitled to homestead or dower. If, however, the widow took an estate in only one-

third of the realty, and the son took the remaining two-thirds, as he lived on the land with his mother, his widow would be entitled at any rate to dower, if not to a homestead. The will, after some preliminaries not necessary to notice, and omitting the fifth clause, appointing an executor, is as follows: "Secondly. That I give and bequeath to my beloved wife, Mary Catherine, one-third of my entire estate, real and personal; that is, she is to have all the land during her life. Third. I give and bequeath to my son, James Crittendon, the remaining two-thirds of my estate. Fourth. If in the event of my son's death in infancy, my will is that his part go to his mother." "Sixth. My will is, at the death of my wife, Mary C., then all her aforesaid part to go to my son, James Crittendon."

The appellants, who were the plaintiffs below, are the widow of James C. Stephens, son of the testator, and her present husband, Thomas L. Young. They insist that the widow of the testator, Mary Catherine, took an estate for life in only one-third of the estate; that this is shown in the succeeding clause, giving the son "the remaining two-thirds;" that the words, "that is, she is to have all the land during her life," are words reducing or restricting the devise of one-third, that stood as one in fee, to a life estate; that the sentence was intended to read, "I give to my wife one-third of my entire estate, real and personal, but she is to have the land thus devised to her during her life only;" and that such must be the construction, if effect be given to the devise to the son of "the remaining two-thirds of the estate,"—a devise importing an immediate taking by him in fee. However plausible this may seem, and is, we are constrained to think that the words, "she is to have all the land during her life," mean just what they say. Having given her one-third of the estate, real and personal, he remembers the infancy of his son, his dependence on his mother, and the fact that upon her will devolve his care and oversight. He enlarges his seeming original intention, and provides that she is to have all the land during her life. This gives her a home, and the small farm of some 140 acres, on which to sustain herself and son. The remaining two-thirds given the son consist, necessarily, of two-thirds of the personal estate, and are taken absolutely. It is all that is left. That which remains is left after the wife gets what is specifically given her. He gets two-thirds of the estate "remaining" undisposed of. Should the son die in infancy, "his part," which is two-thirds of the personality, is given the mother; and upon her death, according to the sixth clause, her part goes to the son, in accord with the construction giving her a life estate, with remainder to the son, should he survive her. The son intermarried with the appellant, and died before coming into possession of this remainder interest; and hence she is entitled to nei-

ther dower nor homestead. The only difficulty we have in adopting this construction lies in the fact that by it we restrict the devise to the son in the third clause to an interest only in two-thirds of the personality; but when we consider the sixth clause in connection with it, giving him the whole after her death, we think the meaning of the testator becomes reasonably plain.

The suggestion is not without force that, by the second clause, the widow took one-third the land in fee, but was to have the whole land during life. Then the "remaining two-thirds" of the estate would consist of realty and personality, though the son would take the realty subject to the life estate of his mother. The sixth clause, however, giving the whole of the wife's part to the son at her death, is inconsistent with her taking one-third in fee, unless, as suggested by counsel, the testator was making provision for the disposition of the wife's part in case of her death before his own, which is not improbable. The only question here, however, is whether the widow took a life estate in the whole. The express words to that effect, it seems to us, must control, even though they be not perfectly reconcilable with the supposed meaning of some other clause. Judgment affirmed.

BOONE v. NEVIN.

ROWAN v. SAME.

(Court of Appeals of Kentucky. Oct. 10, 1893.)

STREET IMPROVEMENTS—ASSESSMENTS.

Under the provision of a city charter that assessments for street improvements shall be made on the whole of each quarter of the square binding on the improvements, all property in a quarter square is subject to the assessments, though the improvements extend along only a part of its face.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Actions by Joseph Nevin against E. H. Boone and others. From judgments for plaintiff, defendants appeal. Affirmed.

James S. Pirtle, for appellants. Lane & Burnett, for appellee.

BENNETT, C. J. The appellants appeal from the several judgments against them enforcing liens upon their respective lots for the cost of improving Bank street, in the city of Louisville. Their sole contention is that the apportionment is not correct. The other parties owning property on said street who were assessed for the purpose of improvements, and against whom there were judgments, do not complain. Bank street runs east and west, and the improvement in question is from Eighteenth to Nineteenth street, which two streets run north from Bank at right angles with that street. On the south side of Bank street Eighteenth street makes

an offset, and, beginning at a point about its width west of the intersection with Bank on the north, runs southeast. And Nineteenth, beginning at a point about 120 feet east of its intersection with Bank on the north, also runs southeast and parallel with Eighteenth; and Griffith avenue, from Nineteenth, runs northeast, and at right angles with Nineteenth street, intersecting Bank at Eighteenth street. Thus it will be seen that the distance between Eighteenth and Nineteenth is greater on the north than it is on the south side of Bank, the line running on the north extending at each end beyond the line between the same streets on the south of Bank, and that on the south side are three singularly shaped squares. The lot of Mrs. Rowan and one of Mrs. Boone's lots are in the square surrounded by Nineteenth, Griffith avenue, Bank street, Eighteenth street and Owen street, which latter street runs parallel with Griffith avenue, from Nineteenth to Eighteenth. The northern angle only of this square is on Bank street. Pirtle's lot is in the triangular square, bounded by Bank, Nineteenth, and Griffith avenue. Mackay's and the greater part of Mrs. Boone's property is in the square south of Bank and west of Nineteenth street. It is clear that Pirtle can have no grounds of complaint, for the reason that if different reassessments should be made it would put an additional burden upon his property. Though the improvement on Bank does not extend the whole distance from Nineteenth to the street west of Nineteenth, and in fact does not reach some of the property which is assessed in that square, the square certainly binds upon the improvement; and as the charter requires the assessment to be made upon the whole of each quarter of the square binding on the improvements, Mackay's and Mrs. Boone's property was properly assessed, for, if their property is not liable to assessment for said improvement, no property in that square, though lying directly on the improvement, could be assessed. The principles announced in the case of *Stengel v. Preston*, 39 Ky. 616, 13 S. W. Rep. 839, fit this case and control it. Judgment is affirmed.

LACHAUSEN v. LAUGHTER.

(Court of Civil Appeals of Texas. Oct. 26, 1903.)

ADVERSE POSSESSION.—DECLARATIONS—EXECUTORY CONTRACT.

1. Declarations of a person in possession of lands, made to others than the owner, are to be considered in determining whether his possession is adverse to the owner.

2. Declarations of a person in possession of land, as to his acquisition of it, and his arrangements for obtaining title, are binding on his wife, though they occupy the land as a homestead.

3. An owner of land who has suffered another to take possession thereof under an executory contract, cannot arbitrarily rescind the

contract, time not being of the essence; and whether or not such other's conduct has warranted her in believing that he has abandoned the contract is a question of fact.

Error from district court, Jackson county; William H. Burkhart, Judge.

Trespass to try title by H. J. Lachausen against C. E. Laughter. Judgment for defendant. Plaintiff brings error. Reversed.

J. D. Owen, for plaintiff in error. A. B. Peticolas, for defendant in error.

GARRETT, C. J. This is an action of trespass to try title to recover four acres of land in Jackson county, a part of the William Alley grant, and known as the "Cook Sugar Mill Tract." Both parties deraign title from Caroline A. Cook as common source,—the plaintiff, Lachausen, through a deed from Mrs. Cook and her children, the heirs of her husband, John F. Cook, deceased; and the defendant, C. E. Laughter, as the surviving wife of G. H. Laughter, deceased, through an agreement for an exchange of lands, entered into between her husband and said Caroline A. Cook and her husband, John F. Cook. The defendant also pleaded the statute of limitations. The evidence showed that G. H. Laughter took possession of the land under said agreement in 1870, and inclosed and put the same in cultivation, and continued in possession thereof until his death, in 1887, and that since then the defendant, his surviving wife, has had possession thereof, and was in possession when this suit was brought, October 14, 1890. Upon the question of limitation, several witnesses testified as to statements made to them and in their presence by Laughter in his lifetime, recognizing the title of Mrs. Cook to the land, and that there had been an agreement to exchange lands, but that it had never been carried into effect. The court submitted the case to the jury upon the question of limitation alone, and charged them, at the request of defendant: "Limitation of ten years is created by acts of possession, and not by declarations of the parties. If the acts of Laughter and wife of adverse possession continuously for ten years were of such a character as to give all parties notice of the adverse claim of defendant and her husband, declarations made by defendant or her husband, made to others than the plaintiff, create no estoppel." Plaintiff requested an instruction that the declarations of a person in possession of lands should be considered by the jury in determining whether or not his possession is adverse to the owner. The charge of the court was erroneous, and for the error the judgment of the court below must be reversed.

As the case will be remanded for another trial, we will indicate our views as to the issues upon which it should be tried. We do not think that the question of limitation arises in the case. The contract was an executory agreement for the exchange of

lands, and the defendant's husband did not claim adversely to this agreement. Laughter being in possession of the land, and the nature of the agreement being to exchange land, we do not think that Mrs. Cook could arbitrarily rescind the contract, time not being of the essence thereof; but it is for the jury to consider whether or not she was not warranted by the conduct of Laughter in the conclusion that he had abandoned it. We are further of the opinion that the question of estoppel arises upon the evidence of Dowd that he bought upon the representations of Laughter; that the land belonged to Mrs. Cook; and that an exchange had been agreed on, but never made. The fact that the land was occupied by Laughter and his wife as a homestead would not prevent Laughter's statements from binding his wife, because they were made with respect to the acquisition of the land, and arrangements made for obtaining the title thereto. For the error indicated the judgment of the court below will be reversed, and the cause remanded.

CHAPMAN et al. v. BRITE.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

ACTION ON ADMINISTRATOR'S BOND — MISAPPROPRIATION OF ASSETS — JURISDICTION OF DISTRICT COURT — OFFSETS — ASSIGNMENT OF ERROR — COLLATERAL ATTACK.

1. In an action against an administrator and the sureties on his bond for misappropriating the assets of the estate, where it is alleged and proven that the administrator's residence is not known, and cannot be ascertained with reasonable diligence, and that he is notoriously insolvent, the action may be discontinued as against him, and judgment entered against the sureties, though no citation was ever served on the administrator.

2. The final settlement of a decedent's estate in the county court is not prerequisite to the maintenance of a suit in the district court to recover the property, or its value, misappropriated by the administrator.

3. An assignment of error that the court erred in overruling specified exceptions to plaintiff's petition is not itself a proposition, within the meaning of rule 30 of the courts of civil appeals, (20 S. W. Rep. viii.) which requires assignments of error to be followed by appropriate propositions or statements, unless the assignment of errors is itself in the shape of a proposition to be maintained.

4. The appointment of an administrator de bonis non by the county court cannot be collaterally attacked where the records of the court do not affirmatively show the appointment to be illegal.

5. An administrator who, without authority from the county court, surrenders a note belonging to the estate, and substitutes another in its stead, executed by only one of the parties to the original note, is guilty of a conversion of the assets of the estate; and his liability and that of his sureties for such misappropriation cannot be discharged by showing that the new note is in existence, and has not been paid.

6. In an action against an administrator and the sureties on his bond for wasting the assets of the estate, the district court has no authority to determine whether claims of the administrator against the estate for compensation and expense of administration are just,

though they have not been approved by the county court.

7. While an administrator who has wasted or mismanaged the estate should be allowed commissions to the extent to which the estate has been properly administered, and on the amount which he or his sureties pay, yet, where judgment is obtained against him for money which he has collected, but for which he has failed to account, commissions should not be allowed him in offset to such judgment.

Appeal from district court, Atascosa county; D. P. Marr, Judge.

Action by W. F. Brite, administrator d. b. n., etc., of P. O'Neill, deceased, against J. J. Birmingham, principal, and John Chapman and others, sureties, on the bond of Birmingham as administrator. From a judgment in plaintiff's favor, the sureties appeal. Reversed.

J. M. Eckford, W. J. Bowen, and W. H. Smith, for appellants. C. A. Culberson, for appellee.

Statement of the Case.

NEILL, J. This suit was instituted by appellee as administrator de bonis non of the estate of P. O'Neill, deceased, against J. J. Birmingham as principal, and John Chapman, R. A. Goins, and W. H. Chapman as sureties, on the bond of Birmingham as administrator of said estate. The plaintiff alleged that he was administrator de bonis non of the estate of P. O'Neill, deceased, duly appointed by the county court of Atascosa county at the February term, 1890; that J. J. Birmingham was duly appointed administrator of said estate in November, 1888, and gave bond as such administrator, and that afterwards, on the 3d day of January, 1889, after citation to file a new bond, he executed and filed a new bond in the county court of said county as administrator of said estate in the sum of \$8,000, payable to the county judge of Atascosa county and his successors, with John Chapman, R. A. Goins, and W. H. Chapman as his sureties, conditioned that the said Birmingham should well and truly perform all the duties required of him under said appointment; that, after filing said bond, there came into Birmingham's hands as administrator of said estate personal property, money, and notes, specifying the various items and value, which he unlawfully wasted and converted to his own use, to the damage of the estate in the sum of \$7,500; that on the 27th of September, 1889, an order was made by the county judge of Atascosa county requiring Birmingham to file a new bond within 20 days, and that on the 9th day of November, 1889, he having failed to file a new bond, as required by the order, he was by said court removed from further administration of said estate, and required to file his final report and make his final settlement as administrator on or before the next regular term of said court, and turn over to the administrator de bonis non all assets in his hands belonging to said estate; that he failed to

comply with said order. The petition further alleged that Birmingham's residence is unknown, and that he cannot be found; that appellee had made demand on said sureties on his bond to make good the default of their principal, and that they refused to do so. The defendants John Chapman, R. A. Goins, and W. H. Chapman answered by pleading—First, to the jurisdiction of the court; second, in abatement alleging the illegality of the appointment of plaintiff as administrator of P. O'Neill, and want of authority in the court to make such appointment; third, the nullity of the appointment of plaintiff as administrator, and want of legal capacity to sue. Said defendants then excepted generally and specially to plaintiff's petition and answered by a general denial, and by specially denying (1) that plaintiff was legally appointed administrator of O'Neill's estate; (2) plaintiff's legal capacity to sue; (3) that J. J. Birmingham is a nonresident of this state, or that his residence cannot be ascertained by reasonable diligence; (4) that he is insolvent; (5) that certain items specified in plaintiff's petition were owned by the intestate, or that certain other items were destroyed, wasted, converted, misapplied, or otherwise improperly used by Birmingham; (6) that Birmingham ever collected \$4,500.60 from Musgrave, Mansfield, and Dorsey, the proceeds of the sale of sheep, or misapplied the proceeds of the note given therefor, and alleged that said note had never been paid. The said defendants specially pleaded that on the application of his sureties, heard on September 27, 1889, Birmingham was required to give a new bond within 20 days from the date of said order, which suspended all his functions as administrator of said estate until said order was complied with, which order was of record, and notice to the purchaser of said sheep and his sureties on said note, and, if there was an arrangement made between Birmingham and the purchaser of said sheep and his sureties on said note, the same was made subsequent to the date of said order of the county court, and was illegal and void, and did not relieve the makers from liability on said note, and that defendants are not liable for the amount for which the sheep were sold; that one John Dorsey is indebted to Birmingham, as administrator of said estate, in the sum of \$1,800, in respect to or growing out of the sale of said sheep, which amount is and was a part of the assets of said estate, and should be deducted from any claim plaintiff may have against said Birmingham in connection with the sale of said sheep, or the proceeds of the same. Defendants pleaded as set-offs, and that certain sums of money, giving amounts, were expended by Birmingham to take care of the property of the estate and in paying the current expenses of running the ranch, and that certain sums were due Birmingham for personal services in the

care and preservation of the property of the estate, and for attorney's fees, commissions and debts of said estate paid by Birmingham. The plaintiff discontinued as to Birmingham. And on the 1st of October, 1890, the plea to the jurisdiction and exceptions of defendants were overruled, and the case was tried by a jury, and verdict returned in plaintiff's favor against the defendants John Chapman, R. A. Goins and W. H. Chapman for \$5,652.60, upon which the judgment was rendered from which this appeal is prosecuted.

Conclusion of Facts.

(1) The appellant, W. T. Brite, was appointed by the county court of Atascosa county on the 8th day of February, 1890, administrator de bonis non of the estate of P. O'Neill, deceased, and qualified as such administrator on the 15th day of February, 1890, upon which day letters of administration were issued on said estate by said court. (2) J. J. Birmingham was duly appointed administrator of the estate of P. O'Neill by the county court of Atascosa county on November 9, 1888, and that on said day he qualified as such administrator. (3) On January 3, 1889, by an order of the county court of Atascosa county, Birmingham was required to file a new bond as such administrator, and on the same day he, as administrator of said estate, with John Chapman, W. H. Chapman, and R. A. Goins as sureties, filed in said court a bond payable and conditioned as required by law in the sum of \$8,000, which bond was of that date, and then duly approved. (4) That as such administrator he received property belonging to said estate, exclusive of realty, of the appraised valuation of \$4,070.50. (5) That the property of the above valuation included 3,600 sheep, appraised at \$3,300, of which 3,462 head were sold by Birmingham under an order of court of February 13, 1889, on a credit of six months, for \$4,500, to Bennett Musgrave, for which sum he executed his note, bearing interest from maturity at 10 per cent. per annum, with F. M. Mansfield and Dorsey as sureties to said administrator. (6) That he sold by virtue of an order of court certain other property, which was appraised in the inventory at \$150, for \$309.75, for which a note was executed. (7) That on the 17th day of September, 1889, John Chapman and R. A. Goins filed their petition in said county court, praying that Birmingham be required to give a new bond, in which petition they alleged that his bond was insufficient in amount; that the character of the property had changed since they became his sureties, and that said administrator had removed, or was about to remove, his property from the state; that he had violated the conditions of his bond, and was incompetent and unfit to attend to the business incident to the estate, and was not conducting the same according to law. Upon this application the court found that Birmingham's bond was wholly insufficient in amount to protect and

secure the state, and on September 27, 1890, ordered that he enter into a new bond in the sum of \$12,000 within 20 days from that date. (8) At the November term of said court an order was entered removing Birmingham as administrator of O'Neill's estate, and requiring him to make final settlement of the estate at the next term of court, and to turn over to the administrator *de bonis non* assets in his hands belonging to said estate. (9) That, on the day judgment was rendered, the assets of the estate, exclusive of the realty which came into Birmingham's possession as administrator of said estate, if accounted for, would have been worth \$7,332.25. In this estimate the amount realized on the sale of property in excess of its appraised value, property not inventoried, and the interest on the notes given for the purchase money of property sold by Birmingham, are considered. (10) That the appellee never received any of the property, or notes of the estate except the note of \$369.75, which he obtained from Birmingham's attorney. That claims allowed and approved were paid by said Birmingham, aggregating \$688.80. (11) That all the other assets of the estate, amounting in the aggregate to \$5,652.60, were appropriated by Birmingham to his own use, or squandered by him. (12) That Birmingham abandoned Atascosa county in October, 1889, and from that time to date of judgment his residence was unknown.

Conclusions of Law.

Before the case was called for trial, appellee entered a discontinuance as to Birmingham. It was alleged and proven that his residence was unknown, and could not be ascertained by the use of reasonable diligence, and that he was actually and notoriously insolvent. The court instructed the jury if it was not proven that Birmingham's residence was unknown, or that he was actually or notoriously insolvent, judgment could not be rendered against appellants. The statute authorized the discontinuance as to him, but made it obligatory on the appellee to allege and establish that his residence was unknown, and could not be ascertained by the use of reasonable diligence, or that he was actually or notoriously insolvent, before he could obtain judgment against the sureties on his bond. This obligation having been met and discharged, shows that no error was committed in entering such discontinuance. It was immaterial whether he had been cited in the case or not; if the conditions prescribed by statute that authorized judgment against his sureties were performed the discontinuance was properly entered.

The final settlement of the estate of decedent in the county court was not a prerequisite to the maintenance of the suit in the district court to recover the property, or its value, misappropriated by the former administrator. The amount in controversy being over \$1,000, the district court had exclusive

cognizance of it. *Fort v. Flitts*, 66 Tex. 593, 1 S. W. Rep. 563. Therefore it was not error for the court to overrule appellants' plea to its jurisdiction.

The third assignment of error is that the court erred in overruling the general exceptions and special exceptions Nos. 1 and 2 to plaintiff's petition. This assignment is not in itself a proposition, nor is it followed by one. It will not be considered. Rule 30.

The fourth, fifth, sixth, seventh, and eighth assignments of error call in question the validity of appellee's appointment as administrator of O'Neill's estate. The question was raised by a plea of abatement, which was not sworn to. The court permitted the records of the county court relating to and affecting the appointment to be read in evidence, but refused to hear parol testimony impugning its validity, and refused to submit the plea to the jury for the reason that the records of the county court did not disclose that the appointment of the administrator *de bonis non* was illegal, and that, said court being one of general jurisdiction over the subject-matter, its action was final and conclusive, and not subject to collateral attack. In this, we think, there was no error. *Lyne v. Sanford*, 82 Tex. 63, 19 S. W. Rep. 847; *Alexander v. Maverick*, 18 Tex. 179; *Hurley v. Barnard*, 48 Tex. 87; *Gulford v. Love*, 49 Tex. 715; *Williams v. Ball*, 52 Tex. 608; *Murchison v. White*, 54 Tex. 83; *Heath v. Layne*, 62 Tex. 691. It is only when the record affirmatively discloses that the court did not have jurisdiction to grant the letters of administration that the order making the appointment can be collaterally attacked. *Harwood v. Wylie*, 70 Tex. 540, 7 S. W. Rep. 789; *Duncan v. Veal*, 49 Tex. 604; and *Merriweather v. Kennard*, 41 Tex. 273,—are cases illustrative of this principle.

On the trial of the case, one J. H. Dorsey having testified that he was one of the sureties on the note of \$4,500 given by B. Musgrave to Birmingham as administrator of said estate, and that upon settlement of said note he gave his note for \$1,800, and had not paid it. Appellants then offered to prove by Birmingham's attorney that he had said note for \$1,800 in his possession; that it was payable to Birmingham as administrator, and had never been paid by him. Upon objection of appellee, the testimony was not admitted. The action of the court in rejecting it is assigned as error. The court gave as its reason for excluding the testimony that the attorney had testified that he did not remember whether the \$1,800 note was made payable to Birmingham personally or as administrator; that the evidence offered was immaterial, because Birmingham, as administrator, had no authority to compromise or take other or different notes or security in lieu of the \$4,500 note given for property which had been sold under an order of court, unless specially authorized by the county court to change such

security, and because the note had not been produced or accounted for or turned over to Birmingham's successor, and was inaccessible to said administrator. The unauthorized surrender of the note for \$4,500, and substituting another in its stead, was a conversion by Birmingham of the assets of the estate to his own use, and renders him and his sureties liable for such misappropriation, and the liability could not be discharged by showing that the new note was in existence, and had not been paid. Nothing short of paying the original note in full would have discharged it. There was no error in the court's excluding the testimony. Nor was there error in the court's refusal to permit appellants to introduce in evidence the account of Oppenheimer against the estate for the purpose of showing that an item therein of \$378.50 was a credit in favor of the estate. The account had been rejected by the county court as a claim against the estate, and was not evidence to prove anything.

The sworn statement and accounts of J. J. Birmingham as administrator of O'Neill's estate, filed in the county court, were not, in and of themselves, in the absence of an order by the county court approving them, admissible in evidence, and if they had been tendered without evidence to show the justness and correctness of the items in the accounts as such claims they would have been properly excluded. But counsel offered witnesses to prove that they were such claims, and the court refused to hear any evidence on the subject, upon the ground that no such claims, credits, or offsets could be admitted or allowed in behalf of appellants except such as had been allowed by the administrator and approved by the county court. All that were so allowed and approved were admitted, but those not were excluded; the court giving as a reason for such ruling that the administrator *de bonis non* had full authority under the statutes to settle with his predecessor, and such claims as had not been allowed to the county court should be presented to him, and then to the county court, and that no claim for expenses or compensation could be legally an offset in this suit which had not been passed on by the probate court, the proper tribunal to adjust such matters in the first instance. We think the assignment of error to the action of the court in excluding evidence offered to establish said claims in favor of appellants as offsets to the liability of Birmingham for misappropriating assets of the estate is well taken. We are of the opinion that the proposition of appellants' counsel under this assignment, "that, the district court having acquired jurisdiction of the cause, its jurisdiction was coextensive with all questions or issues necessary or proper to be ascertained upon a final determination of the subject-matter in issue between the par-

ties," is correct. It is a principle of natural justice and of the law that a person who is proceeded against in a court shall have a full and fair opportunity to make his defenses. This opportunity to the defendant to be heard is an essential element to jurisdiction; and if the appellants had no right to be heard on an issue, if established in their favor, that would lessen their liability, complete justice could not be done in the case, which would demonstrate that the court was without authority to hear and determine it. The district court did not have to wait the action of the county court on matters to be determined that were essential to its proper disposition of the cause, but, having assumed jurisdiction, it was its province to dispose of every issue necessary to the dispensation of complete justice between the parties. If the claims sought to be established by appellants against the estate had been proved as just, they would have pro tanto diminished appellee's demand against them, and it was not necessary to have them allowed and approved in the county court as a prerequisite of their being used as an offset in this case. *Mitchell v. Rucker*, 22 Tex. 67; *Bank v. Cresson*, (Tex. Sup.) 12 S. W. Rep. 819. When Birmingham was discharged by the order of the county court his connection with that court and the estate was severed, and neither he nor his sureties were subject to its orders. *Fort v. Fitts*, 66 Tex. 594, 1 S. W. Rep. 563.

In view of the disposition this court will make of this appeal we deem it proper to suggest for the guidance of the district court on its trial of the issue for which it will be remanded that it has been frequently held by courts of other states that compensation should be refused an administrator if he has been guilty of willful default or gross negligence in the management of the estate, whereby it has suffered loss. *Brooks v. Jackson*, 125 Mass. 307; *Clawson's Estate*, 84 Pa. St. 51, 54; *Smith v. Kennard*, 38 Ala. 695. "The principle upon which compensation is refused is that, where the estate has suffered loss by the dereliction of the administrator, the loss will not be enhanced by the allowance of commissions. But when the loss arising out of misconduct is made up to the estate, so that the beneficiaries get the full benefit of a vigorous and efficient administration, it is neither just nor logical that a bonus should be granted to them in the shape of commissions denied the administrator, thus increasing the burden which, in such cases, usually falls upon the delinquent's sureties. To the extent to which the estate has been properly administered, and on the amounts which he or his sureties pay or make up for the losses by devastavit or maladministration, the administrator should be allowed such commissions as the statute provides. 2 Woerner, *Adm'n*, § 526. But where money is collected

by an administrator, and upon his failure to account for it judgment is obtained against him for the amount so collected, the commissions he would have been entitled to if he had properly accounted for it should not be allowed him in offset to such judgment, for the reason that the administrator *de bonis non* would be entitled to his commissions for collecting the judgment, and, if the defaulting administrator was allowed commissions also, the estate would be made to pay commissions twice for a collection it would not have had to pay for but once if the administrator had discharged his duty. Nor do we think an administrator should be allowed to offset a claim for the value of property of the estate he had appropriated to his own use by expenses incurred by him in its care and preservation, unless his care and preservation enhanced its value, and such enhanced value is made the measure of his liability. In that event, his reasonable expenses in such care and preservation, not to exceed the amount the property has been increased in value by reason thereof, should be allowed. In this suit the nature of the offsets claimed by appellants does not sufficiently appear from the pleadings to enable this court to determine whether, under the principles enunciated, they should be allowed. This can only be ascertained by the trial court upon proper pleadings and proof. In this case every issue was correctly determined by the court below except the one as to certain claims alleged to be in favor of the former administrator, for money paid out by him in the care and preservation of the estate and commissions, and pleaded in offset by appellants; and it is not necessary nor proper that the issues which have been correctly adjudicated in appellee's favor should be reopened and again tried. Therefore the judgment of the district court against appellants for \$5,652.60 is affirmed, subject to any legitimate offsets or credits in favor of Birmingham which were pleaded or hereafter may be pleaded, and which were not considered by the district court in said judgment, that may be established by proper and competent testimony, and the cause is reversed solely for the purpose of allowing appellants to establish by competent testimony, if they can, such offsets as the court below refused to take cognizance of, and to plead and prove any legitimate offsets or credits that may have accrued in their favor since the trial; and the district court is instructed to restrict the trial of the case to such matters, and, if any legitimate offsets are established on such trial, to deduct the amount from said judgment of \$5,652.60, as though such offsets had been proven on the former trial, and as of that date.

McCLESKEY et al. v. STATE ex rel. COTTRELL.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

JUDGMENT—COLLATERAL ATTACK—RES JUDICATA.

1. In an action by the state to dissolve the incorporation of a certain town, defendants offered in evidence a judgment in their favor in a former action brought for the same purpose, which judgment was entered on the refusal of the relators to prosecute the suit, the district attorney of the state offering no objection. *Held*, that it was error to exclude such evidence on the ground that the judgment was void, for, as the court had jurisdiction of the subject-matter, and power to render the judgment, such judgment would not be open to collateral attack.

2. The former judgment was conclusive, the parties to each suit being in contemplation of law the same, though the relators were different, proceedings to dissolve municipal corporations being in legal contemplation for the benefit of the public; and respondents in both cases were in contemplation of law the same, being the officers of defendant municipality, representing the members thereof, who were the real parties in interest.

3. The incorporation of a municipality will be held valid, though a reasonable amount of land not in actual occupation be included; but if the excess is such as, in effect, to evidence an attempted fraud on the law, and territory be embraced that cannot be fairly termed a part of the town, it will be annulled.

Appeal from district court, Wichita county; George E. Miller, Judge.

Quo warranto by the state, on the relation of M. G. Cottrell, against E. A. McCleskey and others, to annul the incorporation of a certain town. Judgment was entered in favor of relator, and respondents appeal. Reversed.

L. C. Barrett, for appellants. J. J. Ofiel, for appellee.

HEAD, J. This suit was instituted by the district attorney of the thirtieth judicial district in the name of the state of Texas, upon the relation of M. G. Cottrell, against the mayor, marshal, and aldermen of the town of Iowa Park, to annul the attempted incorporation of said town, upon the ground that a large amount of territory had been improperly included therein. It is no longer an open question that the statute (Sayles' Civil St. arts. 340a, 500-515) under which it was attempted to incorporate this town only authorized the incorporation of the town proper, and that an attempt to include an unreasonable amount of vacant land will have the effect to annul the attempted incorporation, not only as to that part improperly included, but also as to the real town. *State v. Eidson*, 76 Tex. 303, 13 S. W. Rep. 263; *State v. Town of Baird*, 79 Tex. 63, 15 S. W. Rep. 98; *Ewing v. State*, 81 Tex. 172, 16 S. W. Rep. 872; *Mathews v. State*, 82

Tex. 577, 18 S. W. Rep. 711. 'As an original question, the writer inclines to think it would have more nearly comported with the purpose of the statute in this class of cases to have held the incorporation invalid only as to the land improperly included, unless it could be shown that the votes thus obtained would have changed the result of the election as to the remainder. In this way a number of complicated questions could have been avoided which may arise as to the validity of debts undertaken to be created between the time of the attempted incorporation and the institution of the quo warranto proceedings to test its validity. The supreme court has, however, too firmly established the construction above indicated for us now to undertake to disturb it. The finding of the jury, supported as it is by sufficient evidence, would establish the invalidity of the attempted incorporation of the town of Iowa Park, by reason of there being included within its boundaries an unnecessary amount of vacant land that cannot properly be called a part of said town; but on the trial respondents offered in evidence, to sustain their plea of res adjudicata, a judgment which had previously been rendered by the district court of Wichita county, together with the information and answer in said cause, as follows: "No. 417. The State of Texas vs. H. C. Fuller et al. October 27th, 1891. This day came on to be heard the above-entitled cause, when came the plaintiff by attorney, and the defendants also appeared by attorney, and announced ready for trial, when the following agreement, in writing, was submitted to the court: 'State of Texas ex rel. vs. H. C. Fuller et al. To the district attorney, J. J. Ofiel, and attorneys for relators, Carrigan and Hughes and J. P. Boyd: We, the undersigned relators in the above-named suit, hereby authorize and request you to withdraw our information in said cause, and authorize the defendants to take judgment, as we are satisfied with the present existing corporation of which defendants are officers, and have no desire to prosecute said suit. A. D. Lightsey, E. G. Vick, A. C. Bragg, R. R. Martin, Relators in the Above-Named Suit.' And the court, having inspected the same, and the district attorney representing the state of Texas raising no objection thereto, proceeds to render judgment in accordance therewith. It is therefore ordered, adjudged, and decreed by the court that the relief sought by plaintiff in this suit, to wit, a dissolution of the incorporation of the town of Iowa Park, Texas, be, and hereby is, refused, and that said plaintiff take nothing by this suit. It is further ordered that the defendants, H. C. Fuller, mayor, M. G. Cottrell, marshal, and R. S. Simms, C. W. Orr, W. Gibson, George Ligon, and E. A. McCleskey, as aldermen of said town of Iowa Park, Texas, and their successors in office, go hence without restraint on their rights to

act as officers of said town under the proceedings had to incorporate the same, and that they and their successors are hereby decreed to be legally in possession of said offices under the election and other proceedings for incorporation complained of in plaintiff's information. It is further adjudged and decreed by the court that the costs of this court be taxed against defendants, and that the officers of court have their execution." An inspection of the information upon which this judgment was rendered, and which was offered in connection with it, discloses that the subject-matter of the litigation and the relief sought by the state in that case were the same as in this, the only difference being in the names of the relators and respondents, the relator, Cottrell, in this case, being one of the respondents in that, and the defendant McCleskey being a respondent in both, but in different capacities, there having been an election since the first judgment by which he was promoted from alderman to mayor. When these proceedings were offered in evidence by respondents, the bill of exceptions, says the court, sustained plaintiff's objection thereto, "on the ground that said judgment in said cause No. 417 was void," but the particular ground upon which it was held invalid is not disclosed. We infer however, from appellants' brief, that it was upon the ground that the district attorney had no power to make the agreement upon which it was based.

It is not necessary for us to decide whether the representative of the state in a suit of this kind has power to bind it by such an agreement as this or not. Rev. St. art. 261. It is not denied that the court which rendered this judgment had jurisdiction of the subject-matter of the litigation, and the power to render such a decree, and in such case its judgment would not be subject to collateral attack, even though the agreement upon which it was based would not be binding upon the parties if directly called in question. *Gunter v. Fox*, 51 Tex. 383; *Hollis v. Dashiell*, 52 Tex. 187.

We are also of opinion that the parties to both proceedings are in legal contemplation the same. The state was the complaining party in both, although her relators were different. In *Mathews v. State*, 82 Tex. 577, 18 S. W. Rep. 711, it is well said that these prosecutions are under the exclusive control of the state's attorney, and not the relator's; and the conclusion announced in *Hunnicut v. State*, 75 Tex. 233, 12 S. W. Rep. 106, to the effect that the state's officer might file the information without any relator at all, is approved. In fact, that proceedings by quo warranto to dissolve municipal corporations are, in contemplation of law, instituted for the benefit of the public, and the state is therefore the real prosecutor, would seem to be elementary. 19 Amer. & Eng. Enc. Law, 675, 676. Respondents then proposed

to show that the state, in a proceeding instituted by her, had been, by one of her own courts, to which she had confided the jurisdiction to determine such questions, adjudged not to be entitled to the relief sought by her in this case; and, if the party with whom she was litigating in both cases be the same in law, it would seem that the first judgment should have been held to be conclusive. 19 Amer. & Eng. Enc. Law, 684; High, Extr. Rem. 746. Then, were the respondents in both cases in legal contemplation the same? We think this question must be answered in the affirmative. The parties really interested on the side of the respondents were the inhabitants of the territory sought to be incorporated as the town of Iowa Park, and, as they were too numerous to be joined by name, the state in both suits selected the men they had chosen as their officers as fairly representing the interests of all, and in this suit claims the right to annul the proceedings taken to incorporate as to those who are not parties by name, as well as to those who are; and, under these circumstances, we think she is in no position to deny the right of the parties she has made to effectually litigate the matters in controversy, and should be held bound by a decree in their favor to the same extent they would be bound by a decree in her favor. We think these conclusions fairly deducible from the following authorities and the cases referred to therein: *Ewing v. State*, 81 Tex. 172, 16 S. W. Rep. 872; 1 Freem. Judgm. §§ 178, 170, 157. That the trial in the first suit was upon the merits, and embraced the whole subject-matter of this litigation, in the sense of rendering the decree an effective adjudication as distinguished from a dismissal upon formal grounds, we entertain no doubt. See authorities *supra*.

If this suit was being prosecuted for the benefit of the relator individually, it is probable that he would be estopped by reason of the facts alleged in respondents' answer, but as the state is the real party at interest, and as she would have the right to file the information without any relation at all, we think she could not be concluded because her relator might be were it his suit. *Mathews v. State*, and 19 Amer. & Eng. Enc. Law, 675, *supra*.

We cannot hold the charge of the court subject to the objections urged to it by appellants. Under the decisions of our supreme court, we understand the correct rule to be that the incorporation will be held valid, although a reasonable amount of land not in actual occupation be included; but if the excess be such as, in effect, to evidence an attempted fraud upon the law, and territory be embraced that cannot be fairly termed a part of the town, it will be annulled. The charge of the court was perhaps a little too restricted in conveying this to the jury; yet we are not prepared

to say there is such error therein as should require a reversal. What we have said sufficiently disposes of the other assignments. For the error in excluding the evidence offered to sustain the plea of *res adjudicata*, the judgment of the court below must be reversed, and the cause remanded.

HAMILTON-BROWN SHOE CO. et al. v. WHITAKER et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

WRONGFUL ATTACHMENT—FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEES—WIFE'S SEPARATE ESTATE—DOCUMENTARY EVIDENCE—RECORDS.

1. In an action for damages for wrongful attachment plaintiffs claimed title under a bill of sale by defendant in attachment suit. One of plaintiffs, wife of such vendor, claimed that her husband owed her for money loaned him from her separate estate. The evidence showed that after her marriage she sold 200 acres of land, that the proceeds were loaned to her husband, and that the consideration for the conveyance to her by the bill of sale was the debt thus contracted. *Held*, that the record of the will of the wife's father was admissible to show that the land in question was devised to her by the will.

2. When a will was probated it was incorrectly recorded. Seven years later the court ordered the record amended, and the will properly recorded. *Held*, that the probate court had power in such case to amend the record, under *Sayles' Civil St. arts. 1354, 1355*, empowering the court to correct any mistake or misrecital in its judgments; and the lapse of time was immaterial.

3. Interest due from the husband on the amount borrowed from his wife, and agreed to be paid her for the use of the money, became her separate property.

4. The title to the land devised by the will not being involved, but the issue being simply to trace the source from which the funds used by the husband arose, the evidence of any witness acquainted with the facts was competent to show that it came from the sale of the wife's separate property.

5. The wife's mother, who was one of the vendees in the bill of sale, and one of plaintiffs in the action for damages, died during the pendency of the suit, leaving the wife her only heir. The court below found that the mother's claim was a valid one, and there was no finding or evidence that she participated in the alleged fraud in procuring the bill of sale; but no disposition was made of the interest of the mother descending to the wife. *Held*, that the wife would receive the interest of the deceased mother in the same condition as when descent was cast, and, if the mother's title was free from any fraud as to the creditors of the vendor, the wife would receive it in the same condition.

6. If the vendor owed the debts recited in the bill of sale, and the property transferred was no more than sufficient to pay them, and the purpose of the vendees in purchasing was to collect their debts, even though the vendor was insolvent, and though his purpose was to defraud his other creditors, and the vendees knew that such would be the result of the sale, the sale was not fraudulent as to the other creditors.

7. One of the vendees in the bill of sale was a ward of the vendor. The vendor had used the funds of the ward in his business, and had made no return to the probate court since his appointment. The vendees were re-

quired to give full receipt for their entire claims, and the guardian attempted to pay off his ward in that way, though the property was not sufficient to pay the full amount of the claims. There was no proof that any probate court had passed on and approved the acts of the guardian, but during the progress of the damage suit the ward came of age, appeared in his own behalf in the suit, and adopted all acts done by his guardian in the matter in his behalf. *Held*, that the sale to the ward was illegal, and that he acquired no title. *Cabell v. Shoe Co.*, 16 S. W. Rep. 811, 81 Tex. 104, followed.

8. Where a petition of joint purchasers under a bill of sale sets up in severalty the interest of each of the plaintiffs in the property conveyed by the bill of sale, and defines the interest of each in the property, and the bill of sale was made to them as the several vendees, stating that each should hold the property in proportion to the respective claims of each against the vendor, failure of one of plaintiffs to recover does not prevent a judgment in favor of those who established valid claims.

Appeal from district court, McLennan county; W. M. Flournoy, Special Judge.

Action by the Hamilton-Brown Shoe Company and others against Cyrus Whitaker and others to recover damages for the alleged wrongful taking of certain goods under a writ of attachment. Judgment was entered in favor of defendants, and plaintiffs appeal. Modified.

B. H. Rice and Herring & Kelly, for appellants. J. A. Martin, D. H. Hardy, Goodrich & Clarkson, and L. A. Samuels, for appellees.

FISHER, C. J. The appellants, the Hamilton-Brown Shoe Company, James L. La Prelle, Mrs. Mary J. Talbot, Rosa F. La Prelle, joined by her husband, John La Prelle, and Reagan Dickson, a minor, by his guardian, John La Prelle, sued Cyrus Whitaker, as sheriff of Falls county, and the sureties on his official bond, and the sureties upon an indemnity bond, and Meyberg & Rothchild Bros., attaching creditors. The plaintiffs' action was for damages,—the alleged value of certain goods and merchandise that were taken from their possession by the defendants under a writ of attachment in the suit of Meyberg & Rothchild Bros. against John La Prelle. The appellants claim to own the property so levied upon by the appellees by virtue of a bill of sale executed by John La Prelle on the 15th day of October, 1887, before the levy of the writ of attachment, wherein was conveyed to them this property in payment and satisfaction of debts owing by John La Prelle to each of said plaintiffs in severalty; said bill of sale reciting the debt due by him to each of said parties, and that the vendees are "to have and to hold the property above described unto the several creditors aforesaid [the appellants] in the proportion that their respective demands bear to the aggregate amount of all of said several debts above specified." The amended petition, upon which the cause was tried, alleged that since

the institution of the suit, Mary Talbot, one of the original plaintiffs, has died, and that Rosa La Prelle is her only surviving child, and is entitled to her interest in said property as her only heir. The petition generally alleges that the appellants and Mary J. Talbot were joint owners of the property at the time of the levy of the writ of attachment. And the petition further specifically alleges "that said goods, wares, and merchandise, the value of which is now here sued for, was held and owned by plaintiffs and said Talbot in the proportion that their said several demands, respectively, bore to the aggregate amount of all of said debts, and that they are entitled to recover the value of said goods in like proportion," (here alleging the proportion that each plaintiff is entitled to.) During the progress of the suit, Reagan Dickson became of age, and appeared in his own behalf, and by pleadings adopted all acts done by his guardian in his behalf in the making of said bill of sale and in bringing suit to enforce his rights thereunder. The appellees, by answer, justified the taking of the property under an attachment against John La Prelle; that the conveyance of said property by John La Prelle to plaintiffs was made to defraud his creditors, he being insolvent, and they participating in the fraud; that the claims in settlement of which it was made were fictitious and fraudulent; that, if otherwise, the satisfaction of the debts named in the bill of sale was colorable and pretended, and used simply as a mythical consideration for said sale, and that the real intention of the parties was that the debts should not be paid off, but continue to exist, and that under cover of the bill of sale John La Prelle should retain possession of the goods, and dispose of them for his own benefit; that the bill of sale and condition of payment of the debts expressed therein was not assented to by Reagan Dickson, or by any one authorized to act for him; that long before the debt to Meyberg & Rothchild Bros. was incurred, John La Prelle was indebted to James La Prelle and the Hamilton-Brown Shoe Company, and was insolvent, and his insolvency known to them, and they all entered into a conspiracy to represent John La Prelle as solvent, and having ample means and worthy of credit in general, so that he could buy goods on credit, and obtain goods sufficient to pay plaintiffs, and when he obtained such goods he should turn the same over to them in pretended payment; and in pursuance of such conspiracy they made representations as above stated to Bradstreet's Commercial Agency, etc., whereby John La Prelle obtained credit and got the goods in question, and then transferred them to plaintiffs. They further pleaded that Reagan Dickson never assented to any agreement by virtue of which he could become owner of the goods in controversy, and that he owns no interest in

said goods. The cause was tried below before the court without a jury, and judgment was rendered in favor of the appellees.

The court below found the following as its conclusions of fact and law: "In 1887, John La Prella was merchandising in Marlin, Falls county, and on 15th October of that year, upon examination of his affairs with his brother, James La Prella, concluded that he would be unable to meet his liabilities, as he was indebted in a large amount to various parties. He executed a bill of sale on that day to plaintiffs, to wit, Hamilton-Brown Shoe Company, James La Prella, Mrs. Mary J. Talbot, Mrs. Rosa F. La Prella, and Reagan Dickson, to his entire stock of merchandise, and certain other property mentioned in said bill of sale, to pay certain debts that he claimed to have owed them, the value of the property transferred falling \$1,900 short, however, of the full amount of the indebtedness he proposed to liquidate by the transfer. John La Prella was indebted to other parties in various sums aggregating a large amount. James La Prella is the brother of John La Prella, and stockholder and employe of the Hamilton-Brown Shoe Company. Mrs. Mary J. Talbot was the mother-in-law, and Mrs. Rosa F. La Prella is the wife, of John La Prella, and Reagan Dickson is his brother, and was his ward at the date of bill of sale. The Hamilton-Brown Shoe Company is a corporation, located in St. Louis, Mo., and doing business in Texas, James La Prella being their representative in Texas. The parties to whom bill of sale was made went immediately into possession of the goods, John La Prella acting for his wife, Mrs. Rosa F. La Prella, and his ward, Reagan Dickson. On — day of —, 1887, an attachment was levied on part of the goods by the defendant Cyrus Whitaker, sheriff of Falls county, in favor of Meyberg & Rothchild Bros., to secure a claim of \$342.50 against John La Prella. This was a just claim against John La Prella. The proof showed the claims of the Hamilton-Brown Shoe Company, James La Prella, and Mrs. Mary J. Talbot to be valid and owed by John La Prella at date of bill of sale. The indebtedness claimed to be due Mrs. Rosa F. La Prella was evidenced by a note executed in her favor by her husband, John La Prella; this note being \$2,500 principal, and interest thereon amounting to something over \$600, or enough to make the amount of note. The principal was shown to be funds derived from the sale of 200 acres of land lying in Robertson county. This land was claimed to have been inherited from her father, James Talbot, by will of said James Talbot. The will was not admitted in evidence. As to claim of Reagan Dickson, the proof shows that John La Prella was appointed by the probate court of Grimes county his guardian, and that he

had used his funds in his business, but had made no return to the probate court since his appointment. It was shown that the parties to whom the bill of sale was executed were required to give full receipt for their entire claims, and that the guardian attempted to pay off his ward in same way, and property transferred according to estimate in bill of sale was not sufficient to pay full amount of said claims. There was no proof that any probate court had passed upon and approved the acts of said guardian. It was proven that John La Prella reserved in his hands \$2,500 in notes and accounts, not included in the bill of sale. From the evidence, John La Prella seems to have believed that he owed his wife the amount of money included in his wife's note, except the interest included in said note on the principal debt of \$2,500. The evidence shows the goods levied on in this case to be worth about 55 cents on the dollar. From the facts the court concludes that the note representing the claim of Mrs. Rosa F. La Prella was the community property of herself and husband, John La Prella, and hence, in attempting to settle same by transfer, it accrued to his benefit, and was fraudulent, and conveyed no title to Mrs. La Prella; and as to the claim purporting to be due Reagan Dickson, it was wholly unwarranted in law or morals, and fraudulent. The conclusion of the court on the facts is that John La Prella, and James La Prella for himself and as the representative of the Hamilton-Brown Shoe Company, John La Prella presuming to act for his wife, and Reagan Dickson, conferred together and agreed to execute said bill of sale with a fraudulent intent as to other creditors of John La Prella. Taking this view, the court ordered judgment for the defendants."

The first assignment of error insists that the court erred in not admitting in evidence the certified copy of the record probating the will of James Talbot, deceased. Mrs. Rosa F. La Prella, one of the plaintiffs, the wife of John La Prella, claimed an interest in the property conveyed by the bill of sale executed to the plaintiffs by John La Prella by reason of the fact that she was a bona fide creditor of her husband; that he owed her for borrowed money loaned to him out of her separate estate; that said moneys so loaned arose from the sale of land that was devised to her by the will of her father, James Talbot, deceased. The evidence showed that she, after her marriage, sold 200 acres of land, and the proceeds of the sale—\$2,500—were loaned to her husband, John La Prella. The will of Talbot was offered for the purpose of showing that this 200-acre tract was devised to her by the terms of the will. The evidence shows that the consideration for the conveyance to Mrs. La Prella was the debt that John La Prella owed her for the money that

he had used, arising from the sale of the land. We think that the record of the probate of the will was admissible in evidence, and that the court erred in excluding it. It fairly appears from the certificate of the officer that the paper offered in evidence is a copy of the records required by law to be kept for preserving the proceedings of the probate court. There is no merit in the objection that it does not appear from the certificate that the paper is a copy of the record or minutes of the court.

The second objection, and the only one that we deem important to notice, is that the record offered in evidence appears to be a copy of the judgment of the probate court of Robertson county made in 1889, correcting the record of the former judgment made in 1882, probating the will of James Talbot; the contention being that the court had no power or jurisdiction in 1889 to correct or amend the record probating the will in 1882. It appears from an inspection of the certified copy of the probate records offered in evidence, as shown by the bill of exceptions, that the will of James Talbot was probated in 1882, but that in making and entering the record thereof a mistake was made in the record, and that the will was incorrectly recorded. In 1889, the same court, by an order, corrected this mistake, and ordered that the record be so amended as to make it show the true facts, and that the will be properly recorded. The statute requires the will, together with the probation thereof, to be recorded. This record, when so made, becomes the judgment of the court. Articles 1354, 1355, Sayles' Civil St., empower the court to correct any mistake or misrecital in its judgments; and when its judgment correcting such mistake is collaterally questioned, as is done in this case, we must conclusively presume that the court followed the procedure prescribed by the two articles referred to, and that such judgment is legal. It does not appear upon the face of the record that the court, in correcting its record, did not pursue the law that authorizes the correction to be made. Because the judgment correcting the mistake is made after a long lapse of time from the entry of the original judgment is no reason why the correcting judgment is void, and is not a reason for denying the court jurisdiction to correct its records. It is held that the remedy provided by these statutes is not governed by any period of limitation fixed by law. *Ramsey v. McCauley*, 9 Tex. 106. It will be seen from the findings of the court that it held that the debt due by John La Prelle to his wife was community property, and that he owed her nothing. This is sufficient to show the importance of the will as evidence, for, if it had been introduced in evidence, it would have shown her separate interest in the funds loaned her husband. In this connection it is well for us to say that if, upon another trial, it appears from the evidence that the interest due by La Prelle on

the amount borrowed from his wife was agreed to be paid her for the use of the funds of her separate estate, such interest becomes her separate property. *Hall v. Hall*, 52 Tex. 294; *Martin Brown Co. v. Perrill*, 77 Tex. 204, 13 S. W. Rep. 975.

Holding that the record probating the will of James Talbot was admissible, it becomes unimportant to consider appellants' second assignment of error, concerning the exclusion of the evidence of Romanus Talbot. But we think this evidence, as well as that of any other witness who is able, by a knowledge of facts, to trace the ownership of the funds used by John La Prelle to the separate estate of his wife, is admissible. It is not a controversy in which the title to the land devised to Mrs. La Prelle by the will is involved, but the fact in issue is simply tracing back the source from which the funds arose. Witnesses may know that this fund arose from the sale of property that belonged to the wife in her separate right, and that fact may be proven either by the will or by the evidence of witnesses who are acquainted with the facts. It is not a question wherein the title to the land is involved, for the wife may not have a good title, but, if land came to her in such a way as to be her separate property under the law, and it should be sold, the proceeds of the sale, as between her and her husband, would be her separate property, notwithstanding her title may be inferior to that of some one with a better title.

The appellants' fourth assignment complains that the court below erred in not rendering judgment in favor of Mrs. Rosa F. La Prelle for an amount equal to the interest of her deceased mother, Mrs. Mary J. Talbot, which she inherited after the filing of this suit. Mrs. Mary J. Talbot is one of the vendees named in the bill of sale executed by John La Prelle to the appellants, and it appears from the evidence that she died since the commencement of this suit, and that Mrs. Rosa F. La Prelle is her only heir. The court below, it will be observed, found that Mrs. Mary Talbot was a creditor of John La Prelle at the time the bill of sale was executed, and that her demand, and also that of the Hamilton-Brown Shoe Company and James La Prelle, were valid claims and debts owing by John La Prelle. In the final conclusion reached by the court that the sale, as to the interests of James La Prelle, the Hamilton-Brown Shoe Company, Mrs. Rosa La Prelle, and Reagan Dickson, was fraudulent as to the creditors of John La Prelle on account of the combination and conspiracy between James La Prelle and John La Prelle to defraud the creditors of John La Prelle, there is no finding or disposition made of the interest of Mrs. Talbot that descended to Mrs. Rosa La Prelle. Mrs. Rosa La Prelle would receive the interest of her deceased mother, Mrs. Talbot, in the same condition as it existed when descent was cast; and, if Mrs. Talbot's title was free of any fraud as to the

creditors of John La Prella, Mrs. Rosa La Prella would receive it in the same condition. The effect of the findings of the court would seem to negative the existence of any fraud upon the part of Mrs. Talbot in acquiring her interest or title in the property; and, looking to the evidence upon this issue, it does not establish the fact that she participated in any scheme to defraud the creditors of John La Prella. We do not wish to be understood that we entertain the opinion that the finding of the court on the issue of fraud was correct, or that it was supported by the evidence as to the interest of the other plaintiffs. That is a matter we leave to be determined upon another trial. But, however, in this connection, we wish to say that if it be true that John La Prella was honestly owing the Hamilton-Brown Shoe Company and James La Prella and Mrs. Mary J. Talbot and his wife, Mrs. Rosa F. La Prella, the debts recited in the bill of sale executed by him, and that the property transferred was not of greater value than sufficient to satisfy the said debts, and that the purpose of said parties in purchasing said property was to collect their debts, although John La Prella was insolvent, and although his purpose may have been to defraud his creditors, and such purchasers may have known that such would be the result of the sale, and such facts were known to them, we do not understand that in such case the law would hold the sale fraudulent as to the other creditors. A creditor who has a bona fide claim against his debtor, and in good faith receives a transfer of his debtor's property for the purpose of satisfying his claim, and receives no more than sufficient for that purpose, will be protected, although his debtor may be insolvent, and may intend to defraud his other creditors, and such facts be known to the creditor at the time of his purchase. *Owens v. Clark*, (Tex. Sup.) 15 S. W. Rep. 101.

There was no error in the court's holding that the sale to Reagan Dickson was illegal, and that he acquired no title by virtue of the conveyance executed by John La Prella. This has been expressly decided in the case of *Cabell v. Shoe Co.*, 81 Tex. 104, 16 S. W. Rep. 811. Appellees contend that the judgment of the court should be maintained for the reason that the plaintiffs jointly sue for the damages resulting from the trespass, and that, the recovery failing as to Reagan Dickson, one of the plaintiffs, it should fail as to all. The petition, as before stated, set up in severalty the interest of each of the plaintiffs in the property conveyed by the bill of sale. The bill of sale was made to them as the several vendees, stating that each should hold the property in proportion to the respective claims of each of said vendees against John La Prella. The instrument creating the title defines the interest of each in the property conveyed. This identical question was determined by our supreme court in the case of *Cabell v. Shoe Co.*, 81 Tex.

104, 16 S. W. Rep. 811, where the rights of the parties under this bill of sale were in question. In that case the action of damages was by these appellants against Cabell, United States marshal, and the sureties upon his indemnity bond. All the plaintiffs recovered judgment in the court below, and upon appeal the judgment as to Reagan Dickson was reversed, and it was adjudged that his guardian, John La Prella, take nothing by his action, and judgment was rendered in favor of the other plaintiffs in the case. Although it does not appear in the report of the case, an examination of the record shows that appellant Cabell, by his motion for rehearing, complained of the judgment of the supreme court because "Reagan Dickson, one of the plaintiffs, failed to show any cause of action against the appellants, or any interest in the property seized by appellants. The case stated in the petition of plaintiffs failed to correspond with the case made by the proof." This quotation embraces the entire ground urged in the motion for rehearing. The judgment of the supreme court was that the motion be overruled. Thus it will be seen that this question was passed upon by the supreme court, and determined adversely to the contention of appellees. We believe the correct rule upon this subject is that, where the conveyance is made to satisfy the claims of several grantees or creditors, and the consideration for the purchase emanates from each, as shown in this case, and the pleadings ask relief in proportion to their respective interests, is to hold the conveyance valid as to those grantees or creditors whose purchase was bona fide or supported by a valid consideration, although the title of other joint purchasers or vendees may fail on account of some vice in their pretended purchase. *Bump. Fraud. Conv.* (3d Ed.) p. 488; *Burrill, Assignm.* (5th Ed.) § 117.

The inclination is strong in the court to reverse and render judgment in favor of the appellants with the exception of Reagan Dickson, and especially as to the interests of Mrs. La Prella inherited from her deceased mother, Mrs. Talbot; but, owing to the fact that an issue of fraud is raised by the pleadings, we will reverse the judgment of the court below, and remand the cause for another trial. The judgment below as to Reagan Dickson will stand affirmed, and it is further adjudged that one-fourth of the costs of this appeal and of the court below be adjudged against him, and that the remaining costs of this appeal be adjudged against the appellees.

HAMILTON-BROWN SHOE CO. et al. v. KELLUM et al.

(Court of Civil Appeals of Texas. Oct. 11. 1893.)

Appeal from district court, McLennan county; W. M. Flournoy, Special Judge.
Action by the Hamilton-Brown Shoe Com-

pany and others against Kellum & Botan and others. Judgment was entered in favor of defendants, and plaintiffs appeal. Modified.

B. H. Rice and Herring & Kelly, for appellants. J. A. Martin, D. H. Hardy, Goodrich & Clarkson, and T. L. Samuels, for appellees.

FISHER, C. J. The same judgment will here be rendered, and the same disposition made of this case, as was made of the case of Shoe Co. v. Whitaker, 23 S. W. Rep. 520, (this day decided by this court.)

HAMILTON-BROWN SHOE CO. et al. v. CAMERON et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

Appeal from district court, McLennan county: W. H. Jenkins, Judge.

Action by the Hamilton-Brown Shoe Company and others against William Cameron and others. Judgment was entered in favor of defendants and plaintiffs appeal. Modified.

B. H. Rice and Herring & Kelly, for appellants. D. H. Hardy, for appellees.

FISHER, C. J. For the reasons given in the opinion delivered in the case of Shoe Co. v. Whitaker, 23 S. W. Rep. 520, (this day decided,) we make the same disposition of this case as we made of that case, and the same judgment will be here rendered as rendered in that case. Affirmed in part and reversed and remanded in part.

HAMILTON-BROWN SHOE CO. et al. v. SANGER et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

Appeal from district court, McLennan county: W. M. Flournoy, Special Judge.

Action by the Hamilton-Brown Shoe Company and others against Sanger Bros. and others. Judgment was rendered in favor of defendants, and plaintiffs appeal. Modified.

B. H. Rice and Herring & Kelly, for appellants. D. H. Hardy, for appellees.

FISHER, C. J. For the reasons stated in the opinion delivered in the case of Shoe Co. v. Whitaker, 23 S. W. Rep. 520, (this day decided by this court,) we make the same disposition of this case and render the same judgment as was rendered in that case. There is an additional question that arises in this case that does not arise in the Whitaker Case, above referred to. The letter of Heidelbreck, Friedlander & Co. to the Hamilton-Brown Shoe Company, and the reply, may be considered along with the other evidence in the case, but we do not think it can be given the effect of an estoppel against the shoe company, if such was the purpose of the court below. If the information furnished by the Hamilton-Brown Shoe Company was knowingly false, and for the purpose of inducing Heidelbreck, Friedlander & Co. to act upon it, and extend credit to John La Prella, they may, for this deceit, recover the damages, if any, resulting therefrom. But we do not see how this letter can become important in determining the rights of the Hamilton-Brown Shoe Company as a purchaser under the bill of sale executed by La Prella, except as it may have some bearing as legitimate evidence in determining the issue of fraud in the purchase of the goods; and we understand that this is the extent of the appellees' insistence.

DEMPSEY v. McKENNEL.

(Court of Civil Appeals of Texas. Feb. 9, 1893.)

EXEMPTIONS—"CURRENT WAGES FOR PERSONAL SERVICES"—SET-OFF.

1. The amount due a person for services under a contract by which he agrees to nurse another during an attack of sickness, and by which the latter agrees to pay him well, is "current wages for personal services," within the meaning of the exemption law, though neither the compensation to be paid nor the time of payment is fixed.

2. Under the statutory provision that certain property, including current wages for personal services, "shall be exempt from attachment or execution, or every other species of forced sale for the payment of debts," an employer sued for such wages cannot set off a debt due from the employee to a third person, and assigned to him.

Appeal from Jackson county court; Hugh L. White, Judge.

Action by R. K. McKennell against Daniel Dempsey for personal services. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. Peticolas, for appellant. W. A. McDowell, for appellee.

WILLIAMS, J. The judgment in this cause was affirmed by the court of appeals at its last term at this place, and on motion of appellant a new hearing was granted, and the cause comes to this court for disposition. There are two questions presented, viz.: First, is the amount sued for and recovered below due as current wages for personal services? and, second, if it is, can it be offset by a debt due to appellant from appellee, which is in no way connected with it. The facts are that appellant employed appellee to nurse him during an attack of sickness, promising to pay him well for his services. There was no agreement fixing the compensation to be paid, either for the entire service, or by the hour, day, week, or month. Appellant, before the present suit was brought, but after the controversy arose, procured an assignment from one Mrs. Harrison of a debt which appellee owed her for board, and pleaded it as a set-off when sued by appellee. The court below held that the sum due appellee was for current wages for personal services, and could not be offset as attempted. The meaning of the language "current wages for personal services" was considered by the court of appeals in Bank v. Graham, 22 S. W. Rep. 1101, and the terms were defined as follows: "'Current' means 'running; now passing or present in its progress.' 'Wages' means a 'compensation given to a hired person for his services.' Current wages are such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered; as when the services are to be paid for by the hour, day, week, month, or year. The services rendered must be such

as that the compensation therefor is measured by the time of the continuance of the service." It was held that the fee of an attorney is not exempt from garnishment "where he has not been hired for his services by the day, week, month, or year, to be paid at the expiration of the time for which he was hired, and not in proportion to the business done." In the case of *Sydnor v. City of Galveston*, (Tex. App.) 15 S. W. Rep. 202, the same court held that the fees of a physician, where he was employed, and his compensation fixed, per diem, were exempt. See, also, *Bell v. Live-Stock Co.*, (Tex. Sup.) 11 S. W. Rep. 344, in which the meaning of "current wages" is discussed, but not authoritatively decided. The difference between the first case and this seems to be that in the former an attorney was employed at a compensation fixed for given services, without regard to time, while here no compensation was agreed on, but the amount appellee should receive necessarily depended upon the length of time he served. The mere circumstance that the rate of compensation is not agreed on in advance ought not, in our opinion, to take the case out of the exemption. In nursing, appellee was actually occupied by the day, and his right to compensation accrued as he served, being measured by customary or reasonable rates, rather than by express contract. The remuneration to which he thereby became entitled was certainly "compensation to a hired person for services," and it was current because it was accruing during the continuance of his service, and because its amount was measured by the time of his employment. The contract, it is true, did not fix the rate for stated periods of time, nor can we see anything in the language of the law to make the exemption depend on that circumstance. The accrual of his right to payment for his services was concurrent with the time during which he rendered them. The language used in the opinions referred to must be restricted to the facts of the cases then before the court. We therefore hold that the sum due appellee was correctly held to be current wages for personal services.

The question remains whether or not the demand for current wages could be offset by an ordinary debt. We will limit our decision to the facts of this case. The statute provides that "the following property shall be exempt from attachment or execution, or every other species of forced sale for the payment of debts," and in the enumeration of subjects excepted includes "all current wages for personal services." Rev. St. art. 2335. This language is used with reference to property which is usually subjected to payment of debts by the writs named. The terms employed would be wholly inapplicable if used with reference to debts due for wages alone, for they are not reached by being levied upon. They had already been exempted from garnishment by the consti-

tution and by statute. Id. art. 218; Const. art. 10, § 28. The mention of them in the provision above quoted was intended, in our judgment, to express the legislative intent that they should not be subjected to debt in any way, except by the consent of the debtor; in other words, that they should be exempted from an enforced application to the discharge of debts. We need not consider what discounts arising out of the transactions between the master and servant, pending the employment of the latter, the former may deduct from the wages in settlement. No such questions arise here. The set-off pleaded accrued to another person, and had no connection with the contract of service, so far as the answer alleges. Had Mrs. Harrison garnished appellant, she could not have reached, by that process, the debt which he owed appellee; and, in our opinion, she cannot accomplish the same result indirectly by assigning the claim and having it pleaded as a set-off. This question is decided in *Collier v. Murphy*, (Tenn.) 16 S. W. Rep. 465. See, also, *William Deering Co. v. Ruffner*, (Neb.) 49 N. W. Rep. 771. The judgment is affirmed.

RECEIVERS OF MISSOURI, K. & T. RY. CO. v. OLIVE et al.

(Court of Civil Appeals of Texas. Oct. 4, 1893.)

CARRIERS—LIVE STOCK SHIPMENT—DELAY—WHEN CARRIER LIABLE.

Where a shipment of live stock over a railroad is delayed by a washout on its main line, and the railroad company has a way around the washout, by use of which the delay would be avoided, it is liable to the shipper for damages caused by the delay.

Appeal from Williamson county court; D. S. Chessher, Judge.

Action by Olive & Server against George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas Railway Company, to recover damages caused by delay in the shipment of live stock while being transported over defendants' railroad. From a judgment entered on facts found by the court in favor of plaintiffs, defendants appeal. Affirmed.

The court found that the delay at Ft. Worth was caused by a washout on the main line of the Missouri, Kansas & Texas, between Aubrey and Mingo, and further found that defendant had a way around said washout, via Texas & Pacific to Dallas, and thence over a branch of the Missouri, Kansas & Texas, operated by the defendants from that place to Denison, to a connection with the main line of the Missouri, Kansas & Texas at that point; also that, pending the washout, defendants carried cattle billed over the Missouri, Kansas & Texas, destined to St. Louis and Chicago, around said washout via said route, and that defendants made no effort to carry plaintiffs' cattle by way of said

route, and that, had they done so, plaintiffs' cattle would have reached St. Louis and Chicago on the same days they would have done had they gone over the main line of the Missouri, Kansas & Texas without said delay, and would have been sold on said market on the same days.

Fisher & Townes, for appellants. J. W. Parker, for appellees.

FISHER, C. J. Owing to the questions presented, we have had this case under consideration longer than is usual. In fact, we have had the case under consideration and in consultation since the latter part of last winter, and have carefully gone through all of the questions presented, and conclude there is no error in the judgment of the court below, and it is affirmed.

GULF, C. & S. F. RY. CO. v. RUSSELL
et al.¹

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

CARRIERS — INJURIES TO STOCK IN TRANSPORTATION — MEASURE OF DAMAGES — EVIDENCE — INSTRUCTIONS.

1. In an action to recover for injuries to mules by defendant's negligence in transportation, plaintiff testified that there was a market value at Cleburne for mules, and that he was acquainted with it; that the mule killed in transportation would have been worth \$100 in Cleburne in good condition; that the other mules, by reason of their haggard condition on arrival at Cleburne, were worth \$5 less per head than if carefully transported. On cross-examination he testified that Cleburne was not a place to which such stock were shipped for sale; that he had seen a span of mules of about the same grade as his sell for \$200 at private sale; that he saw an old mule sell there for between \$50 and \$75; that he had never sold or tried to sell stock at Cleburne; that a few days after his stock reached Cleburne he drove them off without selling any of them. *Held*, that a motion to exclude the evidence as to market value of the mules, on the ground that plaintiff had shown on cross-examination that there was no sale for mules at Cleburne, and, if there was, he was not acquainted with it, was properly overruled.

2. A charge that the market value at a given time and place may be proved by evidence of actual sales of like property, and evidence of a single sale is admissible, but not sufficient alone to establish market value, is not objectionable as leading the jury to believe that they might determine the market value from plaintiff's testimony as to the sale of the span of mules in Cleburne.

3. Plaintiff testified that the mules were in good condition when delivered to defendant, and that the train carrying them received a very hard jerk; that, 15 minutes after, he examined the mules, and found one of them dying; and that there was no sign of violence on the mule. The conductor of the train also testified as to the jerking of the train. *Held* not error for the court to refuse a motion for new trial, based on the ground that there was no evidence that the mule was killed through defendant's negligence.

Appeal from Brown county court; R. P. Connor, Judge.

Action by John A. Russell and another against the Gulf, Colorado & Santa Fe Rail-

way Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Appellees sued appellant, claiming damages for the negligent transportation and delay of 22 mules and two horses from Brownwood to Cleburne, Tex., about December 31, 1890, as follows:

One mule killed.....	\$225 00
One mule injured.....	20 00
Shrinkage on twenty-two mules and horses, at \$5 per head.....	110 00
Two extra feeds, necessitated by delay	6 00

Total \$361 00

J. A. Russell, one of the appellees, testified: "There was a market value at Cleburne for mules on January 3, 1891, and I was acquainted with it. The mule that died at Goldthwaite, Texas, would have been worth in the market at Cleburne on or about January 3, 1891, had he arrived there in fair condition, \$100. The other mules, by reason of their haggard and drawn condition, were worth about five to fifteen dollars per head less in Cleburne than they would have been worth had they been delivered there within a reasonable time, and proper care had been used in transporting them. The mule that was crippled was by reason of said injury depreciated in value in said market fifteen to twenty dollars, in addition to the depreciation by reason of his haggard and drawn condition." Cross-examination: "After getting to Cleburne I drove the stock into the country, about three miles from Cleburne, where I kept them three or four days. I never carried the stock to Cleburne to try to sell them. There were no dealers in stock in Cleburne, and it was not a place to which such stock was shipped for sale. I never shipped any there before or since. Whilst in Cleburne I saw a span of mules sell for \$200 at private sale. They were partly broken, and about the same grade as mine. Broke mules is worth more than unbroke mules. This span of mules I saw sold were not well broke. I saw another mule sell in Cleburne on the same day. He was a large broke mule, but was old and stove up. Don't know his age, but he showed to be stove up. He sold for between fifty and seventy-five dollars. These were all the sales I saw, and they were private sales. Never took stock to Cleburne to sell them. I offered them for sale. Did not offer them in Cleburne, and tried to sell them where I had them in the country, but never got an offer for them. About four days after stock reached their destination I drove them from the vicinity of Cleburne without having sold any of them. I did not keep them at Cleburne because the market was not as high as I was looking for." Redirect examination: "My testimony with reference to market value of the mules, and depreciation in their value by reason of damage by delay, etc., also applies to the two horses. I saw horses sell in Cleburne, January 5, 1891, but they were sold

¹ Rehearing pending.

at stray sale, and they were inferior horses, and do not remember what they brought. I saw no other horses sell there. Whilst at Cleburne I inquired as to the value of horses and mules, and learned what such mules as mine could bring there." Plaintiff further testified: "The mules and horses were in good condition when delivered to defendant at Brownwood. They left there a few minutes after being loaded. At some point between Mullen and Goldthwaite, the train carrying our mules received a fearfully hard jerk. Do not know the cause of the jerk. I and Dan Lindsey were sitting in the caboose at the time, and it threw me from the seat, and threw Dan Lindsey from the seat, and nearly out of the car. Do not know the distance from Mullen to Goldthwaite, but the train was not long after the jerk in getting to Goldthwaite. After its arrival, I found the mule down in the car, and dying. It died in a few minutes after I found it." Cross-examination: "The sudden jerk of the train I testified about occurred about fifteen or twenty minutes before we reached Goldthwaite. When the train reached Goldthwaite, it stopped at the depot and I went to the car containing our stock, and they were all upon their feet, and I noticed nothing wrong with any of them. I merely looked through at the bottom of the car, and saw that none of them were down. From the car I went to hotel, and got a lunch, and then returned to caboose. I passed along by the side of the car containing our stock, but noticed nothing unusual. Train moved down about a quarter of a mile, and stopped at stock pens. I then went to our stock, and found a mule lying down on his side, and apparently in the agonies of death. I got into the car, and lifted the mule's head, but, being afraid of being kicked by the others, I left the car, and in a few minutes the mule was dead. I do not know what caused the mule's death. The only thing that had occurred to the train was the sudden jerk before testified to. I saw no sign of violence on the mule." Dan G. Lindsey, for plaintiff, testified as to sudden jerk substantially the same as plaintiff J. A. Russell. C. A. Alkin testified as follows: "In January, 1891, I was freight conductor on defendant's road, and as such conductor had charge of the train that transported plaintiffs' horses and mules from Brownwood to Goldthwaite. Stock received no rough handling in switching whilst in my charge. We had a heavy train, and stalled once or twice, and in starting received considerable jerking. Upon arrival at upper depot at Goldthwaite, where I turned over train to yardmaster, I noticed nothing wrong with the stock. My stock report was made at depot at Goldthwaite, and signed by J. A. Russell." The report of stock shows the condition of plaintiffs' stock was "good," and has a certificate attached as follows: "I certify that the movement

and condition of stock, as above given, is correct. In charge of stock, J. A. Russell." W. E. Pardue testified: "I examined plaintiffs' mule after he was found dead, and found no bruises, or anything whatever, to indicate that death was caused by violence. I had a conversation with plaintiff about the mules after forty-five minutes after their arrival here. I returned with him to the yard, and examined the mule, and found no bruises or anything to indicate that the mule had come to his death by violence. Plaintiff then told me that, before he notified me of the death, he got into the car, and examined him, to see if he had the lockjaw. That plaintiff stated to him that he (plaintiff) could not account for the mule's death."

O. H. Lee and J. W. Terry, for appellant.

1. On the trial of above cause, and after plaintiff J. A. Russell had been examined in chief, and defendant had cross-examined him, defendant moved the court to exclude from the jury all evidence of said witness as to market value of horses and mules in Cleburne, Tex., on the ground that it appeared for the first time on cross-examination of said witness that if there was any market for horses and mules at Cleburne, Tex., on or about the 3d day of January, 1891, the witness was not acquainted with it, which motion the court overruled, and which ruling is assigned as error.

2. The court erred in not sustaining defendant's motion to strike out all the evidence of plaintiff J. A. Russell as to the market value of the horses and mules at Cleburne, Tex., on January 3, 1891, it having been made to appear, after said witness was re-examined and cross-examined, that, if there was any market value at said time and place for horses and mules, he was not acquainted with it.

3. The court erred in the following paragraph of its charge: "The market value at a given time and place may be proved by evidence of actual sales of like property, and evidence of a single sale is relevant and admissible, but not sufficient alone to establish market value."

4. The court erred in refusing the following special charge asked by defendant: "You are instructed in this case that it is not enough for plaintiffs to show the death of the mule, but the burden of proof is on plaintiffs to show, not only that the mule died, but that its death resulted from injury received by the mule, and which injury was caused by the negligence of the defendant, its agents or servants."

5. The court erred in overruling defendant's motion for a new trial, for the reason stated in the first ground thereof, to wit: (1) Because the verdict is unsupported by the evidence, in that there was no evidence that the mule came to his death through any negligence on the part of defendant, its agents

or servants; but, on the contrary, the evidence tends strongly to show that the mule died from some disease.

KEY, J. After examining the record and briefs in this cause, we conclude that the judgment should be affirmed; and it is so ordered.

RIO GRANDE R. CO. v. CROSS et al.
(No. 314.)¹

(Court of Civil Appeals of Texas. Oct. 19, 1893.)

CARRIERS—ACTION TO RECOVER FOR GOODS LOST—MEASURE OF DAMAGES—INTEREST—OBJECTION TO AGREED STATEMENTS OF FACTS—WHEN REVIEWED—BILL OF LADING—CONSTRUCTION.

1. Where a railroad passes into the management of trustees under authority conferred by a mortgage of the company's property and franchises, such trustees become the company's agents, and it will be liable for goods lost in transitu over the road during the trustees' management; Sp. Act 12th Leg. pp. 189-192, under which said road was organized, and which authorizes it to raise money by sale of bonds secured by mortgage on its road and franchises, not being intended to empower it to surrender control of its road to others, and to relieve itself of its liabilities to the state and public.

2. Where a statement of facts was agreed on by the parties, and when offered on trial defendant objected to it as an entirety, the objections not showing the particular parts deemed objectionable, the action of the trial court in overruling the objections will not be reviewed on appeal.

3. Where, in an action to recover for goods lost in transitu over defendant railroad company's road, there was judgment for plaintiff, the court properly allowed interest on the value of the goods at 8 per cent. until the law changing such rate to 6 per cent. went into effect, since plaintiff was entitled to the current rate of legal interest on the value of the goods lost.

4. Bills of lading issued by the Morgan Steamship Company for the shipment of goods via defendant's railroad and the Morgan line of steamers to New Orleans, provided that the goods should be conveyed on the steamship direct to New Orleans, the acts of God and the country's enemies, fire at sea, etc., excepted, neither the ship nor owners thereof being liable for loss from such causes. *Held*, that the limitations of liability contained therein applied only to carriage by ship.

Appeal from district court, Cameron county; John O. Russell, Judge.

Action by J. S. and M. H. Cross against the Rio Grande Railroad Company. There was judgment for plaintiffs, and defendant appeals. Affirmed.

James B. Wells and Hume & Kleberg, for appellant. McCampbell & Welch, for appellees.

GARRETT, C. J. This suit was brought by the appellees in the district court of Cameron county against the Rio Grande Railroad Company to recover from it the value of certain Mexican eagle dollars and a package of gold coins of the aggregate value of \$9,110, alleging that on the 17th day of January, 1891, they delivered the same to the appellant in

the capacity of common carrier for hire, to be transported by it from the city of Brownsville to Point Isabel, in Cameron county, Tex., there to be delivered by it to the Morgan line of steamers; that appellant failed to transport and deliver said articles of value, whereby it became liable to appellees for the value thereof, with legal interest. Appellant answered by a general demurrer and general denial. The case was tried without a jury, and resulted in a judgment for the appellees for the value of the money as alleged, together with interest thereon, at the rate of 8 per cent. per annum from January 19, 1891, to July 13, 1891, and from that date at the rate of 6 per cent. per annum. The case was tried upon an agreed statement of facts, from which the following condensed statement is made:

(1) The appellant, the Rio Grande Railroad Company, is a corporation created by special act of the legislature of the state of Texas approved August 13, 1870, with authority to construct, equip, maintain, and own a railroad from Point Isabel, on the Laguna Madre, to Brownsville, on the Rio Grande. By section 5 of said act it is provided that "said company shall have power to borrow money or to purchase property upon its own credit for the purpose of constructing and maintaining its railroad, and may issue bonds and obligations therefor, payable at such time and place, and at such rate of interest, in the lawful money of the United States or of any foreign country, as the directors of said company may elect; and to secure the payment of said bonds or obligations may mortgage its road, its capital stock, its corporate franchises, and any or all of its property, real and personal, or any part or portion thereof, in such manner and form as said company or its directors shall deem best and expedient." Sp. Act 12th Leg. pp. 189-192. (2) To raise money necessary to build said railroad, appellant, on the 1st day of July, 1872, issued and sold its bonds to the amount of \$150,000, and to secure their payment made and delivered to H. M. Woodhouse and Joseph Rudd, Jr., trustees, a mortgage on all the property of the road, and all corporate franchises held or exercised by said railway company. Said mortgage is of record in Cameron county. (3) By the provisions of said mortgage, in case of default in the payment of interest on any of said bonds for the period of six months the trustees were authorized to take, enter into and upon, all and singular the premises conveyed, and to have, hold, and use the same, operating by their superintendents, managers, receivers, or servants, or other attorneys or agents, the said railway, etc., with the full charge and management of the railroad, to the exclusion of the company, in order to pay off the mortgage; but if the yearly income should fall short of the expenses, etc., the said trustees were authorized to sell. (4) About the 1st day of January, 1891, Simon Celaya and Feliciano

¹ For additional findings, see 28 S. W. Rep. 1004. v.23s.w.no.11—34

San Roman, who were made substitute trustees under said deed of trust, by virtue of the aforesaid power vested in them under said instrument, went into the exclusive possession, operation, management, and control of said railroad line, its property, franchises, etc., and ever since that time up to the time of trial had been and were continuously and exclusively in the possession of and control and management of said railroad, and so in all things operating and running said road, and were especially doing so on the 19th day of January, 1891, and up to the time of trial. (5) On said last-named day said trustees, Celaya and San Roman, through and by their agent and employe, C. Martinez, received from appellees at their railroad office in Brownsville, to be transported to the end of the line of said railroad, and delivered to the Morgan Steamship Line, (of the Southern Pacific Steamship Company's Line,) 10,500 Mexican eagle dollars and a package of gold, together of the value of \$9,110. By their said agent said trustees gave to appellees a memorandum in writing, stating the quality, character, order, condition, and value of the aforesaid property, as follows: "Brownsville, Texas, January, 1891. Forwarded by J. S. and M. H. Cross, in good order, by the Rio Grande Railroad, the following property, to be delivered in like good condition at Brazos, unto Morgan No. 716. [Description.] [Signed] C. Martinez." Appellees at once, and before the shipment of the money by the trustees, delivered said written memorandum to the agent of the steamship company, who took it up, and issued to appellees four bills of lading. (6) The aforesaid trustees, in their usual course of operating, running, managing, etc., of said railroad, caused said articles of value to be laden on the regular train of said railroad on the morning of said 19th day January, A. D. 1891, and started for its terminus at Point Isabel, and when said train had proceeded on its course about 15 miles from the city of Brownsville it was attacked by Mexican bandits and robbers, numbering 10 or 12 persons, its engine and part of its cars derailed, and some of them burned, and the train and the persons thereon robbed, and the persons in charge of said train and others thereon overawed and controlled by force of arms, and said train robbed of more than \$20,000, and, among other, all of the above articles of value, by the said bandits and robbers, who made off with their booty, and the said trustees were unable to deliver the said articles of value, as they had agreed, at the terminus of said road to said Morgan steamer, and no part of the same reached the consignee of appellees. (7) February 5, 1891, appellees demanded of S. Celaya and F. San Roman, as trustees of the Rio Grande Railroad Company, that said railroad company deliver to them the property, or, in its absence, its value, as per the bill of lading. The trustees,

having declined to pay appellees, bring their suit against the Rio Grande Railroad Company alone. Appellees admit that the mortgage under which the trustees have taken possession of the railroad to the total exclusion of the company was duly executed in accordance with law and the charter of the company. (8) The bills of lading issued by the Morgan line of steamers were for the shipment of the money via the Rio Grande Railroad Company and Morgan line of steamers to New Orleans, La. It stipulated that the money was to be "conveyed upon said steamship direct or transhipped as aforesaid, to the port of New Orleans in like good order and condition, (the acts of God, the country's enemies, fire at sea or in port, accidents to or from machinery, boilers, or steam, restraint of government, pirates, robbers, or thieves, collisions at sea or at port, and all and every danger of the seas, river, and stream navigation, of whatever nature or kind soever, excepted, and neither the ship nor owners thereof being liable for loss from any of the causes above excepted,) and there to be delivered," etc.

Conclusions of Law.

1. We do not deem it necessary to enter upon an examination of the authorities or a discussion of the cases with the view to determine the weight of authority from this and other states upon the question presented by appellant as to its liability as a common carrier while its railroad is being operated by trustees under authority conferred by a mortgage of its railroad property and franchises, because we are of the opinion that in this state a railroad company cannot voluntarily surrender the management and control of its railroad to others, and thereby relieve itself of its duties and liabilities to the state and to the public. This has been practically decided by our supreme court in the case of Woodhouse v. Railroad Co., 67 Tex. 416, 3 S. W. Rep. 323, wherein the appellant here was appellee in a cause of action that arose during the management of the same trustees. It does not appear that in that case the court had under consideration the clause in the defendant's charter, which is a special act of the legislature, authorizing the company to raise money by the sale of bonds, and to secure the same by a mortgage of its road, its capital stock, its corporate franchises, etc., in such manner and form as said company or its directors might deem best and expedient; but we are of the opinion that the power to mortgage contained in the charter is not sufficient to authorize the defendant to surrender control of its railroad and the management thereof to other persons, and relieve itself of its liabilities and duties to the state and public. We hold, therefore, that the trustees, Celaya and San Roman, must be treated as the agents of

the defendant for the management and operation of its railroad in the discharge of its duties as public carriers, and that the defendant is liable for the loss occurring during such control.

2. The case was tried upon a statement of the facts which had been agreed upon and filed by the parties. When it was offered on the trial the defendant objected to it as an entirety for the several different reasons stated in the exceptions to its admission appearing at the end of the statement. The objections do not point out the particular portions of the evidence objected to, nor does it appear what part of the evidence was offered by the defendant. We do not feel that we should be required to pass upon a number of objections addressed to the entire evidence, especially when it is not shown what part of the evidence was subject to the objections; but we do not think there was any error in overruling the objections if they should be entertained, because the defendant was liable for the acts of the trustees as its agents, and it was not necessary, in order to authorize the introduction of the evidence, that such agency should be averred. The surrender of the control of its railroad by the defendant was its voluntary act, and not in obedience to authority of a court, as in the case of a receiver.

3. It is now well settled that legal interest may be allowed upon the value of the goods as a part of the measure of damages when a common carrier has not delivered them according to contract. *Railway Co. v. Jackson*, 62 Tex. 212. The court in this case, sitting as a jury, awarded interest at the rate of 8 per cent. per annum until the law went into effect changing the rate to 6 per cent. The objection is made that 6 per cent. only should have been allowed for the entire time. It would seem that the object of the rule is to give the shipper the current rate of legal interest on the value of his property which has been lost. This the court has given, and we see no error in its action. There is authority for this rule in cases of contract, where the rate of interest is not stipulated. *White v. Lyons*, 42 Cal. 279, and other authorities cited by appellees.

4. The evidence does not show that the shipment of the money was interstate, but, if it did, the limitation of liability by the steamship company in its bill of lading applies only to carriage by the ship.

5. Appellant's proposition that in any event it was only liable for negligence because the carriage was gratuitous, the record not showing that it was for compensation, is not supported by the assignment of error under which it is stated. There being no error, the judgment of the court below will be affirmed.

RIO GRANDE R. CO. v. MUNOZ' SUCCESSORS. (No. 315).¹

(Court of Civil Appeals of Texas. Oct. 19, 1893.)

Appeal from district court, Cameron county; John C. Russell, Judge.

Action by L. Munoz' successors against the Rio Grande Railroad Company. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

James B. Wells and Hume & Kleberg, for appellant. McCampbell & Welch, for appellees.

GARRETT, C. J. Appellees brought this suit in the district court of Cameron county to recover of appellant as a common carrier for the failure to deliver certain money intrusted to it for transportation from Brownsville to Point Isabel, there to be delivered to the Morgan Steamship Company. The facts upon which the liability of the defendant is sought to be established are identical with those of No. 314, —*Railroad Co. v. Cross*, 23 S. W. Rep. 529,—and the questions presented are the same. The case was tried upon an agreed statement of facts, and we refer to the case of *Railroad Co. v. Cross*, above mentioned, for our conclusions upon the same. Our disposition of the questions presented in the *Cross Case* are here adopted for the determination of this case. The judgment of the court below is correct, and will be affirmed.

RIO GRANDE R. CO. v. PETITPAIN. (No. 316).¹

(Court of Civil Appeals of Texas. Oct. 19, 1893.)

Appeal from district court, Cameron county; John C. Russell, Judge.

Action by L. N. Petitpain against the Rio Grande Railroad Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

James B. Wells and Hume & Kleberg, for appellant. McCampbell & Welch, for appellee.

GARRETT, C. J. Appellees brought this suit in the district court of Cameron county to recover of appellant as a common carrier for the failure to deliver certain money intrusted to it for transportation from Brownsville to Point Isabel, there to be delivered to the Morgan Steamship Company. The facts upon which the liability of the defendant is sought to be established are identical with those of No. 314, —*Railroad Co. v. Cross*, 23 S. W. Rep. 529,—and the questions presented are the same. The cause was tried upon an agreed statement of facts, and we refer to the case of *Railroad Co. v. Cross*, above mentioned, for our conclusions upon the same. Our disposition of the questions presented in the *Cross Case* are here adopted for the determination of this case. The judgment of the court below is correct, and will be affirmed.

JORDAN v. JORDAN.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

CUSTODY OF CHILDREN—RES JUDICATA.

1. Rev. St. art. 2871, empowers the district court, in all case of separation between

¹ Rehearing denied.

man and wife, to give the custody of the children to either the father or mother, as it shall deem proper. *Held*, that the award made by said court in divorce proceedings is conclusive on the parents, so that neither of them can thereafter petition the county court for guardianship of the person of a child whose custody was awarded to the other.

2. The jurisdiction of the county court to appoint guardians for minors does not accrue until the death of one or both of the minor's parents, his natural guardians.

3. Rev. St. art. 2505, permits a minor of 14 or more to select a guardian, except where the surviving parent has appointed a guardian; and article 2510 permits such minor to change his guardian, with the same exception. *Held*, that such a minor's expressed desire to exchange the guardianship of one parent for that of the other does not authorize the county court to grant guardianship of his person to the former, after the district court, in its decree of divorce between the parents, has awarded him to the latter.

Appeal from district court, Kaufman county; Anson Rainey, Judge.

Petition by Sarah E. Jordan against A. J. Jordan for guardianship of the person of Andrew Jordan, Jr. From a judgment of the district court affirming the county court's judgment for the petitioner, A. J. Jordan appeals. Reversed.

Dillard & Stroud, Clark & Morrow, and Woods & Gossett, for appellant. A. J. Booty and W. H. Allen, for appellee.

LIGHTFOOT, C. J. On December 19, 1890, Sarah E. Jordan filed a petition in the county court of Kaufman county against A. J. Jordan for the guardianship of the person of Andrew Jordan, Jr., a minor 14 years of age, residing in said county. She set up in her petition that she was married to A. J. Jordan (appellant) October 20, 1861, and they had five children, the said Andrew being the youngest. That on September 13, 1884, a divorce was granted by the district court of Panola county, Tex., and that the custody of two of the children—the two girls—was decreed to said Sarah E. Jordan, and the custody of Andrew and his brother was decreed to the husband (the eldest child was of age.) That said A. J. Jordan, the husband, is unfit to have the care of said minor, Andrew, because he has neglected the education of said child. That immediately after said divorce, defendant brought said child to Kaufman county, and plaintiff moved to Marshall. That during said time the minor has been hired out to various parties while defendant was off teaching school, and petitioner has not been allowed to see him, nor to write to him, nor send him books, etc. That he was poorly provided for, and defendant had denied him the gift of clothing, etc., sent him by his mother. That he was not allowed the privilege of church and schools, nor of clean and comfortable clothing; and his physical, moral, and mental training were neglected, setting out a number of alleged acts of negligence

on the part of the father. She further sets up that she has a good and comfortable home in the city of Marshall, and the two sisters have been well educated, and are refined in their manners; and that she is able to raise the minor, and give him proper physical, moral, and mental training under Christian influences, and in the refined and elevating society of the two sisters. She prays for an order in vacation giving her the custody of the child during the pendency of the application, and that A. J. Jordan be enjoined from exercising any control over or having charge or custody of said minor during the pendency of the application, and on final hearing for permanent guardianship of the person of said minor. On December 19, 1890, the county judge, at chambers, granted the order requiring the sheriff to deliver said minor to petitioner, requiring her to execute bond in the sum of \$500, conditioned for the delivery of the minor at the time designated by the county court, and enjoining the defendant from interfering in any manner with the applicant in the custody of said child. The bond was given and approved, and the custody of the minor delivered to applicant. The defendant demurred to the petition, and pleaded the judgment of the district court of Panola county setting the rights of the parties as to the custody of said minor as res adjudicata, and specifically denied each of complainant's allegations of any failure on his part to properly provide for said minor physically, or for his mental or moral training; but set up the full performance of his duty in every respect, and claimed that he could better manage, control, and provide for the minor, who is a boy over 14 years of age; and prayed that the order of the county court in taking said minor and placing him in the complainant's custody be vacated, and that he be restored to defendant's custody; for a writ of habeas corpus, etc. Both parties filed supplemental pleadings, attaching requests of the minor,—to the complainant's petition a request that his mother be appointed his guardian; and to defendant's answer a request that his father be appointed his guardian. Judgment was rendered in the county court in favor of the applicant, which was appealed to the district court, where it was again tried June 5, 1891, and the demurrer of defendant to plaintiff's petition was overruled, and judgment rendered appointing complainant, Sarah E. Jordan, as guardian of the person of said minor, and against defendant for costs.

The following are the conclusions of fact found by the court: "(1) In 1874 (1884) Sarah E. Jordan and A. J. Jordan, man and wife, were duly divorced by a decree of the district court of Panola county, Tex., by the terms of which decree, A. J. Jordan was awarded the custody of the minor, said

minor being at the time about seven years of age. (2) After said decree A. J. Jordan moved to this (Kaufman) county, where he has since resided, teaching school, which is his profession. He has been boarding the minor with other parties while he was away teaching school. While he has not been personally unkind to said minor, he has neglected him, and failed to give him that parental care that he should. (3) That after said decree Sarah E. Jordan moved to Marshall, and has lived there since. She has a home, and is financially able to take care of said minor. Her influence as a mother, her education, her surroundings, all combine to make it much to the advantage of the minor that she have his care and custody. (4) The financial ability of Sarah E. and A. J. Jordan are about equal. (5) The minor is now 14 years of age, and in open court signified his preference for Sarah E. Jordan to be his guardian."

The leading question in the case is clearly presented in the assignments of error by appellant from 1 to 5, inclusive. Can the judgment of the district court of Panola county, which awarded the custody of the minor to the father, be set aside by the county court of Kaufman county in a subsequent suit between the same parties, and the custody of the minor given to the mother? There are other questions presented by the assignments of error upon the findings of the court, but we think that a proper solution of the above question will settle the case. Under our statutes, the father and mother are recognized as the natural guardians of the persons of their minor children, and ordinarily they need no appointment of any court to act as such. Rev. St. art. 2494. "When the parents of a minor live together, the father is the natural guardian of the persons of the minor children by the marriage, and is entitled to be appointed guardian of their estates. Art. 2495. Where the parents do not live together their rights are equal, and the guardianship of their minor children shall be assigned to one or the other, according to the circumstances of each case, taking into consideration the interest of the child alone." Under the divorce statutes the district court is given the power and jurisdiction to determine which of the spouses shall have the custody of such children. "Art. 2871. Custody of children. The courts aforesaid shall have power in all cases of separation between man and wife, to give the custody and education of the children to either the father or mother, as to said court shall seem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the child or children, to be determined and decided on the petition of either party; and in the mean time to issue an injunction or make any order that the safety and well-being of any such children may require." In this case it appears that, the father and mother having separated, a peti-

tion for divorce was duly filed in the district court of Panola county, and that court, having full jurisdiction of all the parties, and having fully inquired into all matters appertaining to the prudence and ability of the parents and the age and sex of the children, and looking to the safety and well-being of the children, awarded to the mother the custody of the two girls, and to the father the custody of the two boys, including the minor, Andrew, in controversy in this suit. That, being a court of competent jurisdiction and having jurisdiction of all the parties and the subject-matter, its decree cannot be collaterally attacked, but as to the questions therein adjudicated its judgment is final. Rev. St. art. 2871; Haymond v. Haymond, 74 Tex. 421, 12 S. W. Rep. 90; Williams v. Williams, 13 Ind. 523; Sullivan v. Learned, 49 Ind. 252; Shaw v. McHenry, 52 Iowa, 182, 2 N. W. Rep. 1096; Wakefield v. Ives, 35 Iowa, 238; Wilkinson v. Deming, 80 Ill. 342; Dubois v. Johnson, 98 Ind. 6; 2 Bish. Mar. & Div. §§ 530, 750, 754, 765. In the case of Haymond v. Haymond, supra, the court, after quoting in full article 2871 of our divorce statute, says: "No more sacred trust or greater responsibility can be devolved upon a court than the duty of determining which one of the two contending parents shall have the control of their minor children. It is a question of the welfare of the child, rather than of outrage to the affections of a mother, and one that should be solved by all the circumstances and conditions surrounding the parties *at the time the final order shall be made.*" (The italics are ours.) This sacred trust and grave responsibility of the trial court would be of but little importance if the same question could be adjudicated again between the same parties, the next day, in another tribunal, the custodian selected by the court set aside, and the custody of the child awarded to the other parent. But it is contended that the county court has general supervision over the appointment of guardians for minors, and in such supervision can appoint a guardian of the person of a minor, notwithstanding the decree of the district court in settling the custody of the minor in a suit between the two parents. Mr. Bishop says: "The relation of parent and child constitutes a status not altogether unlike that of husband and wife; hence an order for the custody of the children is in this sort of ex parte divorce competent and proper." Bish. Mar. & Div. § 170. Under our statute the district court is expressly given jurisdiction to determine the custody of the children. Where the father or mother is living, the county court is not called upon to appoint a guardian of the persons of their minor children, but the natural guardianship of the parent is fully recognized, even to the extent of appointing by will the guardian of such children. Rev. St. arts. 2494-2497, inclusive. Upon the decree of the district court award-

ing the custody of a child to one of the parents, such parent is thereby selected by the court as the natural guardian, entitled to all the rights and privileges, and subject to all the duties and responsibilities, of such natural guardian. In the case of *Kahn v. Israelson*, 62 Tex. 226, Judge Stayton says: "Under the statutes now in force, the surviving parent is the natural guardian of his or her minor child. * * * As to the person, the surviving parent, as under the former statute, without appointment by the county court, is the guardian." *Cook v. Bybee*, 24 Tex. 278. So it is clear that the guardianship of the person of a minor, who has surviving parents, is fixed by law without an appointment of the county court; and when the custody has been settled by a decree of the district court in a divorce proceeding the interference of another court should not be permitted.

But it is further contended by appellee that the minor, Andrew Jordan, having reached the age of 14 years, is, under the statute, entitled to select his own guardian, and that, having selected his mother, she is entitled to the appointment. Let us examine this question in the light of the statute. Rev. St. art. 2505: "A minor who is fourteen years of age or over, has the right to select a guardian either of his person or estate, or both, which selection may be made in open court, in person or by attorney, and the person selected if qualified, shall be entitled to be appointed guardian, except in the case where the surviving parent of such minor has appointed a guardian by will or written declaration, in which case the person so appointed shall be entitled to the guardianship." Also in article 2510, which gives the right to a minor over 14 years of age to change his guardian, the same exception is made; so that the natural right of the parent to the guardianship of the person of his minor child cannot be changed at the will of the minor when he arrives at the age of 14 years, nor can the minor change the appointment of a guardian appointed by the will or written declaration of the parent. The right of a minor over 14 years of age to choose his guardian applies only to such minors as have no surviving parents nor "guardians appointed by them by will or written declaration." How far the district court of Panola county, which rendered the decree awarding the custody of the minor to appellant, could go in reopening or changing its decree it is not necessary for us to here inquire. *Gray v. Thomas*, 83 Tex. 246, 18 S. W. Rep. 721. Under the facts of this case it is evident that, while this elegant and refined woman is reaching out with all the warmth and tenderness of a mother's love to secure the custody of her child, yet no such facts are shown as should deprive the father of that legal custody awarded him by the district court of Panola county. It may be that, if the question was before us as an original

proposition, we would not make the same decree as was made by that court, but such is not the case, and in this collateral proceeding we are compelled to recognize the binding authority of that adjudication. The judgment of the district court is reversed and remanded, with instruction that such judgment be rendered therein as will restore the custody of said minor to appellant, and that the demurrer and exceptions of defendant below be sustained, and said cause dismissed.

BOYD v. ROBERTSON.

(Court of Civil Appeals of Texas. Sept. 5, 1898.)

CONTRACTS FOR THE SALE OF LAND—CONSTRUCTION.

1. Plaintiff, by written contract, agreed to convey defendant land, defendant to pay a specified sum every four months, and further agreed to take cordwood by the car of nine cords of defendant, at \$20 per car, in payment, plaintiff to pay freight. Held an executory contract of sale, which gave defendant no right to a deed of the land until payment of the price.

2. Defendant entered upon the land, put improvements thereon, aggregating \$800 in value, and, on making his first payment in cordwood, a deed was promised, but never given him. He was promised a deed on other occasions also, but never received it. A second payment in cordwood was refused, plaintiff alleging that he did not need the wood, and no further payment was ever made, and plaintiff never thereafter informed defendant that he would receive payments in wood if tendered. Held to bar plaintiff's right to recover the land, but that he might recover the purchase money due at the time of suit brought, with interest from date of judgment, and costs of suit.

Appeal from district court, Dallas county.

Trespass to try title by J. L. Boyd against W. Robertson. From a judgment for defendant, plaintiff appeals. Reversed.

Word & Reeves, for appellant. Porter & Reed, for appellees.

Conclusions of Fact.

FINLEY, J. On May 20, 1886, appellant executed and delivered to appellee the following instrument of writing: "Dallas, Texas, May 20, 1886. This is to certify that I, J. L. Boyd, have agreed to sell to W. Robertson five hundred and twenty acres of land, out of the R. A. Hankla survey, situated about seventeen miles south of the city of Dallas; W. Robertson to pay for said land \$1,040, to be made payable \$40 every four months, and to bear, at the rate of ten per cent., interest from date. I, J. L. Boyd, agree to take cordwood by the car of nine cords, at the rate of \$20 per car, delivered at Dallas; I, J. L. Boyd, paying freight. [Signed] J. L. Boyd." The land was pointed out by appellant, and by him the appellee was put in possession. Immediately appellee began to make improvements upon the land, and did put improvements of a substantial character on the land, perhaps ag-

gregating in value the sum of \$800. On December 16th, following the execution of the said written instrument, appellee delivered to appellant 17 cords of wood, of the value of \$38, upon which appellant paid him \$6, leaving \$32 as a payment upon the land. At the time of this payment, appellee demanded a deed to the land, which appellant promised to make him, but he did not do so. No other payment was ever made upon the land. Appellee offered to make the second payment in wood, but appellant declined to take it, saying that "just then he did not need any wood; that the times were hard, and he was not able to pay the freight on it." Appellee thereafter frequently demanded of plaintiff a deed, which he uniformly promised to execute, but failed to do so, and, on account of appellant's failure to give appellee a deed, he made no further payment or offer of payment upon the land. The amount now due on the land is \$1,633.90, principal and interest, and there is a balance of \$160, principal, which will fall due as follows: \$40, January 20, 1894; \$40, May 20, 1894; \$40, September 20, 1894; and \$40, January 20, 1895,—with 10 per cent. interest from October 6, 1893, on each and all of said amounts.

Conclusions of Law.

1. The written instrument signed by appellant and delivered to appellee, in its legal import, is an executory contract for the sale of land, which does not imply a consummated sale by making deed to the land until the payment of the purchase money.

2. The facts alleged in appellee's pleadings, and established by the evidence, present sufficient equities to entitle him to some means of relief against absolute forfeiture of the purchase money paid and improvements made on the land, though not to the relief asked for by him.

3. The acts of appellant in refusing the payment tendered, in frequently promising appellee a deed to the land, and the absence of evidence showing that, after he declined one payment in wood, he ever informed appellee that he would receive such payments, or that his condition changed in fact, and he would have received such payments had they been tendered, we think ought to preclude his right to a decree for the recovery of the land. The decree of the court below is erroneous, and it is here reversed and reformed, so that (1) appellant shall recover the amount of the purchase money now due, to wit, \$1,633.90, with 10 per cent. interest per annum from this date, and all costs of suit; (2) he shall have his order of sale and execution; (3) the balance of the purchase money remaining unpaid is adjudged to be a lien on the land.

PARK et al. v. PRENDERGAST et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

MORTGAGES—PRIORITY—FORECLOSURE—JUDGMENT—SUFFICIENCY OF PLEADINGS—WAIVER OF OBJECTIONS—STATUTE OF LIMITATIONS—PLEA BY JUNIOR MORTGAGEE—NEW PROMISE BY EXECUTOR.

1. In an action against an executrix and a firm to foreclose a mortgage executed by deceased, the petition averred that such firm claimed to have a lien on the mortgaged premises. The executrix set up, in answer, the execution of certain notes, and a mortgage to secure the same by deceased prior to plaintiffs' mortgage. The firm pleaded the same notes and mortgage, and all other facts essential to foreclosure of their lien, against both plaintiffs and the executrix, and prayed for relief. Plaintiffs pleaded the four-years statute of limitations as to such notes and prior mortgage. After demurring, such firm replied, *inter alia*, that the executrix, on a certain date, before the expiration of the four years, indorsed on such notes an acknowledgment of the amount then due, and allowed the same as a just claim against the estate; and that in plaintiff's mortgage the debt set up by such firm was admitted by deceased, and its prior payment specially provided for. *Held*, that the pleadings authorized a judgment that the firm's lien was superior to plaintiffs'.

2. Where facts are defectively pleaded, the adverse party can only avail himself of the defect by exception to the pleading or objection to the evidence in the trial court.

3. Where a mortgage is expressly made subject to a prior mortgage, the junior mortgagee cannot, in an action to foreclose the prior mortgage, claim that the latter is barred by the statute of limitations.

4. An executor, before a debt against the estate is barred, may suspend the operation of the statute of limitations by acknowledgment of the debt and a new promise to pay it, especially where he is the sole legatee.

Error from district court, Limestone county; Rufus Hardy, Judge.

Action by Eva B. Park and J. H. Park, her husband, against Ada R. McCain, independent executrix of the estate of J. H. McCain, deceased, and Prendergast, Smith & Co., to foreclose a mortgage, in which the defendant firm set up a prior mortgage on the same premises, and asked a foreclosure thereof and other relief. From a judgment of foreclosure as to both mortgages, but making the lien of Prendergast, Smith & Co.'s mortgage superior to the lien of plaintiffs' mortgage, the latter bring error. Affirmed.

The court finds, as conclusions of fact, that the Yarbrow notes, set up by Prendergast, Smith & Co. in their pleading, were dated January 1, 1885, and matured at 12 months. That J. H. McCain, the maker of these notes, died July 24, 1889. That he left a will in which defendant Ada R. McCain was named as independent executrix. That this will was probated September 19, 1889. That defendants Prendergast, Smith & Co. were the owners by transfer of the Yarbrow notes and the

deed of trust given to secure the same. That Mrs. McCain, as executrix, on October 1, 1889, made the following indorsement on one of the notes: "There is now due on this note the sum of \$1,258.62, which I allow as a just claim against the estate of J. H. McCain, to be paid in due course. Ada R. McCain, Executrix." And on the other note was made a similar indorsement, except as to amount due. That on December 2, 1887, J. H. McCain executed in favor of Eva B. Park, then Eva B. Smith, the \$1,000 note sued on, on which is now due \$1,283.35. And that McCain also executed a mortgage in favor of plaintiff on the land described to secure the payment of this note. The court concluded, as matter of law that, under the facts found, and "under the indorsement made on the notes by the executrix before they were barred, and under the acknowledgment of same made by McCain in his mortgage to plaintiff, the lien therefor was not barred as to plaintiff, and that as to the executrix the notes were not barred." The court also found as a fact that in the mortgage sued on by plaintiffs there is the following language used with reference to the Yarbrow notes and deed of trust: "This deed of trust is given subject to a first mortgage on the within and above described land, [the same described in plaintiffs' petition,] given to Mary E. Yarbrow, of Limestone county, Texas, to secure the payment of the following notes, bearing date January 1, 1885, payable 12 months after date, described as follows, [describing the notes and mortgage in favor of Mrs. Yarbrow.]" The court concluded as matter of law that, under this recognition by McCain of the Yarbrow debt and deed of trust, the "lien was not barred as to plaintiffs."

Thos. J. Gibson, for plaintiffs in error.
Baker & Prendergast, for defendants in error.

Conclusions of Fact.

FINLEY, J. The conclusions of fact of the trial judge are approved and adopted by this court.

Conclusions of Law.

The first assignment of error presented in brief of plaintiffs in error is as follows: "The court erred in giving judgment for Prendergast, Smith & Co., against the said Ada R. McCain, executrix, etc., and in holding their lien superior to plaintiffs', because there was no such pleading filed by said Prendergast, Smith & Co., setting up a new promise in writing, as would authorize the judgment in their favor against said executrix." Plaintiffs' petition avers that Prendergast, Smith & Co. claimed to have a lien, etc., on the property they seek to foreclose on. Mrs. McCain, executrix, answers, and sets up the execution, etc., of the Mrs. Yarbrow notes, and the mortgage to secure them, and states the amount due on them, etc. Prendergast, Smith & Co. answer, and plead the said Mrs.

Yarbrow notes, and the lien on said land to secure them, fully and correctly, and all other facts necessary to recover judgment on them, and to foreclose their lien on said land, against both the executrix and plaintiffs in error, and pray fully for the relief applicable, and then pray "for such other and further relief as the nature of the case may require," etc.; then, in reply to plaintiffs' plea of limitation, after demurring, etc., plead "that the executrix of said J. H. McCain, deceased, on the 1st day of October, 1889, and previous to the expiration of four years after the maturity of the notes forming the basis of their claim, indorsed on said notes an acknowledgment of the amount then due upon each, and allowed the same as a just claim against the estate of said deceased, to be paid in due course; and they further aver that by the terms of the instrument itself, the foreclosure of which is sought by the plaintiffs, of date December 2, 1877, the debt set up by these defendants is recognized and admitted by the debtor, the said J. H. McCain, and it is therein specially provided that the payment of the debt claimed by these defendants should take precedence of the debt set up by plaintiffs." Plaintiffs in error did not demur, either generally or specially, to any of the pleadings. They did not object to the introduction of the evidence, and in no way on the trial called the attention of the court below to any supposed imperfection or omission in the pleadings. We are of opinion that the issues formed by the pleadings embraced the matter of the new promise by the independent executrix to pay the Yarbrow indebtedness, and its acknowledgment, as a prior lien to plaintiffs' mortgage. If these facts were imperfectly alleged in the pleadings of defendants Prendergast, Smith & Co., (which we do not decide,) the appellants could only avail themselves of the defect by exception to the pleadings, or objection to the evidence in the court below. The court did not err in refusing to give effect to plaintiffs' plea of limitations against the prior mortgage. *McClellan v. State*, 22 Tex. 405; *Dewitt v. Miller*, 9 Tex. 239; *Rutherford v. Smith*, 23 Tex. 322; *Railway Co. v. Montier*, 61 Tex. 122.

The remaining assignments necessary to be noticed are as follows: "(a) The court erred in concluding, as matter of law, from the facts found and filed in the case, that, under the acknowledgment made by McCain in his mortgage to plaintiff Eva B. Smith, the lien to secure the debt held by Prendergast, Smith & Co. was not barred as to plaintiffs. (b) The court erred in concluding, as matter of law, from the facts found and filed in the record, that, under the indorsements made on the Yarbrow notes by the executrix before they were barred, the lien of Prendergast, Smith & Co. was not barred by the statute of limitation as to plaintiffs." The mortgage lien of plaintiffs was given subject to the mortgage lien previously given to secure the

Yarbro debt. The existence of the Yarbro debt and mortgage to secure it was not merely recited in plaintiffs' mortgage, but it was therein expressly provided that it should be subject to it. A junior mortgagee, whose mortgage is expressly made subject to a prior mortgage, cannot defeat the prior mortgage lien by showing that it is invalid against the mortgagor, and thereby secure a larger lien than that contracted for. Plaintiffs' claim upon the land was subordinate to the Yarbro mortgage, and cannot be asserted in hostility to it; and the court did not err in so treating it. 1 Jones, Mortg. p. 484, § 595; Freeman v. Auld, 44 N. Y. 50; Hardin v. Hyde, 40 Barb. 435; Hancock v. Fleming, 103 Ind. 533, 3 N. E. Rep. 254; Forgy v. Merryman, 14 Neb. 513, 16 N. W. Rep. 833.

The disposition of this question renders it unnecessary for us to decide the point raised by the last assignment above copied; but we will quote, with our full indorsement, the language of Mr. Justice Gaines in the case of Howard v. Johnson, 69 Tex. 658, 7 S. W. Rep. 522. He says: "The allowance by the executor was made before the claim was barred, and implies a distinct promise to pay in due course of administration. What effect this had upon the operation of the statute of limitations we need not determine. It does not follow that, because an executor may not revive a debt already barred, he may not suspend the operation of the statute before the bar is complete. Wood, Lim. § 190. In the case of independent executors, the exercise of such a power may, in some instances, be highly beneficial to the estates in their hands." We will further add that where the executor is the sole legatee, as in this case, it is difficult to conceive of any reason why the power here questioned should not be exercised. The judgment of the court below is affirmed.

TEXAS & PAC. RY. CO. v. BARRON.
(Court of Civil Appeals of Texas. Sept 4, 1893.)

CARRIERS—INJURY TO PASSENGER—PLEADING AND PROOF—EVIDENCE.

1. Plaintiff, a passenger on defendant's train, sued for personal injuries, alleging that he was injured through the reckless running of the train and the dangerous condition of the roadbed. The causes of the accident were the dangerous condition of the track and the failure of the section foreman to inspect it. *Held*, that the negligence of the foreman was but an incident of proof of the negligence alleged, and that there was no variance.

2. Evidence that the general superintendent reprimanded the section foreman for his failure to inspect the track the morning of the wreck is admissible.

Appeal from district court, Kaufman county; Anson Rainey, Judge.

Action by W. J. Barron against the Texas & Pacific Railway Company to recover for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

R. S. Lovett and Manion & Huffmaster, for appellant. Wm. H. Allen, for appellee.

Conclusions of Fact.

FINLEY, J. About noon on June 30, 1889, about three miles east of Elmo, in Kaufman county, as appellant's east-bound through passenger train was passing on its railway, the track beneath it gave way because the dirt supporting the same at that place was washed out during a very heavy rainfall shortly before or about that time. The baggage car was turned over, and the baggage master instantly killed. The express and mail cars were turned partially over, and the smoking car, ladies' car, and sleeping car were derailed, though not turned over. Appellee, who was a passenger on said train from Terrell, and intended to go to Wills Point, was, with many others, in the smoking car at the time of the wreck, and sustained serious personal injuries therein. The rain which caused the washout was not extraordinary or unprecedented. The section foreman did not inspect the track after the rain and before the wreck, though there was ample time for him to have done so, and it was his duty to do it. At the time of the accident the train was running at a rapid rate of speed,—full schedule rate, if not in excess of it. We conclude that the cause of the wreck was the condition of the roadbed,—the washout; the roadbed not being in a condition to resist the force of such a rainfall was the result of the negligence of the railway company, either in original construction or maintenance of its roadbed; and that the failure of the section foreman to inspect the track at the place of the accident, after the rainfall and before the train ran over it, was negligence.

Conclusions of Law.

There are but two assignments of error presented by appellant.

First assignment of error: "The verdict of the jury and the judgment of the court are not authorized by plaintiff's pleadings, in this: that plaintiff in his petition seeks a recovery upon the ground that defendant's train was run in a reckless manner, and its road in bad condition, and upon the trial sought to recover, and did recover, upon the ground of negligence not alleged, to wit, that defendant's section foreman had not gone over defendant's road that morning at the place where the wreck occurred." So much of plaintiff's petition as sets forth the cause of his injury is as follows: "That while plaintiff was such passenger, as aforesaid, through the carelessness, negligence, and reckless running of said cars by the agents of said defendant, and the negligent and dangerous condition of defendant's roadbed, the cars of defendant ran off of said track, and plaintiff was hurled violently against and upon the sides of said

car and the projecting arms of the seats therein," etc. Appellant claims that the failure of the section foreman to inspect the track was the only negligence shown, and that it was not alleged. The cause of the wreck was the dangerous, defective condition of the track. The failure of the section foreman to inspect the track, as well as all acts or conduct of defendant's employees owing any duty in the premises, tending to show negligence in relation to such condition, are to be regarded as but incidents of proof of the main fact alleged, namely, "the negligent and dangerous condition of defendant's roadbed." We are of opinion that the proof sustains the allegations as to negligence, and that the assignment is not well taken. *Railway v. Kirk*, 92 Tex. 232.

Second assignment of error: The court erred in permitting the witness R. L. Warren to state that he heard Superintendent Grant reprimand the section foreman for not having gone over defendant's road on the day the wreck occurred, said witness stating that he could neither recollect the language of said Grant nor the substance thereof; said testimony being admitted over defendant's objection, as shown by bill of exceptions No. 1. The bill of exceptions to the ruling in question is as follows: "Be it remembered, that on the trial of the above cause, while R. L. Warren, witness for plaintiff, was on the stand, plaintiff's counsel asked said witness to state whether he heard Superintendent Grant reprimand the section boss after said wreck occurred for not having gone over that part of defendant's road prior to the wreck, and on the morning of the wreck, to which defendant, by its counsel, then and there objected, which objection was overruled by the court, and the witness stated that after the wreck he heard said Grant reprimand said section boss for not having gone over said road prior to said wreck; that he did not remember the language used by said Grant, nor the substance thereof, to which answer defendant then and there excepted, upon the ground that said answer was an opinion of witness, and a mere conclusion, and was incompetent as evidence against defendant, which objection was overruled by the court, and the defendant then and there excepted to said ruling, and presented this its bill of exception." "This bill is signed with the explanation that, while the witness stated that he could not repeat the language used by Grant, nor give the substance of the language used, yet he stated that, from what language he heard Grant use, witness understood that he (Grant) was reprimanding said foreman for not going over the road that morning after the rain. [Signed] Anson Rainey, Judge." It is contended that this evidence was not admissible—first, because it was the mere opinion of the witness as to the effect of the words spoken; second, it was not shown that the person speaking was acting

within the scope of his authority; third, it was not shown to be a part of the res gestae. The first of these objections to the evidence was the only ground urged in the trial court, and it alone can be considered by this court. *Rules Dist. Ct. 58; Railway Co. v. Hogsett*, 87 Tex. 687, 4 S. W. Rep. 365. It is a general and elementary principle that a witness must testify as to facts, and not as to inferences and conclusions. Was this principle violated in the admission of the testimony of the witness? He testified to the fact that he heard the general manager, Grant, reprimand the section foreman for not inspecting the track on the morning of the wreck. He did not remember his language or form of expression, but he did remember the idea conveyed or impression received by him, and it was to this that he testified. How much such evidence proves or ought to weigh with a jury is another and different question. Where the impression received is vague and uncertain, the trial court might properly exclude the evidence; but where the defect is a failure to remember the exact words or forms of expression, while the impression or idea conveyed is distinct and clear, the evidence should be admitted. *Simpson v. Brotherton*, 62 Tex. 172; 1 *Whart. Ev.* §§ 514, 515; *Seymour v. Harvey*, 11 Conn. 280; *State v. Donovan*, 61 Iowa, 278, 16 N. W. Rep. 130; *Walker v. Camp*, 63 Iowa, 627, 19 N. W. Rep. 802; *State v. Jones*, 64 Iowa, 349, 17 N. W. Rep. 911, and 20 N. W. Rep. 470. We do not think the objection urged to the evidence well founded, and, there being no other errors assigned, the judgment should be affirmed; and it is so ordered.

MATTHEWS v. WHITAKER et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

ASSIGNMENT OF LEASE—INJUNCTION.

1. Under Rev. St. art. 3122, prohibiting tenants from renting the leased lands to others during the term of the lease without the landlord's consent, an assignment of the lease without the landlord's consent is void.
2. The occupation of leased premises under a void assignment of a lease will be enjoined.

Error from district court, Bowie county: John L. Sheppard, Judge.

Suit by H. S. Matthews against Benjamin Whitaker and J. H. Bemis. Suit dismissed. Plaintiff brings error. Reversed.

Vaughan & Leary, for plaintiff in error. McLean & Hynson, for defendants in error.

LIGHTFOOT, C. J. The plaintiff's petition, after the formal part, set out, in substance, that on October 24, 1889, he was lawfully seised and possessed of a certain tract of 40 acres of land in Bowie county, Tex., and owned the same in fee simple, and that defendants on that day entered upon the

same, and ejected plaintiff therefrom, to his damage \$5,000; setting out a description of the land, which, though very imperfect, indicates the land in such a way that it may be aided by proof. That the 40 acres is a part of plaintiff's homestead, on which he resides with his family. That on October 24, 1889, plaintiff entered into a written contract, whereby he leased said 40 acres of land to W. Behan for 20 years. That neither in said lease nor otherwise did he authorize said Behan to assign said lease or sublet said premises. That on November 14, 1889, said Behan failed, and made an assignment to J. H. Smelser, assignee, of all his property, subject to forced sale, including certain saw mills, planing mills, and appurtenances, known formerly as the "Matthews Mills," and situate upon said 40-acre tract of land. That in January, 1890, the said assignee, under an order of the district court of Bowie county, Tex., sold and transferred to defendants, Whitaker & Bemis, said mills. That, prior to the sale, plaintiff notified said defendants that said mills could not be operated on said land, and must be moved off, and, notwithstanding said notice, they entered upon said premises wrongfully and forcibly about February 17, 1890, and ejected plaintiff, and have ever since been operating said mills, and propose to continue in such possession for 20 years. That plaintiff's dwelling is within 50 feet from said mills, and the noise caused by the operation thereof, and the presence of the crew of mill hands, are sources of constant annoyance to plaintiff and his family, and, if continued, they will be compelled to abandon the said premises. That the monthly rent of said premises is \$100, which defendants have appropriated to their own use during their said occupancy. And that plaintiff has been damaged thereby in the sum of \$5,000. He prays for an injunction restraining defendants from operating said mills and machinery on said 40 acres of land; for the restitution of the premises; that a writ of possession be issued; for his damages, costs, and general relief. The defendants interposed a demurrer to the petition, which was sustained, and the cause dismissed. Upon what ground the court below sustained the demurrer does not appear from the record. This ruling is properly assigned as error.

The description of the 40 acres of land was not perfect, but was sufficiently certain to indicate the land sued for, and to admit testimony. The petition set forth a good cause of action upon its face, and the demurrer should have been overruled. At common law, and in other states, where not restricted by statute, a leasehold interest may be assigned without the landlord's consent, but in this state, under Rev. St. art. 3122, "if lands or tenements are rented by the landlord to any person or persons, such person or persons, renting said lands or tenements, shall not rent or lease said lands or tenements

during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney." In construing this statute, in the case of Railway Co. v. Settegast, 15 S. W. Rep. 229, our supreme court holds that it prohibits the assignment of a lease without the consent of the landlord. For the error of the court in sustaining the demurrer to plaintiff's petition, the judgment is reversed, and the cause remanded.

TERRY v. CUTLER et al.¹

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

SALE UNDER EXECUTION—VALIDITY—SUBROGATION—JURISDICTION.

1. A sale of land under an execution, made after the return day thereof, is void.

2. Where an alias execution is directed to the sheriff of C. county, a sale thereunder by the sheriff of G. county is void, and conveys no title.

3. Where an execution is lost, the question as to which of two counties it ran to is, where the evidence is conflicting, for the jury.

4. The statute of limitations does not begin to run against the right of the purchaser at a void sale, on foreclosure of a vendor's lien, to be subrogated to the vendor's rights in the judgment of foreclosure, until adverse possession is taken by the vendee.

5. A plea to the jurisdiction by executors in trespass to try title that they live in another county than that in which suit is brought, and administered the estate there, is bad.

6. Where land is sold under a vendor's lien, and afterwards is conveyed by the vendee to a third party, the latter cannot hold the title as against the purchaser at the execution sale under the lien, whether such sale was void or voidable only, without paying the amount of such lien.

Appeal from district court, Grayson county; P. B. Muse, Judge.

Trespass to try title by Mary P. Terry against W. T. Cutler and others. Judgment for defendants. Plaintiff appeals. Reversed.

W. W. Wilkins, J. C. Edmonds, and G. G. Randell, for appellant. I. M. Standifer and Brown & Bliss, for appellees.

RAINEY, J. This is an action of trespass to try title, brought by appellant against appellees, to recover the land in controversy. The facts are that, in 1859, A. Rhine, the then owner of the land, deeded same to W. M. Allen, part of the purchase money not being paid. In 1860, Rhine brought suit in Collin county for the unpaid purchase money, and a judgment of foreclosure was awarded him. An order of sale was issued, directed to the sheriff of Grayson county, which was returned, for want of time to sell after seizing the land and advertising the same for sale. An alias order of sale was issued, and delivered to the sheriff of Grayson county, and the land sold thereunder. A. Rhine became the purchaser, his bid being credited on the judgment, and the sheriff made him a deed. In 1865, A. Rhine, by warranty

¹ Rehearing denied.

deed, conveyed the land to Isaac Rhine, who, in turn, by warranty deed, conveyed same to appellant, who paid her separate money for same. In 1874, W. M. Allen deeded the land to Joseph Bledsoe, and, in 1882, Bledsoe deeded part of the land to W. T. Outler, and Bledsoe and Outler deeded all of the land to part of appellees. Appellant made the executors of A. and I. Rhine parties, and prayed in the alternative that, if she could not recover the land, she be subrogated to the rights of A. Rhine under the foreclosure proceedings. Rhine's executors pleaded to the jurisdiction of the court, on the ground that they lived in Collin county, and the estates were administered there, which plea was sustained. Defendants filed exceptions to plaintiff's plea for subrogation, and pleaded the statute of limitation of ten and two years as against the judgment. The exceptions were sustained, and upon the trial the court instructed a verdict for appellees, from which an appeal was taken.

The first proposition to be considered is whether the sale of the land in controversy made by the sheriff of Grayson county under the alias order of sale, if the order of sale was directed to the sheriff of Collin county, is void, or voidable only. Appellant claims that sale made under such circumstances is voidable only; that the first order of sale vested the sheriff of Grayson county with power to sell the land, and convey a good title, and, as he had proceeded to seize and advertise for sale, he had the right to sell, whether an alias order of sale issued or not, notwithstanding the return day of the first had expired. In support of this position, he quotes various sections of Freeman on Executions. It is true that, in section 58 of said work, Mr. Freeman, in speaking of the writ of "venditioni exponas," says: "The venditioni exponas was so frequently issued as to create the impression that it was a writ of authorization, as well as of compulsion, and was necessary to enable the officer to proceed with the sale. Such was not the fact. It gave the officer no authority not previously possessed by him. Notwithstanding the return of the fieri facias, he could sell the property levied on as well without as with a venditioni exponas." This seems to apply more strictly to personal property, as the officer, by "levying the writ, obtains a right of possession and a special property in the goods seized, which continues after the return day, and authorizes him to sell as effectually as if the original writ remained in full force." But some jurisdictions hold a different doctrine as to real estate. Mr. Freeman, in the same section, says: "A levy upon real estate gives no special property, and no right of possession to the officer making the levy, and hence it has been inferred that, after the return day of the writ under which the levy was made, he occupies no official or other relation

towards such property, and has no power to dispose of it, and thereby make effectual the lien created by the levy. Where this view prevails, an exception exists to the general rule that a venditioni exponas confers no authority, and it is then necessary, after the return day of an execution, that this writ issue to empower the officer to sell real estate levied upon, but not sold; and a sale without such writ is void." The supreme court of this state has held repeatedly that a sale of land under execution, made after the return day thereof, is void, and no title passes thereby. *Hester v. Duprey*, 46 Tex. 625; *Mitchell v. Ireland*, 54 Tex. 301; *Cain v. Woodward*, 74 Tex. 549, 12 S. W. Rep. 319. This being the rule of law in this state, the first order of sale, having become functus officio, cannot be looked to or relied on to aid the alias order of sale, if that was defective to the extent of being void. The alias writ alone conferred authority, if any, to sell, and from that alone the officer could derive authority to sell and pass title to the purchaser. "A sheriff or constable has no authority to act under a writ directed to another sheriff or constable, and, if he does so, a sale made by him is void." 2 Freeman, Ex'ns, § 291, and authorities there cited. If the alias order of sale in this case was directed to the sheriff of Collin county, then the sale made thereunder by the sheriff of Grayson county was a nullity, and conveyed no title to the purchaser. *Witt v. Kaufman*, 25 Tex. Supp. 384; *Bybee v. Ashby*, 2 Gilman, 151; *McKay v. Bank*, 75 Tex. 181, 12 S. W. Rep. 529.

The appellee complains of the trial judge in charging the jury that the undisputed testimony in this case showed that the alias order of sale was directed to the sheriff of Collin county, and the sale thereunder by the sheriff of Grayson county was a nullity, and did not pass title. We think this action of the court was error. When there is an issue raised by the evidence, it is the province of the jury to pass upon it, and the court cannot take that right from them.

In view of the fact that the alias order of sale was lost, the recital in the execution docket that the alias was issued, and delivered to the sheriff of Grayson county, raises a presumption that it conformed to the legal requirements, especially when it was shown that an original order of sale had previously issued, directed to the sheriff of Grayson county, and was returned by him, for want of time to sell, and said alias was issued thereon. The testimony to overcome this presumption was the testimony of witnesses Bledsoe and Head, who testified to having seen the alias order of sale among some papers of a case pending in the district court of Grayson county, involving the land in controversy, and that it was directed to the sheriff of Collin county. The testimony of these witnesses was positive as to it being the alias in question. This was 13 years

after they had seen it. While their testimony was positive, the alias being lost, and the one they saw not coming from the proper custody, and 18 years having elapsed since they had seen it, we think raises an issue of fact that should have been submitted to the jury for their determination. *Smithwick v. Andrews*, 24 Tex. 436; *Schleicher v. Markward*, 61 Tex. 90.

The appellant, by proper pleadings in the court below, asked, in the event the sale was avoided, to be subrogated to the rights of A. Rhine under the judgment of foreclosure. This plea was excepted to by the defendants, upon the ground that the said judgment was barred by limitation. The court sustained the exception, to which ruling proper exceptions were taken, and the same assigned as error. We think this ruling of the court error. The land was sold under the judgment of foreclosure, and bid in by A. Rhine, the amount of his bid being credited on the order of sale. For about 13 years Allen, the vendee of Rhine, acquiesced in this sale. No claim during that time was set up by him, nor did he pay the purchase money for the land, and it is probable that these conditions would have thus stood had not others raised the question. But, be that as it may, no limitation would run under such circumstances until possession of the land was taken, and there is no pretense of adverse possession in this case sufficient to constitute a bar. In order to avoid sales of like character of this, it is incumbent upon the party so seeking to pay the amount that is a charge upon the land. This has not been done by appellees. "The rule is that, when the property is charged with the debt for which it is sold, then, independently of the legal proceedings under which it was sold, the purchase money must be restored before it can be recovered." This rule was held to be the law in *Howard v. North*, 5 Tex. 290, and has been adhered to and reaffirmed ever since. *Horan v. Wahrenberger*, 9 Tex. 313; *Bailey v. White*, 13 Tex. 114; *Teas v. McDonald*, Id. 349; *Sydnor v. Roberts*, Id. 598; *Brown v. Lane*, 19 Tex. 203; *Andrews v. Richardson*, 21 Tex. 287; *Morton v. Welborn*, Id. 772; *Johnson v. Caldwell*, 38 Tex. 218; *Stone v. Darnell*, 25 Tex. Supp. 435; *Burns v. Ledbetter*, 56 Tex. 282; *French v. Grenet*, 57 Tex. 273; *Walker v. Lawler*, 45 Tex. 538; *Mayes v. Blanton*, 67 Tex. 245, 8 S. W. Rep. 40; *Railway Co. v. Blakeney*, 73 Tex. 180, 11 S. W. Rep. 174; *Jolly v. Stallings*, 78 Tex. 605, 14 S. W. Rep. 1002. It will be seen from the foregoing cases that it makes no difference whether the sale was void, or voidable only. They hold to the broad doctrine that, when a party purchases land, before he can become the absolute owner thereof he must pay the purchase money therefor. Before defendants can hold the land sued for, they must pay off and discharge the debt with which it is charged, which is the amount bid by A. Rhine at the foreclosure sale, and credited

on the alias order of sale, with interest at the rate specified in said judgment of foreclosure.

Rhine's executors were proper and necessary parties, and the court erred in sustaining their plea to the jurisdiction of the court. For the errors indicated, the judgment of the district court is reversed, and this cause remanded for a new trial.

BOYDSTUN et al. v. ROCKWALL COUNTY.¹

(Court of Civil Appeals of Texas. Sept. 13, 1893.)

SCHOOL FUND—INVESTMENT—LIABILITY OF COUNTY TREASURER—ESTOPPEL.

1. Const. art. 7, § 6, provides for sales of county school lands by the county, and for the investment of the proceeds "as prescribed by law." Sayles' Civil St. art. 986m, §§ 2, 3, provide that the investment must be by an order of the commissioners' court, made at a regular term of the court, when the full court is present, and that not less than four must concur in the order, and the names of those concurring must be spread on the minutes of the court. *Held*, that the statute was mandatory, and a purchase of bonds by the county judge, to be paid for out of the permanent school fund, without an order of the county court, as provided by law, was wholly void.

2. Sayles' Civil St. art. 994, provides that the county treasurer shall pay out the moneys of the school fund as required by law, in such manner as the commissioners' court of his county may direct. *Held*, that an order of the county judge to pay money from such fund for the purchase of bonds as an investment for the school fund affords no protection to him or the sureties on his bond.

On Rehearing.

An unauthorized contract of a county judge to purchase county bonds for the school fund may be ratified by the county court.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by the county of Rockwall against J. D. Boydston and others, sureties on the official bond of W. T. Power, county treasurer. Judgment for plaintiff. Defendants appeal. Affirmed.

Henry C. Coke, for appellants. Word & Charlton, for appellee.

FINLEY, J. Appellants rely for a reversal of the judgment below upon a single assignment of error, which is as follows, to wit: "The court erred in holding that the matters set up in the third paragraph of defendants' second amended original answer constituted no defense to plaintiff's action, and in sustaining plaintiff's demurrer to said third paragraph of said answer." The substance of the third paragraph of appellants' answer, as stated in their brief, is as follows: "Defendants, after pleading general demurrer and general denial, by the third paragraph of their answer set up that for four years prior to June, 1889, and down to

¹ For opinion on appeal to supreme court, see 24 S. W. Rep. 272.

the time of filing said answer, there had prevailed in Rockwall county a custom that the county judge thereof, when an opportunity presented of making an investment of the permanent school fund of said county satisfactory to said county judge, should make same if the commissioners' court of said county was not then in session, without waiting for a session of said court. That said custom prevailed and was universally acted upon in the purchase of county bonds by said Rockwall county, with the full knowledge, consent, and approval of the commissioners' court of said county. That the said county of Rockwall had, during the period aforesaid, purchased a number of county bonds, and still owns and holds a number of such bonds, and that all of same had been purchased in the aforesaid manner, and that no order of the commissioners' court made in advance of said purchases, authorizing the same, was had. That many such transactions were had prior to the one in question, and that all of the county bonds now held and owned by said county of Rockwall were acquired in this manner. That about the month of June, 1889, the said Power, as treasurer, had in his possession \$6,500 belonging to the permanent school fund of said county. That during said month of June, or the months following, and prior to November, 1889, the county judge of Rockwall county, pursuant to aforesaid custom and usage and the authority conferred upon and exercised by him thereunder, purchased for the county of Rockwall seven Roberts county courthouse bonds of \$1,000 each, for the sum of \$7,000, and directed said Power, as treasurer, upon receipt of said bonds to pay for same said \$6,500 of the permanent school fund in his hands as treasurer, which said Power did, and received as the property of Rockwall county, and as a part of its said permanent school fund, said seven bonds; and the said county judge executed his official obligation to the vendor of said bonds for the remaining \$500 of the purchase money, there not being a sufficiency of the permanent school fund in the treasury to pay the entire consideration. That on or about November 12, 1889, during a session of the commissioners' court of said county, said Power, as treasurer, made his report to said commissioners' court on the condition of the permanent school fund of said county, showing an investment of said fund in county bonds amounting to \$19,400, which investment of \$19,400 embraced the aforesaid seven Roberts county bonds; and while said report did not enumerate or describe any of the said county bonds therein referred to, it was well known to each member of said court that the said investment embraced the said seven Roberts county bonds. That said report was examined by the said commissioners' court and in open court approved, and said approval was indorsed upon said report, and the name of each member of said court signed thereto.

That said report, after having been approved as aforesaid, was sent to the superintendent of public instruction, at Austin, Texas, and there filed in his office. That said Power afterwards, and during the term of his office, became insane, and on the 18th day of February, 1890, the commissioners' court of Rockwall county made an order directing R. E. Chandler, county clerk of said county, to take into his possession and safely keep the books, archives, and papers belonging to said office of treasurer, which the said clerk did, and received into his possession under said order all the property of Rockwall county in the hands of said Power as treasurer, embracing, among other things, the aforesaid seven Roberts county bonds. That thereafter one R. Y. Kernodle was appointed treasurer of said county by the proper authorities, to succeed the said Power, and upon his qualification the said Kernodle received from said county clerk the property aforesaid, including the aforesaid seven Roberts county bonds; and the said Kernodle then executed in writing and delivered to the said commissioners' court, then in session, his receipt for all of the property of said county coming into his hands as such treasurer, including by express enumeration and name the aforesaid seven Roberts county bonds. That at the date of the execution of aforesaid receipt by said Kernodle to said commissioners' court, a committee of said court examined in person the securities which passed into the hands of said Kernodle as treasurer, and for which he executed the said receipt, and among the aforesaid securities so examined were the aforesaid seven Roberts county bonds. That the said Power died without recovering his faculties, and about the time of the appointment and qualification of the said Kernodle the said commissioners' court examined the books and accounts of the said Power, and verified the same by an examination of the assets and securities in his hands, and for which he was accountable, and after said examination the said commissioners' court made an order approving said books and accounts of said Power, and finally settling and disposing of the same; but the said order was, through inadvertence of the clerk, not entered upon the minutes of said court. That after the said Kernodle became treasurer as aforesaid he paid to the vendor of said seven Roberts county bonds, out of the funds of said county, aforesaid, the \$500 official obligation given by said county judge for the balance due said vendor on the purchase of said bonds. That the said Kernodle, on the 12th day of November, 1890, made to the said commissioners' court his report of the condition of said permanent school fund, showing, among other things, payment by him of the said duebill or obligation of the county judge for said \$500, and the possession by him as part of said permanent school fund of said seven Roberts county bonds, which said report was, on the day aforesaid,

said, examined and approved in open court, and approval indorsed thereon, signed by each member of said court, and under their signatures appeared 'Commissioners' Court of Rockwall County;' and said report was filed as part of the record of said commissioners' court. That prior to the date of the filing and approval of the report aforesaid, the said Kernodle, as treasurer, as aforesaid, did receive the annual interest upon the said seven Roberts county bonds, and the same, while not specifically named in the report approved as aforesaid, was embraced in said report, and the fact that it was so embraced in said report was known to said commissioners' court, and to each member thereof, and was in the approval of said court acted upon and approved. That on February 9, 1891, R. A. Sneed, being then treasurer of Rockwall county, and having in his possession said seven Roberts county bonds as the property of said county and belonging to the permanent school fund thereof, the commissioners' court of Rockwall county entered an order directing him as treasurer to go to Roberts county, Texas, and collect the interest on said seven bonds. That on the 9th day of November, 1891, the said Sneed, as county treasurer of said county, made to said commissioners' court his report of the condition of the permanent school fund of said county, showing the total amount of said fund invested in county bonds to be \$20,000, which total embraced aforesaid seven Roberts county bonds, and this fact was known to said commissioners' court, and each member thereof; and the said report, on the same day, by order entered upon the minutes of said court, was approved, and, in addition thereto, was signed by each member of said court, and beneath their signatures appeared 'Commissioners' Court of Rockwall County, Texas,' and said report became a part of the record of said commissioners' court. Defendants further alleged that at all times since the date of the purchase of said bonds they had been held by the treasurers of said county as a part of its property. That the fact of the purchase thereof as an investment of the permanent school fund of said county had been known to the county judge, and to each member of the commissioners' court of said county, and that at every session of said court from the date of the purchase of the same down to the time of the institution of this suit the said knowledge had been possessed by said county judge, and each member of said commissioners' court, and the purchase and ownership of said bonds by said county was never repudiated, and was at all times ratified and approved by the said commissioners' court, and each member thereof, during the whole of said period, until about the date of the institution of this suit, when, as an after-thought and scheme to avoid a loss which said commissioners' court had conceived the county in danger of sustaining by holding said bonds, the pur-

chase and ownership thereof was repudiated. That the said county of Rockwall, on April 29, 1891, instituted in the district court of said county a suit against the vendor of said bonds, seeking to recover from him the value of said bonds, on the ground that he had sold the same to said county falsely representing their value and validity. By reason of aforesaid facts defendants claimed that said county was estopped from denying the legality of the purchase of said bonds and its acquisition of same, and that, if there was any irregularity in said purchase, it had been ratified and approved and made good."

The facts pleaded as a ratification and estoppel against the county are strong and definite in their character, and if it was in the power of the commissioners' court of Rockwall county by collateral acts of recognition to ratify the unauthorized acts of the county judge and county treasurer in investing the permanent school fund of the county in Roberts county bonds, without an order of the commissioners' court authorizing such investment, then the plea of estoppel against the county must be held to be sufficient and good in this case. "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers, but not otherwise. Ratification may be frequently inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals." 1 Dill. Mun. Corp. § 463. The principle announced in the above quotation is recognized as being well established, but it is subject to a material qualification. When there is a mode of contracting prescribed which operates as a limitation upon the power to contract, then the mode prescribed becomes the measure of power, and there can be no ratification inferred from acts recognizing the legality of a contract made in violation of the prescribed mode. *City of Bryan v. Page*, 51 Tex. 532; 1 Dill. Mun. Corp. §§ 449-463; 2 Herm. Estop. § 1086; *Suth. St. Const.* §§ 454-459; *Smith v. City of Newburgh*, 77 N. Y. 130; *Davis v. City of Jackson*, 61 Mich. 540, 28 N. W. Rep. 526; 15 Amer. & Eng. Enc. Law, 1042-1086. The pleadings and facts of this case disclose that the \$6,500 paid by the treasurer for the Roberts county bonds belonged to the permanent school fund of Rockwall county, but it is not expressly disclosed from what source the money was derived. The counties in this state have no permanent school fund except that arising out of the grant of four leagues of land by the state to the several counties, and it may be safely assumed that the money paid out by the treasurer of Rockwall county was derived, originally at least, from the sale of such lands. It then becomes important to ascertain the powers and limitations of counties over this fund.

Section 6, art. 7, of the constitution, as

amended, reads as follows: "School lands of counties. All lands heretofore or hereafter granted to the several counties of this state for educational purposes, are of right the property of said counties respectively to which they were granted, and title thereto is vested in said county, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part in manner to be provided by the commissioners' court of the county. Actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed 160 acres, at the price fixed by said court, which price shall not include the value of existing improvements made thereon by such settlers. Said lands and the proceeds thereof, when sold shall be held by said counties alone as a trust for the benefit of public schools therein, said proceeds to be invested in bonds of the United States, the state of Texas, or counties in said state, or in such other securities and under such restrictions as may be prescribed by law, and the counties shall be responsible for all investments; the interest thereon and other revenue except the principal, shall be available fund." It will be seen that the provision of our organic law, which vests the ownership and control of these lands, and the proceeds derived from the sale thereof, in the several counties, qualifies or limits the power therein granted by these words: "Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein, said proceeds to be invested in bonds of the United States, the state of Texas, or counties in said state, or in such other securities and under such restrictions as may be prescribed by law, and the counties shall be responsible for all investments; the interest thereon and other revenue except the principal, shall be available fund." This constitutional provision is the original source of the county's power, and immediately accompanying the grant of power is the restriction and limitation that it shall be invested "under such restrictions as may be prescribed by law." The exercise of the ownership and control of counties over this fund is not absolute, but limited in the constitution by such restrictions as the lawmaking power of the state may provide. In pursuance of this constitutional warrant, the legislature, in an effort to throw around this fund safeguards for its protection, has provided the mode by which it may be invested. Article 988m, §§ 2, 3, Sayles' Civil St., are as follows: "Article 988m: Bonds of a county may be sold and proceeds reinvested. Any county at any time having its school funds derived from the sale of its county school lands invested in the bonds of the United States, of this state, or of any county, shall have the authority to sell these bonds, when in the opinion of the county commissioners'

court it shall be deemed for the best interest of the fund, and invest the proceeds in its own or any other county bonds duly and lawfully issued. Sec. 2. Sale may be made when. Such sale and reinvestment shall be made when the proceeds of the sale can be reinvested in such county bonds bearing the same or a greater rate of interest, and having the same or a longer time to run before their maturity, and no commissions shall be paid the county judge or any other officer for making such sale or reinvestment. And the said court shall never pay a higher price for the bonds in which it is proposed to reinvest such proceeds, than the price at which such other bonds were sold. Sec. 3. Order for sale, how made. The order for the sale and reinvestment shall be made by the county commissioners' court at some regular term thereof, when there is a full court present, and not less than four in number shall concur in the said order, the names of those concurring being spread on the minutes of the said court." The mode prescribed by law, or, in the language of the constitution, the restrictions required by law for the investment of this fund, are: (1) It must be by order of the commissioners' court; (2) the order must be made at a regular term of the court; (3) there must be a full court present; (4) not less than four in number must concur in the order; and (5) the names of those concurring must be spread on the minutes of the court. This manner of contracting for the investment of the permanent school fund belonging to counties we think was clearly intended by the legislature and contemplated by the framers of our constitution as a limitation upon the power of the commissioners' court to contract in relation to the matter. If the commissioners' court had possessed the unqualified power of investing this fund at its own discretion, and then a statute had been enacted directing the court as to certain formalities to be observed in contracting, it might be contended with force that the statute was directory, and that irregularities in the manner of contracting could be cured by the recognition of the contract as being legal and of binding force by the commissioners' court. But such is not the case under consideration. Here the power to contract is coupled with the mode, and it would be doing violence to the rules of constitutional and statutory construction to assume that the power would have ever been granted in the absence of the limitation as to mode. This construction of our constitutional and statutory provisions on this subject is not only believed to be in accord with the general established principles of construction, but also in thorough harmony with the well-known sacred regard in which our lawmakers have held this fund, provided for the education of the children of Texas in all successive generations. It is believed that the commissioners' court has no power to invest this fund, except by a compliance with the statutory mode provided; and, having no

power itself to contract otherwise, it cannot ratify a contract made by another which is subject to the same objection. The commissioners' court is the only body intrusted with the power of investment of this fund. The county judge has no authority whatever in the premises, and his acts in relation to the permanent school fund have no more legal force than would those of any private citizen.

Is the treasurer and his sureties protected by the order of the county judge directing him to pay out the \$6,500 of permanent school fund for the seven Roberts county bonds? Article 994, Sayles' Civil St., provides: "It shall be the duty of the county treasurer to receive all moneys belonging to the county, from whatever source they may be derived, and to pay and apply the same as required by law, in such manner as the commissioners' court of his county may require and direct." Article 998, Id., provides: "The county treasurer shall not pay any money out of the county treasury except in pursuance of a certificate or warrant from some officer authorized by law to issue the same; and if such treasurer shall have any doubt of the legality or propriety of any order, decree, certificate or warrant presented to him for payment, he shall not pay the same, but shall make report thereof to the commissioners' court for their consideration and direction." It has been seen that the county judge has no authority to invest the fund; neither is there any provision of our statutes making him legally competent to give orders upon it for any purpose whatever. It is true that he is *ex officio* presiding officer of the commissioners' court; but he is not the commissioners' court, and may not legally exercise the powers which are conferred upon it by law. The district court judge is of higher official station and dignity than he, but because of his want of legal authority in the premises no one would contend that a similar order from him would afford any protection to the county treasurer in paying out the permanent school fund. The order of the county judge was wholly without legal force, and therefore can give no protection to any one respecting it.

But the question may be asked if the commissioners' court may not ratify the act of the treasurer in paying out the money, as distinguished from the illegal contract made by the county judge? We think not. The commissioners' court can only deal with this fund in the manner prescribed by law. When it departs from the legal mode it loses its power in the premises. To hold otherwise would be to give little effect to the limitation intended as the condition of the exercise of the power granted. We are free to say that the facts of this case present a hardship, and it would comport much better with our feelings if we could pronounce the liability in this case against the actual violators of the law, instead of the sureties of the dead and insolvent treasurer; but the ap-

pellants voluntarily assumed the risk of becoming sureties upon the official bond of the treasurer, and they must bear the legal consequences, which it is our duty to declare. It is our opinion that the court did not err in sustaining the demurrer to the third paragraph of appellants' second amended original answer, and the judgment of the trial court is affirmed.

Conclusions of Fact.

(1) On the 6th day of November, 1888, W. T. Power was duly elected to the office of county treasurer in and for Rockwall county. On the 14th day of November, 1888, said Power executed his official bond as required by article 988, Sayles' Civil St., in the sum of \$11,000, with T. J. Wood, Jr., W. J. Jones, George A. Truit, and Chancey Allen as sureties thereon, which bond was on November 15, 1888, approved by the commissioners' court, and filed, and said Power took the oath of office, and became thereby duly qualified as county treasurer. (2) After his qualification as county treasurer there came into the hands of said W. T. Power, as such treasurer, the sum of \$6,500 belonging to the permanent school fund of Rockwall county. (3) Some time prior to November 1, 1889, the county judge of Rockwall county purchased for the permanent school fund of said county seven courthouse bonds of Roberts county, Tex., of \$1,000 each, and directed said Power, as treasurer, to pay said \$6,500 of the permanent school fund held by him on said purchase. Said \$6,500 being insufficient to pay for said bonds by \$500, the said county judge executed in his official capacity a due-bill for that amount to the vendor of said bonds; and said Power, as he was directed by said county judge, paid to the vendor of said bonds said \$6,500 of the permanent school fund, and received therefor seven Roberts county courthouse bonds of \$1,000 each, for the permanent school fund of Rockwall county. (4) The said Roberts county courthouse bonds ever since their purchase have been in the possession of and held by Rockwall county, and are still so held and possessed. (5) There was no order of the commissioners' court of Rockwall county made directing or authorizing the said county judge, or anyone else, to make the said purchase of the said Roberts county courthouse bonds with said permanent school fund, and no order of said commissioners' court was ever made directing or authorizing the said county treasurer to pay out the \$6,500 of the permanent school fund belonging to the county for the said Roberts county bonds. (6) W. T. Power died before the institution of this suit, and his estate was wholly insolvent.

Conclusions of Law.

1. The act of the county judge in purchasing the Roberts county bonds to be paid for out of the permanent school fund of Rockwall county, without an order of commis-

sioners' court passed in accordance with law, was wholly void, and of no binding force upon the county or any of its officials.

2. The county treasurer had no authority to pay out of the permanent school fund moneys for any purpose, except upon an order of the commissioners' court made as provided by law; and the direction of the county judge to him to pay out that fund can furnish no protection to him and his sureties on his official bond.

3. The paying out of the permanent school fund upon the order of the county judge without any order of the commissioners' court was a misapplication of the fund, and a breach of the treasurer's official bond, which rendered him and his sureties on such bond liable to the county for the amount of the fund so misapplied.

4. The facts set out in the third paragraph of appellants' second amended original answer do not estop the county from asserting their liability as sureties on the county treasurer's bond, and the action of the court below in rendering judgment against them and in favor of the county is approved.

On Motion for Rehearing.

(Jan. 3, 1894.)

At a former day of this term, this court rendered an opinion affirming the judgment of the lower court. A motion for rehearing was filed, and, pending this motion, this court certified the vital questions involved in the case to the supreme court of Texas for its decision. The questions so certified having been answered by the supreme court in a manner requiring a different disposition of the case from that formerly made by this court, we now grant the motion for rehearing. As the court below sustained a general demurrer to that portion of defendants' answer which set up ratification and estoppel, and that issue, therefore, not having been tried by the court, the case will be reversed and remanded for a new trial. Reversed and remanded.

GULF, C. & S. F. RY. CO. v. HASKELL.

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

OVERFLOWING LANDS — INJURY TO CROPS — DAMAGES — EVIDENCE — OPINIONS OF CASE OF OVERFLOW.

1. In an action against a railroad company for damages resulting from an overflow alleged to have been caused by defendant's construction of an embankment, it is error to admit evidence that, after the overflow, defendant altered the embankment, so as to allow a free passage for water.

2. In an action against a railroad company for causing an overflow of plaintiff's land by the construction of an embankment, it is proper to allow witnesses testimony with reference to the flow of water therein to testify that the overflow was caused by the embankment.

3. The measure of damages for the destruction of a crop by an overflow is the value of such a crop at or near the place where it was grown, subject to estimates and allowances for the contingencies and expense attendant on its cultivation and care till maturity.

4. Where an overflow of land only damages the crops thereon, and causes no perma-

nent injury to the land, except as showing a liability on its part to further similar overflows, it is error to instruct the jury that they may compensate the owner for permanent injury to his land by estimating its value before and after the overflow.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by H. N. Haskell against the Gulf, Colorado & Santa Fe Railway Company for damages caused by an overflow of plaintiff's land. From a judgment for plaintiff, defendant appeals. Reversed.

Alexander & Clark and J. W. Terry, for appellant. Coombes & Gano, for appellee.

LIGHTFOOT, C. J. The appellee brought suit in the district court of Dallas county to recover of appellant damages upon the following cause of action, as stated in his petition: That appellee is the owner of a tract of land lying in Dallas county, about three miles northeast of the courthouse, being a part of the John Grigsby league; that on the 1st day of January, 1887, the defendant company constructed its roadbed and track in a northeasterly direction through the county of Dallas, and threw up and graded its roadbed over and across a part of the John Grigsby league, and over and across a branch known as "Peak's Branch," a short distance below and to the southeast of appellee's tract of land, and erected and made an embankment across said Peak's branch to the height of 12 feet, extending said embankment for a long distance on each side of said branch; that said defendant company left a small opening in said embankment at the crossing of said branch, of only about 20 feet in width, as an outlet for the surface water for a large scope of territory lying on the northwest of its said roadbed, and for the water flowing off through said branch; that said opening was and is wholly insufficient to permit the water to flow off; that the said embankment dams up the natural flow of water, and causes the same to overflow and damage plaintiff's land; that defendant company so constructed its said roadbed for a long distance northeast of said Peak's branch as to cause the surface water which was accustomed to flow southeastwardly in channels lying to the east of said Peak's branch, and forced the same to flow over a part of plaintiff's land, and into said Peak's branch, thereby injuring plaintiff's land, and increasing the volume of water to be borne off through said Peak's branch; that defendant company, by reason of the diversion and obstruction of the natural flow of water as aforesaid, overflowed, washed away, and destroyed 90 panels of plaintiff's fence, of the value of \$100; 400 blackberry vines, with the fruit thereon, of the value of \$400; one-half acre of general garden vegetables, of the value of \$100; one-half dozen fruit trees, of the value of \$20; 1 acre of millet,

of the value of \$25; 1 acre of corn, of the value of \$20; one-fourth acre of potatoes, of the value of \$50,—and injured and damaged plaintiff's said lands permanently in the sum of \$2,500; the total damage of plaintiff in the sum of \$3,200. There was a verdict of a jury, and judgment against the defendant company, from which it has taken this appeal.

The first assignment of error by appellant is as follows: "The court erred in allowing the plaintiff's witnesses Jeff Haskell and J. M. Browder to state to the jury, over defendant's objection, that defendant enlarged its trestle, and made a wider opening for Peak's branch after the overflow of 1888, because said evidence was irrelevant, and not competent, and was calculated to have an undue influence on the jury in arriving at the cause of the overflow; the same being likely to be considered by the jury as an admission on the part of the defendant that the opening was not sufficient, and was the cause of the plaintiff's land being overflowed." This point was properly raised by objection to the testimony, as shown by defendant's bill of exceptions. In the case of *Railway Co. v. McGowan*, reported in 73 Tex. 363, 11 S. W. Rep. 338, Judge Henry held that such testimony was not admissible. He says: "In this court, in the case of *Railway Co. v. Burns*, it was held that such evidence was improper; Judge Watts saying: 'As a general rule, upon principle, as well as matter of public policy, such evidence ought not to be admitted. As a matter of common knowledge, the railway tracks and machinery, as well as other instrumentalities used in operating trains, are continually undergoing repairs and being improved. Undoubtedly, the public is greatly interested in the continuance of such improvements. Where circumstances have directed the attention of the company to a part or portion of the roadbed or other instrumentalities that, by additional safeguards, would be rendered more safe, to hold as a general rule that, after the desired improvement is made, that the company thereby admits that it has been negligent, would result in deterring the company from ever making an improvement. Indeed, it would be a harsh rule if every change for the better was to be considered as evidence showing former negligence.' 4 Tex. Law Rev. 54, 56; *Morse v. Railway Co.*, 30 Minn. 405, 16 N. W. Rep. 358."

The point raised in the second assignment of error is that "the court erred in permitting plaintiff to prove by himself and his witnesses Jeff Haskell, T. J. Kerr, and W. F. Clark, over defendant's objection, that, 'in their opinion, defendant's embankment caused the overflow of plaintiff's land,' and erred in refusing to rule out their said testimony after allowing them to testify, because said witnesses were not experts,

and it had not been shown by their testimony that they were in position to know the facts, such as would justify the court in permitting them to give their said opinions to the jury." We do not think the court erred in admitting this testimony. "All witnesses must state facts only, except in certain cases in which persons of skill and learning may give their opinion. There are cases, however, in which unskilled witnesses may give their opinions; and there is still another class of cases in which they may do so when they give along with the opinions the facts on which they are founded. * * * The case of *Porter v. Manufacturing Co.*, 17 Conn. 249, resembles very much the one before us. In that case a witness who had long been familiar with a particular region, and its streams and the rainfall, was permitted to give his opinion upon the question of whether a dam across a stream had not been raised so high as to be unsafe. The court said: 'The opinions of such persons upon a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unfamiliar with the facts of the case; and to preclude them from giving their opinions on the subject, in connection with the facts testified to by them, would be to close an ordinary and important avenue to the truth.' * * * On such a question, the judgment of ordinary persons having an opportunity of personal observation, and testifying to the facts derived from that observation, was equally admissible, whatever comparative weight their opinions might be entitled to, of which it would be for the jury to judge." *Railway Co. v. Klaus*, 64 Tex. 294, 295; *Railway Co. v. Hadnot*, 67 Tex. 503, 4 S. W. Rep. 138; *Com. v. Sturtivant*, 117 Mass. 122.

There are a number of other assignments of error in the cause raising the question in different forms as to what would be the true measure of damages in causes like this, all of which may be considered under one head. The appellee seeks to recover—First, for the value of the products of his land which were destroyed by the overflow; and, second, for what he alleges to be the permanent damages to his land. The third, seventh, and eighth assignments of error are as follows, and may be considered together: "Third. The court erred in permitting the plaintiff, Haskell, to testify to the value of his fruit trees, blackberries, fence, etc., because, plaintiff having sued for permanent injury to his land, the measure of damages was the value of his land before and after the overflow, and not the value of the products and things destroyed and the injury to the land." "Seventh. The court erred in its charge to the jury stating the measure of damages to be 'the damages, if any, he [plaintiff] sustained by reason of said over-

flow, the reasonable value at the time of his garden, fruit trees, growing crops, and vines; and, if you are further satisfied that the plaintiff's land was permanently damaged thereby, then you may, in addition, compensate him for such damages; and in estimating this you will look to the evidence before you as to the value of the land thus overflowed or submerged, just before and after such overflow, and the difference, if any, will be the amount of his recovery; because the plaintiff, by his petition, alleges and seeks pecuniary compensation for permanent damages to the land overflowed, and the proper measure of damages is not the value of the products and things destroyed thereon and the difference in the value of the land before and after the overflow." "Eighth. The court erred in refusing to give to the jury the second special instruction requested by defendant, as follows, viz.: 'You are instructed by the court that if you find from the evidence that defendant's embankment is defective, and that thereby plaintiff's said land is liable to overflow from occasional heavy rains, but is not permanently injured, nor taken or destroyed, then, in this event, plaintiff is entitled to recover the damages or injury which his land and other property sustains from the successive overflows when they occur; and in this event plaintiff can only recover in this suit for the damage or injury his said land and property thereon specified in his petition sustained by said overflow of April 27, 1888.'" The testimony of the witness Haskell was properly objected to by appellant, and a bill of exceptions taken. The testimony does not properly set out the value of the crops destroyed. We do not think the measure of damages was properly submitted to the jury. The plaintiff alone testified as to the value of his crops destroyed. He said: "I had about one-half acre in garden vegetables of all kinds. The one-half acre of vegetables was worth \$100. I had an acre of corn destroyed, which was worth \$20. I had about an acre of millet destroyed, worth \$25. I estimate my corn at what I expected to make. I expected to make about 75 bushels per acre. I think corn is worth now about 80 cents per bushel. I do not know what millet was grown. I cannot guess. I had a pretty stand of corn. I had already plowed it out with double shovels. I believe I was using, from my garden, onions and radishes. I think I had everything else growing nicely. I have made \$100 off my garden every year I have raised a garden. On April 27, 1888, I could not have gotten any millet. I estimate this millet at what I sold for last year, which was \$12 per ton. I put the corn at 75 bushels per acre, because I have raised that much on the land." The testimony of the witness Haskell was properly objected to by appellant, and a bill of exceptions taken. The testimony does not

properly set out the value of the crops destroyed. He should have given their value at the time of the destruction, and should have been held to this rule in estimating the damages. It is clearly held by our supreme court in *Railway Co. v. McGowan*, 73 Tex. 362, 11 S. W. Rep. 336, as follows: "The only correct criterion for ascertaining the value of a growing crop at any period of its existence is to prove what that character of crop was worth at or near the place where it was grown, when you are to make proper estimates and allowances from ascertained or ascertainable facts for the contingencies and expenses attending this from cultivation and care." See, also, *Railway Co. v. Helsley*, 62 Tex. 596.

The charge of the court upon the measure of damages is correctly set out above in the seventh assignment of error. This charge is not correct, and does not properly present the measure of damage for permanent injury to the land as applied to this case. The charge asked by appellant called the court's attention to the question. The plaintiff, in his petition, alleges that the defendant "injured and damaged plaintiff's said land permanently in the sum of twenty-five hundred dollars," but said petition does not show in what such permanent injury consists, but it may be inferred that it consists in the construction of the embankment with insufficient culverts to allow the water to escape. If the damage to a party's land should consist in washing away the soil, or in washing away his house, or in leaving such deposits upon the land as to render it unfit for cultivation or the like, this would be such injury as could be recovered for in an action; but, where such damages consist in rendering the land liable to overflow in the future, it is such as may or may not occur, and the liability is such as may or may not be removed by the construction of additional culverts and outlets for the water, so that this character of damage is in its nature uncertain, and cannot be recovered until the injury actually occurs, and each separate injury renders the party at fault liable for such injury as may then occur. In the case of *Railway Co. v. Helsley*, 62 Tex. 596, the facts were very similar to the facts in this case; and Judge Stayton, in commenting upon the charge in that case, says: "The charge, however, in reference to the measure of damages, was incorrect. The charge was as follows: 'If you find for the plaintiff, you will find for him such a sum of money as the evidence shows he has been damaged, not exceeding the amount of damages alleged. In estimating the damages you find for plaintiff, if any, you will do so by estimating the market value of the land at and just before the time of building the railroad, and the market value of the same after the injury was done, if any be shown by the evidence to have been done.'

Of this charge, we may say, as was said of a similar charge by the supreme court of Iowa: 'The rule announced by the court is a proper one when the act complained of takes a part of or affects a change in the realty itself which is the subject of the controversy. In this case no part of the land was taken, nor was any change wrought upon it. The only detriment which the land sustains is its liability to overflow from unusually heavy rains. The true measure of damages is the injury which the land and other property of plaintiff sustains from the successive overflows when they occur.' *Van Pelt v. City of Davenport*, 42 Iowa, 314. If the appellee's crops have been destroyed or damaged by the negligence or wrong of the appellant in the matters complained of, then he is entitled to recover their value; and, if his land has been rendered less productive or otherwise injured, then he is entitled to recover such damage as will be a fair compensation to him for the loss thus sustained; and from time to time, if injury results to him from the negligence or wrong continuing, he will be entitled to relief by a proper action or actions." In the case of *Railway Co. v. Tait*, 63 Tex. 226, the court, in passing upon a similar charge, says: "Neither the charge given nor the evidence offered were such as to enable the jury to ascertain the true amount of damages the appellant would be entitled to recover. The evidence was based on the idea that the facts out of which the injuries grew were to continue, and that the land was practically taken for the use of the railway company. It went to show the value of the entire tract before the water was thrown upon it, and its value afterwards. The petition sought damages for injuries already received, and sought relief through which the continuance of the causes which had produced the injuries would be prevented; but the charge of the court and the evidence looked to a case in which the causes of injury were to continue." And that cause was reversed on that ground. In the case of *Railway Co. v. Johnson*, 65 Tex. 398, Judge Robertson says: "The measure of damage for negligently damaging the land of another, without permanently taking it, is the value of the products, including the fruit trees destroyed and injury done to the land, but not the difference between the value of the land before and after the overflow."

The fourth assignment of error is as follows: "The court erred in allowing the plaintiff, as a witness for himself, to testify, over defendant's objection, that one Crockett, an engineer, had charge of the construction of defendant's trestle (in 1882) at Peak's branch, and that said engineer boarded with plaintiff; and that in a conversation he had with said Crockett, while engaged in such construction, Crockett then

told him that said opening was insufficient as an outlet for the water of Peak's branch, but that he could not make it wider; that his superior engineer would not let him put in a wider trestle,—because said testimony was hearsay and inadmissible, and it was not shown that said Crockett or his superior were the employees and agents of this defendant." We think the objection to this testimony was well taken, and it should have been excluded. It was not admissible as a part of the *res gestae*, nor does it come within any exception allowing the admission of hearsay testimony. The points above mentioned dispose of the material questions in the case. For the errors named, the judgment is reversed, and the cause remanded.

TEXAS & P. RY. CO. v. MANSELL.¹

(Court of Civil Appeals of Texas. Sept. 5, 1898.)

CARRIERS—CARRYING PASSENGER PAST STATION—EVIDENCE—DAMAGES.

1. A passenger on defendant's train was carried half a mile past his station on a dark and damp night. The conductor told him it was a short distance back, but that he could go on to the next station, whence, however, he could not return till the next day. The conductor refused to back the train to the station, saying that he was behind time. The passenger was unwell, but failed to tell the conductor so. *Held*, that the passenger could recover for the exposure, fatigue, and mental distress caused by his walk back to the station.

2. In walking back to his station, which the servants of defendant railway company had negligently passed, plaintiff had to cross two trestles on his hands and knees, owing to the darkness, and his knees were consequently sore and stiff for some days. He had been sick with jaundice, and the exposure gave him a cough which lasted for some time, and in crossing one of the trestles he was frightened by the sound of an approaching train. *Held*, that a verdict in plaintiff's favor for \$1,000 was excessive, and should be reduced to \$500.

Appeal from district court, Wood county; Felix J. McCord, Judge.

Action by W. B. Mansell against the Texas & Pacific Railway Company for having negligently carried plaintiff past his destination. From a judgment for plaintiff, defendant appeals. Modified.

W. B. Teagarden, for appellant. W. M. Giles, for appellee.

Conclusions of Fact.

RAINEY, J. Appellee, being a passenger on appellant's train, was carried past his station, a short distance, at night, it being dark, and the ground wet. The conductor told him that it was a short distance back, but that he could go on to the next station, which was Big Sandy, but that if he went on he would not get back until 2 p. m. next day. Appellee insisted that the train be backed to the station, which the conductor refused to do,

¹ Rehearing denied.

stating that he was behind and could not do so. He told appellee to stand aside, and let the train pass, and he would have a dry walk on the track back. That appellee had to walk back a distance of about one-half a mile. In doing so he had two trestles to cross, and on account of the darkness he had to crawl, which bruised his knees, and made them sore and stiff for several days. While crossing one of the bridges he heard a train coming, which frightened him; and that he had been sick with jaundice, and the exposure gave him a cold and cough which lasted him some time. He made no statement to the conductor about his being sick. A trial was had, resulting in a verdict by the jury for \$1,000 in favor of appellee. A motion for new trial was overruled, and appellant appealed to this court.

Conclusions of Law.

The appellant's servants were negligent in passing the station, and in not backing the train to the station that appellee might there get off, and for this negligence appellee is entitled to recover. The award of the jury of \$1,000 seems to us excessive. The sum of \$500 is, in our opinion, full compensation for the injuries sustained. If the appellee will, within 30 days from this date, enter a remitter of \$500, judgment in his favor will be entered for \$500; otherwise, the cause will be reversed and remanded.

FORDYCE et al. v. DILLINGHAM.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

CARRIERS OF PASSENGERS—FACILITIES FOR ALIGHTING.

A train must be stopped at a station long enough to allow passengers to alight safely, and, if not, and they are carried past, the train should, if necessary, be backed; and in the case of a woman traveling with four children, all less than six years old, it was negligence to set them down six hundred yards beyond the station, in a wet place, at 5 A. M., in cold winter weather.

Appeal from district court, Henderson county; F. A. Williams, Judge.

Action by Mrs. M. V. Dillingham against S. W. Fordyce and A. H. Swanson, receivers of the St. Louis, Arkansas & Texas Railway Company, for damages for personal injuries caused by negligence of defendants' servants. Judgment for plaintiff. Defendants appeal. Affirmed.

Clark, Dyer & Bolinger and Sam H. West, for appellants. Richardson & Watkins, for appellee.

Conclusions of Fact.

RAINEY, J. Mrs. M. V. Dillingham boarded the train of appellants as a passenger, with her four children, all under the age of six years, at Winona, to be transported to Brownsboro, a station on defendants' road. On reaching Brownsboro, the

station was called out, but the train failed to stop long enough for her to alight with safety. After the train pulled out the conductor saw that she had not gotten off. He stopped the train about 600 yards from the station, and requested her to get off, which she did, and walked back with her children, carrying one in her arms to the station, where she found shelter in the depot. This occurred about 5 o'clock on a cold morning in December. She got off at a place where the ground was wet, and she suffered physical pain from the cold and walk, and mental anguish from her embarrassing situation. At the time the train passed Brownsboro she had friends waiting to take her to her destination in the country, but, when she failed to get off, her friends, supposing she had not come, went home, causing her to be detained at the station several hours before she could get away. The injury sustained was caused by the negligence of appellants' servants.

Conclusions of Law.

Two errors are assigned, in substance that there is not sufficient evidence to support the verdict, and that the verdict is excessive. While there is a conflict in the evidence, there is sufficient to show that there was negligence on the part of the appellants in not stopping the train long enough for Mrs. Dillingham to alight, and in having her leave the train where she did. Under the circumstances, the train should have been backed to the station. The jury having passed upon the evidence, and there being sufficient to support the verdict, it will not be disturbed. It seems that the jury believed the testimony adduced by plaintiff, which, if true, was ample to warrant the damages assessed. The judgment of the court below will be affirmed.

EAST TEXAS FIRE INS. CO. v. FLIPPIN.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

INSURANCE—CANCELLATION—OTHER INSURANCE.

An agent, representing the several companies insurers of plaintiff's property, under instructions from them, went to plaintiff to cancel the policies. Plaintiff told him that they were transferred as security to two of his creditors, and declined to accept the unearned premiums. The agent thereupon mailed drafts for the same to said creditors, and one draft was accepted and paid. The other was declined by the creditor, on the ground that the fire had already occurred. It appeared that this creditor had recovered judgment on the policies involved, and the insurers had also compromised with plaintiff for his interest in them. Held, that these policies constituted "valid and existing insurance," within the prohibitory condition of a policy taken out by plaintiff the day of his talk with the agent.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action by M. V. Flippin, and later by Mrs. J. V. Flippin, his widow, against the East

Texas Fire Insurance Company, on a policy of insurance. Judgment for plaintiff. Defendant appeals. Reversed.

Whitaker & Bonner, for appellant. Todd & Hudgins, for appellee.

LIGHTFOOT, C. J. In this case there are a number of assignments of error, and many points raised, in a voluminous transcript of nearly 200 pages, but from the view we take of the case it will only be necessary to consider a few of them. The suit was brought by M. V. Flippin on a policy of fire insurance for \$2,500. The plaintiff died pending the suit, and his widow and only heir, J. V. Flippin, became plaintiff. One of the defenses set up by the defendant company was that the assured, at the time the policy was issued, already held additional insurance beyond the amount permitted by the policy, without notice to or consent of the defendant.

Fourth assignment of error is as follows: "The court erred in refusing special charge No. 1 asked by the defendant, to the effect that the jury should find for the defendant, because a material condition of the policy had been violated, in that the uncontroverted evidence showed that the insured had valid and existing insurance on the property in a much larger amount than permitted by the terms of the policy here sued on, and reference is made to said special charge as a part of this assignment." With this will also be considered eighth assignment of error: "The verdict of the jury is contrary to the law and the evidence, in that the evidence shows that defendant company's policy provided that it should be void if there was more than \$2,500 additional insurance on said building, or more than \$5,000 total insurance; defendant company's policy being for \$2,500, and the evidence further showing that there was more than \$2,500 additional insurance, valid and existing, and uncollected at the time of the fire, by reason of which this defendant is not liable." The charge asked was as follows: "The evidence in this case shows that, by the terms of the policy sued on, it was provided that the same should become void, unless consent in writing is indorsed by the company thereon, if the assured shall have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property insured, or any part thereof. It further shows that the policy sued on permitted additional insurance to the amount of \$2,500, or a total insurance of \$5,000; and the evidence further shows that there was more than \$2,500 additional insurance, or more than \$5,000 total insurance. Therefore a material condition of said policy has been violated, and you must find for the defendant." Do the facts of this case show, or tend to show, that, at the time the policy sued on in the case was issued, the other policies had

been canceled? The evidence was as follows: The policy issued by defendant company was for \$2,500, and permitted an additional amount of \$2,500 of insurance to be effected on the property; and it contained a provision that the policy should become void "if the assured have, or shall hereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property, * * * or any part thereof." M. V. Flippin, in his proof of loss, which was introduced by plaintiff, stated under oath that he had \$7,500 other insurance in addition to the sum insured by this company. He attaches to his proof of loss a schedule showing a total insurance over and above the sum of this company's policy of \$15,500, this amount being on a double storehouse, the south half of which was covered by the policy sued on herein. That three of the policies were made payable to Lehman, Abram & Co., as their interest may appear, to secure a mortgage debt; and four of them payable to Meyer & Aronson, or order, as their interest may appear. It was shown that Parks et al., trustees of the Mechanics' Bank of Saint Louis, holding the policies by transfer from Meyer & Aronson, who held them through M. V. Flippin, the insured, had sued after the fire, and recovered judgments on policies covering the same property, against the following companies, and for the amounts named: Hartford Fire Insurance Company, for \$2,522.40; Citizens' Fire Insurance Company, for \$560.31; Hanover Fire Insurance Company, for \$1,121.02; Connecticut Fire Insurance Company, for \$840.80; Home Fire Insurance Company, for \$1,681.60; Phoenix Fire Insurance Company, for \$1,680.53. These same policies were sued on by Flippin in the district court of Bowie county, Tex., after the fire, and the suits had been compromised by a payment to him of 20 per cent. of their face. Other policies which were held by Lehman, Abram & Co. were sued on by the latter, and a recovery defeated. C. E. Beard, a witness for plaintiff, testified that he was an insurance agent in Texarkana, and represented all the companies holding policies on Flippin's property, except the East Texas Fire Insurance Company; that on the 19th of February, 1885, he, under instruction from his companies, went to Flippin to cancel the policies; that Flippin told him that the policies were held as shown in the proofs of loss, and declined to receive the unearned premiums, but directed him to send them to the parties holding the policies, who were entitled to them; that witness remitted, by mail, drafts to the parties mentioned for the policies held by each of them; that the draft sent to Lehman, Abram & Co. was received by them, and paid; that that sent to Meyer & Aronson was received by them, but returned to witness uncollected and unpaid, with the information that under the circumstances, inasmuch as the fire had occurred, they could

not accept it; that defendant company's policy was issued on the same day; that Beard, as agent for the other insurance companies, had the above conversation with M. V. Flippin, and Hagey, the agent, was told that all other insurance had been canceled. The petition alleges that the fire occurred on February 21, 1885. The policies on the property largely exceed the sum of additional insurance permitted by the policy sued on. Whether the above charge, in the strong language in which it was presented, should have been given, it is not necessary now to determine; but it was certainly sufficient to call the attention of the court to the facts upon the points indicated, and we think the court should have presented to the jury a proper charge upon the question.

The facts before us, as shown by the evidence, do not indicate that the policies upon the property, at the time the policy sued on was issued, aggregating \$15,500, had been canceled. These policies had been made payable to Lehman, Abram & Co. and Meyer & Aronson, to secure debts of the assured, with full notice to the companies, who had no authority or power to cancel them without notice to the beneficiaries. These policies were not in evidence, and we cannot tell whether there was or was not a clause providing for a cancellation at the option of the companies. Unless there was such a clause, they had no power to cancel by notice and tender of the unearned premiums. 1 May, Ins. § 67. If there was such a clause, they could not cancel without notice and tender of the unearned premiums to the legal owners and holders of the policies. 1 May, Ins. § 67c; *Lattan v. Insurance Co.*, 45 N. J. Law, 453. In no event could it be claimed, under the facts presented to us, that the policies had been canceled at the time this policy was issued. The uncontroverted evidence and admissions of the assured in his proofs of loss show that, at the time this policy was issued, there were other policies upon the property for largely more than was allowed in the appellant's policy, and its agent was told that they were canceled. There was no waiver shown of the conditions upon which it was issued, and, under the facts as disclosed in the record, that policy never took effect. *Insurance Co. v. Blum*, 13 S. W. Rep. 572, 76 Tex. 653; 2 May, Ins. § 364. This question was fully presented below, on motion for new trial, which should have been granted. For the errors above indicated, the judgment is reversed, and the cause remanded.

BATSELL v. ST. LOUIS, A. & T. RY. CO.
(Court of Civil Appeals of Texas. Sept. 4, 1893.)

SUBSCRIPTION—SEVERALTY OF OBLIGATION—CONTRACT—PART PERFORMANCE.

1. Where several persons to a subscription each agree to pay the amount set opposite his name on condition that the payee perform cer-

tain acts, the agreement is several, and each may sue separately for a breach by the payee.

2. The fact that the subscribers appointed a committee to act as their agent in carrying out the purpose of the subscription does not prevent a subscriber from suing for a breach by the payee.

3. A contract to construct and maintain a railroad between certain points in consideration of contributions by citizens, being entire in its nature, a failure of complete performance entitles a contributor to recover the amount paid, unless an excuse for the failure be shown, or that the part performance is beneficial.

Appeal from district court, Grayson county; P. B. Muse, Judge.

Action by C. W. Batsell against the St. Louis, Arkansas & Texas Railway Company. From a judgment dismissing the action on demurrer to the complaint, plaintiff appeals. Reversed.

Brown & Bliss, for appellant. H. O. Head, Perkins, Gilbert & Perkins, and Sam H. West, for appellee.

RAINFY, J. Appellant brought this suit against appellee to recover \$1,900, paid to appellee on an executory contract, the conditions of which, it is alleged, the appellee failed to perform. The appellant, among others, became a party to a subscription contract, by which each became liable for the payment of the amount only opposite his name, conditioned that the appellee would construct, equip, and maintain a railroad from Mt. Pleasant to Sherman. By the terms of said instrument, a committee was designated and empowered to make a contract in conformity with the terms of said subscription obligation with said railroad company. A contract was made by which the railroad company bound itself to establish, equip, and operate said road, build engine houses and machine shops in the city of Sherman, and to make Sherman the end of a division of said road. Appellant alleges that he paid the amount of his subscription, and that the appellee has failed to perform its part of the contract. Various demurrers were filed to the petition, which the court sustained, and dismissed appellant's cause of action, from which ruling of the court an appeal was taken to this court.

There are various errors assigned by the appellant in the ruling of the court in sustaining the exceptions of appellee to the petition of appellant, and dismissing this cause. They may be grouped and disposed of under three propositions, as follows:

1. Can appellant in this case sue without making his cosubscribers parties plaintiff? Appellee contends that the contract under consideration in this case is joint, and that all the covenantees are necessary parties. There is confusion among the decisions on this point, and it is frequently difficult to determine whether a contract is joint or several. This must be ascertained from the facts and circumstances that pertain to the particular case. Mr. Parsons, in his work on Contracts,

¹ Rehearing denied.

(volume 1, p. 15,) says: "The circumstances of each case, and the situation and relation of the parties, and the nature of the consideration, are all to be looked into to ascertain who is really interested, and who has sustained damage arising from a breach of the contract, and whether such damage was joint or several." Again, on page 19, he says: "The nature, and especially the entirety, of the consideration, is of great importance in determining whether the promise be joint or several; for if it moves from many persons jointly, the promise of repayment is joint, but if from many persons, but from each severally, there it is several." In the case of *Darnall v. Lyon*, 19 S. W. Rep. 506, involving the consideration of the same contracts that are now under consideration, the court of civil appeals for the second district certified to the supreme court of Texas the following questions, among others, for answer: "Whether the subscription agreement is a separate contract, so as to admit of a separate suit thereon against each subscriber for the amount of his subscription." The reply was: "We are clearly of the opinion that this question should be answered in the affirmative. Although the words, 'We, the undersigned, hereby promise and agree,' if unqualified, would import a joint undertaking, yet the subsequent provisions in the writing that 'each subscriber' should 'be liable only for the amount opposite his name' leaves no doubt that the intention was that the obligation was to be several." 22 S. W. Rep. 304. This we think decisive of this question. If one can be sued for the amount of his subscription, he certainly ought to have the right to interpose as a defense the noncompliance of the other contracting parties. If this is the law, there is no good reason why he cannot sue alone, and recover what he has paid, if there has been a breach of the contract by the other party. If it were the intention of the subscribers to be severally bound, which intention, we think, is expressed in the contract, it makes it several, and the other parties to the subscription paper are not interested in a recovery by the appellant. It is a matter that alone affects the railroad company and him. Besides, it would doubtless be a difficult thing to determine and adjudicate the rights of all the parties growing out of this transaction in one suit.

2. It is further contended that, by the terms of the contract, the committee alone can sue. We do not think this a correct proposition. That the committee were the agents of the parties was clearly decided in the case of *Darnall v. Lyon*, supra. That a party has a right to sue for the breach of a contract entered into on his behalf by an agent, is well settled.

3. The remaining point to be settled is as to the extent of appellant's right of recovery, and whether or not his pleadings are sufficient on this point. The contracts in this

case constitute, we think, what is known as an "entire" contract. The common-law rule in such a case is: "A party to an entire contract, who has partially performed it, and subsequently abandons the further performance according to its stipulations voluntarily, and without fault on the part of the other, or his consent thereto, can recover nothing for such part performed." This doctrine has been modified in this state to the extent that, though a contract is entire in its character, if a party abandons his contract after part performance, he is only entitled to compensation for the benefit bestowed on the opposite party, or on others, if within the contemplation of the contract others are included. *Hillyard v. Crabtree*, 11 Tex. 264; *Carroll v. Welch*, 26 Tex. 147; *Wels v. Devlin*, 67 Tex. 507, 3 S. W. Rep. 726; *McFarland v. Lyon*, 23 S. W. Rep. 554, (decided this term.) The pleading of plaintiff clearly alleges a substantial breach of the contract by appellee. The contract being entire, it was the duty of appellee to perform it as agreed upon. If it failed to do this in any substantial particular, the plaintiff has the right to recover what he has paid, by showing a breach of the contract. If he does this, then the burden is on the defendant to show an excuse for his failure, or that he is entitled to compensation for part performance. 1 Whart. Ev. (3d Ed.) § 392. In the case of *Missouri, K. & T. Ry. Co. v. City of Ft. Scott*, 15 Kan. 435, in which this question was involved, Justice Brewer, in the opinion, says: "Wherever, therefore, in case of a subscription upon conditions by a city to the capital stock of a railroad company, there has been a failure on the part of the company to comply with one or more of the conditions, and it can be shown by the contract or aliunde what amount was paid as a consideration for the condition or conditions broken, such amount and interest is the proper measure of damages." He further says: "Cases may arise in which the contract is an entirety, and there is in it no means of apportioning the amount, and nothing can be shown aliunde to establish an apportionment, nor to show the relative or absolute values of the conditions performed and those broken." "In such cases we take the rule of law to be that no action can be maintained to recover the consideration, nor upon a quantum meruit, until all the conditions are performed; and, in case the consideration be paid in advance, and only part of the considerations are performed, the entire consideration can be recovered." The case there under discussion is very similar to the one at bar. In fact, the contract made by the railway company in that case does not differ in any essential particulars from that made in this case, and the principles therein announced as to the measure of damages we think is a clear and correct enunciation of the rule of law in such cases. On account of the errors in the rulings of the court, as

indicated in the foregoing, the judgment of the lower court should be reversed and remanded, and it is so ordered.

McFARLAND v. LYON.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

SUBSCRIPTION—CONDITIONS—ASSIGNMENT.

1. A subscription contract, providing that the subscribers shall be "liable only for the amount opposite his name," is a several obligation.

2. In an action on a subscription contract in aid of the construction of a railroad it appeared that the subscribers appointed a committee to make a contract with the company to carry the subscription into effect. The court found that this committee had exceeded their powers in making the contract they did. *Held*, that it should have found further whether defendant ratified their action.

3. Contractors who have taken a subscription list in aid of the railroad from the company by assignment subject to the conditions of the contract between the company and the subscriber's committee, to which said contractors too are parties, cannot enforce a subscription against the defense of nonperformance by the company.

Appeal from Grayson county court; E. P. Gregg, Judge.

Action by O. T. Lyon against C. H. McFarland on a contract of subscription. Judgment for plaintiff. Defendant appeals. Reversed.

Woods & Woods and E. C. McLean, for appellant. W. W. Wilkins, for appellee.

RAINEY, J. The appellant, with others, signed a subscription paper by which they agreed each to pay the St. Louis, Arkansas & Texas Railway Company the sum set opposite their names, each one to be liable only for the amount opposite his name, in consideration that the said company should construct, maintain, and operate a railroad from Mt. Pleasant to Sherman, and establish and maintain in Sherman depots for freight and passengers. They appointed a committee of three to make a contract with said company for the purpose of carrying into effect the subscription, and authorizing and empowering said committee "to make a suitable contract with the said railway company, and to provide therein for the time and manner of collecting this subscription, and all other details that may be found necessary as to the location of depots, and whatever else there may be to the interest of our town in making the same; and a majority of said committee is hereby authorized to act, their action to be as binding as if specified in this agreement; provided, that there shall not be collected of said subscription more than fifteen per centum per month, after the construction shall have been actually begun." The committee made a contract with said company obligating the subscribers to procure a part of the necessary right of way, to grade part of the road, and

to procure depots grounds and terminal facilities within the corporate limits of Sherman, and depot grounds at intermediate stations; the company agreeing to complete said road by August 1, 1887, and to equip and operate the same. The contract recites a contract made between the committee and Briton & Lyon, by which Briton & Lyon were to carry out that part of the contract between the railroad and the committee which was to be performed by the citizens, and the railroad company accepted Briton & Lyon to do the work agreed on. Briton & Lyon also entered into a contract with said company, agreeing to carry out the contract made with the committee, the company assigning to Briton & Lyon the subscription list without recourse, subject to the limitations contained in the contract between the committee and the railroad company. Briton & Lyon to receive the benefits of all donations, and one-half the net profits arising from the location of towns between the west line of Hopkins county and Sherman. Briton & Lyon executed to the committee an obligation to carry out the contract made by Briton & Lyon with the railroad company. The above-mentioned contracts, except the subscription list, were executed at the same time, referred to each other, and purported to be made in pursuance of the original subscription agreement. The appellant having failed to pay his subscription, the appellee brought suit, alleging the fulfillment of the contract on their part, the refusal of the appellant to pay, and setting forth the contract theretofore made. Appellant answered by special demurrers, which were overruled, and pleaded limitation, failure of consideration, and that appellee and the railroad company were partners. Appellee excepted specially to appellant's answer, which was sustained by the court, and appellant refusing to amend, no proof was allowed to sustain the allegations of the answer, and a verdict and judgment were rendered for appellee for the full amount sued for.

There are three questions raised by demurrers that we deem necessary to notice, and which we think settle the issues presented. First. Was the subscription paper signed by the citizens of Sherman for the purpose of inducing the St. Louis, Arkansas & Texas Railway Company to construct the said road a joint or several obligation? Second. Did the committee have authority to contract with Briton & Lyon and bind the citizens to procure the right of way and grade the road? Third. Could the appellant in this suit plead a failure of consideration as against appellee for the failure of the St. Louis, Arkansas & Texas Railway Company to carry out its contract? When the case of Darnall v. Lyon, 19 S. W. Rep. 506, which involved the construction of the contracts herein, was pending before the court of civil appeals of the

second supreme judicial district, that court certified to our supreme court for decision the same questions, in substance, that are here in issue. 22 S. W. Rep. 304. In passing upon the first question, they answered in the following language: "We are clearly of the opinion that the first question should be answered in the affirmative. Although the words, 'We, the undersigned, hereby promise and agree,' if unqualified, would import a joint undertaking, yet the subsequent provision in the writing, that 'such subscribers,' should 'be liable only for the amount opposite his name,' leaves no doubt that the intention was that the obligation was to be several." This is conclusive of this question, and coincides with our construction of the contract.

The supreme court seems to have met with some difficulty in reaching a conclusion as to a proper solution of the second proposition. It did, however, reach the conclusion that the committee exceeded its authority in making the contracts with Briton & Lyon and with the railway company. The action of the committee being without authority, the said contracts are of no binding force and effect as against appellant, unless he has ratified the action of said committee, as alleged by the appellee. The question of a ratification not having been passed upon necessitates a remanding of this cause for an adjudication of that issue. If on another trial it should be established that appellant had ratified the action of the committee in making said contracts, then a solution of the third proposition becomes essential.

The allegations of appellant's answer as to the failure of consideration were sufficiently full to admit proof thereunder. The railroad company, under the contract, was to equip, maintain, and operate the road, and to build engine houses and machine shops in the city of Sherman, and to make that point the end of a division. This constitutes an entire contract, and if it is shown that the railroad company has failed to perform any material condition in the contract, a recovery can only be had to the extent of the performance on its part, if it is shown that such part performance is beneficial to those within the contemplation of the contract, such recovery not to exceed the ratio that such part performance bears to the whole contract. *Hillyard v. Crabtree*, 11 Tex. 264; *Wels v. Devlin*, 67 Tex. 507, 3 S. W. Rep. 726; *Batwell v. Railway Co.*, 23 S. W. Rep. 552, (decided at this term.)

It is contended that the payment by appellant of his subscription is a condition precedent to the performance of the contract by appellant. If that should be the proper construction, it would not avail the appellee, if the allegations of appellant's answer be true, which are that there has been no performance on appellee's part, and that appellee is insolvent. If the railroad company has failed to comply with its contract, or is un-

able to do so, appellee can recover only to the extent of its performance as above stated. Appellee being a party to the contract, his claim is liable and subject to the same defenses as it would be in the hands of the railway company. For the reasons above set forth, the cause is reversed and remanded.

SEWELL v. CONNOR.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

PARTNERSHIP—ACTION FOR EVICTION—PLEADINGS.

Plaintiff alleged that he and defendant agreed to operate a newspaper and job-printing business, in which defendant was to furnish printing press and type, and plaintiff his time, skill, and labor, the net proceeds to be equally divided between them; that plaintiff established the paper, securing 450 subscribers, an advertising patronage of about \$50 per month, and a patronage in job work of about \$15 per month; that, after plaintiff had operated the business six months, he was ousted by defendant, who took possession of the entire property, and notified the patrons that he had discharged plaintiff from his employment. Plaintiff sought to recover \$100 per month for his services, and \$1,000, as exemplary damages. *Held*, that the complaint stated a good cause of action. *Ball v. Britton*, 58 Tex. 57, followed.

Appeal from district court, Morris county; John L. Sheppard, Judge.

Action by R. M. Sewell against R. E. Connor. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Reversed.

Talbot & Turner and J. F. Jones, for appellant. J. M. Moore, for appellee.

FINLEY, J. This cause is asked to be reversed on account of the action of the trial court in sustaining a general demurrer to plaintiff's petition. The substance of the petition, as stated in appellant's brief, is as follows: "That he (appellant) and appellee, on or about the 1st of January, 1889, mutually agreed that they would establish, operate, and publish a newspaper in the town of Daingerfield; appellee to furnish a job and printing press, type, and such other fixtures as were necessary for doing such work; appellant to devote his time, attention, skill, and labor to the management and operation of the business. From the proceeds arising from said business, all current expenses were to be first paid, and the residue, if any, was to be equally divided between appellant and appellee. And that on January 1, 1889, appellant began work and did establish and edit a newspaper called the 'Weekly Record,' and that he gave his entire time and attention to the establishment, operation, and editing of said paper, and doing job work until June 21, 1889, during which period appellant obtained about 450 subscribers to said paper, and an advertising patronage to the same of about \$50 per month, and a patronage to the job-work business

of about \$15 per month. And that on June 21, 1889, they had recently purchased a large quantity of stationery, and on the said date had the most of said stationery then on hand. And that on said last written date appellant was giving said business his time and attention, according to contract, and was ready and willing to continue to discharge his duty, when, on said last-named date, appellee unlawfully and in utter disregard of his agreement, evicted appellant from said business by entering the Weekly Record office, and taking possession thereof, together with all property connected therewith, including the subscription list and stationery, and changed the locks of the doors, and always thereafter denied appellant any rights or connection with said business; and appellee caused to be published in a newspaper called the 'Morris County News,' published in the town of Daingerfield, on the 27th day of June, 1889, that he (appellee) had discharged appellant from his employment, and that no person except himself had authority to settle the business of the 'Weekly Record.' Appellant sues for \$100 per month for his services, skill, and labor from January 1, 1889, and for \$1,000 exemplary damages for being ejected from said business by appellee." We think the petition states a good cause of action, and that the court erred in sustaining the general demurrer thereto. All of the principles involved in this case, as they are disclosed by plaintiff's petition, are fully discussed and settled in the case of Ball v. Britton, 58 Tex. 57; and we deem it unnecessary to declare them again. Judgment reversed and remanded.

GULF, C. & S. F. RY. CO. v. HUMPHRIES.
(Court of Civil Appeals of Texas. Oct. 18, 1893.)

CARRIERS—FAILURE TO DELIVER GOODS—ACTION FOR CONVERSION—WHEN MAINTAINED—DAMAGES—RATE OF INTEREST—INSTRUCTION—HARMLESS ERROR.

1. A mere failure to charge as to a particular point, if error, is one of omission, and does not require a reversal.

2. Where, in an action against a carrier for the conversion of goods, it appears that plaintiff was the owner of the claim at the time suit was brought, it is immaterial whether or not he was owner of the goods at the time of their conversion.

3. Where, after the conversion of property, the legal rate of interest is reduced, the owner is entitled as damages to the legal rate at the time of the conversion only to the time the law is changed, and to the lower rate from that time to the date of trial.

4. Where, in an action against a carrier for conversion of goods, plaintiff claims a demand and refusal, and the only evidence on the question was that an attorney made a request for pay for the goods, and not for the goods, it is error to charge that, if there was a demand and refusal or failure by defendant to deliver the goods, such failure would amount in law to a willful conversion.

5. Where the evidence in such action fails to show a conversion without a demand, the error in giving such charge is not harmless.

Appeal from Bosque county court; W. B. Thompson, Judge.

Action by W. A. Humphries against the Gulf, Colorado & Santa Fe Railway Company to recover damages for the conversion of certain well casing shipped over defendant's railroad. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The other facts fully appear in the following statement by HEAD, J.:

This suit was instituted by appellee, as plaintiff in the court below, to recover of appellant, as defendant, damages in the sum of \$98.13, and interest, for the alleged conversion of 190 feet of well casing shipped with appellant as a common carrier at Meridian, Tex., in May, 1888, and consigned to appellee, at Brenham, Tex. The goods reached Brenham in due time, where they remained unclaimed for several months, and until they were about to be sold to pay the freight charges, when, on August 8, 1888, J. T. Swearingen, as the attorney of one Benley, paid these charges, and stopped the sale, but let the casing remain on appellant's platform at Brenham, where appellee saw it on September 6, 1888, but he says made no attempt to remove it. The record does not disclose what finally became of the casing. There is considerable doubt as to whether appellee or Benley was the owner of the casing, but in the settlement between them it was agreed that appellee should retain it. This suit was instituted September 13, 1890. Appellant pleaded general denial, statute of limitation of two years, and reconvened for \$115 charges for storage and freight. The trial, both in justice's and county court, resulted in judgments in favor of appellee for full amount of his claim.

J. M. Terry and Chas. K. Lee, for appellant.

HEAD, J., (after stating the facts.) Appellant, not having requested a charge upon the issue raised by its plea of the statute of limitations, cannot complain at the failure of the court to give one. The error of the court, if error at all, was one of omission, and would not require the reversal of the judgment. In view of another trial, however, we will add that it has been decided by our supreme court that the statute would commence to run, in a case like this, not from the actual date of the conversion, but from the time plaintiff either had notice or was chargeable with notice thereof. Railway Co. v. Adams, 49 Tex. 748.

Appellant's fifth assignment is not well taken. The consignee of the goods can generally, but not always, maintain a suit against the carrier for their conversion. Railway Co. v. Smith, 84 Tex. 348, 19 S. W. Rep. 509; Hutch. Carr. §§ 733-736. It is not, however, necessary for us to decide whether appellee could maintain this suit solely in his relation of consignee or not, as the

evidence is undisputed that he was the owner of the claim at the time the suit was instituted, which is sufficient in this state, even though he may not have been the owner of the property at the time of its conversion. *Railway Co. v. Freeman*, 57 Tex. 156. Appellant is not entitled to a reversal for the failure of the court to charge upon the issue as to it having delivered the property to the agent of the owner, nor as to Benley being the owner at the time of the conversion, because no such charges were requested by it; and the error, if error, was only one of omission. Also, as stated above, the evidence was undisputed that appellee owned the claim at the institution of the suit, and the fact that Benley may have owned the property at the time of the alleged conversion was therefore immaterial.

The judgment rendered by the court allows appellee interest at the rate of 8 per cent. after the act reducing the legal rate to 6 per cent. took effect. This was error. Where interest is allowed as damages, and not as part of a contract, express or implied, the legal rate at the time of the injury should be allowed to the time the law is changed, and the new rate from that time to the trial. This seems well settled. *White v. Lyons*, 42 Cal. 279; 1 *Suth. Dam.* (2d Ed.) § 368; 1 *Sedg. Dam.* 839, and authorities there cited.

The court instructed the jury, among other things, that "if, after said goods reached said place of destination, the said company or its agents willfully or negligently failed or refused to deliver said goods to the said W. A. Humphries or to his authorized agent, or to such person as the said Humphries had duly and legally authorized to receive the same; for example, if the said Humphries or his agent had called for said well casing, and tendered his bill of lading, and offered to pay the freight charges on the same, and the agent of said company willfully or carelessly failed or refused to deliver the same,—then such failure would amount in law to a willful conversion," etc. There is no evidence in the record upon which to base this charge. Appellee does not pretend that he ever made demand for these goods, either by himself or agent, and met with refusal. They certainly were not refused to Swearingen, and the only other evidence looking towards a demand was a request of the local attorney for pay, not for the goods, a short time before the institution of the suit. It was therefore error for the court to give this charge. If, however, the evidence should show a conversion without a demand, we might sustain the judgment upon the ground that the court's error was harmless, and we have carefully searched the record with this view. It will be conceded that a conversion by the carrier must be shown in some way to sustain this suit. This is sometimes shown by a delivery made to a wrong person. *Railway Co. v. Heiden-*

heimer, 82 Tex. 201, 17 S. W. Rep. 698; *Roberts v. Yarboro*, 41 Tex. 449; *Railway Co. v. Adams*, 49 Tex. 748. If this should appear, no demand would be necessary, because the evidence of the conversion would be complete without it. A conversion may also be shown by a demand made by the proper person, and a refusal by the carrier without lawful excuse. *Rish. Neacott. Law*, § 406. We have, however, been unable to find sufficient evidence of a conversion by appellant in either of these ways to authorize us to disregard the charge of the court upon the ground that no other verdict could have been rendered. We have called attention above to the only evidence of a demand, and the only evidence of a delivery to a wrong person is contained in the statement of appellee "that just before the bringing of this suit he got defendant's local attorney at Meridian to write to the defendant, and see if he could get pay for said casing, but that defendant claimed that it had been delivered on an order, and refused to pay him." This testimony, unobjected to, would probably require appellant to show to whom this delivery was made, and, in the absence of such showing, if properly submitted to the jury, might sustain a finding against it, but is clearly not sufficient to authorize us to sustain the judgment in the absence of such submission. If it be contended that appellant's answer admits a delivery to Swearingen as agent of Benley, the evidence would at least require the submission to the jury of the question of his authority to receive it, if it would not require a finding that he had such authority. The judgment must be reversed, and the cause remanded for a new trial.

FAGGARD v. WILLIAMSON.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

ARBITRATION—ORAL AGREEMENT—PENDING SUIT.

District court rule No. 47, providing that no agreement between attorneys or parties touching any suit pending will be enforced unless in writing and filed as part of the record, does not forbid an oral agreement for arbitration of matters in controversy in a pending suit.

Appeal from Bosque county court; W. B. Thompson, Judge.

Action by J. W. Williamson against J. W. Faggard for damages for breach of contract. Judgment for plaintiff. Defendant appeals. Reversed.

Lockett & Kimball, for appellant. S. H. Lumpkin, for appellee.

HEAD, J. The following statement of the nature and result of the suit taken from appellant's brief we have found to be full and correct, viz.: "This suit was brought by Williamson as plaintiff against Faggard as defendant to recover damages for an alleged

breach of a verbal contract entered into by the parties for the making of a crop on defendant's farm, the terms of which were, in substance, that defendant should furnish the land, and a dwelling house for plaintiff and his family, and all the seed, tools, team, and feed, and the labor of himself and nephew, and that plaintiff should move upon the farm and furnish the labor of himself and son, and the assistance of his wife, when necessary. Plaintiff was to have one-third and defendant two-thirds of the crop made, which was to be gathered jointly, except that each party was to gather his own share of the cotton crop. The foregoing comprises the contract as set out in plaintiff's petition, and so far is supported by the testimony of both parties. But on the trial of the cause it was developed that the contract embraced, besides the stipulations in regard to making a crop, an agreement for the raising of money on defendant's land, which was the original object of the contract, and according to the terms of which defendant was to convey the land to plaintiff, who was to endeavor to obtain a loan on it, and was then to reconvey it to defendant. Defendant also claimed that plaintiff agreed to furnish a horse and ox, and the labor of all his children, when needed, in the crop. Plaintiff alleged that defendant withdrew his teams, and so forced him to abandon the contract and quit the farm after he had done several months' work. Defendant testified that plaintiff, after being put in possession of the farm, refused to reconvey the land as he had agreed to do, and that this constituted the original breach of the contract. After demurrers, general and special, on both sides, had been disposed of, a trial was had before a jury, who rendered a verdict for plaintiff for \$260.28, and judgment was entered accordingly."

We are of opinion the court below erred in sustaining appellee's exception to that part of appellant's answer pleading an arbitration and award as to the matters in controversy since the institution of the suit. It seems the court held the agreement for the arbitration to be invalid under rule 47 for the government of the district courts, because not in writing. This rule reads: "No agreement between attorneys or parties touching any suit pending will be enforced, unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." In *Wells v. Lane*, 15 Wend. 99, a similar rule was held not to prohibit an oral agreement to arbitrate a pending suit. We believe the uniform construction placed upon this rule by the profession has been that it applies to proceedings in the conduct of the case in court, and does not prohibit oral agreements for the settlement of the matters in controversy outside of the suit. The construction contended for by appellee would prohibit even evidence of payment unless a

written receipt be taken and filed in compliance with the rule. The tendency of our supreme court has been to construe this rule to be directory, rather than mandatory. *Williams v. Huling*, 43 Tex. 113; *Capt v. Stubbs*, 68 Tex. 225, 4 S. W. Rep. 467; *Jenkins v. Adams*, 71 Tex. 1, 8 S. W. Rep. 603; *Kohn v. Washer*, 69 Tex. 67, 6 S. W. Rep. 551. That a common-law arbitration is binding in this state does not seem to be denied. *Myers v. Easterwood*, 60 Tex. 107. In fact, our statute expressly provides that "nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such other mode as they may select. 1 Sayles' Civil St. art. 56. Neither can it be questioned but that this right extends to pending suits. *Myers v. Easterwood*, supra. That an oral submission to arbitration, when not in conflict with statute of frauds, is binding at common law cannot be controverted. *Morse, Arb.* 50; 1 *Amer. & Eng. Enc. Law*, 655. That part of the contract by which appellee agreed to convey to appellant the land conveyed to him for the purpose of effecting a loan upon it, not having been pleaded by either of the parties, was correctly ignored by the court. The other assignments relate to errors that will probably not occur upon another trial, and will therefore not be considered. The judgment of the court below is reversed, and the cause remanded.

HERNDON v. CAMPBELL.

(Court of Civil Appeals of Texas. June 15, 1893.)

CONTEMPT—PUNISHMENT—STRIKING PLEADING FROM FILES.

Where a petition filed in a court contains scandalous matter reflecting on the integrity of the judge and the master in chancery of the court, it may be stricken from the files without notice, though it sets up a good cause of action. *Pleasants, J.*, dissenting.

Appeal from district court, Smith county: Felix J. McCord, Judge.

W. S. Herndon filed a petition in intervention against T. M. Campbell, receiver. From an order striking the petition from the files, petitioner appeals. Affirmed.

Ben B. Cain and J. M. Herndon, for appellant.

GARRETT, C. J. W. S. Herndon filed a petition in intervention in the cause of Jay Gould v. International & G. N. R. Co., pending in the district court of Smith county, against T. M. Campbell, the receiver of the property of the defendant, to recover a balance due him for services as general attorney or solicitor for the receivership. He set out in said petition the fact and nature of his employment, the amount of compensation which he was to receive, and showed that a balance remained due him, for which he

prayed judgment. Plaintiff alleged that he was first employed by T. R. Bonner and N. W. Finley, who were then receivers; that afterwards Finley resigned, and J. M. Eddy was appointed in his place, when the contract was ratified and approved by the judge of the court; that Eddy afterwards died, and T. M. Campbell, the defendant, was appointed in his stead, and with said Bonner ratified and approved the services of plaintiff. He further alleged "that on or about the 27th or 28th of March, 1891, the said Campbell attempted without cause, and through the direction of the said F. J. McCord, upon some false reason, to discharge plaintiff; but on March 29 or 30, 1891, the said F. J. McCord and T. R. Bonner, in the presence of others, agreed, and then and there said Judge McCord declared, that he had directed said Campbell to abolish plaintiff's office and discharge plaintiff, but then and there, having learned that his information was false, he ordered said Campbell to cancel, vacate, and withdraw all requests to plaintiff to resign. And the said Judge McCord stated and declared that nothing of the kind should occur again, and, further, that he had agreed, when said Campbell was appointed receiver, that in case of disagreement between T. R. Bonner and said Campbell touching any matter of the receivership that the same should not be carried into effect, unless the court took one or the other side of the controversy; and relying on the honesty of the court and his declarations on the 29th of March, 1891, in favor of plaintiff, this plaintiff continued in the service. That on or about the 15th or 16th of August, 1891, plaintiff, having performed all the duties devolved upon him to that date, asked and obtained a leave of absence from Col. T. R. Bonner for three weeks, or until district court in September, 1891. Plaintiff is advised and believes, and so charges, that during his absence and without notice, and without knowledge or consent of T. R. Bonner, on or about the 21st day of August, 1891, the said F. J. McCord, T. M. Campbell, R. N. Stafford, master in chancery, and others unknown to plaintiff held a secret council in the city of Tyler, at which, for the purpose and with the malicious intent of injuring and harrassing plaintiff, they then and there agreed and decided to abolish the office of general solicitor and discharge this plaintiff. Plaintiff avers that the acts, if they were so performed, of said McCord, Campbell, and Stafford, were malicious, in utter violation of the contract with this plaintiff, and to his great damage." Plaintiff also alleged that the court and the master in chancery, by reason of the premises, were disqualified to pass upon his claim for services; wherefore he prayed process and notice for a judge to be elected or appointed, etc. The petition is signed, "J. M. Herndon, Attorney. W. S. Herndon, Attorney," and was filed in court October 21, 1891. On Oc-

tober 24, 1891, the defendant, Campbell, by attorney filed a motion in the cause showing that said petition had been filed, and that in it was set out very many false, scandalous, impertinent, and outrageous allegations and insinuations against the court, the judge thereof, R. N. Stafford, master in chancery, and the receiver, said matters not being pertinent or proper in any wise to the cause of action seemingly set out in the said petition. In intervention, and prayed that the same be stricken from the files and from the docket, etc., and that said J. M. Herndon and W. S. Herndon be notified to appear and answer why they should not be committed for contempt. The motion came on to be heard on the same day, when the court ordered that the petition be stricken from the files, and returned to W. S. Herndon and J. M. Herndon, his attorney; also, that they be cited to appear and show cause why they should not be punished as for contempt for filing the petition. Thereupon plaintiff filed a motion to vacate said order of court and to reinstate his intervention, for the reasons substantially as follows: "(1) A good and valid cause of action was set out, founded upon proper averments. (2) Process had not been issued upon the petition, and the motion to dismiss the same was taken up and acted on ex parte, without notice to the plaintiff. (3) Plaintiff was denied the right secured to him by the constitution and laws of this state as a suitor to litigate valuable rights in the district court. (4) That the court was disqualified to make any order whatever in said cause by reason of the averments in the petition." Plaintiff's motion to reinstate was overruled, and he has appealed, and assigned errors as above shown in the statement of the reasons assigned in his motion why the cause should be reinstated.

The matter contained in the petition was contemptuous. It reflected upon the honesty of the court, and in the most offensive manner charged the judge with entering into a malicious conspiracy with the receiver and master in chancery, officers of the court, to abolish the office of general solicitor, and to discharge the plaintiff from his employment, and averred that by reason of the premises the court and the master in chancery were disqualified to pass upon plaintiff's claim for services. It is not denied that the matter is contemptuous, but it is contended that the petition should not be stricken from the files because it contained scandalous matter. In other words, when a pleading is filed in court, signed, as in this case, by the party himself, impugning the honesty of the judge of the court, and speaking of him in the most contemptuous manner, it is the duty of the judge to pick out and put his finger on the language which he deems contemptuous and order it expunged. However sacred the rights of a litigant may be, and however fearlessly they

may be prosecuted, there can be no question about the manner in which they should be exercised and prosecuted before the courts of the country. As shown by the authorities cited by appellant, the proper practice seems to be to expunge scandalous and indecent matter from a bill or petition filed in court; but an examination of the authorities well show that they do not relate to proceedings in contempt, and refer only to pleadings containing matter scandalous and indecent in its nature, and not such as is written of the court and in contempt thereof, although an attorney may also be proceeded against as for contempt of the court for filing a petition in gross violation of decency and decorum, as held in *Brown v. Brown*, 4 Ind. 627; and in *Sommers v. Torrey*, 5 Paige, 53, counsel who signed a pleading containing scandalous and impertinent matter was held to be guilty of a contempt of the court, and personally liable for the costs of expunging the matter. We do not believe that the court is confined to the punishment for contempt prescribed by the statute, if it be a punishment therefor to order the obnoxious pleading stricken from the files, for courts have the inherent right to protect themselves; and it has been held that the punishment prescribed by statute is not exclusive. In *Re Woolley*, 11 Bush, 95, the right of a legislature to interfere with the manner in which the judicial department shall protect itself is doubted, as well as in *Ex parte Robinson*, 19 Wall. 510, and in *State v. Morrill*, 16 Ark. 334, the right is denied. In *State v. Grailhe*, 1 La. Ann. 183, the defendant filed in the supreme court a petition and brief for rehearing in a cause to which he was a party, the language of which the court held to be extremely disrespectful, so that the court could not consistently receive a brief expressed in such language. It ordered the brief to be taken off of the files of the court and returned to the plaintiff, and on the next day ordered an attachment for the defendant, returnable next day, directing him to be brought before the court to answer for a contempt. Defendant pleaded as *res adjudicata* the order of the court directing the application for rehearing to be taken from the files of the court, but the court, by a decision of a majority, adjudged as a punishment for the contempt that he be fined and imprisoned. Justice Sildell dissented because he considered that the previous action of the court was a disposition of the matter, but the right of the court to strike the motion for rehearing from the files was not questioned by him, and, in response to the contention of the defendant that the order imposed the penalty on him of denying him a rehearing in the cause, it was said that he had still time in which "to file an application for a rehearing, framed in language which might fully explain his legal proposition, without expressions un-

worthy of himself as a citizen and of the dignity and character of the court." In the case of *Sears v. Starbird*, (Cal.) 18 Pac. Rep. 531, the court struck out a brief for rehearing, set aside the submission, and ordered that the appeal be dismissed, if a proper brief was not filed in 30 days. The Texas court of appeals ordered a printed argument that was held to be offensive and indecent struck from the files and returned to the writer. 4 Willson, Civ. Cas. Ct. App. 281. It matters not that the petition filed by the appellant showed a good cause of action, for although he is guaranteed the right to bring and maintain suits by the laws of the state, still he must do so in a proper manner. The order of the court striking the petition from the files, and directing that it be returned to him, did not deprive him of that right, because he had sufficient time in which to file another; but, conceding that he had not time, the right would have been lost by his own inexcusable act, because the offensive matter was not necessary to a proper statement of appellant's cause of action. Appellant filed the petition in court under his own signature, and was not entitled to notice of the motion to strike it out. The judge could have ordered it stricken out as soon as it came to his attention, and was not bound to wait for notice to the offending person or a motion to that effect. He could have stricken it out on his own motion, and is not held to any reasons alleged in the motion filed therefor. There is nothing alleged in the petition to show that the judge of the court was disqualified to hear and determine plaintiff's cause of action. Const. art. 5, § 11; Rev. St. art. 1090. There was no error in the action of the district court in ordering the petition in this case to be stricken from the files and returned to the plaintiff, and the judgment will be affirmed.

(June 29, 1893.)

PLEASANTS, J., (dissenting.) Upon the decision of this cause in this court on the 15th of the present month the undersigned did not concur in the decision, and announced his dissent, and he now here files the grounds of his dissent. I dissent (1) because the law of this state, in my judgment, recognizes no other punishment for contempt of court than that of fine or imprisonment, or both fine and imprisonment; and (2) because the dismissal of a litigant's suit by order of the court, as a punishment for contempt, is a deprivation of a right guaranteed to every litigant by the constitution of the state; and (3) because such punishment is inadequate for so grave an offense as that of contempt of court; and, lastly, because such punishment savors of the personal resentment of the judge of the court towards the offender, and the exhibition of such passion upon the bench is to

be deprecated, as unbecoming its dignity, and as incompatible with the orderly and impartial administration of public justice.

COLLINS et al. v. DURWARD et al.

(Court of Civil Appeals of Texas. Oct. 21, 1893.)

POWER OF ATTORNEY — RATIFICATION OF UNAUTHORIZED SALE — EVIDENCE — COPIES OF DEEDS — WAIVER OF OBJECTIONS — BREACH OF WARRANTY — DAMAGES

1. A power of attorney authorizing the sale of a land certificate does not authorize the sale of the land on which such certificate is subsequently located.

2. The failure of the grantors of such power of attorney to commence suit in trespass to try title to recover the land until nine years after the execution and record of the deed thereof by the attorney in fact, and until one year after the execution and recording of a second deed by such attorney of the same land to the same grantees, to correct an error in the description in the first deed as to the county in which the land is situated, is insufficient to constitute a ratification of the acts of such attorney in fact.

3. In trespass to try title, in which certain defendants also sued their codefendants on the warranty contained in deeds conveying them parts of the land in dispute, it appeared that there was filed an agreement "by plaintiff and defendants" that either party might read from certified copies of title papers, "This agreement to become binding when sanctioned by all of the defendants." It was originally signed by such warrantors, and was signed by one of the warrantees during the trial, but was not signed by the other warrantee. On objection being made by the warrantors to the introduction in evidence of copies of their deeds to such warrantees, the latter stated that they knew of the agreement, and announced that they were ready for trial, relying on it and sanctioning it. *Held*, that there was a waiver by such warrantors of the right to call for the original deeds.

4. The warrantees are entitled to recover from the warrantors legal interest for the period during which they were liable to plaintiff for rents and profits.

Appeal from district court, Wichita county; J. A. Templeton, Special Judge.

Action of trespass to try title by Adaline Durward and others against C. F. Collins, S. Y. Collins, H. Mosely, Hugh Riley, and J. G. Hardin in which defendants Riley and Hardin also sue their codefendants Collins as warrantors under deeds conveying to them certain parts of the land in dispute. From judgments in favor of plaintiffs, and in favor of Riley and Hardin, against defendants Collins, the latter appeal. Affirmed.

The other facts fully appear in the following statement by TARLTON, C. J.:

This suit in trespass to try title was brought by the appellees, as heirs of James E. Ellis, to recover the James E. Ellis 640-acre survey, (patent No. 540, vol. 3,) lying in Wichita county, from S. Y. Collins and C. F. Collins, Hugh Riley, and H. Mosely, original defendants. The defendants Collins, in the first instance, purchased the entire tract in controversy from T. B. Wheeler, a ven-

dee, under certain conveyances executed by Charles I. Evans, for himself and as attorney in fact for certain persons as heirs of James E. Ellis. After their purchase, the defendants Collins sold portions of the tract, with covenants of warranty, and accordingly they were also sued as warrantors by their codefendant and vendee Hugh Riley, and by another vendee, one J. G. Hardin, who himself had been sued as a warrantor by H. Mosely, the remaining original defendant. The plaintiffs recovered judgment for 79-90 of the land, and the warrantees had judgment against the defendants Collins. These alone appeal.

R. E. Huff and A. A. Hughes, for appellants. James B. Goff, for appellees.

TARLTON, C. J., (after stating the facts.) The appellants' claim to the land rests upon two deeds,—the one dated February 22, 1876, the other February 11, 1884,—executed for the purpose of curing a defect in the former, arising out of a description of the land therein as in Clay, instead of as in Wilbarger, county. Each purports to have been executed by Charles I. Evans, for himself and as attorney in fact for William B. Weaver, Ellen Weaver, W. S. White, Adaline Durward, and Alexander Durward. The power of attorney, dated November 18, 1872, and relied upon as the source of authority in Charles I. Evans for the execution of these deeds, authorized him "to sue for and recover, to assign, alienate, and convey, and to do and perform for us and in our names, any and all other acts and things necessary for the recovery, perfection, alienation, assignment, and conveyance of two land certificates granted to the heirs of James E. Ellis as aforesaid,—the one for bounty warrant No. 9,300, for 1,920 acres, the other donation warrant No. 982, for 640 acres of land, both of date December 19, 1839,—and one-third of a league of land situated in the county of Haskell, in said state of Texas, and patented to the heirs of J. E. Ellis, under patent No. 96, of date October 21, 1862." The land in controversy was subsequently, on December 4, 1873, patented to the heirs of James E. Ellis. The certificate does not appear to have been located at the date of the power of attorney.

The question, then, arises here, under appellants' most material assignment of error, whether a power of attorney authorizing the sale of a land certificate will authorize the sale of the land on which the certificate is subsequently located. Concurring with the trial court, we answer this question in the negative. Our conclusion rests upon the strictness of construction to which powers of attorney are subjected, and upon the doctrine that "the authority is never considered to be greater than that warranted by the language of the instrument or indispensable to the effective operation of such authority."

* * * The authority given is not extended

beyond the meaning of the terms in which it is expressed." 1 Devl. Deeds, § 358; Frost v. Cattle Co., 81 Tex. 505, 17 S. W. Rep. 52. A land certificate, while it "symbolizes the right" to acquire land, is yet but personal property. Barker v. Swenson, 66 Tex. 408, 1 S. W. Rep. 117. We perceive a wide difference between a mere right to acquire land and the land itself afterwards acquired by virtue of that right; and we can well conceive that an owner would be willing to authorize the transfer of a certificate who, from considerations of a changed character and a greatly-increased value in the property, would refuse the delegation of authority to convey the land into which it had meanwhile been merged. In Hermann v. Reynolds, 52 Tex. 391, it was held that a power of attorney empowering the agent to sell two bounty claims of the principal, "or any land that may be secured thereby," authorized the conveyance of the land thus secured, as against the principal, who urged no objection to the want of authority. We do not regard the opinion in that case as in any sense conflicting with the view here expressed. The court seems to have been careful to emphasize the significant expression "or any land that may be secured thereby." The conclusion thus announced renders it unnecessary to advert to the first assignment of error, complaining of the exclusion of the deed by Charles I. Evans to T. B. Wheeler, of date February 22, 1876. The error in this connection complained of becomes wholly immaterial, because, as to the grantors therein named other than Evans, the deed was without authority, for the reasons above stated, and as to him the defendants, as the record shows, had the benefit of a conveyance of all his title in the land. We cannot, under the evidence, concur with appellants that the deeds should have been admitted for the purpose of showing ratification by the parties named in the power of attorney of the acts of Evans. The mere lapse of time from the execution of the deed in February, 1876, and its registration in March of that year, in Haskell county, and the execution and registration in Wichita county of the subsequent deed in February, 1884, to the institution of this suit in February, 1885, without any evidence whatever of knowledge on the part of the complaining grantors in the power of attorney, save such as may be inferred from the registration of the instruments, could not suffice to show ratification.

We overrule the third assignment of error, complaining of the action of the court in admitting in evidence copies of deeds from C. F. Collins and S. Y. Collins to the defendants Hugh Riley and J. G. Hardin. It appears from the bill of exceptions that there was on file an agreement in writing "by the plaintiff and defendants that either party may read from the deed records or certified copies therefrom of any title papers, with-

out accounting for originals, or filing same among the papers of this cause, or giving notice of same; this agreement to become binding when sanctioned by all of the defendants." The agreement was prepared by the plaintiffs, and in the first instance signed by some of the defendants only, including, however, the defendants Collins. It seems not to have been signed by the defendant Riley, and to have been signed by the defendant Hardin only after the trial commenced. Each of these defendants, however, on objection urged by the defendants Collins that they signed it with the plaintiffs, and did not understand it to be an agreement among the defendants, stated to the court that he knew of the agreement, and announced ready for trial, sanctioning it and relying upon it. This, we think, was sufficient evidence of a waiver of the filing of the original deeds to justify the admission of the copies.

Hardin and Riley were entitled to recover legal interest from their warrantors for the period during which they were held liable for rents and profits. Brown v. Hearn, 66 Tex. 64, 17 S. W. Rep. 395. All excess of interest over such liability, awarded by the verdict, seems to have been remitted by them. We therefore overrule the fourth assignment of error, complaining that the verdict awarded them 8 per cent. interest from the date of their purchase from Collins.

The record shows that judgment was rendered in favor of the defendant Evans, against the defendant Wheeler. We therefore overrule appellants' final assignment, and their proposition thereunder, to the effect that the judgment failed to dispose of all the parties and issues involved, because no disposition was made of the defendants named. We find no error in the judgment of which appellants can complain, and it is affirmed.

MEYERS et al. v. JONES.

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

COUNTY COURTS — JURISDICTION — SALE OF LAND CERTIFICATE BY WIDOW — TRESPASS TO TRY TITLE — EVIDENCE.

1. Where an action was brought in the county court to establish title to an unlocated land certificate, and, while the suit was pending, a portion of it was located, a judgment as to that portion was void, the court being without jurisdiction, under the constitution, of suits "for the recovery of land."

2. Where a widow transfers her interest in an unlocated land certificate, she and her privies alone, and not her husband's administrator, have the right to question the validity thereof.

3. Under Rev. St. art. 2252, authorizing county clerks to give certified copies of their records, a certificate of a county clerk that no claims had been filed against an estate is inadmissible in evidence.

4. Where defendants claim title to land under a sale of a land certificate by the widow

of decedent, the administrator, to establish his claim to the land, must show that it is necessary to pay debts of decedent.

Appeal from district court, Wichita county; George E. Miller, Judge.

Trespass to try title by W. S. Jones, administrator of Jesse Mumford, deceased, against C. L. Meyers and others. Judgment for plaintiff. Defendants appeal. Reversed.

Robert E. Huff, for appellants. Carrigan & Hughes, for appellees.

HEAD, J. This suit was instituted by appellee as administrator of the estate of Jesse Mumford, deceased, to recover of appellants the title and possession of the 65 acres in controversy, which was located and patented by virtue of a 1,280-acre certificate, issued to said Jesse Mumford, under the act of March 15, 1881. Appellants claim under an alleged verbal transfer of this certificate by the grantee in his lifetime to Foulter, Kerr & Co.; also under a written transfer to the same parties, made by Eldora Mumford, surviving wife of the grantee, after his death; also under a judgment of the county court of Milam county in favor of said Foulter, Kerr & Co., against the surviving wife and heirs of Jesse Mumford, purporting to establish their title to the certificate by reason of their verbal purchase aforesaid. The suit in which this judgment was rendered was instituted before the location of the certificate, and before administration upon Mumford's estate, but the decree was not rendered until after appellee was granted letters of administration, nor until after the location of the land in controversy. This land was located by the appellant Huff for himself, under the belief that his vendors were the owners of the entire certificate.

We incline to the opinion that the judgment rendered by the county court of Milam county after the location of this land, although the suit was commenced before such location, was a nullity as to it, and there was therefore no error in its exclusion by the court below. The language of the constitution is that the county court shall not have jurisdiction of any suit "for the recovery of lands, nor of suits for the enforcement of liens upon land;" and we think, after the location of the certificate, that suit became in effect a suit for the recovery of land of which the county court no longer had jurisdiction. This, of course, does not apply to that part of the certificate unlocated at the time of the rendition of the judgment.

We think the court erred in submitting to the jury any question as to the validity or effect of the transfer from Eldora Mumford to Foulter, Kerr & Co. This transfer was in writing, and upon its face would have the effect to convey all her interest in the

certificate, and the administrator of her husband would have no right to assert fraud nor want of consideration in its procurement. Either she or those in privity with her must do this. Appellants must therefore in this suit be treated as owning her interest in the certificate at the time of its location, and, as this interest was much more than the land in controversy, we think it follows that the court erred in charging the jury that the defendants would in no event be entitled to more than one-third of the land by reason of this transfer. The general rule is that where the owner of an undivided interest in a land certificate locates no more than his interest for himself, and pays the expense of such location and procuring the patent, this is, in effect, a partition, and he is entitled to all of the land, and not simply his proportionate share. *Farris v. Gilbert*, 50 Tex. 356; *Glasscock v. Hughes*, 55 Tex. 479; *Kirby v. Estill*, 78 Tex. 426, 14 S. W. Rep. 695. This is not in conflict with the holding that, where a part of the certificate has already been located for all of the tenants, one of them cannot repudiate his interest in such location, and locate the remainder for himself. *Kirby v. Estill*, 75 Tex. 484, 12 S. W. Rep. 807.

The court did not err in refusing to admit in evidence the certificate of the county clerk of Bell county that no claims had been filed against the estate of Jesse Mumford. These officers are authorized to give certified copies of their records, (Rev. St. art. 2252,) but we find no statute making their ex parte certificates as to facts not existing admissible in evidence. The keeper of the records should be used as a witness in the usual way to prove that an instrument has not been filed. *Edwards v. Barwise*, 69 Tex. 84, 6 S. W. Rep. 677. But, in this case, was the burden on appellants to make this proof? In *Mitchell v. DeWitt*, 20 Tex. 294, it is very clearly held that a surviving wife has the right to sell her interest in the land, subject, however, to the right of the administrator of the husband to subject it to the payment of debts and the expense of administration. In that case the contest was between the purchaser from the wife and a purchaser at the administrator's sale, and the latter was held to have the superior right. No question was raised as to the burden of proof in a suit brought by the administrator to recover the land from a purchaser from an heir. In *Morris v. Halbert*, 36 Tex. 19, the controversy was also between a purchaser from the administrator and a prior purchaser from an heir, and the latter was held to have the better title, upon the ground that the estate was solvent, and it was the duty of the administrator to first appropriate all the other property, and, had this been done, there would have been no necessity for the sale

of the land in question. The opinion in that case perhaps goes further in some respects in placing the burden upon the purchaser from the administrator where there has been a sale by him under orders of the proper court than we would be disposed to approve, and certainly goes further than it is necessary for us to go to hold that, where the administrator before sale seeks to evict a purchaser from the heir, he should show affirmatively that the land he seeks to recover is needed for the purposes of the administration. In *Chubb v. Johnson*, 11 Tex. 469, the administratrix sued to recover land she had sold as sole heir while the administration was pending, and it was held she could not recover, because she neither alleged nor proved that the land would be needed to pay debts of the estate; and, in answer to the suggestion that the court should presume debts from the fact of an administration still pending, it was held that, inasmuch as the administration had been pending for near three years at the time the sale as heir was made, the presumption would be that there were no debts. Appellee, it seems, was appointed administrator of the estate of Jesse Mumford in March, 1885, and his petition in this case was not filed until December 29, 1890; and, if appellants are able to sustain their claim as purchasers from the wife before appellee can take the land from them, he must show that it will be necessary to satisfy prior claims under administration proceedings; in other words, he must recover it for the benefit of creditors of the estate, and not for heirs who could not recover in their own names. The claims of creditors of the estate, if any there be, would be superior to that of a purchaser from an heir, and, if the administrator shows that he represents this class, he could recover as against appellants' claim under Eldora Mumford; but if appellants located their part of the certificate derived from Eldora Mumford upon the land in controversy, so as to entitle them to all of it under the circumstances hereinbefore indicated, their claim would be superior to the other heirs of the estate, and, if the administrator only represents such heirs in this suit, he should not be allowed to recover against those having a better right. The other assignments of error need not be considered. We conclude the judgment of the court below should be reversed, and the cause remanded for a new trial.

WESTERN UNION TEL. CO. v. KERR.
(Court of Civil Appeals of Texas. Oct. 19, 1893.)

COMMUNITY PROPERTY — RIGHTS OF SURVIVOR —
NONDELIVERY OF TELEGRAM — MENTAL ANGUISH.

1. A wife, surviving her husband, may, before administration is granted on his estate, sue on a cause of action which accrued to the

husband during his life, and which, surviving to the community estate, is subject to administration for the payment of his debts.

2. The sender of a telegram cannot recover for mental anguish caused by nondelivery thereof, where it is sent in the name of another person, and there is nothing in it, or the circumstances attending its delivery to defendant company, to give notice of any interest therein on the part of the sender, or to excite inquiry in that regard.

Appeal from district court, Colorado county; George McCormick, Judge.

Action by Mollie J. Kerr against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Walton, Hill & Walton, for appellant.
Foard, Thompson & Townsend, for appellee.

WILLIAMS, J. This is an appeal from a judgment in favor of appellee against appellant for damages for negligent failure of the latter to deliver a telegraphic dispatch. The circumstances out of which the action arose were as follows: Dr. Kerr, the husband of appellee, was ill at his home at Waelder, Tex., and had secured the services of Dr. Jones, of Gonzales, as his physician. Dr. Jones had visited Dr. Kerr, and had prescribed a course of treatment, and had returned to his home at Gonzales, leaving Dr. Henderson, of Waelder, in charge of the patient, with directions to administer the remedies prescribed, and with instructions that, in case the patient's condition should grow worse, to telegraph him, (Dr. Jones,) in order that he might return. On April 10, 1891, Dr. Henderson and Mrs. Kerr became alarmed at the unfavorable progress of the disease, and Dr. Henderson delivered to the agent of appellant at Waelder the following message for transmission: "To Dr. J. C. Jones, Gonzales, Texas. Come at once, if able, to see Dr. Kerr. [Signed] J. M. Henderson." This message was not delivered to Dr. Jones at Gonzales until the next day. The exact time of day at which the delivery took place is involved in a conflict of testimony.

This suit was brought by appellee to recover compensation for mental anxiety and suspense experienced by herself, as the result of the failure of Dr. Jones to arrive, as she expected. She alleged that the message was sent by Dr. Henderson as her agent, and for her benefit, and the petition charged that the operator at Waelder "was well aware of the importance of said telegram at the time;" but there was no allegation that the agent knew that Dr. Henderson was acting as the agent of Mrs. Kerr, or that the telegram was intended for her benefit. It appeared from the petition that the cause of action accrued during the lifetime of Dr. Kerr, and that the sickness from which he was suffering at the time resulted in his death. Defendant demurred generally and excepted specially to the petition, on the grounds, among others, first, that plaintiff

could not maintain the action, inasmuch as the right of recovery, if any, belonged to the community estate of herself and her deceased husband, and there was no allegation as to whether or not the husband left children, and whether or not there was an administration, or necessity for one, upon his estate; and, second, that the damages claimed from mental suffering, resulting to her from the nondelivery of the message, did not appear to have been within the contemplation of the parties. The assignments which present as error the overruling of the general demurrer and these exceptions raise the principal questions involved in this appeal.

First. A cause of action which accrues for a wrong to the wife, before the death of the husband, is undoubtedly the common property of both. *Railway Co. v. Burnett*, 61 Tex. 638; *Railway Co. v. Helm*, 64 Tex. 147; *Potts v. Telegraph Co.*, 82 Tex. 545, 18 S. W. Rep. 604. The question here presented was raised and was involved in the decision in the case last cited, and was decided against the position of appellant. The husband, while living, is the manager and representative of the community estate, and suits for the enforcement of rights which belong to it must be brought by him. After his death, the wife, who survives him, is placed by the law, in most respects, in the attitude of a surviving partner. As such, she may retain possession of the common estate, and may pay debts with which it is chargeable, and for this purpose may dispose of assets of which it is constituted. She may be sued by creditors holding debts against the community estate, and judgments against her will establish charges against it, and may be satisfied out of it. *Carter v. Conner*, 60 Tex. 52; *Hollingsworth v. Davis*, 62 Tex. 438; *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. Rep. 173. She may exercise this control over the community estate until the appointment of an administrator upon the estate of her husband. Having these powers, and being subject to these liabilities, it would seem to follow necessarily that she should be allowed to bring suits to collect and preserve the community estate. Even heirs may bring such actions as are necessary to preserve the estate inherited from the ancestor. *Walker v. Abercrombie*, 61 Tex. 60. The survivor of the marital partnership does not occupy to the estate the relation simply of an heir. His or her rights and powers are not derived from the deceased by inheritance, but originate in the acquisition of the community property under the laws by which the title and powers of the husband and wife are defined. The rules of law which limit the rights of heirs to sue are not altogether applicable. Ordinarily, heirs cannot sue upon a cause of action which accrued to the ancestor, but suit must be brought by an administrator or executor. But an administration is only necessary in order to pay debts.

In case of a community estate, where one of the spouses survives, if debts exist, that very fact would authorize such survivor to devote to their payment the community property, and the power to collect the assets for that purpose would result. Children of a deceased husband, it is true, would inherit his half interest in community property, but would inherit it subject to the wife's power to control it for the purposes indicated. In the exercise of the power conferred upon her by law in the management of the community estate, the surviving wife holds the position of a trustee for the heirs of the deceased husband. *Lumpkin v. Murrell*, 46 Tex. 51. In the case of *Carter v. Conner*, 60 Tex. 60, Chief Justice Willie, speaking of *Woodley v. Adams*, 55 Tex. 530, 531, uses this language: "In the case last cited this court strongly assert the doctrine of this opinion in reference to suits and judgments against the survivor in community, * * * and say that judgments rendered for and against such survivor would be as binding upon those claiming through the deceased member as though such heirs were parties to the record." Our conclusion is that, admitting that such cause of action as accrued to the husband out of the facts alleged would survive to his legal representatives, and become subject to administration for the payment of debts, which, however, we do not decide, the suit may be maintained by the wife as the survivor of the marriage, so long as there is no administration; and that, if there was an administration in this case, it was incumbent on the defendant to plead and prove it, inasmuch as the facts alleged showed, *prima facie*, a right of action in the plaintiff. Whether or not an administration would supersede plaintiff's right of action, we need not determine.

Second. The telegram, according to the petition, was sent by the agent of appellee for her benefit. A breach of the contract thus made would give rise to a cause of action for damages legitimately resulting. That this is true, if Henderson acted as plaintiff's agent, appellant's counsel does not deny. The second question presented does not involve a denial of the right of an undisclosed principal to sue upon a broken contract made by his agent for his benefit, but raises a question as to the character of damages recoverable. The damages sought for injuries to the mind of plaintiff, it is claimed, are not recoverable, "because the petition fails to show that the defendant had knowledge that plaintiff was the beneficiary of the contract for the transmission and delivery of the message, and the alleged damages to her are not the proximate results of the negligence complained of, and because the damages alleged to have been sustained are not such as the parties to the contract will be deemed to have contemplated as a result of the breach thereof." This position, in our opinion, is well taken. The message

was delivered to Dr. Jones, and was signed by Dr. Henderson. Plaintiff is not mentioned in it, and there is no allegation that knowledge that she was the real party to the contract was brought to any of the defendant's agents. The message might have been sent by Henderson as well for his own benefit as for that of the plaintiff, or Dr. Kerr, or any one else interested in his welfare. The sender and the person addressed were both physicians, in attendance upon the sick man. Nothing would be more natural than for the one, representing no one but himself, to send a message to the other. There was nothing in the dispatch, or the circumstances attending its delivery, to excite any inquiry as to the plaintiff's connection with it. How can it be said that a condition of her mind, to result from the failure to deliver it, entered into the calculation of the parties when it was sent? It may be true that she can enforce the contract, if made by her agent for her benefit; but she must adopt it as it was, and can recover nothing but what the agent could recover if he sued in his own name. All defenses and rights which the defendant could urge against the agent, if suing, it may urge against the plaintiff. *Mechem, Ag. § 773*. Can it be contended that, in a suit on this telegram by Henderson, an element of damages would be mental anguish of Mrs. Kerr? In nearly all the cases in our reports in which the plaintiff has been allowed to recover damages for mental anguish, his or her name appeared in the message itself. In the *Broesche Case*, 72 Tex. 654, 10 S. W. Rep. 734, the plaintiff's name did not appear in the dispatch, but he was present when it was sent, paid the fee to the agent, and the latter knew that the message, signed by another person, was sent for plaintiff's benefit. This is pointed out in later decisions as the controlling feature of that case. *Telegraph Co. v. Carter*, 85 Tex. 585, 22 S. W. Rep. 961; *Elliott v. Telegraph Co.*, 75 Tex. 19, 12 S. W. Rep. 954. In the latter case it is said: "The face of the message did not advise the defendant that it was intended for the benefit of plaintiff, or that such persons existed, and there was no evidence that defendant's agent knew of the fact that the mill was idle for want of the saw." Passages from the opinion in the *Broesche Case* are relied on by appellee. Those expressions must be held to apply only to the facts as they there appear. It is there said: "It is immaterial whether appellant was notified that Hons was acting as agent of appellee or not. We cannot see how this could have affected the rights, or influenced the conduct, of appellant's agent." The fact was found, however, that the operator did know of Hons' agency and of *Broesche's* relation to the telegram. That the fact of the agency was not communicated may be immaterial to some questions, but very material to others. The principal may sue for breach of the contract made for

his benefit, whether his existence and connection with it were disclosed or not; but he cannot, in our opinion, recover a class of damages affecting his person, which an ignorance of his existence put beyond the contemplation of the other contracting party. Our supreme court, in this class of cases, has restricted the damages recoverable to such as were within the contemplation of the parties. The rule thus enforced is a conservative one, intended to leave it within the power of parties making contracts to form some estimate of the consequences of a failure to perform. How a knowledge which they did not possess would have affected their conduct, had they possessed it, we are not called upon to speculate.

The case of *Telegraph Co. v. Richardson*, 79 Tex. 651, 15 S. W. Rep. 689, much relied on by appellee, was one in which the message was sent in the plaintiff's own name by the agent. The petition claimed no other damages but such as are indicated above. The record furnishes no evidence that the defendant's agent knew that Mrs. Kerr was the real sender of the message, if such was the fact. The operator at *Waelder* was intimately acquainted with both Dr. Kerr and his wife, knew that the former was sick, and knew the importance of the message; but this furnishes no ground for making the defendant liable for mental anguish resulting to Mrs. Kerr from failure to deliver a telegram with which its agent did not know her connection. Neither the pleading nor the evidence stated a cause of action, and the court erred in overruling the general and special exception, and in refusing a new trial. Reversed and remanded.

ARANSAS PASS LAND CO. v. HANAFORD et al.

(Court of Civil Appeals of Texas. Oct. 19, 1893.)

LEASE—AGREEMENT FOR RENEWAL—CONSTRUCTION—AUDITOR'S REPORT—CONCLUSIVENESS—HARMLESS ERROR.

1. A stipulation in a lease for a year that the lessees "are to have the refusal of a lease on said hotel for the term of three years at price and conditions then to be agreed upon" does not justify the recovery of damages by the lessees for their ejection from the premises at the end of the year covered by the lease, after making no effort to obtain a renewal or extension.

2. An error in submitting the auditor's account to the jury for statement, in disregard of Rev. St. art. 1473, making such report conclusive unless contradicted by exceptions filed before trial, is not ground for complaint by defendant, when the verdict of the jury for all the items concluded by the report does not aggregate so much as the balance shown by the report to be due plaintiffs.

Appeal from district court, Aransas county; James C. Wilson, Judge.

Action by Mrs. J. M. Hanaford and her son against the Aransas Pass Land Company.

From a judgment for plaintiffs, defendant appeals. Reversed.

M. J. Hathaway and R. W. Stayton, for appellant. Willie & Ballinger, for appellees.

GARRETT, C. J. This suit was brought by the appellees, Mrs. J. M. Hanaford and her son, J. S. Hanaford, to recover of the Aransas Pass Land Company a balance alleged to be due them on account for their services in managing and running a hotel for the defendant for one year commencing April 1, 1889; also for certain moneys expended by them for which it was alleged the defendant was liable, and for damages, actual and exemplary, on account of the refusal of the defendant to extend the contract with them for the management of said hotel, and for maliciously and violently ejecting plaintiffs therefrom. The contract entered into between the plaintiffs and defendant purported to be a lease by the defendant to the plaintiffs of Aransas Hotel in the town of Rockport, and the block of ground upon which it is situated, for the time and upon the conditions stated therein. It is in writing, and the effect of it is that the defendant should furnish the hotel, and become responsible for all necessary expenses to be incurred in running it; and plaintiffs should manage, advertise, and run it for one year from April 1, 1889, assisted by the sister and another son of Mrs. Hanaford, and, with the assistance mentioned, to give their time and attention to an economical, careful, and proper conduct of said hotel, and render monthly statements to the defendant's secretary of expenses paid and moneys received, and for their services to receive 25 per cent. of the profits, or, if there were no profits, or the profits did not amount to so much, \$100 per month; the hotel to be open and ready for business by May 1, 1889. There is also this stipulation in the contract: "Parties of the second part, Mrs. J. M. Hanaford and son, are to have the refusal of a lease on said hotel for the term of three years, at price and upon conditions then to be agreed upon." Shortly before the expiration of the year the defendant leased the hotel to one Westbrook, and demanded of plaintiffs possession thereof at the end of the year. At its February term, 1891, upon motion of the parties, the court appointed J. M. Hoopes auditor to audit the accounts between plaintiffs and defendant, and make report thereof to the next term of the court, after giving 10 days' notice of the time and place to the parties where and when he would audit their respective claims, and continued the case. The auditor filed a statement of the accounts between the parties on September 9, 1891, sworn to as required by the statute. There were no objections to the report filed by either party, and the case was tried by a jury on September 14, 1891, and resulted in a verdict for the plaintiffs for the balance due

on salary, the several items of expenditure which plaintiffs alleged they had made, the sum of \$1,000 actual damages and \$1,000 exemplary damages, but plaintiffs entered in the court below a remitter of the amount found by the jury as exemplary damages on the day the motion for a new trial was overruled.

Appellees failed to show a cause of action for the recovery of damages for a breach of the contract. While the testimony of Mrs. Hanaford that a renewal of the lease for three years would have been worth at least \$1,200 to her was probably not admissible as a conclusion of the witness, it was not objected to, and she was not cross-examined as to the facts upon which she based her conclusion, and it might, therefore, support the verdict as to the amount if a breach of contract had been shown. The stipulation in the contract in favor of the plaintiffs for the refusal of a lease of the property for three years depended entirely upon the agreement of the parties, both as to the price and the condition of the lease, and was not an agreement for a renewal of the contract for the management of the hotel, as it seems to have been treated both by counsel for plaintiffs and the court below. Plaintiffs had no agreement for a lease, and the evidence shows that there was no effort to obtain one. Mrs. Hanaford testified that she was relying on her contract; but her contract was one for services as manager of the hotel, with an expression of preference for her over other persons if at the end of the year she and the hotel company could agree on the price and conditions of a lease, and in such event an agreement to lease for three years.

Although the amount of the verdict for exemplary damages was remitted, yet, in view of another trial, taking the position we do in regard to the stipulation for a lease in the contract, we think it proper to state that there could be no recovery of exemplary damages. If plaintiffs had an agreement for a renewal or extension or the making of a lease, and were wrongfully ejected from the premises, then there might be facts and circumstances attending the ejection which, brought to the knowledge of and ratified by the defendant company, would entitle plaintiffs to the recovery of exemplary damages.

As before stated, no objections were filed by either party to the report of the auditor, and it stood unchallenged as a correct statement of the accounts between them until it was offered in evidence. It is not addressed to the court, and does not appear to be a formal report, but it does appear to be a statement of the accounts of the hotel, showing receipts and disbursements and a balance against receipts. It is sworn to, as required by the statute, and the affidavit identifies the parties. It has also the file mark of the clerk, and was sufficiently identified as the report of the auditor to make its ad-

mission in evidence proper. As provided by the statute, the report of an auditor is admissible in evidence, and can only be contradicted when exceptions to the same, or any item thereof, have been filed before the trial. Rev. St. art. 1473. When not objected to, the report is conclusive, not only as to such matters as have been included therein, but also as to such as have been left out or excluded. *Whitehead v. Perie*, 15 Tex. 7; *Boggs v. State*, 46 Tex. 10; *Richie v. Levy*, 69 Tex. 133, 6 S. W. Rep. 685. It was therefore error for the court to submit the account between the parties to the jury for statement as was done in the portion of the charge complained of in the fourth assignment of error, but the verdict of the jury for all the items that were concluded by the auditor's report did not amount in the aggregate to the balance shown to be due to the plaintiffs by the report, and there could have been no injury resulting from the error indicated.

As shown by the second bill of exceptions the court erred in permitting the witness Benham to testify, over the objections of the defendant, that he had examined memoranda in the possession of and furnished by plaintiffs, and made a statement that defendant owed them the several sums which he stated, for which plaintiffs sought to charge the defendant as expenditures made by them.

We do not deem it necessary to notice any other questions presented, as they are not likely to arise in another trial. For the reasons indicated the judgment of the court below will be reversed, and the cause remanded for another trial.

RIO GRANDE R. CO. v. ARMENDALZ & al.
(Court of Civil Appeals of Texas. Oct. 19, 1893.)

MORTGAGES—RIGHTS OF MORTGAGEE WITH NOTICE OF EQUITIES.

1. Defendant A. purchased a mortgage on plaintiff railroad company's property, thereafter, with knowledge of defendant C.'s fiduciary relation to plaintiff as trustee, transferring to C. a half interest on the mortgage. *Held*, that A.'s purchase did not inure to plaintiff's benefit, even though, at the time of the purchase, it was understood between A. and C. that such purchase should inure to the joint benefit of A. and C.

2. Where, in an action to compel defendants to surrender such mortgage on repaying them the amount, with interest, which they had paid therefor, defendants are permitted, over objection, to prove, in contradiction of the recital in the instrument transferring a half interest in such mortgage to C., that the transfer was not made until several months after the date of A.'s purchase, the error, if any, is immaterial, since plaintiff could not recover against A., even though the purchase were made jointly.

Appeal from district court, Cameron county; John C. Russell, Judge.

Action by the Rio Grande Railroad Company against Francisco Armendalaz and another. From a judgment for defendant Armendalaz, plaintiff appeals. Affirmed.

Hume & Kleberg, for appellant. Simpson & James, for appellees.

GARRETT, C. J. The Rio Grande Railroad Company brought this suit in the district court of Cameron county against Francisco Armendalaz and Simon Celaya to compel them to surrender to it, upon repaying them the amount, with interest, which they had paid for the same, a second mortgage on the railroad property and corporate franchises of plaintiff, executed by it to William Railton, of Manchester, England, to secure said Railton the payment of \$50,000 due to him by plaintiff. Plaintiff averred that the defendant Armendalaz, at the time the said second mortgage was purchased, was, and had been continuously for many years prior thereto, a large owner and holder of the capital stock and a large amount in value of the first mortgage bonds of the said railroad company; that at said time, and for several years continuously prior thereto, the said Celaya, as managing trustee under the first mortgage or trust deed, had been in the sole and exclusive possession, management, control, etc., of, and in all things operating, the said railroad for the benefit of the holders of said first mortgage bonds, and, among others, of the said Armendalaz; that during the period of his said management the said Celaya, as such trustee, on many different occasions, paid to the said Armendalaz large sums of money upon the interest and principal of the first mortgage bonds held by him, and said Armendalaz had many dealings, meetings, interviews, etc., with the said Celaya as such managing trustee, and had full knowledge of the active trusteeship of the said Celaya, and of the matters set out in the petition; that on or about the 1st day of January, A. D. 1887, and on divers days and dates thereafter, up to and including the said 25th day of January, A. D. 1887, the defendants entered into a verbal agreement, each with the other, that the said Armendalaz should endeavor to purchase said second or Railton mortgage for their joint and common use, benefit, ownership, and profit, in equal moieties, of the said Celaya and himself, and so hold the same and the proceeds thereof. Then followed the allegation that on January 25, 1887, the defendants, in accordance with their previous agreement, as alleged, jointly purchased the said second mortgage for the sum of \$20,000 in Mexican eagle coin, worth in lawful money of the United States \$15,872; and that inasmuch as the said Celaya was the trustee for all parties interested in said railroad, and the said Armendalaz had full knowledge of the facts set out, said purchase inured to the benefit of plaintiff and its stockholders, upon repayment to them by plaintiff of the amount so paid, with interest, which plaintiff offered to do, and prayed judgment that defendants be compelled to receive the same in satisfaction of said mortgage, etc. The defend

¹ Rehearing denied.

ant Celaya answered, offering to surrender his interest in the mortgage on repayment of the money paid out by him therefor, with interest. Armendalaz answered that he was the owner of one-half interest in the mortgage, but denied generally all the allegations in the petition. The case was tried without a jury, and resulted in a judgment in favor of the defendant Armendalaz, and in favor of the plaintiff as to the defendant Celaya.

Briefly stated, the facts are: (1) On January 25, 1887, and for some time prior thereto, as well as subsequently, the appellee Simon Celaya and F. San Roman had the management of the appellant's railroad and other property, as trustees under the first mortgage of said railroad. Celaya was the active managing trustee of the railroad. (2) On the date mentioned, Armendalaz bought from the owners thereof the second or Railton mortgage, amounting to \$50,000, for \$15,872, and the transfer was made in his name. A few months afterwards he transferred a one-half interest therein to the defendant Celaya. Armendalaz was a large stockholder of the first mortgage bonds of the plaintiff company, and had many dealings and interviews with Celaya as managing trustee of the railroad, and full knowledge of his active trusteeship. He made an offer to Celaya to join him in the purchase of the mortgage before it was made, and they consulted appellant's attorney as to the validity of the mortgage, and what he thought about buying it; and being advised that it was valid, and that it would be an excellent idea to buy it, for in the hands of strangers it might become a dangerous weapon, Armendalaz purchased it. (3) There is a conflict in the testimony as to whether or not Celaya was interested in the purchase of the mortgage when it was bought and transferred to Armendalaz; but the evidence is not sufficient to support the conclusion that Celaya was not an original purchaser with Armendalaz, but bought one-half interest therein some months afterwards. (4) When the directory of appellant learned of the purchase of appellees, it at once tendered them the amount of purchase money expended by them, and demanded of them the transfer and delivery of the mortgage, which was declined, though Celaya expressed a willingness to surrender his interest.

Conclusions of Law.

1. It is not disputed that Celaya, as trustee of the bondholders in charge of and managing appellant's railroad, occupied towards it such fiduciary relation as prevented him from buying up its obligations at a discount, and making a profit thereon; nor is it contended that as a stockholder in the appellant corporation, and an owner of a part of the bonds, secured by the first mortgage on its railroad and other property, the appellee

Armendalaz was prevented from buying the bonds by reason of any fiduciary relations to the appellant as such stockholder and owner of its bonds. The contention is that the purchase of Armendalaz should inure to the benefit of the appellant, because of his participation with the trustee, Celaya, with knowledge of his fiduciary relations. Armendalaz was not a purchaser from Celaya with knowledge of a trust, nor do the facts disclose any such action on his part in the purchase of the mortgage as would render him liable to account to the company for the profits. Even if it should be conceded that the purchase was made for the joint benefit of both of the defendants, there was nothing shown by the evidence that would make the purchase, as to the interest of Armendalaz, inure to the benefit of plaintiff.

2. The written transfer from Armendalaz to Celaya, put in evidence by the defendant without objection, contained the following recital: "And whereas, ten thousand dollars (\$10,000) in Mexican eagle coin, or, that is to say, one equal half ($\frac{1}{2}$) of the purchase price paid by me, the said Francisco Armendalaz, as aforesaid, for said second mortgage of the said Rio Grande Railway Company, and the debt secured thereby, was the property of, and furnished for that purpose by, Simon Celaya, of the city of Brownsville, in the county of Cameron and state of Texas; and whereas, one-half ($\frac{1}{2}$) of said second mortgage of the said Rio Grande Railway Company, and the debt secured thereby, is, by force of the facts above stated, the property of said Celaya." Defendants then offered oral testimony to prove that the recital did not state the facts, and that the true facts were that not until several months after the defendant Armendalaz acquired the mortgage in question did he make the arrangement with Celaya to transfer the one-half interest to him. The evidence was admitted over the objection of the plaintiff that the defendants were estopped from denying any of said recitals, and because no foundation or predicate had been laid in any of the pleadings. Neither of the objections are well taken. *Hicks v. Morris*, 57 Tex. 661; *Pool v. Chase*, 46 Tex. 210, and the authority cited by appellees. But the error, if any, becomes immaterial when it is considered that plaintiff would not be entitled to recover against Armendalaz, although he and Celaya bought the mortgage jointly. There is no error in the judgment of the court below, and it will be affirmed.

COWART et al. v. EDWARDS et al.
(Court of Civil Appeals of Texas. Oct. 19
1893.)

EXECUTORY CONTRACTS—NONPERFORMANCE—
DAMAGES.

1. Defendants agreed, in consideration of plaintiffs' transfer to them of the right to sell

a patented article over a specified territory of 56 counties, that they would pay plaintiff \$25 for each county named; "payment to be made when we sell a county,—that is, on each county when sold." Plaintiffs sued for \$1,400 as damages for nonperformance, but their own testimony showed that defendants, at considerable expense, had honestly tried to sell the articles, but had only disposed of one. *Held*, that defendants' obligation to pay \$25 per county named was not absolute, but only became so as the counties were "sold." No cause of action could therefore arise unless sales were made, or defendants had failed or refused to sell when they could, for a reasonable length of time.

2. On complaint for a gross sum as damages for nonperformance of a contract, plaintiffs cannot recover compensation due under the contract for a small fraction of said sum which has become due and payable on defendants' admitted performance of a proportionate part of the contract.

3. On complaint for damages for nonperformance of a contract, plaintiffs cannot obtain judgment for rescission of the contract.

Error from district court, Fayette county; H. Telchmueller, Judge.

Action by T. E. Cowart and B. R. Reeves against W. P. Edwards and J. W. Tansey on contract. Judgment for defendants. Plaintiffs bring error. Affirmed.

John T. Duncan and J. E. Shropshire, for plaintiffs in error. Brown, Lane & Jackson, for defendants in error.

WILLIAMS, J. Plaintiffs in error brought this suit to recover of defendants the sum of \$1,400, claimed to be due to plaintiffs from defendants upon the following contract: "State of Texas, county of Fayette. Know all men by these presents that we, W. P. Edwards and J. W. Tansey, this day foreclosed (or purchased) from T. E. Cowart and B. R. Reeves a certain territory in the state of Texas, to sell a certain patent right known as the 'Grip-Wheel Windlass.' The conditions of the said sale and transfer named in the deed are that we agree to pay the grantors, Cowart and Reeves, the sum of \$25.00 for each of the following counties, the payment to be made when we sell a county,—that is on each county when sold; Galveston [and 55 other counties named;] the money to be paid into the First National Bank of Flatonia, subject to the order of Cowart and Reeves. August 27th, 1890. W. P. Edwards. J. W. Tansey. W. L. Edwards, Surety. Job Tansey, Surety. Witness: M. A. Hopkins." The cause was tried without a jury, and the judge, after hearing the evidence offered by plaintiffs, rendered judgment for defendants upon the following findings of fact and conclusions of law:

"Findings of Fact and Conclusions of Law: First. A general demurrer to the petition was overruled on the following grounds: (1) That the contract which is the basis of the suit is not to be held void. (2) By reason of the absence of any stipulation by the parties as to the time within which the defendants were

to perform their assumed obligations the law implies that it should be done in a reasonable time. (3) The petition alleges substantially that a reasonable time has elapsed, within which the defendants could have made sales, that the patent rights conveyed were salable, and that the failure of the defendants to sell was due to their negligence, or to their unwarranted repudiation of the entire contract. Second. After plaintiffs had introduced their evidence the court declined to hear evidence of the defendants, and invited counsel of plaintiffs to present his legal views, showing that the facts proved by him support his cause and entitle him to recover." Evidence offered by plaintiffs established the following: "Second findings: (1) The execution of the contract. (2) The failure of defendants to make any sales except one. (3) Their abandonment or repudiation of the contract on the alleged ground that plaintiffs had misled them by false and fraudulent representations, and because they have found the whole enterprise a mistaken and unprofitable speculation. (4) That the plaintiffs have made no fraudulent representations to defendants, whatever illusory opinions they may have expressed concerning the prospect of realizing great profits from their joint venture. (5) No facts are shown tending to prove that defendants could have effected sales if, instead of abandoning a visionary project, they had devoted their entire time and energy to its prosecution." "Third conclusions: First. Since the contract is silent as to the time within which it is the duty of the defendants to perform their part of the agreement, the plaintiffs in order to be entitled to recover damages sued for must prove (1) that the property in question was salable; (2) that a reasonable time has elapsed to make the sales; (3) that the failure to sell is due either to the negligence or refusal of the defendants to carry out the contract. Having failed to prove these facts, the plaintiffs are not entitled to recover damages. Second. Suing alone for damages claimed by reason of the alleged wrong of nonperformance by defendants, the plaintiffs cannot, at least in this suit, recover judgment for \$25 on the ground that the evidence shows the sale of one patent right, nor do the allegations of the petition warrant the rescission of the contract, and restoration of the property in question to the plaintiffs. Third. Defendants are entitled to judgments."

The facts found by the district judge are established by the evidence. It is proper to add that the evidence offered by plaintiffs was sufficient to show that defendants had made honest efforts to sell the patent right in the counties named in the contract, and had failed to sell the same except in one county. It further appeared that as early as October 23d, following the making of the contract, Edwards, one of the defendants, became dissatisfied, and by a letter addressed to one

of the plaintiffs expressed an intention not to further carry out the agreement, charging that misrepresentations had been made by plaintiffs, and that the right to sell the windlass in the same territory was held by other men. Subsequently, further correspondence ensued, in which these complaints were repeated, and in which it was claimed that the original patentee had sold the same territory to other persons before plaintiffs had bought the right to control the sale of the windlass in the state. These charges were not true, according to the evidence. This, with the facts found by the court below, constitutes all the material evidence. The contract did not bind the defendants absolutely to pay \$25 for each of the 56 counties. Their obligation to make payments was to become fixed as the sales of counties should be made, and no cause of action could arise until such sales were made, or until the defendants failed or refused to make sales when it was in their power to do so. This, we think, is the just construction of the agreement. By framing the contract as it was framed, the plaintiffs made their right to the consideration beyond the amount of the note depend, to this extent, upon the ability of the defendants to make the contemplated sales; and we agree with the court below in the opinion that a reasonable time was intended in which sales might be made. The rights of plaintiffs under the contract did not, however, wholly depend upon the caprice of the defendants. They could not escape liability by refusing, without good reason or upon unfounded charges of misrepresentation and defective title, to go on with the undertaking; and had the facts adduced by plaintiffs shown only such a case the judgment might have been different. But, as before seen, the evidence warranted the court below in finding that the patent was unsalable, and that there was no sufficient proof of a failure on the part of defendants to make proper efforts to sell. It is unnecessary for us to determine what should be the effect, in such a case, of evidence tending to show the unsalability of the article, where no effort had been made to sell. Here it is shown by the plaintiffs' own evidence that the defendants did try, at heavy loss to themselves, to vend the windlass, and almost wholly failed. The burden was upon the plaintiffs to show that facts had transpired to fix liability upon the defendants, inasmuch as it did not result from the contract alone, and they failed to do so. The pleadings were not shaped so as to entitle plaintiffs to a judgment for \$25 for the county sold. The cause of action set up was based upon the refusal of the defendants to sell any of the counties, the petition charging that they "failed to sell even one county." For the same reason there was no error in not adjudging a rescission of the contract. No such relief was sought. The judgment is affirmed.

FULLER et al. v. EAST TEXAS LAND & IMP. CO.

(Court of Civil Appeals of Texas. Oct. 19, 1893.)

EXECUTION—SALE—BOND FOR PRICE.

1. A league of land having been levied on and sold under execution, the sheriff made a deed for the league, less an undefined 800-acre tract. The price being insufficient to satisfy the execution, another writ was issued, and levied on the 800 acres, and the sheriff, without any further sale, deeded said 800 acres to the purchasers at the sale of the whole league. *Held* that, while the sheriff presumably had no right to reserve the 800 acres from the first sale, the whole proceedings had the effect to convey the entire league, as the levy, sale, and payment of the purchase money gave the purchasers the equitable title to the whole league, and gave the sheriff power to pass title thereto.

2. A sheriff's sale 50 years old was contested as not made at the courthouse door. A witness who lived in the county at the time testified that, as far as he remembered, the sale was made at a log 160 feet west of the courthouse; that he was satisfied it was not at the courthouse; that he was not at the sale, but was at the place a few minutes afterwards, and was told that defendant's grantors had bought the land in question; that many sales were made at that log. It appeared that plaintiffs' ancestor, the original grantee of the land, lived in the town several years after the sale, and then moved away, having never claimed the land. *Held*, that plaintiffs' evidence was not enough, after such a lapse of time, to overthrow the presumption that the sheriff made a legal and regular sale.

3. Persons claiming under an execution sale on process issued on a bond for purchase price given by a purchaser of the same property at a former execution sale need not defend the title conveyed at such original sale, the second levy being against the land as belonging to a surety on the bond.

4. The facts that in 1840 the original grantee lived on a league which was then sold on execution against another, and that in 1842 it was levied on as belonging to said original grantee, do not prove that in 1840 it did not belong to the other.

5. Act Dec. 22, 1840, repealed so much of Act Feb. 5, 1840, as permitted execution sales on credit and the giving of bonds for the price, but did not take away the remedies under Act Feb. 5, 1840, § 17, on bonds executed before its passage; and a bond for 12 months, given in November, 1840, was properly treated as a judgment to support an execution issued in January, 1842.

Appeal from district court, San Augustine county; James T. Polley, Judge.

Trespass to try title to land by Jasper Fuller and others against the East Texas Land & Improvement Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by WILLIAMS, J.:

This is an action of trespass to try title, brought by appellants for the title and possession of a league of land in San Augustine county, granted to Benjamin Fuller. The plaintiffs relied upon title derived by inheritance from Fuller, the original grantee.

whose heirs they show themselves to be. The defendant's title originated in a sale of the land, made under an execution against Fuller in 1842, at which John D. Nash and Iredell D. Thomas purchased. It was claimed by appellants in the court below, and is claimed here, that this sale was void. The statement of facts, which is filed in the court below, does not contain copies of the various proceedings upon which the validity of the sheriff's sale may depend, nor is any statement of their contents given. In making the transcript, the clerk copied into the statement of facts what purports to be copies of the documents which were in evidence, but at a former day this court, upon motion of appellee, expunged them, so as to leave the statement as it was filed. Standing thus, it does not enable us to ascertain the facts upon which most of the assignments attacking the conclusions of the trial judge depend. We shall have to adopt his findings of fact as to the nature and contents of the documents which were used in the trial, and base our review of his conclusions of law upon the facts thus found, and such others as may be furnished by the statement of facts. The facts thus appearing are as follows: On the 5th day of September, 1839, one Jacob Garrett, administrator, recovered a money judgment in the district court against James S. Whitman, on which an alias execution was issued October 3, 1840, and was on same day levied upon 1,000 acres of land. This land was sold on the first Tuesday in November, 1840, in front of the courthouse door; and, failing to bring two-thirds of its appraised value, it was re-advertised for sale on the first Tuesday in December, 1840, and on that day it was sold by the sheriff on a credit of 12 months, and was purchased by Joseph Castleberry, who executed his bond for the purchase money, in accordance with the statute then in force, with Benjamin Fuller and Thomas H. Garner as sureties. This bond was returned into court by the sheriff with the execution, and there remained until it matured, at the expiration of 12 months. It was not paid at its maturity, and on the 7th day of January, 1842, an execution was issued upon the bond as a judgment against Castleberry, Fuller, and Garner. This execution was, on the 3d day of February, 1842, levied upon the 1,000-acre tract, which had been previously sold to Castleberry, upon the league of land in controversy, and upon another tract. All of this land was sold on the first Tuesday in March, 1842, and was purchased by Thomas and Nash, under whom defendant claims. One of the controversies in the court below was over the question of fact whether or not this sale took place in front of the courthouse door. It does not appear what the sheriff, in his return and in the deeds executed to the purchasers, recited on the subject. The judge found that the sale was properly made before the courthouse door.

A witness who lived in San Augustine county at the time testified that, according to his best recollection, though he would not be positive, the sale was made at a log on vacant lots, 160 feet west of the house then used as a courthouse; that he was satisfied the sale was not made in front of the courthouse; that he was not present at the sale, but was there, according to his best recollection, a few moments afterwards, and was told that Nash and Thomas had bought the Fuller league. Many sales were at that time made at this log. It was shown that Fuller continued to live near the town of San Augustine for three or four years after this sale, and then moved to Panola county, and was lost sight of; neither he nor his heirs having claimed this land until this suit was brought in 1891. We conclude with the trial judge that the evidence adduced by plaintiffs was not sufficient, after this lapse of time, and under these circumstances, to overthrow the presumption that the sheriff acted regularly and lawfully in making the sale. It appears that the whole of the Fuller league was levied on, offered for sale, and bought by Nash and Thomas, and that they paid the purchase money. The sheriff, for some unexplained reason, made a deed for the league, less an undefined tract of 800 acres. The execution was returned unsatisfied, the property not having brought enough to satisfy the judgment, and on the 10th day of June, 1842, another was issued for the amount due on the bond of Castleberry, Fuller, and Garner, on which the following levy appears, of date June 10, 1842: "Levied on a tract of land of eight hundred acres, as the property of Benjamin Fuller. Said land lies in the county of San Augustine, about twenty-three miles southwest of San Augustine; this being a portion of a league of land granted to the said Fuller; * * * property pointed out by Benjamin Fuller." On the 5th of July, 1842, the sheriff, without any further sale, executed a deed to Nash and Thomas, "conveying the said 800 acres of land, the residue or reserve of said league."

George E. Gating and Rufus Price, for appellants. Ingraham, Ratcliff & Ingraham and S. W. Blount, for appellee.

WILLIAMS, J., (after stating the facts.) The record contains 47 assignments of error, many of which are presented in the brief of appellants. The questions upon which the decision must depend are not numerous, however, and we shall not undertake to follow them in the order in which they are presented in the brief. All of them could have been raised by a few assignments.

Appellants contend that the sale of the sheriff, under which appellees claim, was void for several reasons. They contend, first, that the sale of the 1,000 acres which Castleberry bought, and for which he executed the purchase-money bond was void, and that,

therefore, the bond is void, and furnished no legal basis for the subsequent proceedings. One of the reasons urged to show the nullity of that sale is that it was not made upon the first Tuesday in the month. The court below found otherwise, and the execution and the return of the officer are not in the record to contradict such finding. The presumption is in favor of the sheriff's acts. Another objection to that sale is that the levy upon the 1,000 acres was not sufficient. The land was described as the tract of 1,000 acres, being the farm on which Benjamin Fuller then resided. This could be made certain by evidence, and the levy was not upon its face so indefinite as to render it void.

It is next contended that the 1,000 acres was the property of Fuller, and not of Whitman, the defendant in execution. There is no evidence in support of this position, unless it be the statement in the judge's findings that Fuller resided on it at the time of the levy, and the recital in the return on the execution issued in January, 1842, that it was levied on as the property of Fuller. The fact that Fuller resided on it when the levy was made does not show that it was not Whitman's, nor that it was not subject to the levy, and the levy on it in 1842 as Fuller's property does not prove that in 1840 it was not Whitman's. Castleberry bought such title as was passed by the sheriff's deed, and that was sufficient to support his bond. It was not necessary for the defendant to show that a good title passed to Castleberry.

Objection is next made to the judge's findings with respect to that sale; that the land had been appraised prior to the first sale; that it failed to bring two-thirds of its appraised value; that it was readvertised for sale on the next sale day,—the objection being that these findings are unsupported by evidence. All of these facts may have appeared from the recitals in the documents which were offered in evidence. If they did not so appear, it was proper for the judge to presume that they all transpired at the proper time. If it were affirmatively shown that they never took place, the absence of most, if not all, of them would have been mere irregularities, which would not have defeated the title of the purchaser, nor have rendered the sale void. *Howard v. North*, 5 Tex. 290; *Ayres v. Duprey*, 27 Tex. 599. That the bond was executed by Castleberry, Fuller, and Garner, and returned into court, that it matured, and was not paid, we must assume to have been established. The act of 5th of February, 1840, concerning executions, was in force at the time the sale of December, 1840, was made, and the proceedings were in accordance with sections 15-17 of that act. Articles 1302-1304, Hart. Dig. The act of December 22, 1840, (Hart. Dig. arts. 1312-1320,) had the effect to repeal so much of the former act as provided for

sales on credit and the giving of bonds for the purchase money; but this sale had taken place before that act was passed, the rights of the parties had attached, and there is nothing in that act showing a purpose to take away the remedy on bonds executed before its passage which was afforded by section 17 of the act of February 5th. That provision could stand consistently with the act of December 22d. The act of January 27, 1842, did not take effect until after the sale of the league in question had taken place. We therefore hold that the court was right in giving to the bond the effect of a judgment, and in holding that the execution issued upon it was valid. The league was sufficiently described in the levy and sale. So far as the record shows, the sheriff had no right, in executing the deed, to reserve 800 acres. By the levy, sale, purchase, and payment of the purchase money, the equitable title to the whole league passed to the purchasers. The deed from the sheriff was not essential. By the levy under the execution of June, 1842, obviously the sheriff acquired power to pass title to the land. But he had such power under the previous execution and sale, and his last deed may well be treated as an exercise of that power. By the two deeds which he executed, the sheriff conveyed to Thomas and Nash just what they had acquired right to by their purchase of the league.

The judgment of the district court upon the facts found was correct, and is affirmed.

FLINT et al. v. VAN HALL et al., (CUMMINGS, Intervener.)

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

DECRET—INSTRUCTIONS—ISSUES NOT RAISED BY PLEADINGS.

Where a petition in intervention alleges that money in the hands of defendant was procured from the intervener by defendant, to invest, on fraudulent representations, a charge that, if the money was borrowed by defendant through fraud, the title did not vest in him, was outside the issue presented, and misleading.

Appeal from McLennan county court; W. H. Jenkins, Judge.

Action by Flint & Flint against Van Hall and others on a conditional acceptance of an order for a sum of money in the custody of defendant Van Hall. The order in suit was given plaintiffs by H. A. McNally, and accepted by defendant Van Hall on condition that the money proved to be McNally's. Frankie Cummings intervened, alleging that the money for which the order was given was intrusted by her to McNally to invest for her as her agent, and plaintiffs' reply to the plea of intervention was that she had loaned McNally the money to set up in business on his own account. There was judgment for intervener, and plaintiffs appeal. Reversed.

D. H. Hardy, for appellants.

KEY, J. There is error in that portion of the charge of the court below wherein the jury were told that if McNally procured the money in question from Mrs. Cummings by any fraudulent representations, by which he deceived and overreached her, the title to the money did not vest in him. The issues raised by the pleadings did not call for such a charge, and it was misleading. When analyzed, Mrs. Cummings' plea of intervention does not charge that McNally induced her to lend him the money through any fraud or misrepresentations. In fact, it does not aver that she loaned him the money. It alleges that she intrusted him with it as her agent, to be by him invested in a business enterprise for her. It also charges that she was induced to so intrust her money to him by his false and fraudulent representations that he would invest it according to her wishes. But this latter averment was wholly unnecessary, and should have been treated as surplusage. If Mrs. Cummings placed the money in his hands as her agent, to be used for her benefit, it remained her money, and this is so regardless of her reasons for so intrusting it to him. On the other hand, if she loaned him the money, and he did not obtain it with intent not to repay it, and he did not misrepresent existing facts relating to his ability to repay it, then it was McNally's money, and his order on Van Hall in favor of appellants for it vested title in them, and entitled them to it. This is all there is in the case. No issue of fraud should have been submitted to the jury, because, in legal contemplation, none was raised by the pleadings. Under the charge given, the jury may have concluded that if Mrs. Cummings loaned McNally the money, but was induced to do so by his false representations as to the purposes for which he intended to use it, title thereto did not pass to him. But such is not the law. If in fact the transaction was a loan, and McNally misrepresented no fact concerning his ability to repay it, then it became his money, although he may have deceived Mrs. Cummings as to the manner in which he intended to use it for his own benefit; and under such circumstances, unless he borrowed the money with the design never to repay it, there was no fraud, against which the law affords relief. The judgment of the court below is reversed, and the cause remanded.

MILLER v. BOONE et al.

(Supreme Court of Texas. Oct. 19, 1893.)

TRUST DEED—SALE.

1. Where a trust deed provided for a sale at the courthouse door, a sale made at the door of a building used by the commissioner's court and the county court is void, the commissioners having, under article 2310, Rev. St.,

designated the opera house as the courthouse and place where the district court is held.

2. A sale was made under a deed of trust, and the property purchased by the holder of the note secured thereby. He conveyed the property to one M. The sale proved invalid. At the request of M., a second sale under the trust deed was made. *Held*, that the conveyance to M. did not carry the debt, the note, or the trust deed, and the latter authorizing a sale at the request of the payee of the note, a request by M. was unavailing, and the sale thereunder void. 22 S. W. Rep. 102, reversed.

Error from court of civil appeals, second supreme judicial district.

Trespass to try title by Boone and Scarborough against W. J. Miller. Judgment for plaintiffs, who bring error from a judgment of the court of civil appeals in favor of defendant. 22 S. W. Rep. 102. Reversed.

J. D. Martin and J. B. Scarborough, for plaintiffs in error. Smallwood & Smith and Watts, Aldridge & Eckford, for defendant in error.

BROWN, J. Boone and Scarborough sued W. J. Miller in the district court of Mitchell county in trespass to try title to recover four sections of land situated in that county. W. J. Reiger was admitted to be the common source of title. On the 19th day of December, 1884, Boone, Scarborough, and Powell recovered judgment in the district court of Mitchell county against W. J. Reiger for \$1,829, an abstract of which was duly filed and recorded in the proper office of said county on the 5th day of February, 1885. On the 2d day of September, 1885, an execution was issued upon said judgment and levied upon the land in controversy, which was sold by the sheriff on the 6th day of October, 1885, and purchased by Scarborough for the benefit of Boone and Scarborough, Scarborough paying the bid—\$25—of his own money. A deed was made by the sheriff to Boone and Scarborough in pursuance of said sale. W. J. Miller claimed title to the land under the following chain of title: On the 22d day of April, 1884, George J. Reiger executed a deed of trust to Winfield Scott, as trustee, conveying to him in trust the lands in controversy to secure the payment of a note due by Reiger to J. N. Upton for the sum of \$2,425, with 10 per cent. interest from date, dated October 3, 1883, and due October 1, 1884. The deed of trust was recorded in the proper office of Mitchell county on the 29th day of April, 1884, and provided that "upon default in the payment of the note and interest at maturity the trustee, Winfield Scott, or, in case of his refusal or inability to act, the acting sheriff of Mitchell county," is authorized to sell said land, at the request of James Upton, made at any time after the maturity of said note, the sale to be made at the courthouse door of Mitchell county after publishing notice for 20 days. Scott having refused to act, Ware, the sheriff of Mitchell county, sold the land under the deed of trust on the 4th day of February,

1885, and the Concho National Bank became the purchaser for the sum of \$1,700. The Concho National Bank then owned the note. The sale seems to have been regular, except that it was made at the door of a house used and occupied by the commissioners' court and the county court of the county for holding court, but the district court was held at a different place, about 300 yards from that at which the sale was made. The commissioners' court had entered an order designating the opera house as the courthouse and the place for holding the district court. Ware made a deed for the land to the Concho National Bank, and on the 3d day of November, 1885, Reiger, by quitclaim deed, conveyed all of his interest, right, and title to J. N. Upton for an expressed consideration of \$150; and on the 22d day of December, 1885, Upton, by quitclaim deed, conveyed all of his right, title, and interest in the land to the Concho National Bank for consideration of \$1. In September, 1888, the Concho National Bank, for a consideration of \$2,300, paid by W. J. Miller, conveyed to Miller the land in controversy, one section being conveyed by quitclaim deed and the other three sections conveyed by deed with special warranty. On the 21st day of May, 1889, at the request of Miller, Ware, the sheriff of Mitchell county, again sold the land under the deed of trust, at the courthouse door of Mitchell county, after due notice, and Miller bid the land in at the sum of \$1,100, but had not the possession of the note, and paid no money on his bid. Scott had refused to act in making the sale. R. F. Powell, one of the firm in whose favor the judgment was rendered by virtue of which the sale was made under which Boone and Scarborough claim, transferred his interest in the judgment rendered in favor of Boone, Scarborough, and Powell to Miller, the transfer being dated on the 19th day of June, 1889, and on the 23d day of April, 1890, Powell, by quitclaim deed, conveyed all of his right and title to the land to Miller. The legal title to the land and the right of possession remained with Reiger, the maker of the trust deed, until the deed of trust was legally foreclosed; and the purchase of the land by Boone and Scarborough under the execution sale conveyed to them the legal title and right of possession, unless the sale under the trust deed, made before the execution sale, was valid; and the plaintiffs were entitled to recover unless the deed of trust had been legally foreclosed at one of the sales made under it. *Morrow v. Morgan*, 48 Tex. 304; *Schmeltz v. Garey*, 49 Tex. 49; *Spring v. Eisenach*, 51 Tex. 435; *Silliman v. Gammage*, 55 Tex. 369. If either of the sales made under the deed of trust was valid, then the defendant in error, Miller, is entitled to the land, and the judgment of the court of civil appeals should be affirmed; but if both of these sales were ineffectual to pass the title, then the judgment

of the court of civil appeals should be reversed, and the judgment of the district court affirmed.

The deed of trust required that the sale should be made at the door of the courthouse of Mitchell county, and, if this was not done, then the sale was void, and passed no title to the purchaser. *Howard v. North*, 5 Tex. 290. From some cause, not explained, there was no regular courthouse in Mitchell county. Our statute defines the meaning of "courthouse door" as follows: "Art. 2310. By the 'courthouse door' of a county is meant either of the principal entrances to the house provided by proper authority for the holding of the district court; and where from any cause, there is no such house, the door of the house where the district court was last held in that county shall be deemed to be the courthouse door. Where the courthouse or house used by the court has been destroyed by fire or other cause, and another has not been designated by the proper authority, the place where such house stood, shall be deemed to be the courthouse door." The commissioners' court of Mitchell county was the proper authority to designate a place for the holding of the district court, and that court had designated the opera house as such place. The land not having been sold at the place so designated, the sale was void, and conveyed no title to the purchaser.

There is no evidence to show that Miller acquired any equitable right under the deed from Powell, and no pleading upon which such right could be considered in this case if in fact it exists. The sale of February 4th under the deed of trust being void, the legal title remained in Reiger. Boone and Scarborough's judgment was recorded on the 5th day of February, the next day after the sale under the deed of trust. On the 6th of October the sale was made under execution against Reiger, at which Boone and Scarborough purchased. The deed from Reiger to Upton, being made after the sale under execution, passed no title, and did not affect the right of Boone and Scarborough, and the Concho National Bank acquired no right or title to the land by the deed from Upton, made on the 22d day of December, 1885. The right of Miller is therefore reduced to his title, if any, acquired under the last sale under the deed of trust. The deed of trust provides that the sale may be made "at the request of J. N. Upton, made at any time after the maturity of the note." The last sale was made at the request of W. J. Miller, and the question is, had the trustee the power to sell at his request? The power of sale in a deed of trust is an important power granted by the maker, and he has the right to place upon it such limitations and conditions as he may deem proper for his own protection. When the exercise of a power is made to depend upon the direction or request of a given person, then the direction or

request of that person must be given in order to authorize the exercise of the power. 18 Amer. & Eng. Enc. Law, p. 977, § 13; Richardson v. Crooker, 7 Gray, 190; Haymond v. Jones, 33 Grat. 317. Looking to the transcript, we find copied into the statement of facts that portion of the deed of trust which confers the power to sell, with quotation marks, indicating that it is literally copied. There is no provision for the sale to be made at the request of the holder of note, which is common in such instruments, and the fact that such provision is omitted goes far to strengthen the conclusion that the purpose was to confide the authority to put the power of sale into active operation to Upton alone. It may be that Reiger was willing to trust to Upton, believing that he would not direct the sale under improper circumstances; but, no matter what the reason may have been, Reiger had the right to impose the limitation, and the court has no power to disregard it. If, however, we give to the deed of trust the broadest construction claimed for it,—that is, that the owner of the debt would be authorized to give the direction to the trustee to sell,—Miller is in no better condition. The sale of February 4, 1895, at which the Concho National Bank purchased, being void, the bank, by its bidding in the property, acquired no rights therein. The parties, after the sale, stood as they did before the "ineffectual attempt at sale took place." Jones, Mortg. § 1902, p. 605; Association v. Price, 53 Md. 401. In the case cited, after stating the rights of a purchaser at a void sale, who had paid the purchase money, the court says: "But where, as in this case, the mortgagee becomes the purchaser at his own sale, the sale being void, he acquires no rights, either legal or equitable, by means of the sale. In such case the parties stand as they did before the ineffectual form of sale, and all the costs and expenses attending such ineffectual sale must be borne by the mortgagee as the consequence of an unauthorized proceeding." The debt was not satisfied by the sale at which the bank purchased. Monroe v. Buchanan, 27 Tex. 241. After the void sale, the bank owned the note and the mortgage, and Reiger owned the land until the execution sale was made, when Boone and Scarborough became the owners of the land, subject to the lien of the deed of trust. The conveyance of the land to Miller by the Concho National Bank did not operate to transfer the debt and mortgage. In Perkins v. Sterne, 23 Tex. 563, the court says, quoting from 4 Kent, Comm. 161, 162: "So, on the other hand, an assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use; and the reason is that the principal thing always draws to it that which is incidental or accessory, so that the principal thing cannot take one direction, and that which is incident to it another

direction." The conveyance by the bank to Miller did not operate to transfer to him the debt and deed of trust. There is another reason why the ownership of the note did not vest in Miller by the conveyance from the bank. If it were true that the bid of the bank—\$1,700—was to be taken as a credit on the note, yet the note was for a much larger amount,—\$2,425,—with 10 per cent. interest for more than a year, which would leave a large part of the note unpaid, and a subsisting debt in the hands of the bank as against Reiger. Then the bank would remain the legal owner of the note. Whatever equities Miller may have, he was not the owner of the note. The sale not having been requested or directed by Upton, as required by the deed of trust, and Miller having no authority, even as owner of the note, to direct it to be made, the power to make the sale was not exercised in accordance with the provisions of the deed of trust, and was therefore void, and passed no title to Miller. We see no reason why the deed of trust might not yet be executed in a proper manner, and Miller fully protected, in case the plaintiffs in error should not discharge the lien upon the land. It is ordered by this court that the judgment of the court of civil appeals be reversed, and that the judgment of the district court be affirmed. It is further ordered that the plaintiffs in error, Boone and Scarborough, recover of W. J. Miller and the sureties on his appeal bond all costs of this court and all costs of the court of civil appeals and of the district court.

CLARENDON LAND, INVESTMENT & AGENCY CO., Limited, v. McCLELLAND et al.¹

(Supreme Court of Texas. Oct. 19, 1895.)

TRESPASSING ANIMALS.

Where defendant's cattle entered through the fence around plaintiff's range, and communicated a disease to their cattle, defendant is not liable, there being no law in Texas compelling the owner of cattle to restrain them. 21 S. W. Rep. 170, reversed.

Error from court of civil appeals of second supreme judicial district.

Action by McClelland Bros. against the Clarendon Land, Investment & Agency Company, Limited. A judgment for plaintiffs was affirmed by the court of civil appeals, (21 S. W. Rep. 170,) and defendant brings error. Reversed.

Matlock & Peacock and W. R. Butler, for plaintiff in error. Browning & Madden, for defendant in error.

GAINES, J. This suit was brought in the district court of Donley county by the defendants in error to recover of plaintiff in error damages for an alleged trespass of the latter's cattle upon the pasture of the for-

¹For opinion on rehearing, see 23 S. W. Rep. 1100.

mer. It was claimed in the petition that the plaintiffs' cattle had died by reason of a disease communicated to them by those of the defendant. There was a judgment for the plaintiffs, which, upon appeal by the defendant, was affirmed in the court of civil appeals. It was shown upon the trial that the plaintiffs were the owners of a pasture embracing 2,000 acres, which was inclosed by a wire fence, and upon which they held about 100 head of cattle. This pasture was entirely surrounded by a much larger one, which was owned by the defendant corporation, and which was also inclosed by a fence of the same general character. The fence of plaintiffs, as they testified, was constructed of "posts about 30 feet apart, with four barbed wires, and three or four stays between each post." In 1889 the defendant company placed in its pasture a large number of East Texas cattle, which were less in size than the cattle of the Panhandle section. Some of these cattle passed through the plaintiffs' fence, and into their pasture, and there was evidence sufficient to justify a finding that they communicated a disease to some of plaintiffs' cattle, from which they died. The fence appears to have been passed through by the young cattle, presumably the calves and yearlings. One of the plaintiffs testified that "they [meaning the cattle] would crawl through the fence." The other also testified as follows: "They were small, and just walked through our fence."

The court charged the jury as follows: "Every entry of one's own cattle upon the lands or premises of another is a trespass, and the owner of such cattle will be liable for any damages sustained by the owner of such premises, if any, provided such lands or premises were at the time of such entry inclosed by a fence sufficient to exclude therefrom such cattle or animals as were accustomed to be used in the country or the range around and about such inclosed premises, and provided, further, that such trespass is effected by a forcible entry through such fence or inclosure." This charge was assigned as error, upon the appeal to the court of civil appeals, and the assignment is insisted upon in this court. Neither the courts nor the legislature of this state have ever recognized the rule of the common law of England which requires every man to restrain his cattle either by tethering or by inclosure. *Davis v. Davis*, 70 Tex. 123, 7 S. W. Rep. 826. Hence, if the cattle of one person wander upon the uninclosed lands of another, or upon his lands imperfectly inclosed, they are not trespassers, and the owner is not liable for any damage that they may inflict. It follows that one who desires to secure his lands against the encroachments of live stock running at large, either upon the open range or in an adjoining field or pasture, must throw around it an inclosure sufficient to prevent the entry of all ordinary ani-

mals of the class intended to be excluded. If he does not, the owner of animals that may encroach upon it will not be held liable for any damage that may result from such encroachment. This is the necessary result of the right of the owners of domestic animals to permit them to run at large as recognized by the laws of this state. Since he does not owe the duty of confining his cattle, he is guilty of no negligence, and he does no wrong by allowing them to go unconfined, and is not responsible for their acts if, by reason of an insecure fence, they inflict damage upon the lands of a neighbor; in other words, their encroachment upon another's land is not a trespass. If, however, he drives his cattle upon the inclosed land of another, however imperfectly inclosed, he is guilty of a trespass, for which he is liable to answer in damages. *Davis v. Davis*, supra. Tested by the rule we have announced, the charge under consideration cannot be sustained. Abstractly considered, it admits of a holding that if only sheep "were accustomed to be used in the country or in the range around and about the inclosed premises," and the owner of the land had a fence sufficient to exclude such animals, one who should bring in neat cattle, and leave them unconfined upon adjacent lands, would be held to respond in damages for any loss that might ensue by reason of their encroaching upon the inclosed premises. It is clear that such is not the law. It is but just, however, to the learned judge who tried the case, to say that it is apparent from the entire charge, in the light of the testimony, that he did not intend to lay down so broad a doctrine. He referred solely to neat cattle. But the possible construction we have suggested serves to illustrate what we conceive to be an error in the instruction, when applied, as doubtless intended, to the latter class of animals only. We do not hold that for no breach of his fence, and invasion of his pasture by domestic animals, could a landowner recover under our laws. It may be admitted that, if his inclosure be sufficient to exclude all cattle of an ordinary disposition, he would have the right to recover for the trespass of such as were peculiarly vicious and prone to break fences. The owner of a dog may, as a general rule, permit him with impunity to run at large; but if he know him to be vicious, and does not restrain him, he is liable for any injury he may inflict upon person or property; and it would seem that the same principle should apply to the owner of any domestic animal known to him as being accustomed to break through an ordinarily good and sufficient fence. But upon what principle are we to draw a distinction between small cattle and large? If the fact that all the cattle in the neighborhood of his pasture were of large breeds when his fence was constructed would relieve the owner of the necessity of making his fence sufficiently

close to keep out small cattle that might be brought into the country, why should he be not relieved of the necessity of fencing against hogs, provided there were no hogs within reach when he made his inclosure? The owner of the little "dogies," (as the witness calls them,) such as crawled or walked so freely under the wires of plaintiffs' fence, had precisely the same right to permit them to go at large as his neighbors had who owned Herefords or Shorthorns; and it could make no difference who came first with his cattle in the neighborhood. It is equally unimportant whether others in the same section or neighborhood kept the same kind of cattle or not. It is the right of every owner of domestic animals in this state, not known to be diseased, vicious, or "breachy," to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood. For these reasons we think there was error in the charge complained of, for which the judgment must be reversed.

We are of the opinion that the act of March 26, 1879, (2 Sayles' Civil St. art. 4600a,) applies only to counties and subdivisions of counties in which the provisions of chapter 4 of title 93 of the Revised Statutes have been put in force by an election. So, also, title 43, in relation to fences, applies only to lands in cultivation, and not to pasture lands. They have no bearing upon this case, except in so far as they evince a recognition by the legislature of the general rule that owners of domestic animals have the right in this state to permit them to run at large.

In order to obviate any misconception of the scope of this opinion, we call attention to the radical distinction between this case and that of *Davis v. Davis*, supra. In that case the defendant drove his cattle upon the plaintiffs' inclosed land. That made him a willful trespasser. In this the defendant corporation merely put its cattle upon its own pasture, and they passed the plaintiffs' fence of their own volition. If the agents of the defendant corporation knew that their cattle could pass through the plaintiffs' inclosure, and that they were likely to communicate disease to the latter's cattle, it was negligence on its part not to confine them, and for the consequences of that negligence it would be liable. The judgments of the district court and of the court of civil appeals are reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. KIZZIAH.

(Supreme Court of Texas. Oct. 19, 1893.)

INJURY TO EMPLOYE — NEGLIGENCE OF FELLOW SERVANT — INSTRUCTIONS — EVIDENCE — ASSUMPTION OF RISK.

1. Where an employer furnishes defective machinery to his servant, of which defect the latter was ignorant, though the master knew of it, the latter is liable to the servant for injuries caused thereby, though a fellow serv-

ant was guilty of negligence which contributed to the injury.

2. There is no error in refusing requested charges where they are substantially given in the general charge.

3. Findings in matters of fact by the court of civil appeals will not be reviewed.

4. Where plaintiff, a car repairer, was injured while at work between cars on the track of defendant, by the moving of certain cars on the track from some cause unknown, where the only evidence was that the air brakes did not hold the cars, but there was no evidence that there were any defects in them, a charge based on the issue of defective brakes is erroneous. 22 S. W. Rep. 110, reversed.

5. Where there was a distinct issue made as to whether it was the duty or not of plaintiff to inspect the cars and brakes, it was proper, on request of defendant, to charge that if it was the duty of plaintiff to inspect the cars and brakes he could not recover for any defects in them which he might have discovered by inspection. 22 S. W. Rep. 110, reversed.

6. An employee assumes not only the risks which always attend his employment, but those, also, which commonly do so.

7. Evidence that some time after the accident the plaintiff had stated that he had often applied for the rules as to his work, and had been unable to get them, is incompetent for any purpose. 22 S. W. Rep. 110, reversed.

Error from court of civil appeals of second supreme judicial district.

Action by W. L. Kizziah against the Gulf, Colorado & Santa Fe Railway Company for personal injuries. From a judgment of the court of civil appeals (22 S. W. Rep. 110) affirming a judgment for plaintiff, defendant brings error. Reversed.

J. W. Terry, for plaintiff in error. Poin-dexter & Padelford, for defendant in error.

BROWN, J. The appellee sued the appellant in the district court of Johnson county to recover of it damages for injuries alleged to have been received by him while in its employ at Cleburne, in that county. The petition alleges, in substance, that appellee was employed by the appellant as examiner and repairer of cars at said station, and that it was the duty of appellee and one Renfro to make such repairs upon cars, when needed, as could be made without sending them to the roundhouse; that on the 2d day of November, 1888, a train of cars came into Cleburne on the appellants' road, consisting of two passenger coaches and a baggage car, and that the said coaches and car were placed on a spur track for the purpose of having repairs made to the drawhead of the baggage car, the repairs being slight, and such as could be made on the track; that, for the purpose of enabling the persons making the repairs to get conveniently at the drawhead to be repaired, the coaches and baggage car were detached from each other, and separated a distance of about eight feet, and that, before the engine was detached, the air brakes were set upon car and coaches to hold them stationary on the track. He alleged that he and Renfro, in discharge of their duty, went to the baggage car to make the needed repair, and, that while per-

forming his duty in assisting the said Renfro, it was necessary for him to stand upon the track between the coaches and the baggage car, with his body against or in front of the drawhead of the baggage car, with his back towards the coaches; that, while he was engaged assisting Renfro in said work, the coaches rolled down the track towards and against the baggage car, and caught the body of appellee between the drawhead of the coach and the drawhead of the baggage car, crushing and wounding his body and limbs, thereby inflicting serious permanent injuries. Appellee seeks to recover of the appellant upon two distinct grounds: (1) He alleges that the air brakes upon the passenger coaches were defective and insufficient to hold the coaches stationary upon the track where they were placed, although the track was nearly level, and that by reason of such defect the said coaches were caused to roll along said track against the appellee while he was at work, thereby causing the injury. It is alleged that plaintiff was ignorant of the defects in the brakes, and could not have discovered them by due care on his part, and that defendant knew of the defect, or might have known it by the use of ordinary care. (2) The petition alleges that plaintiff was inexperienced in the business for which he was employed by the defendant, that the work was dangerous, and that he was ignorant of the dangers attending it. It is alleged that the defendant knew that plaintiff was inexperienced in that kind of work, and was ignorant of the dangers attending it, and also knew of the dangerous character of the work, but failed to inform the plaintiff of the danger, or to instruct him in his duties while engaged therein, and that if he had known that it was dangerous to go between the cars while they were secured by the air brakes alone, and that said brakes were insufficient to hold them securely, he would not have exposed himself to that danger. He avers that his injuries were occasioned by the running of the cars upon him while engaged in his work, and that it was a danger attending the work which was latent in its character, and unknown to him, and of which he was not informed by defendant. The petition contained other allegations necessary to present these issues. The appellant, among other things, pleaded a general denial, and that it was the duty of the plaintiff to inspect the air brakes on said cars, and if he had performed his duty he could have discovered such defect, if any; and also that the air brakes were sound and safe for the uses to which they were to be applied, and that it was not intended that they should be relied upon to hold the cars on the track while awaiting repairs; and that it was the duty of plaintiff and Renfro to set the hand brakes on the coaches so as to secure them, or to scotch the wheels for that purpose, and, if they had performed that duty, plain-

tiff would not have been injured. The case was tried before a jury, and a general verdict rendered for the plaintiff. Defendant appealed to the supreme court, and upon the organization of the court of civil appeals the case was transferred to that court, which affirmed the judgment of the district court. 22 S. W. Rep. 110. Motion for rehearing was overruled, and the appellant has removed the case to this court by writ of error.

Appellant presents to this court seven grounds for reversing the judgment of the court of civil appeals, three of which we do not think are well taken, and which we first consider. They are as follows:

"First. The court of civil appeals erred in failing to sustain the 22d, 23d, 24th, and 25th assignments of error, which are as follows: '(22) That the verdict of the jury is contrary to the law as given in charge to the jury by the court, in this: The court tells the jury that, if plaintiff's injury resulted from the negligence of plaintiff or his fellow servant Renfro, then they would find for defendant; and under the evidence the finding of the jury was against the law as thus given in charge to the jury. (23) That the verdict of the jury is contrary to law in this: that the evidence shows that plaintiff's injury resulted from his own and from the negligence of C. L. Renfro, and that the latter was a fellow servant of plaintiff in the employ of defendant at time plaintiff was injured, or from the negligence of plaintiff's coemployee, the switchman or brakeman who left the cars without setting the hand brakes, and under the law, therefore, plaintiff could not recover in this case. (24) That the verdict of the jury is contrary to the evidence and is unsupported by the evidence, for the whole evidence in the case shows by a great preponderance thereof that plaintiff's injury, if any, resulted from the negligence of plaintiff or of C. L. Renfro, or of both, and that C. L. Renfro and plaintiff were fellow-servants, and that the air brakes were not defective, and that the injury to plaintiff resulted from the failure of plaintiff and Renfro, one or both, to properly secure the cars which injured plaintiff before attempting to repair the same, and that plaintiff's injury was caused by no act of negligence on the part of defendant. (25) That the verdict of the jury was contrary to the additional charge given to the jury, at their request, filed in this cause on the 19th day of December, 1889, for in said additional charge the court tells the jury that if the plaintiff's injury was caused by the negligence of Renfro, and that if Renfro and plaintiff were fellow servants, as therein defined, then they would find for defendant.'" The right of recovery in this case rests upon the negligence of the appellant in two particulars: (1) In furnishing defective machinery to the appellee with which to perform his service; (2) in not

informing the appellee of the existence of a danger that existed in the performance of his duties, of which the appellee was ignorant, he being inexperienced in the work to be performed; the appellant being informed of the danger, and of the inexperience of appellee and his ignorance of the alleged danger. If appellant furnished defective machinery to the appellee with which to perform the services for which he was employed, and of which defect the appellee was ignorant, and he was injured thereby without fault on his part, the appellant would not be excused from liability for such injury by reason of the fact that a coemployee, a fellow servant of appellee, was guilty of negligence which contributed to the injury. *Railway Co. v. Kirk*, 62 Tex. 227; *Railway Co. v. Whitmore*, 58 Tex. 276. If there was a latent danger in the work, of which appellee had notice, and he was inexperienced in the work and ignorant of the danger, which was known to appellant, and the appellee was injured by such latent danger, the appellant would not be excused from liability because one of its servants, a fellow servant of the appellee, was guilty of negligence in failing to perform an act which would have prevented the injury. *Jones v. Mining Co.*, 66 Wis. 268, 28 N. W. Rep. 207. The concurring negligence of the fellow servant will not excuse the negligence of the master in such cases. The court of civil appeals has found the facts for the appellee as to his being ignorant of the danger and inexperienced, that appellant knew of the danger, and that appellee did not know of it. We cannot say that the verdict of the jury was contrary to the law under such state of facts.

"Second. The court of civil appeals erred in failing to sustain the 10th and 11th assignments of error, and in failing to reverse the judgment in this cause on account of the refusal of the court below to give the charges recited in the said assignments, which are as follows: '(10) That the court erred in not giving in charge to the jury special charge No. 1, asked by defendant, which is as follows: "The defendant asks the court to charge the jury that a railroad company is not liable for damages caused by injury to one of its employees which resulted from the negligence of another employee of such company, unless it be made to appear that proper care was not used in selecting such other employee, or that, he being incompetent or negligent, that fact was known to the company." (11) That the court erred in refusing to instruct the jury as requested by defendant in its special charge No. 2, which is as follows: "You are instructed that if you believe from the evidence that the injury which plaintiff has sustained, if any, resulted from the negligence of Renfro, and that C. L. Renfro was a coemployee of plaintiff, and engaged in the

same department of common service, and used the air brakes for a purpose and in a manner not designed in their use by the defendant company, but which would have been perfectly safe if properly used in work for which it was designed, you will find for the defendant unless it appears from the evidence that proper care was not used in the selection and employment of said Renfro by defendant, or that, he being incompetent or negligent, that fact was known to the defendant.'" There was no error in refusing the charges quoted, because, in so far as they were applicable to the facts of the case, they were substantially embraced in the charge of the court given at the request of the jury, and in the fourth clause of the general charge of the court. The fourth clause of the general charge given by the court is follows: "If you believe from the evidence that there were no defects in the air brakes as the petition charges that there were, but that the plaintiff assumed that said air brakes were sufficient to hold the cars from moving, and that plaintiff thereby failed to take any further steps to secure himself from danger, and that he thereby suffered the injury as alleged in the petition, then you will find for the defendant; or if you find from the evidence that it was the duty of the plaintiff and his coemployee Renfro to see that the cars under their control while repairing or inspecting the same were secured and prevented from moving by means of the hand brakes, or by scotching the same by other means, and shall further believe that said Renfro and plaintiff failed to perform said duty, and that by means of such failure on their part, or on the part of either of them, plaintiff thereby suffered injury, then you will find for the defendant, and so say by your verdict." The charge given by the court at the request of the jury is as follows: "The court, in compliance with your request, instructs you that if you believe from the evidence that Renfro and plaintiff were fellow servants,—that is, engaged in the same kind of work,—and if it was the duty of said Renfro to see that the cars under their inspection, and upon which they were at work, were fastened either by the hand brake, or by scotching the same in some other way, so as to prevent the same from moving, and if they, or either of them, failed to perform that duty, and plaintiff was injured by reason of such failure, then he cannot recover in this suit; but this instruction is to be considered in connection with the whole charge hereinbefore given by the court." There was no evidence that Renfro used the brakes in any way except to permit the cars to remain secured by the air brakes, and in failing to set the hand brake or to scotch with something else. The two charges given as quoted above present the propositions of the negligence of a fellow servant and the failure

to secure the cars by hand brake or otherwise, as the evidence demanded, and are free from the objectionable qualification as to the incompetency of Renfro contained in the charges refused, of which there was neither allegation nor evidence.

"Sixth. The court of civil appeals erred in failing to sustain the twentieth assignment of errors, and in holding that the court below did not err in charging the jury as set forth in said assignment." We deem it unnecessary to copy this assignment. The proposition under it is that there was no evidence that the plaintiff was ignorant of the dangers of the employment and inexperienced, and that defendant knew that he was so inexperienced. The court of civil appeals found that plaintiff was inexperienced and ignorant of the dangers of the employment, and that defendant knew these facts. There is no error in this that this court can revise.

The appellant also presents the following grounds for reversal of the judgment of the court of civil appeals: "Third. The court of civil appeals erred in failing to sustain the 19th assignment of error, and in holding that the court below did not err in charging the jury as set forth in said assignment, which is as follows: 'Nineteenth assignment of error: That the court erred in the first paragraph of the charge, which is as follows: "If you believe from the evidence that the plaintiff was on the 2nd day of November, 1888, in the employ of the G., C. & S. F. Ry. Co., as one of its agents, whose duty it was to inspect the cars, etc., of the defendant, make slight repairs on the coaches, engines, trains, etc., of the defendant, when same could be done at the depot, and that while in the discharge of his duties as such employe he was injured, as alleged in the petition, by the car of defendant, and that said injury was caused by defective air brakes upon the car causing the injury, and shall believe, further, that plaintiff did not know of such defective air brakes, if any, and could not have known the same by the use of such diligence as a person of ordinary prudence would have used under like circumstances, and shall further believe that the plaintiff did not cause said injury by his own negligence in failing to exercise such caution as a man of ordinary prudence would have used under like circumstances, then you will find for the defendant," etc.'" The proposition under this assignment is as follows: "First proposition under nineteenth assignment of error: There was no evidence before the jury that the air brakes were in any respect defective. It is a reversible error for the court to charge upon an issue in support of which there is no evidence, as it creates in the minds of the jury an impression that in the opinion of the court there is sufficient evidence to warrant a finding upon such issue." The court of civil appeals made no finding upon this issue in its conclusions of fact, but in the conclusions of law occurs

this statement: "It is contended that there was no evidence that the air brakes were in any respect defective. The evidence bearing upon that issue was, in our opinion, extremely meager. There were, however, circumstances indicating that the air brakes were defective. These circumstances consist mainly in the fact that they were not sufficient to hold the detached cars, though the latter were on ground apparently level, or nearly so, and that the air brake holding the baggage car on which the work was being done was sufficient to keep it stationary." These circumstances establish only the fact that the cars moved, but do not prove the cause of their moving. They constitute proof that the air brakes did not hold the cars on that occasion, but do not prove that this was caused by a defect in the brakes, which may have been imperfectly set, or from other causes may have failed on this occasion. In the case of *Railway Co. v. Barrager*, (Tex. Sup.) 14 S. W. Rep. 242, Justice Gaines, in delivering the opinion of the court, said: "To say that the burden is upon the servant to show negligence upon the part of the master when he seeks to recover damages for injuries resulting from defective machinery is but to announce the elementary propositions that the plaintiff must prove his case, and we are of the opinion that negligence on the part of the railroad company is not to be inferred from the mere fact that a drawhead has become detached in the operation of a moving train. *Railroad Co. v. Thomas*, 42 Ala. 672." The district court erred in submitting to the jury the issue of defective brakes on the state of the evidence, and the court of civil appeals should have reversed the judgment for that error. *Box v. Word*, 65 Tex. 160; *Lee v. Yandell*, 69 Tex. 34, 6 S. W. Rep. 665.

The fourth ground set up in the petition for error is as follows: "The court of civil appeals erred in failing to sustain the 13th assignment of error, and in holding that there was no error in the refusal of the court to give the charge recited in said assignment, which said assignment is as follows: 'Thirteenth assignment of error: That the court erred in refusing to instruct the jury as requested in defendant's special charge No. 4, which is as follows: "In this case you are instructed that if you believe from the evidence that plaintiff was injured as alleged in his petition, and when he was so injured he was in the employ of defendant as car inspector and repairer, as alleged in his petition, and that it was a part of his duty as such to inspect the air brakes and wheels, etc., on all cars arriving in Cleburne, Texas, and to repair the same, or, together with one C. L. Renfro, to make such slight repairs as he and the said Renfro could make on same without sending the same to the roundhouse or repair shop of defendant, and if you believe the cars or coaches between which plaintiff was injured arrived in Cle-

burne on the evening of the alleged injury, and that it was the duty of plaintiff, or the plaintiff and C. L. Renfro, to inspect the air brakes on same, and that it was a part of their duty so to do, then you will not further consider any of the evidence in this case as to whether said air brake was defective or not, and, if you so believe, you will find for the defendant, and so say by your verdict." There was a distinct issue made by the evidence as to whether or not it was the duty of plaintiff to inspect the cars and brakes, and the court should have given the charge, or some charge on that subject. If it was the duty of the plaintiff to inspect the brakes, then he could not recover on account of defects that he might have discovered by such inspection. The charge as asked was perhaps not as full as it should have been, in this: that it did not limit it to such defects as he, the plaintiff, might have discovered; but it was sufficient, in the state of the case, to call the attention of the court to a necessity for such a charge.

The fifth ground of error assigned by the plaintiff in error in this court is as follows: "The court of civil appeals erred in failing to sustain the eighteenth assignment of error, and in holding that the court below did not err in refusing to give the charge recited in the said assignment, which assignment is as follows: 'Eighteenth. That the court erred in refusing to charge the jury as requested by defendant in special charge No. 9, which is as follows: "That, when the plaintiff accepted the position of defendant in which he was working at the time he was injured, he assumed the risks ordinarily incident to the particular position, and that he also assumed that he had the capacity to understand the nature and extent of the service and the ability to perform it; and, if you find from the evidence that the plaintiff was injured without the risk being increased after he had accepted the position he was in at the time he was injured, you will find for the defendant."'" The charge asked by appellant contained a correct statement of the law as applicable to the facts of the case. *Railway Co. v. Calbreath*, 68 Tex. 528, 1 S. W. Rep. 622. That part of the charge asked which referred to increase of risk was upon a point not in issue, but would not probably have affected plaintiff injuriously. The court had in the general charge instructed the jury as follows: "But the court further instructs you that, when the plaintiff entered the service of the defendant, he under the law assumed all the risks necessarily incident to the business which he had undertaken to perform; and if you believe that plaintiff was injured while in the employ of the defendant, and that said injury was not the result of negligence on the part of the defendant, as the immediate proximate cause of such injury, but was from the danger appertaining to the business which plaintiff had undertaken to discharge, then

you will find for the defendant." The effect of this charge was to inform the jury that, in order to exempt the defendant from liability to the plaintiff for his injury, such injury must have been occasioned by a danger necessarily incident to the performance of the duty undertaken by plaintiff. This restricted the risks which the plaintiff assumed to those which always attended the performance of the work, whereas the law is that he assumes such as commonly attend such work. In view of the charge given, and the fact that the testimony tended to show that the danger was one common to the employment, but not necessarily attending it, the charge asked, or one embodying the main point in it, was important to the proper determination of the liability of the defendant, and should have been given. The refusal was an error that may have caused serious detriment to appellant's rights.

The seventh ground assigned by appellant in this court is as follows: "(7) The court of civil appeals erred in failing to sustain the ninth assignment of error, and in holding that the court below did not err in admitting the testimony of C. V. Myers, referred to in said assignment, and set forth in bill of exceptions No. 7, which assignment is as follows: 'Ninth assignment of error: That the court erred in allowing the witness for plaintiff, C. V. Myers, to testify as is shown by defendant's bill of exception No. 7, and for the reasons therein set out.'" The witness Renfro had been introduced by the defendant, and, upon cross-examination by plaintiff, testified as follows: "It is not true that at Kizziah's house, two or three nights after plaintiff was hurt, in the presence of Paddelford, Myers, Golden, and Mr. and Mrs. Kizziah, that either I or Golden said the railroad was going to beat Kizziah's case for damages because he had not complied with the rule that required the setting of the hand brakes; and I then said I had not seen the rules, and that I did not know that it was the rule that the hand brakes should be set; and that Kizziah spoke right up then and there, and said he had demanded of Mr. Baker the rules three times; and plaintiff did not then and there ask me if I had not, a few evenings before that, asked him (plaintiff) to get a copy of the rules for me, and that I answered him, 'Yes.' Well, I have no idea on earth that it is so, sir, because I did not feel like I needed them. I don't remember whether the time card was mentioned at the plaintiff's house or not." The plaintiff then introduced the witness Myers, by whom he sought to impeach Renfro, and the appellant's bill of exceptions taken to the testimony of Myers, being No. 7, is, in substance, as follows: "That while C. V. Myers was on the stand he was asked the question: 'Did not Kizziah, there at his house, a few nights after he was hurt, in the presence of Golden, Paddelford, C. V. Myers, C. L. Renfro, and Mrs. Kizziah, state that he had de-

manded these rules three times of Mr. Baker, and referred to Mr. Renfro there, and say once, "A few nights before, I went and demanded; and before I left you, you asked me to get one, too?" To which question the defendant, by counsel, objected, because the same is irrelevant and immaterial and inadmissible for any purpose on earth in this cause, is not binding upon the defendant, and does not contradict the witness, because he did not deny it, and because it was an indirect way of getting hearsay testimony before the jury, and of allowing plaintiff to manufacture his own testimony, and inject into the jury, and could serve no other purpose; which objections were by the court then and there overruled, and defendant duly excepted, and the witness was permitted to answer, as follows: 'Mr. Kizziah had stated that he had applied for the rules two or three times, (I don't remember how many times,) and he also stated that Mr. Renfro asked him to get the rules for him from Mr. Baker; and Mr. Renfro was there at the time, sitting in the room. We were discussing the rules about this rule. I think Golden brought up the subject of the railroad company about the brake in some way. I think Renfro admitted the truth of what Kizziah said. He did not deny it. Renfro was there, and it was either Kizziah or Renfro—one—that made the remark that Kizziah had asked Mr. Baker for the rules for Renfro. Whether it was Kizziah said it, or Renfro, I do not know.' To all of which answer the defendant, by counsel, then and there objected, and moved the court to exclude, because the same was irrelevant and immaterial, and not admissible for any purpose; urging the same objections to the answer that were previously urged to the question, which said objections and motion were overruled, and the defendant excepted." In passing upon this assignment the court of civil appeals said: "The testimony of C. V. Myers, complained of in appellant's ninth assignment of error was, in our opinion, properly admitted. It was solely for the purpose of impeaching witness Renfro, who had been previously interrogated upon the same subject-matter, and who had denied the statement about which the witness Myers was called to testify. The testimony complained of referred to a material issue in the case, namely, whether or not the plaintiff had demanded of the foreman, Baker, the rules and regulations of the defendant." We need not cite authority for the proposition that a witness cannot be impeached by asking him on cross-examination as to declarations made out of court on a collateral and immaterial matter, and then proving that he made the declarations denied by him. Was the matter about which he made the alleged declarations material in the trial of this case? We think not. The points of contradiction were that Kizziah had said, after he received the injuries, in the presence of Renfro and others,

that he had applied to Foreman Baker for a copy of the rules of the defendant, and that Renfro had asked Kizziah to get a copy for him. If Kizziah made the statement as stated by Myers, it was *ex parte*, hearsay evidence, and made in his own interest, and therefore not admissible as evidence for him. Likewise, if Renfro asked Kizziah at the time to get a copy of the rules for him, it would be wholly immaterial to the issue being tried, and a declaration of Renfro that he had previously made the request would not be less objectionable. It was an issue before the jury as to whether or not plaintiff had made a demand or request for the rules. This was an important issue. This evidence ought not to have had any bearing upon that issue in any event; but, considering the conflict in the evidence, we doubt not that it may have had considerable weight with the jury in their determination of that matter. The testimony was not admissible in any phase of the case, nor for any purpose. It may have been, and probably was, considered by the jury as corroborating plaintiff. We therefore believe that the court should not have admitted the evidence, and that the court of civil appeals should have sustained the assignment. For the errors committed by the district court, as before stated, the court of civil appeals should have reversed the judgment, and remanded the cause. It is ordered that the judgment of the court of civil appeals and of the district court be reversed, and this cause be remanded to the district court for further trial, and that the appellant recover of the appellee all costs of the court of civil appeals and of this court.

MISSOURI PAC. RY. CO. v. BYARS.

(Supreme Court of Arkansas. Oct. 14, 1893.)

INSTRUCTIONS ON WEIGHT OF EVIDENCE.

It is not within the province of the court to instruct the jury as to what constitutes *prima facie* evidence of a fact, unless such evidence is made so by law.

Appeal from circuit court, Franklin county; Jeremiah G. Wallace, Judge.

Action by Thomas T. Byars against the Missouri Pacific Railway Company to recover a penalty for an overcharge of fare. Plaintiff had judgment, and defendant appeals. Reversed.

Dodge & Johnson, for appellant. D. B. Locke, for appellee.

BUNN, C. J. This is an action by the appellee, as plaintiff, against the appellant company, as defendant, instituted in the Franklin circuit court for the recovery of the statutory penalty for an overcharge of passenger fare on the Little Rock & Ft. Smith Railroad, between the towns and stations thereon of Ozark and Alma; it being alleged in the complaint that the distance between the two

points is 25 miles, and no more, and that on the 6th day of December, 1890, the said defendant company, by and through its servants, was operating said railroad, and that on that day the conductor of one its passenger trains demanded and received of plaintiff, a passenger thereon, the sum of 85 cents as fare between said points. Prayer for \$300 penalty and reasonable attorney's fee. The defendant answered, denying that it owned or was operating said railroad, and that it did on the day named demand, take, and receive from plaintiff, as his fare between said points, the said 85 cents, or any unlawful sum, or at any time. Trial was had at the March term, 1891, of said circuit court on the issues there made, and in the progress of the same, at the instance of the plaintiff, the court gave the jury the following instruction, to wit: "That if the plaintiff shows that the defendant has placed at intervals along the line of its road mile posts, showing the distances, that this is prima facie the distance, and will be considered by the jury as sufficient evidence of the distance, until shown to be erroneous." Verdict for \$250 penalty and \$10 attorney's fee, from which defendant appealed, setting up in its motion for new trial (which was overruled, and the overruling excepted to) the want of evidence to sustain the verdict, the excess of the penalty imposed, and the error of the court in giving said instruction. The constitutional restriction upon courts in this state on the subject of charging juries as to matters of fact ought not to be disregarded, and it is without the province of the courts, in any given case, to say what is prima facie evidence, unless made so by law, or to say that any state of facts is sufficient; and for this error of the circuit court in this instance its judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is deemed unnecessary to consider the other points raised.

DARDANELLE PONTOON BRIDGE & TURNPIKE CO. v. SHINN.

(Supreme Court of Arkansas. Oct. 14, 1893.)

APPEAL—PRACTICE—SETTING OUT INSTRUCTIONS IN ABSTRACT.

The action of the court in refusing instructions will not be considered on appeal when the instructions which were given are not set out in appellant's abstract.

Appeal from circuit court, Conway county; Jeremiah G. Wallace, Judge.

Condemnation proceedings by the Dardanelle Pontoon Bridge & Turnpike Company against J. L. Shinn. From a judgment rendered on the award of damages said company appeals. Affirmed.

W. D. Jacoway, L. C. Hall, and Carter & Davis, for appellant. D. B. Granger, R. B.

*Rehearing denied.

Wilson, R. C. Bullock, and G. W. Shinn, for appellee.

HUGHES, J. In proceedings under the statute to condemn land for purposes of a bridge site, abutment and approach to the bridge, and right of way to the bridge from the public road, leading from the town of Dardanelle, in Yell county, to the town of Russellville, in Pope county, Ark., the appellant obtained a judgment for the condemnation of a strip of land 50 feet wide and 2,000 feet long on the north bank of the Arkansas river, opposite the town of Dardanelle, at which point the bridge was to be, and is claimed to have been, constructed across the Arkansas river by the appellant. The strip of land taken and condemned was a part of a valuable tract of 200 acres owned by the appellee, and from which he had for years operated a public ferry across the Arkansas river, under a license from the county court, and was so operating said ferry at the time of the taking of said strip. The abutment of the bridge on that side of the river was constructed on said appellee's land at an important ferry landing of the appellee, and deprived him of the use of it. The ferry was a valuable one, yielding annually to the appellee a net income of four or five thousand dollars. It appears from the testimony of several witnesses, well acquainted with the land and the situation of the bridge, that in their opinion the land taken from the appellee for bridge site was alone, regardless of the ferry, worth \$5,000, and for this sum the jury returned a verdict in favor of the appellee, and judgment was rendered accordingly. From this judgment appeals were taken to this court by both parties, but the appellee has abandoned his cross appeal.

The abstract made by appellant sets out requests for 10 instructions by the circuit court, which were refused, but does not set out the instructions given by the court, though it appears several were given. This is a failure to comply with rule 9 of this court, which declines to search the voluminous transcript for the instructions given.

The only question left is whether the testimony supports the verdict of the jury. The testimony as to the land taken and condemned is conflicting, but it is apparent from what has been said in reference to it that it is sufficient. Let the judgment be affirmed.

NORTHWESTERN MUT. LIFE INS. CO. v. BARBOUR.

(Court of Appeals of Kentucky. Oct. 10, 1893.)

PRACTICE—MOTION TO DISMISS ACTION—NOTICE.

1. Where plaintiff's motion to dismiss is assigned for hearing to a later date, a motion by defendant to file an amended answer and counterclaim, made at a date intermediate the date of plaintiff's motion and the date assigned for the hearing thereof, does not affect plain-

tiff's right to a dismissal; Civil Code, § 371, providing that an action may be dismissed without prejudice to a future action by plaintiff before final submission of the case to the jury, or to the court sitting as a jury.

2. Notice need not be given defendant of a motion to dismiss, since Code, § 371, makes the right unconditional.

Appeal from Louisville law and equity court.

"To be officially reported."

Action by James P. Barbour against the Northwestern Mutual Life Insurance Company. After plaintiff's motion to dismiss, but before a hearing, defendant moved to file an amended answer and counterclaim. From a judgment sustaining plaintiff's motion, and overruling defendant's, defendant appeals. Affirmed.

Barnett, Miller & Barnett, for appellant. Dodd & Dodd, for appellee.

LEWIS, J. This action was originally brought by James P. Barbour and others against the Northwestern Mutual Life Insurance Company to recover on two policies of life insurance; and, a demurrer to defendant's answer having been sustained, judgment for plaintiff followed; but, upon appeal to this court, that judgment was reversed, and case remanded for the demurrer to be overruled, and further proceedings consistent with the opinion of this court. It appears from transcript of the record before us that, March 7, 1892, defendant moved to file in the lower court the opinion and mandate of this court, and for both the order sustaining demurrer to the answer, and judgment in favor of plaintiff to be set aside. But that motion was not then decided, being assigned to March 15th for hearing. On the same day, March 7th, plaintiff moved to dismiss the action without prejudice, which motion was likewise postponed to March 15th. In the mean time,—that is, March 14th,—defendant moved the court to file an amended answer and counterclaim; but an order was then made postponing the action until March 15th for hearing on all pending motions, though no decision was made thereon until March 28th.

No exception was, or could properly be, taken to filing the opinion and mandate of this court, or to setting aside the previous order and judgment as directed thereby. But the motion of plaintiff to dismiss the action without prejudice was at the same time sustained, while that of defendant to file an amended answer and counterclaim was overruled; and from these two orders defendant has appealed. After the motion to dismiss the action was sustained, if legally done, a denial of the motion to file the amended answer and counterclaim was inevitable, because the action had then terminated, and there were no allegations to be traversed, nor any contract or transaction in litigation out of which the counterclaim could arise. Whether the motion to dis-

miss the action was proper, it seems to us, must depend upon construction of the Civil Code. Section 371 provides that "an action, or any cause of action, may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court, if the trial be by the court." The right of a plaintiff to dismiss his action without prejudice at any time before final submission existed at common law, and a denial of it would often work hardship and injustice. We are therefore satisfied it was intended by the Civil Code that right might be exercised absolutely, and without condition. But, though such be the case, it does not necessarily follow the defendant can be thereby precluded maintaining any cause of action already pleaded as counterclaim or set-off; for section 372 provides that "a defendant is entitled to a trial of a set-off or counterclaim, though the plaintiff dismiss his action, or fail to appear." But, clearly, such right of defendant exists only where the counterclaim or set-off has been filed in court while the action was pending, and before the plaintiff has made a motion to dismiss it. We are thus limited to the single inquiry whether the lower court correctly gave precedence to and decided the motion to dismiss before passing upon that of defendant to file the answer and counterclaim. And as to that question we see no room for doubt; for inasmuch as the right of plaintiff to dismiss was absolute, and the court was bound to sustain the motion when made on March 7th, the intervening motion of defendant to file the answer and counterclaim did not, nor could, legally deprive them of the right, or in any way affect it. Counsel, however, contends that the motion to dismiss, of March 7th, was void because made and entered without notice, as required by a rule of court. It does not seem to us the rules of court, made part of the bill of exceptions, fairly construed, were intended to apply to a motion of a plaintiff to dismiss his action; for we cannot conceive the necessity for or validity of a rule of court requiring one party to notify the other of an intended motion that the Civil Code gives the unconditional right to make, and makes imperative upon the court to sustain. In our opinion the lower court had no discretion, but was bound to dismiss the action upon motion of the plaintiff, and, as a consequence, to overrule the subsequent motion of defendant to file the amended answer and counterclaim. Judgment affirmed.

DAVIS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 12, 1893.)

HOMICIDE—EVIDENCE—CONFESSION OF ANOTHER PERSON—IMPEACHMENT OF WITNESS.

1. On a trial for murder, evidence that a certain person, on his deathbed, confessed to

witness to having himself killed deceased, is inadmissible.

2. A witness who has testified in the case may be impeached, whether his evidence was material or not.

3. Evidence of the bad character of a witness, sought to be impeached, two years before the trial, is competent.

Appeal from circuit court, Lawrence county.

"To be officially reported."

Samuel Davis was convicted of murder, and appeals. Affirmed.

R. T. Burns and Stewart & Stewart, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. The appellant having been convicted of the crime of murdering Viance Tack, in the Lawrence circuit court, he appeals, and complains as follows:

First. That the court erred in not allowing him to prove by G. W. Miller that Granville Pearl confessed to him on his deathbed that he, Pearl, killed Viance Tack. It seems to us that admissions and confessions, as to competency, stand upon the same footing. Admissions cannot be used in evidence except against the person making them in an issue between him and another person, wherein the truth of the admission is involved, or against his privies claiming through him; and confessions are incompetent evidence except against a person charged with crime, or, in a proper state of case, against his confederates. Nor is the proposed evidence competent as a dying declaration, because such evidence is only competent when it comes from a declarant whose personal injuries by another have resulted in death, and the declarations must be confined to the manner and circumstances of the injury and to the person that did it.

Second. In allowing evidence to go to the jury impeaching witnesses who had testified for the appellant, but who had not testified to any material fact for the appellant; the material fact which the appellant desired to prove by them having been excluded by the court. It seems to us that the fact that the witness is sworn and testifies entitles the adversary to impeach his general reputation for truth, without reference to the materiality of his evidence; otherwise there would be constant strife and litigation over the question as to the materiality of the witnesses' evidence, in order to determine whether or not the impeaching evidence was admissible.

Third. It is contended that evidence of the bad character of a witness sought to be impeached, two years before the time that he testified, is incompetent. It is true that the character of a witness at the time he testifies is in issue before the court or jury, but it is equally true that his reputation before then may be inquired into, in order to throw light upon his reputation at the time

he testifies. There is no doubt that Viance Tack was assassinated, and we think that the evidence authorized the jury to believe beyond a reasonable doubt that the appellant was the guilty party. The court committed no error. The judgment is affirmed.

HOUSTON et al. v. LONG et al.

(Court of Appeals of Kentucky. Oct. 28, 1893.)

MECHANICS' LIENS—PROPERTY SUBJECT.

An hotel company was incorporated with 1,000 shares of stock, of which B. owned 993. B. contracted with the company to furnish some land, and build an hotel thereon, and turn it over to the company when completed, he to receive \$100,000 in bonds and the same amount in capital stock. When the hotel was partly built, B. failed. He had conveyed the lot to one W., and also delivered to him \$50,000 of the bonds of the company, to secure a debt. B. afterwards made a deed of the lot to the hotel company. The secretary of the hotel company procured a deed of the lot from W., and bought the bonds from him, giving his note for \$2,500 in payment. *Held*, that the hotel company acquired no such equitable interest in the land as to defeat liens for labor and material furnished B. for the construction of the hotel.

Appeal from court of common pleas, McCracken county.

"Not to be officially reported."

Bill by Dennis Long and others against Berry H. Houston and others to enforce mechanics' liens. Decree for complainants. Defendants appeal. Affirmed.

Wm. Lindsay and T. G. Poore, for appellants. Quigley & Quigley, W. D. Greer, Bloomfield & Bloomfield, and Chas. K. Wheeler, for appellees.

PRYOR, J. The Paducah Hotel Company was chartered by the legislature of the state in the month of April of the year 1884. It was empowered to purchase a lot or lots in the city of Paducah upon which to erect an hotel. Its capital stock was \$100,000, in shares of \$100, all of which was subscribed as will hereafter appear, but no part of any subscription was ever paid. It had the power to issue bonds to pay for the lots and the improvements, and to execute a deed of trust to secure the bonds when issued, the corporation having the power to sell or pledge the bonds to raise the money necessary to complete the enterprise. In March, 1887, this corporation, without any means whatever either in money or property, entered into a contract with S. R. Bullock & Co., by which the latter agreed to furnish the lots in the city, and erect upon them an hotel, and, when completed, to turn over to the hotel company the property, free of all incumbrance; and in consideration of this the hotel company was to issue to Bullock & Co. \$100,000 of the capital stock, paid up, and \$100,000 of first mortgage bonds on the hotel property, secured by deed of trust upon it.

the stock and bonds to be delivered as the work progressed. The hotel was to be completed by the 1st of July, 1888. In April, 1887, the Paducah Hotel Company gave a mortgage to the Farmers' Loan & Trust Company of New York on all its real and personal property then owned, or which might be acquired, including its lands situated in the city of Paducah, to secure the payment of the \$100,000 first mortgage bonds executed, as the deed recites, by the hotel company to S. R. Bullock & Co. At the date of this mortgage the hotel company had no title to the property, nor did it acquire any title until April, 1888, when Bullock made a deed to the company upon the alleged consideration of \$20,000, and delivered it to the appellant Houston, with directions not to have it recorded until ordered. Houston was the secretary of the company at the time, and also the business agent of Bullock, who lived in New York. This deed was put to record some time in the year 1889. When Bullock made the deed to the hotel company, he long prior thereto had conveyed the property to one Walter Wood, and had obtained by some means \$50,000 of the bonds issued by the corporation, and pledged them, as is alleged, to R. D. Wood & Co., of Philadelphia, to secure some indebtedness that is alleged was owing that firm by Bullock. In March, 1889, the appellant Houston purchased these bonds of R. D. Wood & Co. for \$2,500, executing to that firm his note for the money, and in March, 1889, Walter Wood, to whom Bullock had conveyed the hotel lot, made a deed to the appellant Houston, in which it is recited that it was "for a valuable consideration." Houston, who was secretary of the hotel company, became the owner of the 50 bonds, for \$1,000 each, and the owner of the lot for a consideration not expressed. His note was out for \$2,500 for these bonds, not a cent of which has been paid. In the fall of the year 1888, Bullock failed, leaving the hotel building unfinished, having expended a considerable sum in its erection, so as to increase the value of the lot some \$25,000 or \$30,000. The appellees, or the most of them, furnished materials in the construction or erection of the building, and are asserting mechanics' liens, having taken such steps as the statute requires in order to create them. Other creditors of Bullock have obtained attachments that were levied on this lot as the property of Bullock, and for his individual indebtedness. It is claimed by the appellants Houston and the hotel company that, by reason of the contract with Bullock, the company acquired in some way the equitable title to this lot and the building upon it, and that, by the purchase of the bonds and the deed obtained from Wood, the appellant Houston owns the lot, or at least has a lien upon it for his bonds; insisting that, as the hotel company made no contract with the mechanics, they must look to Bullock, and not

to the company, to make payment for the materials furnished. The chancellor could see but little equity in appellants' claim.

It is apparent that the hotel company never expended one dollar for this property, and that the appellant Houston has never paid any part of the \$2,500, and equally manifest that Bullock was the corporation, and in fact the individual owner of the lot and the building upon it. It seems, when the corporation was formed, that Bullock, who owned the lot in his own right, took 993 shares of the stock, leaving \$500 to be taken by others. Three shares were taken by strangers to the contract, and, as soon as subscribed, transferred to Bullock, leaving two shares of \$100 each, one of them held by the clerk of Bullock, and the other by Houston, his attorney and business agent. Bullock, being invested with the title, agreed to build the house, and deliver it to the company, for the recited consideration, and free of all incumbrance; and if this corporation had in fact an existence, it was under no obligation to receive the property until the contract was complied with; and, to recognize the equity contended for, the chancellor is asked to place Bullock in a dual position, by which Bullock as an individual bargains with Bullock as a corporation, and by various devices secures to Bullock as a corporation this valuable property, at the expense of those whose labor and material gave it what value it has, and this is fixed at a sum exceeding \$30,000. There can be no equity in such a claim.

It is argued that Bullock, by some unfair means, obtained these bonds, and pledged them as collateral to Wood & Co.; but this is not the question in this case. It was Bullock's property. He owned it, and was the sole proprietor, either as an individual or corporation, and he took charge of the \$51,000 bonds, because they belonged to him, and, if invalid, he is responsible, and no one else. Bullock, at the date of the contract, was no doubt a man of credit, and perhaps of large pecuniary expectations, and for this reason the appellant Houston, who was his business manager, confided in his honesty, as well as his judgment; and, to the extent of the liability of the appellant Houston for him, he has been made secure by the chancellor by giving him a lien for the amount of his note, and interest, executed to Wood, as against the attaching creditors, and of this no complaint is made by those creditors, and therefore the judgment in this regard must stand, and certainly the appellant Houston has no higher equity in this case.

The attachments of Dennis Long and others were properly sustained, and the property subjected as the individual estate of Bullock. Some complaint has been made, for the first time in this court, that the claims, or some of them, asserted by the mechanics, were for too great an amount. No such exception was taken below, and we

are not prepared to say that the court erred in this respect. Besides, the hotel company has no interest in this controversy, and Bullock, who is the party in interest, is not appealing, and the appellant Houston has been given all he is entitled to. Judgment affirmed.

SMITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 26, 1893.)

MANSLAUGHTER—EVIDENCE—REVIEW ON APPEAL.

1. On a trial for murder it conclusively appeared that deceased was killed by one stroke of a knife, and that a brother of defendant, since dead, had been convicted of the crime, after confessing on his trial that he killed deceased, declaring that it was done in self-defense. No witness for the prosecution stated that the stab was inflicted by defendant, but such witnesses agreed generally that both he and his brother were striking at deceased with knives at the time. Several witnesses testified to dying statements by deceased that defendant's brother killed him, and 10 or more disinterested witnesses testified that defendant was not present. *Held*, that a verdict of manslaughter should be set aside.

2. An erroneous conviction of the commission of the murder charged will not be treated as without prejudice to defendant on the ground that he was present aiding and abetting therein, though he did not actually commit it, when it appears that the case was not tried on such a theory or issue, and the decided weight of the evidence is that he was not present at the time of the commission of the crime.

Appeal from circuit court, Knox county.
"Not to be officially reported."

William Smith was convicted of manslaughter, and appeals. Reversed.

John T. Hays, for appellant. W. J. Hendrick, for the Commonwealth.

PRYOR, J. This court has no power to reverse a judgment of conviction in a criminal case, when based upon the verdict of a jury properly instructed, unless there is an absence of evidence to support it; and we understand counsel representing the defense as insisting there is no testimony to support the finding. A careful reading of this record must impress the mind with the belief that the accused has not had a fair and impartial trial, and that a conviction has been had when the testimony establishes innocence rather than guilt. John Smith and William Smith (brothers) were indicted in the Knox circuit court for the murder of James Jones. It is charged in the indictment that Jones was killed by being stabbed or cut by the defendants with knives or some other sharp instruments. John Smith was first tried, and found guilty of manslaughter, was confined in the state prison under the judgment of conviction, and there died. His brother William Smith, the appellant, being subsequently tried for the same offense, has also been convicted of manslaughter, and is now asking a reversal.

The deceased was killed by one stroke of the knife, as the testimony for the state, as

well as the defense, clearly shows, and, if the cutting was done by John, William Smith, the present appellant, his brother, is not guilty. There is no effort to convict him as aiding and abetting in the killing, or an instruction to the effect that, if he did so, he was as much guilty as if he had inflicted the fatal stab. The facts leading up to the assault resulting finally in James Jones losing his life are, in substance, these: Two men, one by the name of Jarvis and the other Gilbert, were talking of betting on an election, when James Jones, the deceased, stepped up, encouraging Jarvis to bet, and without provocation slapped Gilbert in the face, and when Gilbert offered to resent it he was taken away by his friends, the appellant being one of them, when a sort of general fight took place between John Smith, who has been convicted, and several others. John Smith was knocked down by some one, and, when down, was kicked and stamped upon by one Hibbard and two or three of the Joneses. The accused, William Smith, was not in that fight, but was seen after his brother John had crawled from under three men, as the commonwealth proves, in conjunction with his brother John, cutting at James Jones, the deceased, with a knife, the testimony for the state showing that both the Smith brothers had knives, and were striking at the deceased. John C. Jones, a brother of the deceased, says that John Smith struck at him with a knife, and this brought on the difficulty, and that he did not see William Smith, the accused, at the time. After John Smith had gotten loose from those beating him, all the witnesses who were engaged in the fight on the side of the Joneses say that John and William Smith both made at the deceased, and were attempting to cut him. William Smith's theory of the case is—and such was his defense—that he had taken Gilbert away to prevent the fight between Gilbert and James Jones, and did not return, or attempt to do so, until his brother John had taken the life of the deceased by cutting him with a knife. The testimony for the state as well as for the defense is that the deceased, who died in a short time, stated that John Smith had killed him, and on the trial of John Smith the latter was sworn as a witness, and stated that he did the cutting with the knife, his plea being self-defense. Witness after witness of those present and not engaged in the fight, and who were in a position to see all that transpired, say that after John Smith had managed to get away from those who were beating him, and was in fact running, he met the deceased, and each had knives, James Jones striking the first blow, when Smith cut him, and Jones exclaimed, "I am killed;" that John Smith and James Jones, the deceased, were alone engaged in the fight with knives. The substance of the statements of all the witnesses for the defense is embraced in the statement of one

witness: "That John Smith was knocked down three or four times. Hibbard, John C. and Gillis Jones were fighting him. Some were stamping him, some kicking him, and others hitting him with their fists. Smith got loose somehow, and ran up the road, and, as he came around to the crowd at the lower side of the road, he and James Jones [the deceased] met with their knives, Jones striking the first blow, and Smith making the thrust that killed Jones." This statement is made substantially by eight or ten others, and when you add to this the statement made by the deceased, that he was cut by John Smith, and the sworn statement of John Smith that he did the cutting, and for which he was convicted, there is no room left for doubt as to who in fact inflicted the wound that killed Jones. We do not mean to say that both of the defendants might not have been convicted of manslaughter upon a proper state of case, and for the same offense; but what we do adjudicate is that upon the issue of not guilty, and the law of the case as presented to the jury, there was no evidence to support the finding. The instruction to the jury was, in substance, that if William Smith did the cutting with malice, etc., he is guilty of murder, and, if done in sudden heat and passion, he is guilty of manslaughter. On this law, applied to the facts, the jury had to decide whether or not the cutting was done by the accused. The decided preponderance of the testimony is to the effect that William Smith was not present when the cutting took place, but this court cannot reverse for that reason. Then the question arises: If the accused was present, did he inflict the fatal blow? Not a single witness for the commonwealth states that the stab or blow taking the life of Jones was made by the accused, but nearly all of them state (and they were, or the most of them, engaged in the fight against the brother of the accused, and related by blood and marriage to the deceased) that both John and William Smith were striking at the deceased with knives; and this left the jury to determine which of the two struck the blow that killed the deceased, and, if there was nothing else in this case, the verdict would be sustained; but it is shown in evidence that John Smith was tried and punished for the same offense by the commonwealth; that the deceased stated that John Smith had killed him, and by the defense it is proven that John Smith, when tried, upon his oath stated that he did the cutting; and in addition to this assuring testimony is that of ten or more disinterested witnesses for the defense who state, in substance, that the accused was not present, and by four or five of these witnesses that the deceased said at the time that John Smith had killed him. There can be no rational doubt in any man's mind, after reading this record, that John Smith did the cutting, and when tried and convicted for

the offense by a jury of the same county, upon his own admission, coupled with the declaration by the deceased that John Smith killed him, there is no mode of escape from the conclusion that this verdict is not sustained by the testimony. The jury may have believed the statements of those hostile to William Smith, and excluded as incredible the statements for the defense, made by eight or ten disinterested witnesses, as to the person guilty of striking the blow that took Jones' life. This they had the right to do; but when confronted with the former conviction of John Smith and the proof as to his confession, and the dying statements of the deceased heard by witness after witness, and taking place at the very moment of the cutting, there can be no rational doubt as to who did the cutting.

It may be argued that, if an aider and abettor in the commission of the offense, he was equally guilty with his brother, and, the jury having found him guilty of committing the act, the verdict should stand. He was not tried as aiding in the commission of the offense, and, besides, the decided weight of the evidence is that he was not present at the time of its commission, and for that reason this court will not hold that although the accused has been convicted of the cutting, still, as the proof shows him to have been present, aiding in the commission of the offense, his substantial rights have not been prejudiced by the verdict. Such a view of the case cannot be entertained, the preponderance of the testimony showing the accused was not in the fight, but away from the scene of the conflict when his brother took Jones' life. The proof is clear that the appellant did not inflict the wound, and this court will not imply guilt upon an issue not made, and, if made, the weight of the evidence, as it now appears, being for the defense. The judgment is reversed, with directions to award a new trial, and for proceedings consistent with this opinion; and, if a retrial is had, it should be upon the question as to the accused aiding and abetting in the commission of the offense.

SCHLENKS v. CENTRAL PASS. RY. CO.

(Court of Appeals of Kentucky. Oct. 18, 1893.)

STREET-CAR COMPANY — ACCIDENT AT CROSSING — INSTRUCTIONS — IMPUTED NEGLIGENCE.

1. In an action for the death of a child, run over by defendant street-car company at a crossing, where there is no evidence of negligence on defendant's part, the court may properly refuse to instruct as to the precautions to be observed by the managers of cars at street crossings.

2. The negligence of a nurse, through which a child in her charge is injured, is imputable to the parents of the child.

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

Action by Charles H. Schlenks, administra-

trator, against the Central Passenger Railway Company, for the death of his intestate. From a judgment for defendant, plaintiff appeals. Affirmed.

R. Lee Suter, Hargis & Eastin, George L. Everboch, and R. O. Davis, for appellant. Humphrey & Davie, for appellee.

BENNETT, C. J. The appellant's intestate was his son, about 3½ years of age, and living in the city of Louisville. The son, in charge of a nurse about 12 years old, and employed by the appellant as a nurse, went out on the streets, and when returning came to a crossing which they had to cross. The nurse and son stopped on the sidewalk, apparently waiting for the defendant's electric street car, which was then approaching, to pass the crossing. The boy was in the rear of the nurse, and he, just as the car was approaching the crossing, jerked away from the nurse, and ran across the street, to the track of the street railway, and stooped down, as if to pick up something. Just then the car struck him, and run partly over him, and killed him.

On the trial of this action for damages for killing the child the court instructed the jury: First. That if the death of the boy was caused by the negligence of any of the employees in charge of the cars, they must find for the plaintiff in damages equivalent to the boy's power to earn money had he not been killed. Second. That if the negligence was gross, the jury might find punitive damage in their sound discretion. Third. The fact that the boy was killed by the car of the defendant did not place the burden upon them to show that it was not negligently done, but that the burden was upon it to establish contributory negligence. Fourth. That if the boy was killed by the negligence of his nurse, they could not find for the plaintiff, unless they also believe that the boy would have been killed by the negligence of the appellee, notwithstanding the negligence of the nurse. The court then defined gross, ordinary, and slight negligence. We are not prepared to say that any of the instructions given were wrong, but the appellant complains that the court should have given instructions defining the duty and the precaution that should be used by the managers of such cars at populous street crossings. It will be observed that the court's instructions tell the jury that if the appellee was guilty of any negligence, whereby the boy was killed at the crossing, they must find for the plaintiff; leaving the matter of the appellee's duty in regard to the public when making the crossing to the judgment of the jury. Without going into the evidence in detail, it is sufficient to say that it does not establish any negligence whatever on the part of the appellee at said crossing on the oc-

casional of the boy's being hurt. On the contrary, if there was any negligence, it was on the part of the inexperienced nurse having the boy in charge, by reason of being of nonage; and, as she was the agent of the plaintiff, in the temporary control and custody of the boy, her negligence must be imputed to the father. And as the verdict of the jury was clearly right, and just what it should have been, we must decline to enter into a discussion of what is the legal duty of the appellee at populous crossings, especially so as the evidence does not present the question, there being, as said, no evidence suggestive of negligence at the crossing. The judgment is affirmed.

BRAFFORD v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 21. 1893.)

HOMICIDE—EVIDENCE.

On a prosecution for homicide, there was evidence that defendant and two others, who confessed their guilt, were together on the morning of the day of the killing, armed with guns and one pistol; which latter defendant had; that he was heard to say that the matter would be settled that day; and that they went so armed to a house, where deceased was shot with a gun and a pistol. *Held*, that a verdict of manslaughter was authorized by the evidence.

Appeal from circuit court, Knox county.

"Not to be officially reported."

A. E. Brafford was convicted of manslaughter, and appeals. Affirmed.

James N. Brafford and Wilson & Rawlings, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. The appellant and others were charged with the crime of murdering, and conspiring to murder, James Tuggle, and the trial of the appellant resulted in convicting him of the crime of manslaughter. There was evidence before the jury that the appellant and two of the others charged in the indictment were seen, on the morning of the day of the killing, together, armed with guns and a pistol, the appellant having the pistol; and the appellant was heard to say that the matter would be settled that day; that they went to the schoolhouse, armed as indicated, and where Tuggle was shot with gun and pistol, and the appellant was present at the shooting; and it also appears that appellant was the only one of the party that had a pistol.

The verdict of the jury was authorized from the evidence. The confession of two of the parties charged that they did the killing is not inconsistent, if true, with the fact that appellant was guilty of the offense charged. The jury was properly instructed. The judgment is affirmed.

VANCE v. LOUISVILLE COURIER JOURNAL CO.

(Court of Appeals of Kentucky. Oct. 21, 1893.)

ACTION FOR LIBEL—INSTRUCTIONS—EVIDENCE.

1. In an action for libel, where there is evidence to show the truth of the article alleged to be libelous, asserting that plaintiff, while deputy federal supervisor of elections, intimidated and interfered with the voters on one side, and worked for the other side, it is proper to instruct the jury that they must find for plaintiff if the publication was false and malicious, and that malice is inferable from the falsity of the publication, but that if they believe the publication was substantially true, or a reasonable and fair criticism of plaintiff's conduct as supervisor, and made in good faith, then they must find for defendant.

2. Where plaintiff, in justification of his conduct in interfering with voters, testified that they were going into a neighboring room, and that he stopped this, as he believed, from the way some of them voted on coming out, that they were bribed, he cannot complain that defendant newspaper drew the same deduction of bribery from similar action on the part of other voters in going aside with him, and then voting for his candidate.

Appeal from court of common pleas, Jefferson county.

To be officially reported."

Written by Burton Vance against the Louisville Courier Journal Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. W. Thum and P. B. Muir, for appellant. Hagan, for appellee.

LAZELRIGG, J. This was an action for libel, instituted by the appellant against the appellee, by reason of the following publications appearing in the appellee's newspaper, the Courier Journal, of date November 3, 1893. "Wantonly Exceeding Their Province." Burton Vance, a defeated Republican candidate, was at the first precinct of the Seventh ward as a supervisor of election. In defiance of the law he interfered in every way with the polling of Democratic votes, challenging the voters, insisting on naturalized citizens showing their papers, and otherwise retarding the election and intimidating the voters. He will be arrested this morning for violating his oath of office." Also the following: "Officious Supervisors. Isaac Frost was arrested at the first precinct of the Seventh ward on the affidavit of Burton Vance. This young man Vance has made himself very officious. Although a supervisor, and therefore forbidden to do any electioneering, he worked constantly for Wilson, and constantly interfered with peaceable Democrats who wished to cast their ballots. He was seen to take several colored men aside, and then vote them. He himself will be arrested this morning on the charge of bribery." The appellee admitted the publication, and pleaded that the charges made therein were true, that the language was a fair and reasonable criticism upon the conduct of a public officer, and

also pleaded facts in mitigation. After hearing the testimony, the jury found a verdict for the defendant company. The appellant's counsel assign some 29 errors in their motion and grounds for a new trial, all of which, however, are fully embraced in the alleged error of the court in giving and refusing instructions to the jury.

Without considering in detail the facts shown in proof, upon which the finding of the jury may be supported, we advert to it as showing the proper application of the law to the facts of the case. Vance, who was a lawyer, and an intimate friend of one of the candidates for congress, had been appointed an assistant supervisor under the provisions of the federal election law. At midnight before the morning of the election he met two Hazen detectives from Cincinnati, Ohio, made a map or rough sketch of the streets of the city for them, and agreed with them on certain signs by which he would furnish the names of voters whom the detectives had reason to believe had been bribed. The candidate at whose instance the detectives came from Cincinnati was present when these plans were matured, and, according to the testimony of the appellant, gave positive instructions to make their arrests irrespective of party. On the day of the election, Vance was active both inside and outside the room where the votes were being taken. He offered Wilson ballots to persons approaching to vote, before they had expressed any preference or indicated that they wanted such a ticket. He challenged voters known to be entitled to vote, and thus delayed and interfered with the election. He was seen to take voters aside, and into a room a short distance away, and talk with them secretly, who, when they came back, voted for Wilson. He consulted frequently with the strangers,—the detectives. He arrested Frost, and ordered Bills out of the precinct. He testifies "that he saw a number of persons going into a barroom kept back behind the polling place by James P. Whallen, and a number of voters going therein, and that he stopped it, as he believed that some voters were bribed from the way in which they came out and voted." The proof is that he browbeat and bullied the Democratic workers and voters, and threatened to arrest them. The Republican worker and voter was unmolested. The Democratic supervisor was appealed to. W. B. Halderman, one of the officers of the defendant company, and who was on the ground in company with Bills, who expressed a determination to make the necessary affidavits, then sought the chief supervisor of the election for the purpose of having Vance arrested. After a fruitless search for him, they postponed action until the following morning, at which time, however, the fight being over, the intention was abandoned. This is a brief synopsis of the testimony introduced by the defendant to show the

truth of the publications, and to establish that the comments complained of were fair and reasonable criticisms upon the official conduct of the appellant. We may say in this connection that the appellant proved by a number of witnesses that his conduct was in no way reprehensible or officious, and that he performed his duties impartially. The point of our inquiry is, however, was there proof in behalf of the defendant, and in support of the pleas tendered by it, to authorize the verdict of the jury? The court instructed the jury to award the plaintiff damages if they believed the publications were false and made maliciously, and malice was to be inferred or presumed from the falsity of the publications, but that if they believed the statements contained in the publications were substantially true as published, or were reasonable and fair criticisms of the acts and conduct of the plaintiff as supervisor, and were made in good faith, without malice, then they should find for the defendant. Proper instructions on the duties required of the supervisor were also given. We are of opinion that these instructions were substantially correct. The jury were the judges of the truth of the matters put in issue, and they were the judges of the reasonableness of the grounds upon which the newspaper charges were based. Animadversion upon the conduct of a public officer, however severe, is not libelous, if it be confined within the limits of fair and reasonable criticism based on facts. It may be thought that the imputation of bribery contained in the printed matter was not supported in fact, but it will be observed that the supervisor, upon seeing persons go in and out of a room with his opposing workers, interfered with the freedom of their action upon the belief that it was evidence of bribery; therefore he cannot complain if his activity, exercised in the same manner, be taken as evidence of the same offense. Judgment affirmed.

CRAWFORD v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 24, 1893.)

HOMICIDE—INSTRUCTIONS.

In a prosecution for homicide, the use in an instruction of the language, "brought on the conflict by attacking the deceased with a pistol," is not too general, as failing to indicate the manner or purpose of bringing on the difficulty.

Appeal from circuit court, Lee county.

"Not to be officially reported."

Anderson Crawford was convicted of manslaughter and appeals. Affirmed.

Riddell & Riddell, for appellant. W. J. Hendrick, for appellee.

HAZELRIGG, J. The appellant shot and killed Hampton Chambers, in Lee county, in March, 1892. He was indicted for manslaughter; tried, convicted, and sentenced to

confinement in the penitentiary for two years. His motion for a new trial having been overruled, he has appealed to this court, complaining of the instructions given the jury by the court. The proof discloses the parties to have been unfriendly for some months prior to the fatal meeting. By the commonwealth it is shown that the appellant, upon approaching the mill, where the deceased was engaged in drinking whisky with some companions, drew his pistol, advanced upon the deceased, and fired the first shot. The witnesses for the defendant show that the deceased, upon discovering the approach of the appellant, jumped to his feet, drew his pistol, advanced on the appellant, and fired the first shot. We think the jury reasonably could have found from the proof either (1) that the appellant commenced the conflict, or (2) that the deceased commenced it, or (3) that the parties voluntarily began it upon discovering the presence of the other. The instructions of the court cover these different aspects of the case, and an accurate statement of the law applicable thereto. It is thought by counsel that the expression, "brought on the conflict," found in instruction No. 3, is open to the objection pointed out in *Robinson v. Com.* (Ky.) 11 S. W. Rep. 81, and other decisions of this court, where similar language is condemned as being too general, and as not indicating the manner or intent with which the difficulty is "brought on." But here the language is, "brought on the conflict by attacking the deceased with a pistol," thus leaving no doubt of the manner or purpose of bringing on the conflict. We think, too, that the instruction on the subject of the conflict being mutual meets an aspect of the case shown by the testimony of a number of the witnesses. Each combatant, upon discovering the presence of his enemy, advanced to the fray with pistol in hand. There was no compact to fight, but certainly there is evidenced a mutual intentment to fight out their differences to a finish. Judgment affirmed.

LOUISVILLE BAGGING MANUFACTURING CO. v. CENTRAL PASS. RY. CO.

(Court of Appeals of Kentucky. Oct. 24, 1893.)

ELECTRIC STREET RAILWAYS—INJUNCTION.

1. The use of a street for an electric railway will not be enjoined because the construction of the track will prevent an abutting owner from loading his drays by standing them at right angles to the sidewalk, such a method obstructing the use of the streets, and being in violation of a city ordinance.

2. The operation of an electric street railway by the overhead wire system is not so dangerous to those who reside or do business on a public street as to authorize its restraint by injunction.

Appeal from Louisville law and equity court.

"To be officially reported."

Bill by the Louisville Bagging Manufac

turing Company for an injunction to restrain the Central Passenger Railway Company from opening an electric street railway. Bill dismissed, and complainant appeals. Affirmed.

Thos. F. Hargis, for appellant. Humphrey & Davie, for appellee.

LEWIS, J. The Louisville Bagging Manufacturing Company, a corporation, brought this action for an injunction, which was temporarily granted, restraining the Central Passenger Railway Company, a corporation, and its officers, from constructing or operating an electric railway on Walnut street, between Nineteenth and Twentieth streets, in the city of Louisville, where plaintiff has a large building used for manufacturing bagging. H. R. Thompson, judge of the Louisville city court, was also enjoined from proceeding, until termination of the action, to try J. J. Tap, president of plaintiff and others, upon warrants against them for cutting down and removing posts erected by the railroad company for use in operating its cars. The right to construct and operate by electricity the railway upon Walnut street, it appears, had been, before the action was commenced, granted to the company by resolution or ordinance of the general council of the city of Louisville, duly passed, in pursuance of authority conferred by acts of the general assembly; and, as exercise of such delegated authority by municipal legislation has been often sanctioned and recognized by this court, the right so given to the Central Passenger Railway Company must be regarded as valid and effectual as if conferred directly by the general assembly. Moreover, as legislative power to authorize construction of a railway upon a public street, and operation of it by even steam, has been distinctly and often held by this court to exist, we see no reason to deny power to likewise authorize construction of such railway to be operated by electricity, for it is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated; and it is only when other ways of travel and transportation are prevented or unreasonably obstructed that courts can interfere to either enjoin or limit operation of railroads upon a public street. It therefore seems to us the simple inquiry in this case is whether the manner in which the railway under consideration has been or is designed to be constructed and operated is such as to clearly impose a new and additional burden upon the land of plaintiff abutting Walnut street, and, as a consequence, entitling him to previous compensation for the right of way.

The first ground of complaint by plaintiff is that the railway track constructed in

front of its manufacturing establishment will prevent loading and unloading vehicles used in transporting its goods and raw material in the manner heretofore done, which is by backing the wagon or dray up to, and at right angles with, the sidewalk. The answer to that complaint is—First, that such way of loading and unloading necessarily seriously obstructs, not merely operation of every double-track railway, but proper use of a street for all other vehicles; second, there appears to be an ordinance of the general council prohibiting loading and unloading of vehicles in that mode.

The next ground is that operating an electric railway car upon a public street is dangerous to those who reside or do business thereon. Practical application of electricity as a power to drive machinery or move carriages, as also for illuminating purposes, is of recent date, and it is shown the system best adapted for the purpose, if yet discovered, is by no means a perfect one. The evidence of experts and men having actual experience shows that three different systems for moving railway cars by electricity have been tried in this country, viz. the underground conduit system, storage battery system, and that of the overhead wire; and it fully appears that the two first are as yet so defective or imperfect that, of several hundred electric railways in operation, there are not a dozen to which either system has been applied, all others being run by the overhead wire or trolley system, the same used by the Central Passenger Railway Company. To apply electrical power in that way requires erection at edge of the sidewalk, on each side of a street, of tall poles, about 120 feet apart, and from top of opposite poles is stretched across the street sustaining wires, which hold up the electric wire that is thus suspended over middle of the railway track, and from which, by means of the trolley pole, the electric current is connected with the motor placed under the car. It will be thus seen that the electric wire is not like telegraph, telephone, and electric light wires near to buildings, but suspended over the railway track. It further appears that the electric pressure, measured by volts, required to drive a street-railway car is not so great as to destroy or seriously injure a person or animal coming in direct contact with it; injury, where it is produced, resulting only where a broken or detached telephone or telegraph wire falls on it. The evidence in this case, which need not be considered in detail, shows that, although new and not fully perfected, the trolley system of operating street-railway cars, when properly adjusted and supervised, is not much, if any, more dangerous than horse power, and much less so than steam power, applied in the same way. Moreover, while street-railway cars thus operated go at greater speed, are more comfortable, and must in time become a

cheaper mode of travel, they can be easier controlled than horse cars, and do not really more obstruct the streets, or interfere unreasonably with business transacted thereon. It therefore seems to us that in view of the benefit and convenience to the public of electric cars thus operated, and comparatively little inconvenience or danger they are to individuals, it would be going beyond the province of a court, and contrary to decided weight of judicial authority, to enjoin or limit their use; especially when a party seeking such remedy so signally, as has the plaintiff in this case, fails to show he has been unreasonably obstructed or hindered in his business, or that his rights have been illegally interfered with. The judgment dismissing the temporary injunction and dismissing the action is affirmed.

**LLANO IMPROVEMENT & FURNACE
CO. v. WHITE et al.**

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

APPEALS FROM JUSTICES OF THE PEACE—DISMISSAL.

1. A county court, on dismissing an appeal from a justice of the peace for want of jurisdiction, has power to adjudge costs of the appeal against the appellant.

2. Though a county court, on dismissing an appeal from a justice of the peace, is not authorized to award a writ of procedendo, an order in its judgment that "the justice court proceed with the execution of its judgment" is mere surplusage, and harmless error, and does not vitiate the rest of the judgment.

Appeal from Llano county court; W. S. Maxwell, Judge.

Action by White & Allen against the Llano Improvement & Furnace Company on a promissory note. From a judgment of the county court dismissing defendant's appeal from the justice of the peace, defendant appeals. Affirmed.

Miller & Lauderdale, for appellant. Slater & McLean, for appellees.

FISHER, C. J. The appellees sued the appellant in justice court on a note for \$142.18, and obtained judgment, from which an appeal was taken to the county court. That court dismissed the appeal, with a judgment against the appellant for costs, and awarded execution therefor, and also ordered that the justice court should proceed with the execution of its judgment. Appellant's appeal to this court rests upon two grounds: (1) That the county court, by dismissing the appeal, lost its jurisdiction over the case, and therefore had no power to render a judgment for costs or otherwise; (2) that the judgment of the county court, requiring the justice court to proceed with the execution of its judgment previously rendered in the case, was without authority of law, and the court had no power to make such an order.

The first question raised was directly decided in the case of *Roeser v. Belmer*, 7 Tex. 1. It is there held that the dismissal of a cause by the court for the want of jurisdiction does not deprive the court of the power to render a judgment for the costs of the appeal. In the case of *Wadsworth v. Chick*, 55 Tex. 242, the supreme court dismissed the appeal for the want of jurisdiction, and rendered judgment against the appellant and the sureties on her appeal bond for the costs of the appeal, and for the costs incurred in the trial court. As we interpret the judgment of the county court, it is simply a judgment against the appellant for the costs incurred in bringing its case to that court on appeal, and leaves the judgment of the justice court as to the amount recovered, as well as the costs there incurred, to be collected by process from that tribunal. So far as known to this court, it has been the uniform practice of the courts of this state, upon the dismissal of appeals for the want of jurisdiction, or for other reasons, to render a judgment against the one appealing for the costs of the appeal. We regard this question as no longer open, and think it settled by the adjudications previously cited.

We think there is no merit in the second objection to the judgment. There is no statute in this state that authorizes the county court, upon the dismissal of an appeal from the justice court, to award a writ of procedendo requiring the justice court to proceed with the execution of its judgment; but such an order can be made, and such a writ will lie, upon the dismissal of a case carried to the county court by certiorari. *Sayles' Civil St. art. 313; Clark v. Hutton*, 28 Tex. 123. But the fact that the county court, in entering its judgment dismissing the appeal, stated therein that the justice court should proceed with the execution of its judgment, cannot be regarded as reversible error, when it does not appear that the judgment authorizes or requires the issuance of a writ of procedendo, and that the judgment of the justice court is executed by authority of such writ. If the county court, in entering a judgment that it could lawfully render,—that is, dismissing the appeal, and awarding costs,—in addition, required the justice court to do that which the law demanded,—that is, execute its judgment,—although 't had no authority to make such an order, it would not make invalid the judgment that it had the authority to render. The order of the county court did not award a writ of procedendo, and undertake, by process from that court, to enforce and execute the judgment of the justice court, but it was simply to the effect that "the justice court proceed with the execution of its judgment." Upon the dismissal of the appeal by the county court, the law would require the justice court to execute its judgment, and the order of the county court

to that effect is requiring no more than is exacted by the law. It is simply repeating the declaration of the law. Although the power to so declare may be wanting in the court, it is nevertheless harmless, as the power to execute the declared order does not exist. If the court, without authority, makes an order that cannot in any event result in harm, we fail to see how it can affect that part of the judgment that it had the lawful power to render. The judgment of the court below is affirmed.

HEFLIN v. CAMPBELL.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

AUTHORITY OF AGENT—PAROL EVIDENCE.

1. An agent authorized to make a rent contract has no power to collect the rent, unless specially authorized.

2. Where plaintiff holds a written contract for the conveyance of land on making certain payments, he cannot show by parol that under the terms of the contract the title vested in him before compliance with its terms.

Appeal from Caldwell county court; George W. Kyser, Judge.

Action by T. S. Heflin against J. W. Campbell, administrator of one Hendry, deceased, to recover rent. Judgment for defendant. Plaintiff appeals. Reversed.

The other facts fully appear in the following statement by COLLARD, J.:

This is a suit brought by appellant to recover rent alleged to be due upon a verbal contract of lease of a house leased to appellee's intestate, Hendry, for 14 months, —from November 1, 1885, to January 1, 1887. The defendant, among other defenses, alleged that his intestate, Hendry, had rented the house from one J. H. Muenster, the owner, and had paid him all the rent sued for. Plaintiff replied that Muenster was acting as his agent in such renting, and that the rent had not been paid. The court instructed the jury, in effect, that if Muenster was the agent of plaintiff, Heflin, and as such had rented the premises to Hendry, and had received all the rent due for the term as sued for, then the verdict should be for the defendant. The plaintiff requested a charge "that the fact that Muenster was the agent of plaintiff for the purpose of making the rent contract would not authorize him to collect the rent due, unless he had special authority to collect." The court refused the requested charge. The verdict and judgment were for the defendant, from which plaintiff has appealed, and assigned as error the refusal to give the requested charge.

M. R. Stringfellow, for appellant. Fly & McNeil, for appellee.

COLLARD, J., (after stating the facts.) If the rent was due to plaintiff, Muenster must have had authority from him to collect

it, before he could receive it in satisfaction of the claim. The mere fact that he was authorized to make the contract "would not, as of course, confer upon him the incidental authority to receive payments" subsequently falling due; but it would be a circumstance or a fact by which, considered with other facts and circumstances, such special authority might be established or implied. The jury should be left to determine the fact, upon proper instructions. The charge asked was the law, and should have been given, with the qualifications indicated above. *Smith v. Hall*, 19 Ill. App. 17; *Thompson v. Elliott*, 73 Ill. 222; *Cooley v. Willard*, 34 Ill. 68.

Appellant contends that "the court erred in excluding the deposition of D. C. Muenster, offered by plaintiff in rebuttal of the testimony of defendant, as to statement made to him by J. H. Muenster as to the effect of the deed to plaintiff by J. H. and D. C. Muenster, and in rebuttal of the presumption of fraud which might arise from the face of the contract read by defendant, and for the purpose of showing title and good faith, as set out in plaintiff's first bill of exceptions." The court excluded the testimony, upon objection that it was not in rebuttal. The objection made may not have been correct, but there are two objections to it which are fatal: First, J. H. Muenster's statement to D. C. Muenster, offered in evidence, as to the effect of the instrument, was hearsay; and, secondly, the instrument was not ambiguous. It spoke for itself. If it does not convey title by its terms, parol evidence cannot add to it, to give it such effect. It was a contract by the Muensters to convey the lot and premises to plaintiff upon certain terms to be complied with by him. The title remained in the Muensters until such compliance, and upon such compliance—which, of course, could be shown by parol—the right and real title vested in plaintiff, and not before. It seems that plaintiff did comply, and so become the owner, before Hendry's lease—the basis of this suit—commenced to run, and the court submitted the case upon that theory, the defenses being made to depend upon payment to J. H. Muenster as agent. It may not appear, upon another trial, that plaintiff became the owner by compliance with the contract. We cannot say, and do not intend to say, anything that will then affect that question. Nor do we intend to conclude the investigation as to whether Hendry in fact rented from plaintiff as the owner; that is, from Muenster as agent of the plaintiff. We do say, however, that the plaintiff cannot, by parol, create a greater interest in himself than the instrument purports to convey, and that that instrument did not purport to vest in him the title until it was complied with by him, so as to give him the right of specific performance. If defendant should impeach the

legal effect of the instrument by parol, then plaintiff can sustain it by legitimate parol evidence. The testimony of D. C. Muenster may have been in rebuttal, but it was inadmissible upon other grounds. In such case, we should not reverse the judgment to admit the testimony. We cannot say that there was no testimony, under the issues, to warrant the conclusion that the small house was to be taken as part payment of the rent. It is unnecessary for us, at this time, to comment upon the facts under this issue. We are of opinion that the judgment of the lower court should be reversed, and the cause remanded, and it is so ordered.

MAVERICK v. ROUTH et al.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

DECISION ON APPEAL — REMAND FOR NEW TRIAL.

The statute (Called Sess. 22d Leg. p. 31) provides that on reversal of the judgment below the court of civil appeals shall render such judgment as the court below should have rendered, except when some matter of fact must be ascertained, or damages assessed, or the matter is uncertain, when the cause shall be remanded for new trial. An action for breach of warranty having been tried without a jury, and judgment rendered for plaintiff, defendant appealed. Plaintiff confessed one of the errors assigned, and moved to reverse, and remand for new trial, to allow him to make certain proof necessary to support a judgment, which he had failed to make below. *Held*, that the court was bound to render judgment, and, his motion being denied, plaintiff might withdraw his confession of error.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by W. T. Routh and others against Albert Maverick for damages for breach of warranty. Judgment for plaintiffs. Defendant appeals. On motion of appellees to reverse the judgment, and remand the cause for new trial. Motion denied.

I. P. Simpson, for appellant. C. A. Keller, for appellees.

NEILL, J. On March 8, 1893, appellee recovered a judgment in the district court of Bexar county against the appellant, of \$994.90, for an alleged breach of warranty, from which judgment Maverick appealed to this court, where the appeal is now pending. The appellee comes here, and confesses that one of appellant's assignments of error is well taken, and moves the court to reverse and remand the cause for a new trial, in order to allow him to make certain proof necessary to support a judgment, which he failed to make in the court below. The motion is resisted by appellant, who contends that, as the case was tried by the court without a jury, it is the duty of this court to render such judgment as the court below should have rendered.

Section 36, p. 31, Called Sess. 22d. Leg.,

provides that: "When the judgment or decree of the court below shall be reversed, the court of civil appeals shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damages to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below." Cases are tried by inferior courts with a view to this statute, and with full knowledge on the part of litigants that, if the judgment rendered should be reversed on appeal, it is the plain and unequivocal duty of this court to render the proper judgment, without the case should fall within the exception. Under this statute, the parties to a suit, as the result of the trial, have the right to a proper judgment; and the party who was entitled to it in the court below cannot be deprived of it by its failure to do its duty, but can demand the right on appeal, and cannot then be deprived of it by a confession of error on the part of his apparently successful adversary, without the court's passing on the merits of the case. The motion is overruled, and leave granted appellee to withdraw his confession of error.

GALVESTON, H. & S. A. RY. CO. v. DUELM.¹

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

RAILROADS—ACCIDENTS AT HIGHWAY CROSSINGS—DAMAGES.

1. In an action for injuries received by collision with a train at a highway crossing, eye-witnesses may testify that they thought the train was running at an unusual speed, and that, if any signals had been given, they believe they would have heard them.

2. A witness may testify that she was on the train, and that it was running so fast that it frightened her; that she knew it was running very fast, and thought so before the collision, because it frightened her.

3. It being in evidence that the engineer did not try to stop the train, it is proper to exclude his evidence that he could not have stopped it after he saw plaintiff on the track, 150 feet away.

4. A witness, being asked by counsel for the railroad if she were not giving an opinion about the signals, was properly allowed to answer: "I know that no signals were given until after passing the crossing, and this is not a mere opinion."

5. A passenger on the train testified that, when the train had stopped after the wreck, a uniformed negro, whom he took to be a train porter, tried to prevent him from going back to the place of the wreck. The court at once withdrew this evidence from the jury. *Held*, that since it might well have been in answer to a proper question on the res gestae, and was promptly withdrawn from the jury, there was not necessarily fatal error.

6. The complaint having alleged negligence on the part of the trainmen, and none of these having testified that any effort was made to stop the train after plaintiff was seen, plain-

¹ Rehearing denied.

tiff's counsel could properly insist to the jury that no effort was made for that purpose.

7. In an action against a railroad company for personal injuries, plaintiff's counsel said to the jury: "And we know * * * that corporations have no souls, and therefore, I say, no consciences, and there is no way to make these big corporations respect the rights of these little defendants except by making them pay for it." Defendant objected, and the court reproved the counsel, who nevertheless repeated the remark. The court again stopped him, and instructed the jury not to heed the argument, and counsel told the jury that he would quit, and let them render a verdict to suit the judge. The verdict was for one-third of the amount sued for. *Held* not ground for reversal.

8. Plaintiff alleged that on approaching the crossing he stopped and looked for a train; that he did not see or hear a train until his horses were on the track, when he discovered a train very near him, running full 50 miles an hour; that he could not back his wagon, nor had time to jump from it, but being so entrapped by the negligence of defendant's servants he tried his best to escape by whipping his horses; that said servants were grossly negligent, were an hour behind time, and running the train at an excessive speed, and failed to signal in approaching the crossing, as required by law; that, had they done so, he would not have driven on the track. Defendant pleaded plaintiff's contributory negligence and general denial. The court charged that plaintiff sued defendant for damages he said were done him by defendant's engine and train, by injuries caused by defendant's servants negligently propelling the same, whereby he was hurt without his fault. Defendant denied, and said that it used all proper care, and that if plaintiff was injured it was by his own negligence. *Held* a proper statement of the issues, these not being confined to the question of signals.

9. Under Acts 1883, (page 28,) requiring engineers, at 80 rods from a highway crossing, to whistle and ring the bell, and to continue to ring till the crossing is past, an instruction which makes a ringing or whistling at 80 rods' distance, without continuance of the ringing, a compliance with the law, is properly refused.

10. The court properly refused a charge that the jury should not consider whether or not a person approaching the crossing could not see a train by reason of a cut in the railroad, as railroad companies have a right to build their tracks by cuts over highway crossings as elsewhere, and to expect that, when the legal signals have been given on a train, they will be heeded by persons attempting to pass the crossing.

11. In such case a charge that it is not every degree of negligence that would prevent plaintiff's recovery, but only some negligence of which an ordinarily prudent man would not have been guilty, is not error.

12. The rate of speed of the train, if a proximate cause, may be considered with other facts on the issue of the railroad's negligence, though there is no statutory limit to said speed.

13. Where plaintiff's injuries are external and obvious to the eyes of the jury, his testimony as to the probable amount of his doctor's bill, though wrongfully admitted, is rendered harmless by the admission, without objection, of the doctor's own testimony on the subject. *Railway Co. v. Wesch*, 22 S. W. Rep. 957, 85 Tex. 594, distinguished.

14. Where plaintiff's injuries are external and obvious to the jury, and their permanency has been testified to by his doctors as well as by himself, the verdict being for less than one-third of the amount sued for, the court will allow plaintiff to remit the amount he has wrongfully been allowed to testify to as his expense incurred for drugs, and will refuse to reverse for that error. *Railway Co. v. Wesch*, 22 S. W. Rep. 957, 85 Tex. 594, distinguished.

Appeal from district court, Guadalupe county; George McCormick, Judge.

Action by Frederic Duelm against the Galveston, Harrisburg & San Antonio Railway Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. *Affirmed*.

Upson & Bergstrom, for appellant. Ireland, Burges & Dibrell, for appellee.

FLY, J. Appellee brought this suit in the district court of Guadalupe county to recover damages in the sum of \$31,250, as alleged by appellee, plaintiff in the court below, for injuries received and expenses incurred by him caused by a collision of one of defendant's trains of cars with plaintiff's wagon, December 1, 1889, at a public road crossing over defendant's railroad near the Guadalupe river, in the said county of Guadalupe, through the negligence of defendant's employes in not sounding the whistle, and in not ringing, and continuing to ring, the bell, on said train of cars, at a distance of at least 80 rods from and before reaching said crossing, and just prior to said collision, and through the unskillful management of said train, and the running of the same at an excessive and unusual rate of speed, to wit, full 50 miles an hour, by defendant's servants, whereby plaintiff alleges that his leg was broken, and necessarily had to be amputated, that he was otherwise seriously injured, suffered great pain, and was made a cripple for life. The defendant answered by general denial, specially denying negligence, etc., charged by plaintiff, and averred that the plaintiff's injuries were caused by his own carelessness and negligence, etc. The case was tried by a jury, and resulted in a verdict and a judgment in favor of plaintiff May 17, 1890, for \$9,000.

We find the following facts established by the record: On the 1st day of December, 1889, appellee and his daughter Augusta were on their way from the home of appellee's son to their home in Wilson county. On their journey it became necessary for them to cross the right of way and roadbed of appellant. The road they were traveling was a public one, and had been laid out and traveled before the railroad was constructed. That appellee was going south, and from the approach to the crossing on the north it was impossible to see a train until quite near the track. That when appellee approached the track he stopped his wagon, and he and his daughter carefully listened and looked up and down the track to ascertain if there was an approaching train. Not hearing or seeing a train, he drove upon the track, and a train ran upon his wagon, threw him violently to the ground, and seriously and permanently injured him. That his leg was broken in two places, and his head and back injured. That amputation became necessary, and was performed. That

his injuries were such that he would never be able to work again as a farmer or wagonmaker, the two occupations he had followed. That as a farmer he had earned about \$800 a year, and as a wagonmaker from \$2½ to \$5 per day; that he had suffered excruciating agony, and was at time of the trial suffering great mental and physical pain and anguish. That his medical and drug bill would be about \$1,500. That no whistle was sounded, or bell rung, until just about the time the wagon was struck, and no effort made to halt the train. That both legs had been badly lacerated; one being broken in two places, and the bones protruding from the flesh. That plaintiff was wholly incapacitated for work during the balance of his life. That the place where the accident occurred, from the peculiar lay of the ground, and there being a curve and deep cut there, was dangerous for those wishing to cross the railroad. That the train was behind time, and running very rapidly. From and in connection with these facts we deduce the conclusions of law as hereinafter enunciated, and in arriving at these conclusions we shall take up and discuss the errors assigned as they appear in brief of counsel for appellant.

The first six assignments, as well as tenth and eleventh, allege as error the action of the court in overruling objections made to the testimony of certain witnesses as to the giving of signals and the rate of speed at which the train was running when the accident occurred. These witnesses in effect stated that they thought or believed the train was running at an unusually rapid rate, and that, if any signals had been given, they believed they would have heard them; and one witness says she was in a position to have heard them if they had been given. All of the witnesses testify that they were watching the movement of the train, and on the alert. One of the witnesses stated that she was on the train, and that it was running so fast that it frightened her; that she knew the train was running very fast, and thought so before the collision, because it frightened her. We are of the opinion that this testimony was admissible. They were necessarily compelled to give an opinion based on a comparison between the rate of speed the train in question was running and other trains, and the fact that the high rate of speed frightened a witness would certainly not be ground for excluding her testimony. It is often impossible to show the rate at which an object was moving, except by the opinion of eyewitnesses. Conclusions upon such questions as the speed of a moving train are necessarily, in most instances, based upon the opinions of persons who observed it. That they are unable to state positively the exact rate of speed would not necessarily render the opinion of the witnesses incompetent or useless evidence. *Lawson, Exp. Ev.* 460, 462, 465; *Railway*

Co. v. Crocker, (Ala.) 11 South. Rep. 262; *Guggenheim v. Railroad Co., (Mich.)* 33 N. W. Rep. 161; *Railroad Co. v. Crist, (Ind. Sup.)* 19 N. E. Rep. 310; *Thomas v. Railway Co., (Mich.)* 49 N. W. Rep. 547.

The seventh assignment brings in review the action of the court in not permitting the engineer of the train that caused the injury to testify that it would have been impossible for him to stop the train after he saw plaintiff. This evidence was properly excluded. The engineer made no effort to stop the train when he saw plaintiff on the track, although he was 150 feet distant, and his opinion as to whether he could have stopped the train could not certainly have remedied his negligence in not trying to stop.

In the fifteenth assignment of error, complaint is made that counsel for plaintiff contended in his speech to the jury that no effort was made to stop the train. This was true, and under the allegations in the petition and the proof it was legitimate argument for the jury. Neither the engineer nor fireman swore that any effort was made to halt the train when the plaintiff was seen, and there was a charge in the petition of negligence and carelessness on the part of these employees; and counsel were fully authorized to discuss this phase of the case to the jury.

In the twelfth assignment, appellant objects to the witness Wade testifying: "I know that no signals were given until after passing the crossing, and this is not a mere opinion." This answer was in direct response to a question asked by appellant's counsel, in which she was asked if she was not giving an opinion about the signals, and we can see no impropriety in the answer.

The thirteenth assignment is too general and indefinite to be considered, but we will say, however, that the court did not err in refusing to strike out the depositions of the witness Wade.

While one of the counsel for plaintiff was addressing the jury he said: "And we know from Blackstone, one of our first law books, that corporations have no souls, and therefore, I say, have no consciences, and there is no way to make these big corporations respect the rights of these little defendants except by making them pay for it." This was objected by defendant, and promptly reproved by the court, but it was reiterated by counsel. The court again stopped him, and instructed the jury not to heed such argument, and counsel then told the jury that he would quit, and let them render a verdict to suit the judge. This conduct upon the part of counsel was very reprehensible, and deserves censure, and had it been tolerated by the judge, and had the verdict shown any evidence of passion or prejudice, we would not hesitate to reverse the case on account of it. But it was promptly stopped, the jury were instructed not to heed it, and the verdict shows that they did not heed it,—the

verdict not being for one-third of what was sued for; and therefore we do not think that it calls for a reversal of the case. *Moore v. Moore*, 73 Tex. 382, 11 S. W. Rep. 396; *Sinclair v. Stanley*, 69 Tex. 724, 7 S. W. Rep. 511; *Railway Co. v. Irvine*, 64 Tex. 535.

In the seventeenth assignment, complaint is made that the issues made by the pleadings were not properly stated in the charge of the court. After pleading that he had stopped and looked in each direction for a train, and getting out fully the circumstances under which he had approached and attempted to cross the railroad, plaintiff alleges that he did not see or hear an approaching train until his horses were on the railroad track, when, to his great surprise and terror, for the first time he discovered a train of cars within an incredibly short distance from him, approaching from the west, and running full 50 miles an hour. He says he was already on the track, and that it was not possible to back his wagon, and said train was coming with lightning speed; that he did not have time to jump from said wagon, but that after he was thus entrapped by the negligence and carelessness of the servants and employees of defendant in charge of said train, in running and operating the same, he tried with all his power to escape by whipping his said horses, etc. Plaintiff further says that the servants and employees in charge of said train were grossly negligent and careless and unskillful in the management of said train, and were an hour behind time, and were running at a great, excessive, and unusual rate of speed, to wit, full 50 miles an hour, and failed to ring the bell or sound the whistle in approaching said public crossing, as required by law; and he says, had the bell been rung or the whistle sounded, he would not have driven upon said track, and would not have been injured; and that his said injuries were caused, as aforesaid, by the negligence and carelessness of defendant's said agents and servants in charge of said train of cars, to his great damage, as aforesaid, in the aggregate sum of \$31,250 actual damages. Defendant pleaded contributory negligence on the part of plaintiff, and general denial. The issues, as set out in the pleadings, were placed before the jury as follows: "The plaintiff sues the defendant company for damages he says was done him by defendant's railway engine and train on December 1, 1889, by reason of personal injuries to himself caused by the agents and servants of defendant in negligently and without the use of proper care on their part in propelling the engine and cars, whereby he was run over, and seriously and permanently hurt and injured, without fault or negligence on his part. The defendant denies the allegation of plaintiff, and says it used all proper care and prudence in propelling its train on the occasion referred to, and alleges, if plaintiff was injured as alleged, it was caused by his own negli-

gence and want of proper and ordinary care on his part, and therefore it is not liable therefor." We are of the opinion that the issues in the case were tersely but clearly and distinctly presented to the jury in the charge quoted. In this suit, as in all suits on account of personal injuries alleged to be caused from the negligence of defendants, the inquiry to be answered by the jury is, were the injuries caused by the negligence of defendant without contributory negligence on the part of plaintiff? And while the court did not specially set forth the manner in which it was alleged the injury was inflicted, still there was nothing to mislead the jury. *Driess v. Frederick*, 73 Tex. 460, 11 S. W. Rep. 493. The allegations in the petition were full and explicit, and the testimony in evidence was properly admitted, and a fuller statement of the issues was unnecessary. There were aftercharges of negligence besides the failure to sound the whistle or ring the bell, and it would have been error to have confined the issue of negligence to this point. The position in the eighteenth assignment is not well taken, for the reasons, as stated above, that the pleadings were full, and the trial court was justified in instructing the jury that if the train was being run and propelled in a reckless manner by defendant's servants, and proper care, watchfulness, and prudence were not exercised, and the injury was caused by such lack of care and prudence, defendant would be liable. The cases cited by appellant do not militate against the charge. *Railway Co. v. Hanks*, 73 Tex. 323, 11 S. W. Rep. 377; *Railway Co. v. Underwood*, 64 Tex. 463; *Railway Co. v. Brown*, 75 Tex. 267, 12 S. W. Rep. 1117.

Assignments 19 and 23 complain of the charge of the court on the question of the failure to ring the bell or sound the whistle because it in effect requires the jury to find against defendant unless both were done, and refusal to give the special instruction asked by defendant; and objection is also made to the same clause of the charge because it charges the jury improperly in regard to taking all the circumstances in view surrounding the accident in determining the question of negligence. The instructions criticised are as follows: "The law requires all companies operating railway trains to provide each locomotive engine with a bell and steam whistle, and that such whistle shall be blown or such bell rung at the distance of at least eighty rods (which is 1,320 feet) from the place where the public road shall cross a railway track, and also that such bell shall be rung and kept ringing until the engine shall have crossed said public road or stopped; and in this case, if you find from the evidence that those in charge of the engine of defendant failed to blow the whistle or ring the bell, as stated above should be done, and that, by reason of such failure to comply with the law, plaintiff was run over

and injured, then he would be entitled to such damages as you may find from the evidence he may have sustained, provided you find plaintiff exercised due diligence and care to prevent such injury, as the law of contributory negligence has been heretofore given you in this charge. In passing upon the question of the negligence of the parties in charge of defendant's engine and train, you may consider the time and place at which the injury may have been given, its surroundings, the rate of speed at which the same was being run, and whether or not the proper signals were given by the said parties in charge of said train." This charge is carefully guarded, and we are unable to see that it is open to the objections made by defendant. It has followed the doctrine as laid down in *Railway Co. v. Nixon*, 52 Tex. 19; and while instructing the jury that the statute required a whistle to be sounded or bell to be rung at road crossing, yet the failure to ring the bell or blow the whistle must be the proximate cause of the injury. The instruction asked by the defendant makes the ringing of a bell, or the blowing of a steam whistle, at the distance of 80 rods from the crossing, without continuing to ring the bell, a compliance with the law; but this is not the case. The act of 1883, which was in effect when this case was tried, requires both the use of bell and whistle at the distance of 80 rods, and the continuous use of the bell until the crossing is passed. Acts 1883, p. 28. The use of the word "and" instead of "or" in the first part of the clause objected to is immaterial, as defendant was not charged with a failure to have a steam whistle and bell, but with a failure to use either, and the negligence is confined by the court to the failure to use one or the other.

The court properly refused to instruct the jury, as requested by appellant, as follows: "In considering the question of negligence as to the defendant, you will not consider whether or not a person approaching the crossing where the accident occurred could or not see an approaching train of cars by reason of a cut or a curve in said railroad, as railroad companies, in the construction of their tracks, have a right to fix the grade of such tracks, and to build the same by curves and cuts, and to over public crossings and elsewhere; and, in operating trains thereon, railroad companies have a right to expect that when the signals required by law have been given in approaching a crossing, that the same will be heeded and respected by all persons passing, or attempting to pass, such crossing." The rights of railroad trains and of ordinary travelers and vehicles at public crossings are mutual, co-extensive, and in all respects reciprocal. In the exercise of their respective rights, all parties are held to a due regard for their own safety and the safety of others. At a public crossing, neither the railway company

nor the ordinary traveler has the exclusive right of passage, but wagons, buggies, and carriages, or the traveler on foot has a right to travel the public highway across a railroad; and, if the duty was devolved on plaintiff in this case to be more careful in listening and looking for a coming train on account of the crossing being at a place where the train could not be seen at any great distance, it would devolve a like duty and care on defendant in approaching a crossing with which its employees must have been acquainted, and knew that more caution was required than at ordinary crossings. 1 Ror. R. R. p. 531 et seq. Railroad companies are bound to observe at least ordinary care in approaching and passing public crossings; and even if the law did not require signals to be given, and there be obstructions in the way of seeing approaching trains, or other circumstances likely to prevent persons from hearing the ordinary noise or seeing approaching trains, these circumstances, without any statutory law on the subject, might render signals necessary to due care, and of the existence of these facts and circumstances the jury are to judge. 2 Ror. R. R. § 3, p. 1012. In passing on the question of negligence of both plaintiff and defendant it became necessary for the jury to take into consideration all of the circumstances surrounding the case, and in order to do this it properly became a matter of inquiry whether the view of the railroad was obstructed, in order that they might determine whether or not plaintiff had exercised ordinary care and discretion, and whether or not the failure to give the signals was the proximate cause of injury. On this point we quote from an opinion from our supreme court in a case very similar to this: "What is due care under a given group of facts must be determined by the jury by applying the rule as to what, in their judgment, a man of ordinary prudence would have done under the attendant circumstances. It is reasonable that a sane man will not knowingly and recklessly expose himself to imminent bodily danger; that the instincts of self-preservation existed. It may be inferred, then, that the deceased did not know of the presence of the approaching train at the time he drove upon the track. We may ask, why did he not know it? and what was his duty in regard to it? It appears in the record that the deceased, in a wagon with high sideboards, had been driving southward near four hundred feet, nearly parallel with the track, and a distance of less than two hundred feet from it. That he turned to the right, and traveled west about seventy-five feet to reach the track. That at the angle, and between that and the track, the right of way, which was fifty feet, was grown up with sunflowers and weeds so high that the view to the track was obstructed. A violent wind was blowing from the south. The trains, in passing this crossing.

usually had been signaled by the ringing of the bell or the blowing of the whistle. The train (a passenger) was behind time, and was moving at unusual speed. There is testimony that from the angle and to the track the deceased could not have seen the approaching train,—unless, perhaps, on sharp lookout,—from the weeds, etc., obstructing his view. It does not appear that in going southward, parallel with the track, and going in the same direction with the train, he could have seen the train, unless he had risen to his feet in the wagon, and looked back upon the track. From the testimony we may infer, from the speed at which the train was moving, that it was not in his sight save by looking back, else it had reached the crossing before the deceased. The deceased had a right to be upon the road, had a right to cross the track. No bell or whistle sounded, warning the approach of the train. Deceased had a right to expect such signals. The weeds obstructed his view; the windstorm deadened the sound of the train. He was run upon and killed without warning. In this state of facts, if the road was public, and the statutory duties required of defendant in crossing public roads existed, then the court could not properly withhold from the jury the right to pass upon the questions of negligence and due care," etc. *Railway Co. v. Lee*, 70 Tex. 501, 7 S. W. Rep. 857. From what we have heretofore said in regard to the traveling public in ordinary vehicles having equal rights with railway trains at public crossings, we do not desire that the inference be drawn that we hold that a person has the right of way at all times, and can rush on a railroad crossing regardless of his personal safety, or of the rights of railroad companies, but that in the exercise of ordinary care and discretion, and with the mutual rights of the other in view, each has the same right of passway at public crossings as the other.

The twentieth assignment brings in review a special charge requested by plaintiff, and given, as follows: "The jury is instructed that it is not every degree of negligence that would prevent a plaintiff from recovering, if otherwise entitled to recover; but, in order to preclude a recovery on that account, plaintiff must be guilty of some negligence as an ordinarily prudent man would not have been guilty of under like circumstances." While this charge is not as lucidly drawn as it might have been, still, we are of the opinion that there was no error in giving it in this case. Plaintiff had the right to go upon the track, and, even if he had been a mere trespasser, the railroad would not have been absolved from using care in preventing the injury. *Railway Co. v. Welsen*, 65 Tex. 443.

Our view of the case—that all the circumstances surrounding the accident were legitimately to be considered by the jury in ar-

riving at a conclusion—disposes of the twentieth assignment of error.

We are of the opinion that the charge requested by appellant, as set out in twenty-second assignment, in regard to positive and negative evidence, was properly refused. There were no witnesses, who testified on the question of the signals being omitted or given, who possessed more accurate means of information than the other, unless it was the witnesses for the plaintiff, and we cannot see that any injury resulted to defendant by a failure to give the charge. Several of the witnesses swore positively that no signals were given, and several of defendant's witnesses swore that the signals and collision were almost simultaneous. The remaining charges asked by defendant were embodied in the charge of the court, so far as applicable, and so far as they declared the law. The rate of speed of the train was a proper item to consider, in connection with the other facts, in ascertaining negligence; and while railroad companies may have the abstract right to run their trains as fast as they may desire, yet they will be held responsible for such high rate of speed if it is the proximate cause of damage to any one.

The third assignment of error in this case is the only one that has given us serious trouble in arriving at a conclusion in regard to it, and that has only arisen in view of the case of *Railway Co. v. Wesch*, decided last June, and reported in 85 Tex. 594, 22 S. W. Rep. 957. In the case referred to, the supreme court has held that it was erroneous and improper to permit a witness to testify that his expenses on account of his injuries were "about \$750 or \$800." In commenting on the testimony the court says: "In the present case the direct influence of the testimony which was erroneously admitted was to increase the verdict in an amount not less than \$750, nor more than \$800, for expenses consequent upon the injuries. But it is by no means certain that it did not have a potent effect in the same direction upon the amount of damages awarded for physical and mental suffering, for loss of time, and permanent incapacity to earn money. Such damages are in their nature indeterminate, and are left largely to the discretion of the jury. There is no measure for determining the extent of the pain or the limit of its compensation; neither is there any rule for determining with any degree of exactness the effect of a broken collar bone upon the sufferer's earning capacity. Therefore a jury might reasonably conclude that the suffering was greater, and the injury more serious and more permanent, in a case in which the expense consequent thereupon was great, than in one which it was small. We conclude, therefore, that the remittitur of \$800 did not necessarily destroy the effect of admitting the improper testimony, and that it should not have been allowed." In the case we have before us for

decision the plaintiff was allowed to testify as follows: "From the amount of services rendered and to be rendered, I think his doctors' bill will be more than \$1,000. I suppose my drug bill will be about \$500." This answer had been taken by deposition, and was properly objected to in writing. The idea conveyed by the language quoted from the Wesch Case is that a remittitur of the \$800 at no time would have cured the error in admitting the obnoxious testimony; but we conclude that the opinion was delivered in view of the facts in that particular case, and that the court did not intend to lay down an invariable rule to be followed in every case, regardless of the facts. In the Wesch Case the injury seems to have been internal,—the breaking of a collar bone,—and it was hard for a jury to determine the exact injury, and every circumstance doubtless weighed in the determination of the matter. As the court says: "There is no measure for determining the extent of the pain or the limit of its compensation; neither is there any rule for determining with any degree of exactness the effect of a broken collar bone upon the sufferer's earning capacity." In other words, the supreme court, we believe, was simply holding that in that particular case, where the injuries were to a great extent hidden, and where a heavy verdict for damages was rendered, the illegal testimony must have had some effect in determining the amount of the damages in excess of the \$800. There can be no question in this case as to the \$1,000 medical bill, for the two doctors who attended on plaintiff were permitted, without objection, to testify that the amount of the bill would be \$1,000. One testifies: "My medical bill will be from \$800 to \$1,000. It will sure amount to this sum, and my charges are within the usual fees for like services all over this state. He will have to be treated for some time yet." The other physician testified: "I think that it would be a reasonable charge—\$1,000—to attend plaintiff as he has been attended." This testimony went unchallenged before the jury, and, if the testimony of plaintiff as to the \$1,000 medical bill was illegal and improper, the force of the objection to it has been obliterated and parried by the same testimony being admitted without objection. *Railway Co. v. Mackie*, 71 Tex. 492, 9 S. W. Rep. 451.

In regard to the admission of the testimony as to the amount of the drug account, we are of the opinion that the admission of the testimony was erroneous. But, under the facts of this case, does this error taint the whole verdict? We hold that it does not. The testimony clearly shows that the plaintiff had his leg broken in two places, that the bones protruded through the skin, that he incurred serious injuries in his other leg and his back, and that he suffered excruciating agony. The mere relation of these facts carry with it to the mind the truth that the man has received irreparable injury, and his

suffering and anguish in mind and body must have been intense. No drug bill, however large, could aggravate or tend to increase the force of the evidence on these points. But the question of the agony and suffering of the plaintiff was not left to inference from the facts, but the doctors, in addition to others, swore that there was a compound fracture of the right leg; that the left leg was bruised and badly lacerated; that there were wounds on the back and neck; that the wounds on the left leg were six weeks in healing; that plaintiff complained a long time with his back: that the right leg had to be amputated to save his life; that the bones in the right leg had been so bruised and crushed that three different amputations were necessary; and that it was possible that the leg would have to be taken off at the hip joint. The doctors also swore that the chances of plaintiff for life and death were about equal; that he is a cripple for life, and is wholly incapacitated for work the balance of his life; and that his sufferings had been of the most excruciating character. We do not believe that this evidence could have been intensified by any other facts, no matter how strong. The doctors and another witness also swear that the drug bill would be very large, as plaintiff had bought many and costly medicines. This testimony was not objected to, and all the force and effect of the objection of defendant was waived and destroyed by the introduction of this additional testimony without cavil or objection. But, if the error was not cured by the admission of the additional testimony without objection, then the testimony did not and could not have possibly added to or intensified the testimony, as to the mental and physical suffering of plaintiff, to a greater sum than the amount of the drug bill, and, that amount—\$500—having been remitted by appellee, we conclude that the error, if any, is cured.

Witness Johnson, a passenger on the train, was permitted to swear that a uniformed negro, whom he took to be a train porter, after the wreck tried to prevent him from going back to the place of the wreck when the train had stopped. After he had testified to this, the court ruled it out, and withdrew it from the jury. We do not believe this testimony affected the jury. It may be the negro thought the passenger might be left, or stopped to talk with him; certainly, there was nothing to show that he wanted to keep the witness from seeing the wreck. However, the evidence was withdrawn from the jury, and the result of the case does not show that its baleful effect, if any, tainted the verdict. As a part of the *res gestae* the court, doubtless, permitted the question to be asked that elicited the obnoxious answer, but as soon as it came, seeing that it was not proper, it was withdrawn from the consideration of the jury. The practice of admitting testimony, and then withdrawing it

from the consideration of the jury, has been reprehended by the supreme court, but whether it required a reversal or not is a question to be determined by the facts and the circumstances of each particular case. *Smyth v. Caswell*, 67 Tex. 576, 4 S. W. Rep. 548.

The testimony being ample and convincing in support of the verdict, there being no evidence of excess in the verdict, the same being for a sum less than one-third of that claimed in the petition, there being no material error in the charge of the court, and the sum of \$500 having been remitted, the judgment is reformed, and affirmed accordingly.

GRAVES v. SMITH.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

JOINT OBLIGORS—PAYMENT BY ONE—CONTRIBUTION.

Where one of three joint obligors pays the debt, he is not entitled to recover of the other two obligors, jointly and severally, two-thirds of the amount paid by him, but may recover of each of such other obligors one-third, only, of such amount.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Sarah B. Smith, executrix, against E. G. Graves and R. L. Graves, to recover the amount paid by plaintiff's testator in satisfaction of a judgment rendered against him and defendants on a note executed by him and defendants. From a judgment in favor of plaintiff for two-thirds of the sum claimed, defendant E. G. Graves appeals. Reversed.

George C. Altgelt, for appellant. Upson & Bergstrom, for appellee.

FLY, J. It is alleged in plaintiff's (appellee's) petition that her testator, in 1875, signed a note as a surety for appellant and his father, R. L. Graves, and afterwards the payee of the note recovered judgment on the note against the makers, and, defendant failing to pay off or satisfy the judgment, plaintiff's testator paid the same; that the amount of the judgment was \$1,172.14, together with interest thereon from March 13, 1878, at the rate of 1½ per cent. per month. Defendant E. G. Graves excepted to plaintiff's petition because the cause of action was barred by the statutes of limitation of 2, 4, and 10 years; because it does not appear from the petition what amount was paid by plaintiff on the judgment,—and excepted to the portion of the petition setting up interest at 1½ per cent. per month because no facts are shown, entitling plaintiff to that rate of interest. This defendant also pleaded general denial; that he did not receive any consideration for the amount of the judgment, but that plaintiff's testator had received it all; and there was a plea of 2, 4, and 10

years' limitation. R. L. Graves, the other defendant, answered by general denial. There was a verdict and judgment for \$1,433.32, with 8 per cent. interest from date of payment of the judgment. Only E. G. Graves perfected his appeal.

The petition alleges that plaintiff's testator signed the note as a surety, and the defendants as principals, and the only pleading in the case on the point, other than this, is the exceedingly unsatisfactory allegation in appellant's answer that "he did not receive any of the consideration whereon the said judgment is founded, but that the same was wholly received by plaintiff's testator." Upon the most liberal construction of this allegation, and that in the petition, we are not prepared to say that the court was justified in giving a charge as to all the parties being principals; but, admitting this very doubtful proposition to be correct, we are of the opinion that the court erred in not directing the jury to find for aliquot parts of the indebtedness against the respective defendants. The charge which is assigned as error is as follows: "If you find from the testimony that all of the parties were principals, then the plaintiff is entitled to recover from the defendants two-thirds of the amount paid." The jury responded in a verdict for two-thirds of the amount paid on the judgment, evidently in direct response to this paragraph of the charge, for under no other paragraph could their verdict be held responsive to their instructions. If they had found from the evidence that the allegations in plaintiff's petition were true, and that the testator had signed the note as a surety, they would have been compelled to have rendered a verdict for the full amount sued for; and the defendants, both being principals, would have been jointly responsible to the testator for the amount paid out by him for them. Was the charge of the court correct? We think not. If the note was signed by the three men as principals, upon a settlement among themselves of the indebtedness each one would be liable to the one paying the whole indebtedness in proportion to what each obtained out of the consideration of the note. If either of them obtained nothing, he would, *ipso facto*, as among the signers of the note, be a surety, and not a principal. In the absence of proof, it would be presumed that joint obligors on a note were benefited in equal degrees by the consideration. In the case of sureties, when one pays off the debt of an insolvent principal, he can recover from each surety his proportionate part of the indebtedness for the whole amount of the shares of the other sureties in a joint judgment against them. *Acers v. Curtis*, 68 Tex. 424, 4 S. W. Rep. 551. Where one of several principals pays off a joint indebtedness, we are of the opinion that the same rule would prevail. Plaintiff's testator, if he signed the note with defendants as principals, was, as between the makers of the

note, responsible for the amount he received as a consideration, and when he paid the debt he was entitled to contribution from each of his joint obligors, in the amount of his aliquot share of the debt. Daniel, Neg. Inst. § 1340. We hold that the charge of the court, instructing the jury to find a joint verdict against defendants, was error. The other assignments are not well taken, and need not be discussed. The judgment of the lower court is reversed, and the cause remanded.

BAKER et al. v. GUINN.¹

(Court of Civil Appeals of Texas. Oct. 23, 1893.)

SALE—WHAT CONSTITUTES—ACTION FOR CONVERSION—INSTRUCTION—MISJOINDER OF CAUSES OF ACTION—JURISDICTION OF COURT—AMOUNT IN CONTROVERSY—HOW DETERMINED.

1. A creditor agreed to buy his debtor's cotton crop and pay one-quarter or one-half cent per pound more than any one else would give, and credit the amount on the debt, which was due. At the time only part of the cotton was gathered. The debtor was to pick the balance of the cotton, and haul it all to S.'s gin, to be held by him subject to such creditor's order. *Held* that, on delivery of the cotton to S. by such debtor, and obtaining an offer for it after it was ginned and its weight was ascertained, he became entitled to credit on his debt as agreed, and the title passed to such creditor, though the credit was not made until after a levy on the cotton by other creditors as the property of such debtor.

2. In an action by such purchaser against other creditors of the seller for the conversion of such cotton while in the possession of S., a request to charge that "a sale is not completed while anything remains to be done to determine its quantity, if the price depends on this, unless this is to be done by the buyer alone. No sale is complete, so as to vest in the vendee an immediate right of property, so long as anything remains to be done between the buyer and seller in relation to the property sold," is not applicable to the facts.

3. In such action plaintiff set up a mortgage held by him as assignee on the property converted and other property, and asked that the same be foreclosed. *Held*, that it was error not to sustain an exception to the petition on the ground that if plaintiff owned the property, foreclosure was unnecessary and inconsistent with his claim of ownership; and also to refuse to withdraw such mortgage from the jury.

4. Defendants filed a plea to the jurisdiction because the value of the property in controversy did not exceed \$200, and on the trial there was no dispute that the value of the mortgaged property exceeded \$200. *Held*, that it was error to charge that the value of the property in the mortgage was the test of jurisdiction, and that, if such value was over \$200, the court had jurisdiction.

5. The amount claimed in the petition, and not the amount of the verdict, will be deemed the amount in controversy, unless it appears from the petition that the case is not within the jurisdiction, or unless it otherwise appears that plaintiff, in framing his petition, has improperly sought to give jurisdiction where it does not belong.

Appeal from Guadalupe county court; James Greenwood, Judge.

Action by J. D. Guinn against Baker & Terrell and George Wilson for the conversion of certain cotton by defendant firm, claimed to have been purchased by plaintiff from defendant Wilson, and to foreclose a mortgage on such cotton and other property as against Wilson. From a judgment entered on the verdict of a jury in favor of plaintiff, defendants Baker & Terrell appeal. Reversed.

Burgess & Dibrell and W. R. Neal, for appellants. J. D. Guinn, for appellee.

NEILL, J. This suit was brought by appellee in the county court of Guadalupe county against the appellants to recover the value of four bales of cotton weighing 2,040 pounds, alleged to be worth \$204, and to be the property of appellee. It was alleged that appellants, knowing the cotton to be the property of appellee, unlawfully seized and converted it to their use, and that such seizure was maliciously and oppressively made, with the knowledge on the part of the appellants that thereby appellee would be put to great trouble, loss of time, and expense. Appellee alleged also that he purchased the property from George Wilson, and at the time it and other property was incumbered by a mortgage given by Wilson to secure J. M. Blanks in the payment of \$40.90, the payment of which was assumed by appellee at the time of his purchase, and the mortgage assigned to him by the mortgagee, and that the property mortgaged was worth \$400. Wilson answered in the case, admitting the debt to Blanks, and the execution of the mortgage to secure it. The appellee prayed judgment for the value of the property converted, for \$25 attorney's fees, \$50 loss of time, \$500 exemplary damages, and for a foreclosure of his alleged mortgage on the property as against Wilson. The appellant, in his answer, pleaded to the jurisdiction of the court, averring that the allegation of the value of the cotton made by appellee was fictitious and false, and that it was fraudulently made for the purpose of giving the county court jurisdiction; that in fact the cotton was not at the time of its conversion, nor at any time since, worth exceeding \$200; and that the other items of damages were alike false, and fraudulently alleged. The appellants specially excepted to the allegations of appellee as to the mortgage made by Wilson to Blanks, and moved to strike them out upon the grounds of irrelevancy, and that suit could not be maintained on the mortgage without making Wilson a party. (Many other exceptions were made by appellants to the pleadings, but, as the action of the court on them is not assigned as error, it is not necessary for us to specify them.) Appellants then interposed a general denial and a special plea that the alleged sales of the cotton by Wilson to appellee were made for the purpose of defrauding his creditors. The case was tried by a jury, who rendered a verdict in

¹ Rehearing denied.

favor of plaintiff for the sum of \$175.40 principal and \$31.90 interest against Baker & Terrell, and in favor of plaintiff against Wilson in the sums of \$40.96 principal and \$8.68 interest, and decreed a foreclosure of said mortgage, upon which verdict the judgment from which this appeal is prosecuted was rendered.

Appellants' first assignment of error is as follows: "The court erred in refusing to grant a new trial because the facts and circumstances in evidence conclusively showed that the sale of the cotton by Wilson to Guinn was incomplete and did not pass the title, for the reason that the buyer and seller did not expressly stipulate that the title should pass at the time of the contract of sale, and there remained something to be done by both buyer and seller, viz. Wilson was to finish gathering the cotton, and haul all the cotton to the gin, and was to get the best offer for the cotton he could obtain in order to determine the price,—the stipulated price being one-quarter or one-half a cent per pound more than any one else would give, and the buyer was to take up a mortgage on the cotton held by Blanks, and when the quantity and quality of the cotton was ascertained, and Wilson had obtained the best offer procurable, Guinn was to allow Wilson one-quarter or one-half a cent a pound more than such offer, and credit this amount on the land note executed by Wilson to Guinn." Their second assignment is: "The court erred in refusing the special instruction asked by defendants, as follows: 'A sale is not completed while anything remains to be done to determine its quantity, if the price depends on this, unless this is to be done by the buyer alone. No sale is complete so as to vest in the vendee an immediate right of property so long as anything remains to be done between the buyer and seller in relation to the property sold,'—because this special instruction was the law applicable to the facts proven, and was not embraced in any of the charges given; and, when anything remains to be done for the purpose of ascertaining the price, the performance of this is a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in a state in which they ought to be accepted."

The testimony relating to the first assignment of error is, substantially, that in the fall of 1888 George Wilson was indebted to the appellee in the sum of \$1,000, evidenced by his promissory note, secured by a vendor's lien on the land upon which Wilson then resided. That in the fall of that year appellee visited Wilson at his place, and demanded payment of his debt, saying that he must have something on it, or he would foreclose his lien. That, Wilson not being able to pay anything, the following agreement was made between the parties, viz.: Appellee agreed to buy Wilson's crop of cotton and pay a quarter or a half cent per pound more for the

cotton than anybody else would give, and credit Wilson with the proceeds on his note. Wilson agreed that appellee should have the cotton which had been gathered and all in the field, estimated at four or five bales, upon the terms agreed on by appellee. At that time there were two or three bales gathered and on the premises. It was further agreed between the parties that Wilson should pick the balance of the cotton, and haul it to Schultz's gin, and leave it there in Schultz's charge, to be held by him subject to appellee's order. That Wilson was to have nothing further to do with the cotton after it was delivered to Schultz. In pursuance of the above agreement Wilson picked the balance of the cotton, and hauled it all to said gin, and delivered it to Schultz for appellee, at the same time notifying Schultz that he had sold the cotton to appellee, and to hold it subject to Guinn's order. The cotton was ginned and baled, the bales weighing 2,040 pounds, and while at the gin was levied upon by virtue of an execution issued on a judgment in favor of appellants against Wilson as Wilson's property. Schultz held the cotton as Guinn's from the time it was delivered until it was levied on, and then notified the officer making the levy that it was appellee's property, and that he held it for him. While the cotton was at the gin, and before the levy, Wilson was offered 10 cents per pound for it, and told the parties making the offer that it was Guinn's. Appellee credited Wilson's note with the cotton at a valuation of 10½ cents per pound. This credit was not entered until after the levy, for the reason that up to that time Guinn did not know the weight of the cotton, nor the price Wilson had been offered for it. The part of the court's general charge relating to the second assignment of error is: "The plaintiff claims the cotton in controversy by purchase from Geo. Wilson prior to the alleged conversion by defendants. There is a difference between a sale of personal property and an agreement to sell. Under an agreement to sell no title passes, but whenever parties have agreed upon the times of sale, and the property sold is identified, and nothing remains but to deliver it, and if it appears from the evidence that the parties understood and intended the title to pass without actual delivery at the time of said sale, then the title will pass without such delivery; but, when anything remains to be done by way of selecting out or separating the property from other property of the same kind for purposes of identifying the property sold, then no title passes until the property has been selected and identified." At the request of appellants the court also instructed the jury that "an ordinary test of ownership is, whose loss would it have been if the property at the given time had been destroyed by fire or otherwise? The party who would have to bear the loss would be the owner." While it may be that the title to the cotton may not have vested in appellee at the time the agree-

ment was made between the parties on Wilson's place, on account of there being something to be done by Wilson, under the terms of the contract, in relation to the cotton, necessary to complete the sale, the question as to whether the title to it passed to appellee at that time is not conclusive of his rights. If the title passed by the agreement and what was done in pursuance of it before it was converted by appellants, appellee had the right to recover from them the property or its value. There is no doubt about there being a sufficient consideration to support the contract, and that both parties had the right, as between themselves, to carry it into effect. Wilson, as he agreed to, picked the balance of the cotton, hauled it to the gin, delivered it to Schultz as the property of appellee, received an offer of 10 cents per pound for it after it was ginned and its weight ascertained. The cotton was held by Schultz as appellee's property, and subject to his order, and notice given the officer of these facts at the time of its seizure. So Wilson had done everything required of him to pass the title to appellee and to entitle him to a credit on the note of at least 10½ cents per pound for 2,040 pounds of cotton, and if appellee had refused to enter the credit at any time after the weight was ascertained and the offer of 10 cents made for the cotton, Wilson, by a proper proceeding, could have compelled the entry of the credit, or have, if sued on the note, offset it to the amount of the credit that he was entitled to under the contract. The appellee had the same right to the cotton that Wilson had to have the credit entered on the note, and the fact that under the contract he may have had the option of paying one-quarter or one-half of a cent per pound more than Wilson's offer of 10 cents would not deprive him of the right. If Wilson was satisfied with the price as fixed, no one else had any right to complain. The credit was placed on the note estimating the cotton at 10½ cents per pound as soon as appellee ascertained the weight and the price offered Wilson for it. True, this was done after the seizure under execution, but Wilson's right to have it done had attached before, and, consequently, appellee's right to the property.

In the case of *Hopkins v. Partridge*, 71 Tex. 607, 10 S. W. Rep. 214, Quash Reed owed Partridge for a tract of land, who held his (Reed's) notes, given in consideration for the land. All the notes were past due. Partridge went to where Reed was gathering cotton in the field. A part of the cotton had been picked, some of which was stored in Reed's cotton pen in the field, and some in his smokehouse on the farm. Partridge bought all the cotton in the pen and smokehouse, as well as that ungathered, and promised to give Reed the market price for the cotton at Pittsburgh. The cotton was at that time worth seven cents per pound in Pittsburgh, Tex., but that was not agreed on by the parties. Reed accepted Partridge's

proposition, and then and there sold him said cotton, and agreed to pick out the balance, and haul the same to Bailly's gin. When it was hauled there and ginned, Partridge was to haul it to Pittsburgh, where the same was to be weighed, and the number of pounds and price ascertained in the market, and then give the proper credit on Reed's note. About four weeks after this agreement was made, while the cotton was still in the pen, smokehouse, and field, in the same condition, it was levied on by an officer in favor of Hopkins as Reed's property. It was assigned as error that the testimony did not show a complete sale of the cotton, (1) because the transaction did not include delivery of possession; (2) there was work to be done on the cotton, preparing for delivery; (3) no price was fixed, or could be, until after it was taken to market; (4) because the cotton being found in Reed's possession was subject to attachment. The court held that under the facts stated all the objections urged were satisfied, and that there was clearly a change of ownership. As to the price, the court said it could be ascertained with certainty. To constitute a sale, "the price need not be directly stipulated. The stipulation may be indirect and descriptive, as where it is agreed to be 'ten cents a bushel less than the Milwaukee price on any future day the vendor might name.' In such a case the title does pass before the naming of the day." *Tied. Sales*, § 45. When the price is susceptible of ascertainment by means of some criterion prescribed in the contract, so as to render future negotiations in regard to it unnecessary between the parties, it is sufficient, if the other requisites have been performed, to constitute a sale. *Story, Sales*, § 220. The evidence to show a sale, and that the title to the property passed to the appellee before the seizure, was, in our opinion, sufficient to warrant the verdict, and there was no error in the court's refusing to grant appellant a new trial. Nor do we think there was any error in its refusal to give the special charge set out in their second assignment of error. It was not applicable to the facts in the case. If it had been, it was substantially given in the court's general charge. While the charge complained of in the third assignment is not strictly accurate, in that it is not full enough, it substantially presents the law arising from the facts as proven, and, if deemed inaccurate by appellants, they should have asked a special charge, fully presenting the law applicable to the case as developed by the testimony. If the agreement between appellee and Wilson on the latter's place did not constitute a sale, it was at least an executory contract of sale, and, when everything was done in pursuance to the contract by Wilson that he agreed to do, the contract on his part was complete, and the sale became absolute, and the title passed to Gullin, who was, as we

have seen, bound to credit Wilson's note with the value of the cotton, estimated at 10½ cents per pound, if he did not choose to credit it with the value of the cotton estimated at 10½ cents per pound. Story, Sales, § 315. The fourth, fifth, and seventh assignments of error all relate to the action of the court in foreclosing the mortgage on certain property, including that in controversy, given by Wilson to Blanks, and assigned by the latter to appellee. We think all these assignments are well taken. If appellee owned the property and the mortgage debt, a foreclosure of the mortgage lien was wholly unnecessary, and inconsistent with his claim of ownership. The exception to appellee's petition on that ground should have been sustained. And after the court failed to sustain it, it should have withdrawn the mortgage from the consideration of the jury by giving the special charge asked by appellants. As the judgment on the debt secured by the mortgage was rendered only against Wilson, and the property was found to be appellee's, the error would not affect the appellants except as to costs, (which could be revised and corrected under an order of this court,) and we would not be required to reverse it were it not for the fact that this error was the parent of another, which we consider fatal to the judgment. The court instructed the jury that the value of the property mentioned in the mortgage was the test of jurisdiction, and that, if they believed the value of the property mentioned therein was over \$200, the court had jurisdiction. The mortgage had no more relevancy to the case than the "white-backed brindle bull" described in it, and it would have been just as appropriate for the court to have instructed the jury that the value of the courthouse of Guadalupe county was the test of jurisdiction as it was to give the instruction it did. There was no question about the fact that the property described in the mortgage was worth over \$200. Hence the effect of the charge was to withdraw appellants' plea to the jurisdiction of the court from the jury. The failure of the court to set aside the verdict and dismiss the case for want of jurisdiction because the verdict shows the value of the property to be less than \$200 is also assigned as error. There is an unbroken line of authorities from *Swigley v. Dickson*, 2 Tex. 192, down to this case, holding that the amount of the verdict does not determine the question of jurisdiction, but that the question must be determined by the amount in controversy. The amount claimed by the plaintiff in his petition will be deemed the amount in controversy, and will determine the question of jurisdiction, unless it appears from the petition that the case is not within the jurisdiction, or unless it shall otherwise appear that the plaintiff in framing his petition has improperly sought to give jurisdiction where it did not properly belong. In this case it is averred in appel-

lants' plea to the jurisdiction that the matter in controversy is less than \$200, and that the amount alleged in plaintiff's petition is falsely and fraudulently made for the purpose of giving the county court jurisdiction. It is apparent that some of the matters alleged as items of damages were not elements of damages in cases of this character, but the value of the property was alleged at over \$200, and the alleged manner of its conversion was such as would entitle appellee to exemplary damages if established by the evidence; and, if there was not sufficient evidence to entitle appellee to the exemplary damages prayed for, it would not follow that the court was without jurisdiction of the subject-matter. The matter in controversy was the alleged value of the property, and the alleged exemplary damages growing out of the manner of its conversion, and, without it being shown that the value of the property and the manner of its conversion were fraudulently alleged for the purpose of giving jurisdiction where it did not belong, the court would have jurisdiction though it should appear on the trial that the property was not worth \$200, and that no exemplary damages were shown. A party does not invoke the jurisdiction of a court at his peril. If he acts fairly and honestly in making his allegations as to the amount in controversy, a court will in no wise cast him out because he has made a mistake as to the value of the subject-matter in controversy. *Dwyer v. Bassett*, 63 Tex. 275; *Graham v. Roder*, 5 Tex. 146; *Railway Co. v. Nicholson*, 61 Tex. 551; *Roper v. Brady*, 80 Tex. 588, 16 S. W. Rep. 434. For the reason that the court below erroneously permitted a mortgage to be foreclosed which had no relation to the issues in the case, and made the value of the property described in it the test of jurisdiction, its judgment is reversed and remanded.

KEATING v. JULIAN et al.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

TRIAL OF RIGHT OF PROPERTY—VALUE OF USE

In a trial of right of property, evidence of the value of the use of the property from the time it was received by claimant under his bond is properly admitted, as the judgment should show such value to enable claimant to choose between the provisions of Rev. St. art. 4845, allowing him to return the property, and pay for the use thereof, or to pay for the property, with interest on its value.

Appeal from district court, El Paso county; T. A. Falvey, Judge.

Trial of right of property between Julian & Johnson, as plaintiffs, and Rosalie Keating, as claimant. Judgment for plaintiffs. Claimant appeals. Affirmed.

Merchant & Teel, for appellant. Davis, Beall & Kemp, for appellees.

NEILL, J. This was a suit under the statute for the trial of the right to certain property seized by virtue of a writ of sequestration issued in favor of Julian & Johnson in a suit brought by them for the property against one Charles Gallagher. The appellant, on the 24th day of October, 1889, made affidavit and bond for the trial of her title to the property, which were filed in the district court on the 1st day of March, 1890. On February 28, 1890, appellees obtained judgment against Gallagher for the property, subject to appellant's claim. On the 25th day of November, 1890, the appellant filed a motion to nonsuit appellees upon the ground that they failed to appear both at the first and second terms of the court after she had filed therein her affidavit and bond, and did not appear on or before the appearance day of the third term of the court thereafter, which motion was overruled by the court, and the parties under its directions made up the issues in the case. The appellant alleged in her tender of issues that she claimed the property as administratrix of the estate of Paul Keating, deceased; that she was informed and believed that the sale of the property made by her intestate on the 19th day of August, 1889, to appellees was intended as a mortgage lien; that the value of the property assessed by the sheriff on the writ was excessive,—and prayed that judgment be rendered in her favor, as administratrix of Paul Keating, for the property. The appellees, in their tender of issues, denied the right of appellant to recover the property in the capacity in which she claimed it, alleging that she was not then, and never had been, the administratrix of Paul Keating. The allegations in said special plea were duly sworn to. The appellees further alleged that it was not true, as stated by appellant, that the sale made by Paul Keating to them on the 19th of August, 1889, was intended as a mortgage lien, but alleged, on the contrary, that said instrument was an absolute conveyance and bill of sale, given for a valuable consideration, and received by them bona fide, in ignorance of any claim by any person whomsoever, and that they claimed the property as their own by a good and valid title. On December 1, 1890, the case was tried by the court without a jury, which found that the appellant had failed to establish her right to the property, that its value was \$479.50, and that the value of its use by the appellant was \$132. Upon these findings the court rendered judgment, together with 10 per cent. damages, and 8 per cent. interest, on the value of the property, from which judgment this appeal is prosecuted.

Conclusion of Facts.

(1) Rosalie Keating was not, at the time she tendered her issues in the case, the administratrix of Paul Keating, nor was she when the cause was tried. (2) On August 19, 1889, Paul Keating, in payment and dis-

charge of a debt he then owed appellees, conveyed the property to them absolutely by a bill of sale, which was intended by the parties as such, and not as security for the debt. (3) The value of the property at the time the claimant's affidavit and bond was filed was \$479.50. (4) The value of the use of the property, from the time it was taken from the sheriff under said affidavit and bond by the appellant to the time of trial, was \$132.

Conclusions of Law.

1. There was no error in the court's overruling appellant's motion to nonsuit the appellees. It was for the court to determine whether an appearance had been properly entered by appellees within the time required, and, having determined that such appearance was so entered, we do not feel authorized to disturb its ruling on the question for the purpose of summarily disposing of the case in appellant's favor, contrary to what the facts developed on the trial show to be just.

2. The evidence amply sustained the finding of the court that the property claimed by appellant was worth, at the time she filed her claim, \$479.50. If the evidence was much less in sustentation of the finding, we would not, under repeated holdings of our supreme court, feel authorized to disturb it.

3. The court did not err in hearing evidence to prove the value of the use of the property, nor in overruling appellant's objection to such evidence. In the case of Publishing Co. v. Hixson, (Tex. Sup.) 14 S. W. Rep. 849, the court held that a judgment against the claimant in a case of the trial of the right of property should fix the value of the use of the property in controversy, and, upon reversing the case, instructed the court a quo to determine the value of the use of the property at the time of the rendition of the judgment, to enable the claimant, if he should wish to return the property in satisfaction of the judgment, as provided by article 4845, to know what amount he is required to pay for its use up to the date of the judgment. We are of the opinion that none of the assignments of error are well taken, and affirm the judgment of the court below.

COOPER v. GORDON.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

ARCHITECTS—VALUE OF SERVICES—EVIDENCE.

1. In an action for services as an architect, in drawing plans, the issue being as to the amount agreed to be paid, the introduction of the plans in evidence was, at most, harmless error.

2. Testimony of a witness that he had obtained good plans of an architect for a less sum than that proved by plaintiff to be the customary rate of charges of architects was properly excluded.

Appeal from Maverick county court; J. A. Bonnet, Judge.

Action by J. R. Gordon against E. H. Cooper. Judgment for plaintiff. Defendant appeals. Affirmed.

Dan W. Nicholson, for appellant.

FLY, J. Appellee brought this suit on a claim for value of services rendering in preparing plans and specifications for store-houses for appellant in Eagle Pass. There is no contract declared on, but an allegation that the services rendered were reasonably worth the sum of \$333.97½,—being 3½ per cent. of \$9,537, the cost of the buildings,—a credit of \$75 being admitted on said claim. He also prayed for 8 per cent. interest thereon from August 1, 1888. Appellant pleaded in abatement that the matter in controversy amounted to less than \$200, and the county court had no jurisdiction; that the services performed by plaintiff were done under a contract that the services would not be valued at more than \$100, and not less than \$75; that defendant had paid \$75 on this contract, leaving a balance due by defendant to plaintiff of \$25; that plaintiff had falsely and fraudulently alleged a sum that would bring the matter within jurisdiction of the county court. The same matters are set up in the answer as matters of defense, and, in addition, there is a plea of tender of \$50 before suit was begun, and at the time of the filing of the answer. The case was tried before a jury, and a verdict for \$165 returned in favor of plaintiff.

As to the plans and specifications being furnished by plaintiff, an architect in San Antonio, and being used by defendant; as to the same being satisfactory; and as to \$75 being paid on the amount due for the plans,—there is no controversy; but as to the contract price for the plans agreed upon there is complete antagonism between the plaintiff and defendant, in their testimony. Plaintiff, although he does not declare on the contract, swore that defendant promised to give him 3½ per cent. of the value of the buildings as compensation for the plans and specifications, while defendant swore that the agreement was that the plans and specifications should not cost less than \$75, nor more than \$100. Plaintiff also swore that, on a compromise, he agreed to take \$165 for the balance due on the plans, but defendant would not give more than \$150. Architects were introduced to show that the charge of 3½ per cent. on the value of the buildings was reasonable and customary.

The defendant objected to the plans and specifications being used as evidence before the jury "because they were immaterial and irrelevant, and the jury are not supposed to be the judges as to whether the plans were good or not, nor as to their value." There was no denial on the part of defendant that the plans and specifications were in all re-

spects as he desired them, and, while it was not essential that they should be introduced in evidence, yet we are unable to see how defendant was injured by their introduction; and, while the jury may not have been qualified to pass on the sufficiency of the testimony, yet we are not aware of any one else, engaged in the trial, who would be authorized to judge of the testimony for them. There was no error in admitting the testimony.

Defendant, after plaintiff had proved the customary rate of charges by architects for their work, desired to prove by one witness that he had obtained plans and specifications from an architect in San Antonio for a much less sum than that charged by plaintiff, and proved to be customary, and, by another, that the plans that the first witness had bought at a lower price were good plans. This testimony was clearly inadmissible. Plaintiff had proved the customary and reasonable charge for such work, and such proof could not be answered by the fact that some individual had charged less. What is reasonable compensation for labor is not determined by what some one man may be willing to take for like labor, but by what the general rule may be as to charges for such labor among members of the certain craft, occupation, or profession.

There was no evidence to support the allegation of fraud in suing for an amount larger than the true amount due, to give the county court jurisdiction, and the court might very properly have refused to charge the jury on that question; but a charge covering the allegation was given by the court at the request of plaintiff, and there was no error in refusing to give another charge asked by defendant on the same subject. The charges asked by plaintiff covered the law of the case, and there was no necessity in giving the other charges requested by defendant. The plaintiff was entitled to recover interest on his account from January 1, 1889. He pleaded it properly, and the jury returned a verdict for interest from January 1, 1889. The law fixed the rate at 8 per cent., and there was no error in rendering a judgment for the \$165, with 8 per cent. thereon from January 1, 1889. Article 2977, Rev. St.

No diligence whatever was shown in discovering the alleged newly-discovered testimony, and it would not probably change the result on another trial. There is no affidavit of the witness attached to the motion, and the defendant merely swears that he has been informed and believes that a certain witness will swear to certain facts. The other grounds in the motion for new trial, as well as all the assignments of error, have been disposed of in this opinion. We are of the opinion that the facts are amply sufficient to sustain the verdict, and, there being no error in the action of the lower court, the judgment is affirmed.

FOSTER et al. v. ANDREWS.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

VENDOR'S LIEN — EFFECT — RES JUDICATA — PERSONS NOT PARTIES.

1. A vendor of land, who in his deed expressly retains a vendor's lien, is not affected by a judgment of foreclosure obtained by his vendee against a subsequent vendee in a proceeding to which he is not a party.

2. A vendor of land, who expressly retains a vendor's lien for the whole price of the land, is not affected by a judgment for the land, obtained against his vendee, in a proceeding to which he is not a party; and it is immaterial that subsequently the vendee, having failed to pay the purchase money, reconveys the land to him, since his title is not dependent on such deed.

Appeal from district court, McLennan county; J. R. Dickinson, Judge.

Action by B. P. Andrews against J. T. Foster and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

This is an action of trespass to try title, brought on the 22d day of September, 1887, by appellee, B. P. Andrews, against J. T. Foster, one of the appellants, for 60 acres of land in McLennan county. Foster answered, disclaiming as to one-half the land, and by plea of not guilty. By amended petition, filed March 23, 1889, Robert Rogers was made a party defendant, but before this, to wit, March 9, 1889, he had appeared and filed a plea of not guilty. The cause was tried without a jury, and judgment was rendered for plaintiff, Andrews, for the land and \$140 rent, (from Foster and Rogers jointly \$105, and from Foster alone \$35.) Defendants appealed.

The trial judge filed conclusions of fact and law as follows:

"Conclusions of Law and Fact.

"Fact.

"The parties in open court agreed that Fountain Jones was the common source of title, and I so find. I further find that on March 8, 1876, said Jones and wife sold the land in controversy to W. C. Parker for \$500.00, wholly on a credit due December 25, 1876, and in the deed to him of that date retained and reserved an express lien on said land to secure the payment of the said purchase money; the purchase money note drawing 10 per cent. interest per annum from date. That on September 20, 1876, said Parker and wife sold said land to Isaac Bates for \$571.00, wholly on credit, and in the deed of that date retained a lien on said land to secure the purchase money, taking two notes for the purchase money,—one for \$521.00, the other for \$50,—each bearing 10 per cent. interest per annum from date, and each due December 25, 1876. That in this trade between Parker and Bates it was the understanding and agreement between them that Bates was to become paymaster to said Jones

for said \$500 purchase money due from Parker to Jones. That on December 28, 1876, said Bates and wife, for the purpose of paying and canceling the purchase money due from Parker to Jones for said land, and with the knowledge and acquiescence of said Parker, deeded said land back to said Jones, and in this way alone was the purchase money from Parker to Jones paid; or, rather, the purchase money from Parker to Jones was never paid, and, because this could not be done, said Bates, with the knowledge and acquiescence of said Parker, on said date deeded said land back to said Jones, and at the time this was done said Jones, Bates, and Parker understood this was a full settlement of the land question between them. That on February 1, 1877, for the purpose of correcting the description of said land in the deed of December 28, 1876, above, said Bates and wife executed another deed to said Jones for said land. That on December 21, 1877, said Jones deeded said land to T. J. & J. T. Powers for \$900.00, on credit. Said Fountain Jones died on November 29, 1878, and left a will, which was duly probated, etc., and in evidence, devising all his property to his wife, V. A. Jones. On December 29, 1882, said T. J. & J. T. Powers, not having paid the purchase money, and being unable to pay it,—\$900.00,—they agreed to give Fountain Jones for said land, deeded said land to said Mrs. V. A. Jones in satisfaction of said purchase money. On December 20, 1883, said Mrs. Jones deeded said land to plaintiff for \$595.00 cash paid. Each of these deeds was a general warranty deed. On October 29, 1879, W. C. Parker instituted suit in the district court of this county against Isaac Bates on said \$521.00 note, and to foreclose the vendor's lien on said land, and obtained service by publication alone, and on November 18, 1880, obtained judgment and foreclosure. On December 13, 1880, an order of sale of said land under this judgment issued to this county, and the land was sold on January 4, 1881, by the sheriff and bid in by J. T. Foster for \$15.00, and deed to him duly executed by the sheriff, dated February 2, 1881. On March 28, 1881, Foster brought suit against said J. T. & T. J. Powers in this court for said land, lost it in this court, the judgment being rendered herein June 23, 1882. On December 22, 1883, Foster filed petition, bond, etc., for writ of error to the supreme court, the cause was taken there, and the judgment reversed and rendered for the said Foster against said Powers on February 6, 1885. 64 Tex. 248. On December 19, 1883, Foster deeded R. H. Rogers an undivided one-half interest in said land. The rental value of said land is \$35.00 per annum. The statement of facts in the case of Foster v. Powers was offered in evidence by defendants on the trial of this cause. It was objected to at first by the plaintiff, but, before the court ruled on the question, plaintiff withdrew his

objections, and stated that 'he would agree that the statement should be admitted in evidence for all purposes by both parties.' Defendants then introduced it in evidence, and in the further progress of the case it was considered by the court and both parties in evidence for all purposes, and the statement of the evidence of the witnesses as therein given was read to the court and argued by both parties on the argument of the cause, as the evidence of such witnesses in this case, and was so considered by the court in deciding the case and in making these conclusions of law and fact.

'From these conclusions of fact I conclude as the law of the case that the superior title to said land was in Fountain Jones and his devisee, and never passed to Parker or Bates; and that said Joneses were not concluded by the judgments in the cases of *Parker v. Bates* or *Foster v. Powers*, and that the title to said land is in plaintiff, and he is entitled to recover.'

The facts as found by the court are true. It is not stated in the findings of the court, but it is true, that the deed from Fountain Jones to T. J. & J. T. Powers, of date December 21, 1877, for \$900, expressly retained the vendor's lien on the land in controversy to secure the payment of the same, being evidenced by four promissory notes; the first due January 1, 1878; the second, January 1, 1879; the third, January 1, 1880; and the fourth, January 1, 1881. These notes were never paid, and in settlement of the same T. J. & J. T. Powers conveyed the land to Mrs. V. A. Jones, sole legatee under the will of Fountain Jones, December 20, 1882, who conveyed to plaintiff, Andrews, December 20, 1883.

Scarborough & Rogers, for appellants. Clark, Dyer & Ballinger and S. L. Samuels, for appellee.

COLLARD, J., (after stating the facts.) There is no principle of law more firmly established in this state than that upon a sale of land on a credit by title bond or deed, expressly retaining a vendor's lien upon the land to secure the payment of the purchase money, the title remains in the vendor until the purchase money is paid. This being true, the title to the land in controversy never passed from Fountain Jones, the common source of title, or his wife, until the sale by her to the plaintiff in this case on December 20, 1883. The findings of the court below, sustained by the testimony, ascertain this fact. If plaintiff below should not recover upon his title, there must be some sufficient reason for it. Appellants contend that the final judgment of the supreme court in the cause of *Foster v. Powers*, 64 Tex. 248, is res adjudicata of plaintiff's title acquired from Mrs. Jones. Mrs. Jones was not a party to the foreclosure suit of *Parker v. Bates*. No defense was made by Bates or any one,

he having no notice of the suit except that implied by publication of the citation. That suit only adjudicated the right of Parker to foreclose his vendor's lien note as against Bates. It did not affect the rights of Mrs. Jones. Foster, purchasing the land at sheriff's sale under that foreclosure, acquired no rights against Mrs. Jones' superior title. Bates, to whom Parker had sold the land by deed reserving lien, had, before the foreclosure suit, with Parker's consent, conveyed the land back to Jones in settlement of the purchase money due Jones from Parker, for which vendor's lien was retained in deed of Jones to Parker, Bates becoming paymaster. On December 21, 1877, Jones conveyed the land to T. J. & J. T. Powers, by deed retaining vendor's lien for the purchase money, \$900, which has never been paid, leaving the title in Jones, which passed to Mrs. Jones by his will upon his death, November 29, 1878, and it was still in her at the time Parker sued Bates, October 29, 1879. Foster's recovery by final judgment of the supreme court on February 6, 1885, would be only a recovery of their right to the land, which could not be more than a right to pay the owner for it—an equity of redemption. Such recovery was of no more value than the deed of T. J. & J. T. Powers would have been. Mrs. Jones was not a party to that suit, nor was her vendee, Andrews, the plaintiff in this suit. It is true that she took a deed for the land from T. J. & J. T. Powers on December 29, 1882, pending the litigation between them and Foster, but she had the real title without that deed, and it did not affect her right under the real title. She was not holding title under the Powers deed, nor under Bates, nor under Parker by virtue of his deed, but by a superior right to all of them. She was not claiming as vendee through the sale of Parker to Bates, in which sale Parker's vendor's lien was retained. Her rights are those of Parker's vendor, under express lien retained in Parker's deed, rights executed and vested by the deed from Bates to Jones with the consent of Parker. Had Parker paid for the land, and so become the owner, and then sold by executory contract to Bates, who in turn conveyed to her, then Parker's foreclosure against Bates may have concluded her as to rights so acquired, whether she was a party to that suit or not, as was decided in the case of *Foster v. Powers*, 64 Tex. 248. In that case the court so treats the rights of Powers as vendee of Bates' vendee holding by unsatisfied executory contract from Parker, the true owner, as the facts then appeared. In that case the court went no further back into the rights of the parties than to Parker as the supposed owner, deciding that one purchasing from the vendee without notice, by deed retaining lien, that the purchase money had not been paid, was not a necessary party to his (Parker's) foreclosure against his immediate vendee, and that the purchaser under

the foreclosure could recover the land from one so holding. The court went no further. It did not decide that a vendor holding superior title would be concluded by a foreclosure suit by his vendee against the vendee of the latter. The legitimate scope and effect of Parker's judgment of foreclosure would be to bind Bates' vendee, or others under that deraignment, and so it was held that Foster could recover against Powers. The title of Mrs. Jones, now asserted, was not dependent upon Bates' title. It did not come through Bates, or under the transaction between Parker and Bates, and so such title in her could not be affected by that litigation, she not being a party to the suit. When Foster recovered from the Powerses, they did not have her title. It is a mistake to suppose that her title rests upon the Powers deed to her. It matters not what was adjudicated in the suit of Foster v. Powers, or what the evidence was; the right now set up by Mrs. Jones' vendee, the plaintiff, was not and could not have been determined, as neither of them was a party to the suit. Giving all the effect to that judgment that it can have, it cannot reach the right now asserted, the owners of such right not being parties to it. That judgment may have the effect to cut off her deraignment from the title Powers had, but not from the true title that Powers never had, that Bates never had, and that Parker never had. The action of trespass to try title may be maintained and a recovery of land may be had upon the equitable as well as the legal title. Mrs. Jones' equitable title was superior to any title ever held by Parker, or any parties claiming under him; and whether she had the legal title or not is of no importance. She had the superior, the only real, title, and conveyed it to plaintiff.

There was ample evidence to sustain the finding of the court that Parker had never paid Jones for the land. The testimony taken, the statement of facts in the case of Foster v. Powers, was read by consent of parties, to be used for all purposes. Whatever was proved by the statement of facts in that case was properly before the court, and was matter for its consideration.

We have in the foregoing disposed of all the material questions arising by assignments of error in this appeal adversely to the appellants, and we conclude that defendants had no title that could be set up against that of plaintiff, and that the latter should have recovered the land.

Appellants have assigned as error that part of the judgment awarding plaintiff rents, upon the ground that, as defendants were in possession of the land by virtue of a writ of possession from the supreme court, they cannot be considered such wrongdoers as are liable for rent. The judgment of no court, as between defendants and third parties, could affect the right of the owner, not a party, under the facts of this case; and there can be no more efficacy in such judgment of

our supreme court than any other court of competent jurisdiction. The judgment could have no more effect than deeds between third parties, passing the same rights. The judgment of the court below is affirmed.

LLANO IMPROVEMENT & FURNACE CO. v. WATKINS.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

WRITS—RETURN—INTEREST ON JUDGMENT.

1. Under Rev. St. art. 1225, requiring the officer's return of a citation to state when the citation was served, and the manner of service, conforming to the command of the writ, a return, "Came to hand the 24th day of September, A. D. 1891, at 12 o'clock A. M., and executed the 24th day of —, A. D. 189—," was fatally defective, and could not support a judgment, though defendant, after judgment, excepted, and gave notice of appeal.

2. Under Rev. St. art. 2980, providing that on contracts bearing interest at more than 8 per cent. the judgment shall bear the same rate from its date, a judgment on a note calling for 12 per cent. interest and 10 per cent. attorney's fees is properly entered for the sum of principal, interest, and attorney's fees, the whole to bear 12 per cent. interest from date.

Appeal from Llano county court; W. H. Maxwell, Judge.

Action by G. M. Watkins against the Llano Improvement & Furnace Company on a promissory note. Judgment for plaintiff. Defendant appeals. Reversed.

Miller & Lauderdale, for appellant. Slater & McLean, for appellee.

COLLARD, J. This appeal is from a judgment by default against appellant upon service as shown by the return of the officer: "Came to hand the 24th day of September, A. D. 1891, at 12 o'clock A. M., and executed the 24th day of —, A. D. 189—, by delivering to S. Duncan, secretary of the Llano Improvement and Furnace Company, the within-named defendant, in person, a true copy of this writ." The date of service is impossible. The return is fatally defective, and cannot support the judgment. Rev. St. art. 1225. There was no appearance by defendant. Defendant excepted to the judgment, and gave notice of appeal, but this cannot be held to be appearance, or waiver of service. The court, upon such return, had no authority to render the judgment, and for this error it must be reversed.

The note sued on called for 12 per cent. interest, and 10 per cent. on principal and interest, as attorney's fees, if placed in the hands of an attorney for collection. The court gave judgment for amount due on the note, principal and interest, and 10 per cent. thereon as attorney's fees, the whole judgment to bear 12 per cent. interest from date. It was not error to allow the contract rate of interest on the whole amount of the judgment. Rev. St. art. 2980; Washington v.

Bank, 64 Tex. 4. It is ordered that the judgment of the court below be reversed, and the cause remanded.

**LLANO IMPROVEMENT & FURNACE CO.
v. EUBANKS.**

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

Appeal from Llano county court; W. H. Maxwell, Judge.

Action by C. P. Eubanks against the Llano Improvement & Furnace Company on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

Miller & Lauderdale, for appellant. Slater & McLean, for appellee.

FISHER, C. J. The note sued on, in addition to the principal, called for 12 per cent. interest from date, and 10 per cent. on the amount of principal and interest, as attorney's fees, in case the same was placed in the hands of an attorney for collection. There is no express stipulation in the note that the attorney's fees shall bear interest. The court below rendered judgment against the appellant for the principal amount of the note, and interest on that sum at the rate stated in the note, and upon this amount rendered judgment for the 10 per cent. attorney's fees, and that the gross sum of the judgment shall bear interest at 12 per cent. The validity of this judgment is attacked by the following assignment of error: "The court erred in rendering judgment for ten per cent. of the principal and interest of the note sued on, as attorney's fees, and for interest on said attorney's fees from the date of the judgment, at the rate of 12 per cent. per annum." The following authorities on the points raised hold against the appellant: *Washington v. Bank*, 64 Tex. 4; *Furnace Co. v. Watkins*, 23 S. W. Rep. 612, (decided at the present term.) The judgment of the court below is affirmed.

SLOAN et al. v. THOMPSON et al.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

APPEAL—ASSIGNMENT OF ERROR—WAIVER—JUDGMENT—ENTRY—CLERICAL ERROR—COLLATERAL ATTACK—TRESPASS TO TRY TITLE—TITLE TO MAINTAIN—ACTION AGAINST HEIRS—DEED—PROOF—CERTAINTY OF DESCRIPTION.

1. An assignment of error, though briefed, will be presumed to have been waived by counsel for failure to comply with either of court of civil appeals rules 24, 25, or 31, (20 S. W. Rep. viii.), which respectively require that the assignment specify the grounds of error relied on, and point out that part of the proceedings contained in the record in which the error is, and that there should be subjoined to each proposition in the brief a statement of such proceedings contained in the record as will be sufficient to explain and support the proposition, with a reference to the pages of the record.

2. Where the validity of a judgment is attacked because it appears to have been rendered "July 14, 1874," and the action was not begun till 1875, the minutes of the court are admissible to show a clerical mistake in the entry of the judgment for "July 14, 1876."

3. Trespass to try title or an action to remove a cloud from title may be maintained in the district courts of Texas by the holder of the equitable title to land.

4. A judgment which finds that "proper service had been made by publication on defendants" cannot be collaterally attacked because the affidavit for service by publication was insufficient.

5. A judgment cannot be collaterally attacked because founded on insufficient and incompetent testimony.

6. One of the parties to a lease and bond for title having died, the instrument was admissible in evidence on proof of deceased's handwriting, and testimony by the other party that the instrument was executed by the deceased, and that one of the witnesses was dead, and the other not to be found after diligent inquiry.

7. Where a call in a deed was for "a survey in the name of Meader," and in subsequent deeds for "a survey in the name of Meadows," the bad orthography in the name, with no other facts, could not produce uncertainty in the description of the land, the other calls being correct and proper.

8. In an action against the heirs of a deceased person by one having a claim against them relative to such property, under 2 Pasch. Dig. art. 5460, a judgment for plaintiff concludes all who claim by inheritance in the succession of the deceased, whether inheriting immediately from him or as successors of those so inheriting.

9. An assignment of error on a point on which there is no bill of exceptions in the record cannot be considered on appeal.

Appeal from district court, McLennan county; A. C. Prendergast, Judge.

Trespass to try title by J. R. Sloan and others, as heirs of David Sloan, against M. A. Thompson and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

Appellants, the heirs of David Sloan, brought this suit on the 16th day of January, 1890, in form of trespass to try title, against M. A. Thompson and Jacob Miller, appellees, to recover 320 acres of land in McLennan county, patented to David Sloan on June 21, 1871. The defendants filed pleas of not guilty, three, five, and ten years' limitation, and claim for valuable improvements. Plaintiffs Phebe E. Swaim, M. M. Smith, M. E. Wilson, and N. J. Rabon replied to the pleas of limitation, setting up their coverture. Judgment was rendered for the defendants, from which plaintiffs appealed. The trial commenced on May 17, 1890, and the cause was taken under advisement until June 17th, when the judgment was rendered.

B. D. Owen, for appellants. M. Surratt, for appellees.

COLLARD, J., (after stating the facts.) Appellants' first assignment of error is: "The court erred in overruling plaintiffs' amended or second application for a continuance." The brief of appellants cites page 5 of the transcript as containing the application, but no part of it, or the grounds upon which it is asked, are stated, nor are we advised by the brief that any exception was taken to the action of the court. On page 5 of the transcript we find a general application to continue, which is the only one in the rec-

ord. The assignment of error cannot be applied to this application. The grounds of the application not being set out, we cannot see that any specific error is pointed out in the assignment. Rule 24 for the supreme court and courts of civil appeals requires that the assignment specify the grounds of error relied upon, and that a ground of error not distinctly specified shall be considered as waived. Rule 25 requires that, to be distinct, the assignment must point out that part of the proceedings contained in the record in which the error complained of is in a particular manner so as to identify it. These rules are not complied with in the assignment. Rule 31 requires that to each one of the propositions in the brief there shall be subjoined a brief statement in substance of such proceedings, or part thereof contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. This rule has not been complied with. The object of this rule is to present to the court a complete statement of the matters and questions involved in the assignment, so that the court will not be compelled to search the record and extract from it such parts as will make the assignment intelligible and applicable. The assignment of error must be considered as waived. We call attention to these rules, because they should be enforced. The case before us is not exceptional. It is not uncommon practice in preparing briefs to overlook especially rule 31, above referred to, the neglect of which demands upon the part of the court unnecessary consumption of time in the examination of the record, and collating therefrom the materials for a proper understanding and decision of the questions raised. It will be presumed that learned counsel intended to waive a point briefed, in disregard of a rule so important.

Appellants' next assignment of error is that "the court erred in striking out plaintiffs' amended original petition and bill of review, after they had taken leave to amend, and had filed same under leave of the court, and stated that the proper affidavits thereto would be and were supplied during the trial of the cause." The judgment of the court does not show any action of the court upon the bill of review, nor is there any order to that effect in the record, or order showing leave to plaintiffs to amend their petition. We are not cited to any part of the proceedings which shows that the court's attention was called to the bill of review. In so far as we are informed by appellants' brief, there is no merit in the assignment of error. Besides, the assignment points out no specific error.

Appellants assign as error the court's ruling in admitting in evidence, over their objections, "the judgment in the cause of Andrew Prather v. Heirs of David Sloan, in the district court of McLennan county, because

said judgment is null and void, for it affirmatively appears on its face to have been rendered on June 14, 1874, and the plaintiffs' original petition in said cause was not filed till March 29, 1875, as shown by the petition and file mark on same." Plaintiffs proved themselves to be the heirs of David Sloan, deceased, to whom patent issued for the land in suit on June 21, 1871. Defendants claimed under the judgment mentioned in the assignment of error, by conveyances from Prather and his assignees to themselves. The minutes of the court show the judgment, number, and style, the cause No. 2,721, Andrew Prather v. Heirs of David Sloan, date of judgment June 14, 1874, and proceeds: "This cause coming on to be heard, when came the party plaintiff by his attorney, and, representing to the court that proper service had been made by publication on the defendants, and the papers and record also showing said facts to the court, and the plaintiff demanding trial, and it appearing that the defendants by allegation were alleged to be unknown, and no counsel appearing for them, it is ordered by the court that Felix H. Robertson, Esq., an attorney at law of this bar, be, and is hereby, appointed as counsel to represent the interest of said unknown heirs of David Sloan, deceased, in this litigation. And the counsel, having here announced as ready for trial, submit the pleadings and the evidence offered by the plaintiff to the court, a statement of said evidence being written out, filed, and made part of the record in this cause; and it appearing to the court, after due consideration, that the demands of the plaintiff were sufficiently established and proven, it is therefore considered, adjudged, and decreed by the court," etc., the judgment proceeding to quiet the title of Andrew Prather to the 320 acres of land in controversy as to the heirs of David Sloan, divesting title out of them and vesting the same in plaintiff. The statement of facts does not show the date of the filing of the petition in the foregoing cause, but a bill of exceptions allowed by the court shows that it was filed on March 29, 1875. The affidavit for citation by publication was made on March 29, 1875, and sworn to before D. R. Gurley, the clerk of the court. On the back of the affidavit is a file mark, dated December 10, 1876. The substituted copy of citation by publication purports to have been issued on the 27th day of August, 1875, and returned on the 20th day of January, 1876. Immediately preceding the judgment offered by defendant, in the minutes of the court, is the following entry, read by defendants in connection with the judgment: "Tuesday morning, June 14th, 1876. Court met pursuant to adjournment. Present, the same officers of the court as on the preceding day." It clearly appears from the foregoing that the judgment was rendered on June 14, 1876, upon the petition, affidavit, and proceedings anterior to the judgment, and that the date 1874, instead of 1876, was

a clerical error, fully explained and corrected by the record. The assignment of error is not well taken. It was not error to admit in evidence the minutes of the court showing the entry above, preceding the judgment. The minutes were admissible to show the clerical mistake of date of the judgment.

Appellants say that the court erred in not sustaining their objection to the introduction in evidence of the judgment in cause No. 2,721, "for the reason that it is null and void, because it affirmatively appears in the pleadings of the plaintiff therein and elsewhere in the records of the cause No. 2,721 that the legal title to the land in controversy was in the defendants therein, the heirs of David Sloan, for which reason the plaintiff in said cause was not entitled to maintain a bill to remove a cloud upon his title, and to have the legal title of the said heirs canceled." Plaintiffs offered the original petition of Prather in cause No. 2,721, "which showed," as stated in statement of facts, "that the legal title to the land was in David Sloan or his heirs when said suit was instituted, the plaintiff therein alleging that the said land was patented to said David Sloan, and asked judgment divesting all title out of said heirs, and vesting the same in himself, (the said Andrew Prather,) and removing all clouds upon his title to said land." The amended petition in cause No. 2,721 alleged that David Sloan died leaving heirs, successors, and legal representatives, to whom descended whatever estate in the property in controversy he (Sloan) had or acquired in the land by virtue of the patent issued to him. In this state, under our blended system of law and equity, one holding an equitable title to land may maintain an action of trespass to try title or to remove clouds from title. We are not embarrassed with the rules of courts of equity as to equitable titles, but our courts have jurisdiction to entertain proceedings involving both law and equity, and to grant relief according to the nature of the case. The real title to land, whether it be legal or equitable, can be asserted in our district courts, and such relief granted as the parties are entitled to. *Thomson v. Locke*, 66 Tex. 383, 1 S. W. Rep. 112; *Hardy v. Beaty*, 84 Tex. 569, 19 S. W. Rep. 778.

In this connection we may say, in answer to other assignments of error, that the suit of Prather v. Heirs of Sloan was not an action in personam; it was an action for land, involving the title to the land in controversy in this suit. It was an action for the land, and to remove clouds; but had it been only to remove clouds, it would still be an action involving title to land, cognizable in our courts, and a proceeding in rem. Our courts have the power to settle titles to land within our state, and obtain jurisdiction for such purpose by suit for the land or involving title to the land, obtaining service upon the parties interested by publication as

provided by our statutes. The law was so declared, if it had not been before, by the case of *Hardy v. Beaty*, supra. A state is allowed to settle titles to lands within its territory, even against nonresident defendants or unknown heirs, and the state has the right to prescribe the procedure and methods by which such results are accomplished.

It is next insisted that the court below erred in not excluding the judgment in cause No. 2,721, because it is null and void, "for the reason that the record in the cause shows affirmatively that plaintiff therein knew David Sloan personally prior to his death, and either knew the heirs of David Sloan personally, or could have easily ascertained their names and places of residence by inquiry, so as to have had them personally served with process; and, the said Prather having such knowledge, judgment in his favor and against said heirs, based upon service by publication upon them, is null and void." Andrew Prather testified in cause No. 2,721, "I knew him [David Sloan] personally in Navarro county, I think." The proceedings in the cause show that Sloan died leaving heirs. If it should be admitted that the judgment could be attacked in a collateral proceeding for the cause alleged, it does not appear that the cause existed. The record in the case of Prather v. Sloan does not show the fact stated.

Appellants insist that the affidavit for service by publication in that cause was not sufficient, and therefore the judgment was a nullity. The affidavit is as follows: "No. 2,721. Andrew Prather v. Heirs of David Sloan. This day personally appeared before me J. Rice, agent of the plaintiff in the above-entitled cause, who, being duly sworn, says that the names and residences of the heirs, successors, or legal representatives of David Sloan, parties to said suit, are unknown to affiant J. Rice. Sworn to and subscribed before me, this the 29th day of March, 29, 1875. [Seal.] D. R. Gurley, Clk. D. O. McL. Co." The affidavit is "in terms of the statute. Pasch. Dig. art. 5460; Rev. St. art. 1236. It was not necessary, as appellants suppose, that the affidavit should disclose what or that any diligence was used to ascertain the names and residences of the heirs. If it should be held that the affidavit was insufficient, the judgment could not be attacked collaterally for that reason. *Hardy v. Beaty*, supra; *Treadway v. Eastburn*, 57 Tex. 209; *Russell v. Farquhar*, 55 Tex. 361. The judgment affirmatively finds that "proper service had been made by publication on the defendants." This is conclusive of all questions as to service, as to publication of citation for the proper length of time, return, and every other essential to make and complete service by publication. Assignments of error directed to the return of citation and other matters as to service are, therefore, not well taken.

Appellants contend that the judgment should not have been admitted and considered by the court, because it was founded upon insufficient and incompetent testimony,—the uncorroborated testimony of Andrew Prather that David Sloan had transferred his certificate for 320 acres of land to James Lockridge, and that Lockridge had transferred the same to him, (Prather.) The facts upon which the judgment was rendered are not in the record before us, except as mentioned in a bill of exceptions allowed appellants. Without deciding that the evidence was or was not sufficient to authorize the judgment, it must be held that the judgment cannot be questioned for such reason in this proceeding.

Error is assigned to the admission in evidence by the court of a lease and bond for title from Andrew Prather to G. W. Brumfield upon the ground that "the execution thereof as to the said Prather was not duly proven." Defendant Jacob Miller deraigned title to 80 acres of the land in dispute from Andrew Prather, one of his conveyances being the bond for title mentioned in the assignment of error. This title bond was not executed by Prather, but by his agent, J. Rice, who, by written power of attorney from Prather, had full power to sell or make bond for title to the land in controversy. The lease and bond for title were in one instrument,—a joint contract signed by Rice as agent for Prather, and by Brumfield,—and was attested by W. O. Wilson and R. Callaway. Brumfield testified to the execution of the instrument by Rice; that Callaway was dead; and that he had made diligent inquiry for Wilson, and that he could not hear of him after December, 1881; that at that time he (Brumfield) went to Navarro county, where Wilson lived, and got him to prove up the instrument, but, the certificate of proof being illegal, he went there again shortly after, and could not hear of his whereabouts, though he made diligent inquiry. It was shown that Rice was dead. John A. Harrison testified that he was a brother-in-law to Rice; knew his handwriting and signature; and that the contract, the signatures of Rice and of Prather, were in Rice's handwriting. The proof made satisfies the demands of the law, and accounts for the absence of the subscribing witnesses; and it was not error to admit the instrument. 1 Greenl. Ev. 572. The decision of this question, and others in regard to title of defendants, is not important, because, if we are correct in holding that the judgment in cause No. 2,721 was conclusive, and passed the title to Prather, plaintiffs could not recover in this suit, the title having been divested out of them by that decree.

But we will briefly notice other assignments properly presented. Appellants contend that the court erred in admitting the deed from M. Surratt to W. B. Thompson, the execution thereof not being proven. The

deed conveyed 80 acres of the land in suit. Rice, as agent of Prather, had conveyed the land to Surratt. Defendant M. A. Thompson is the surviving wife of W. B. Thompson. The deed was admitted as a recorded instrument. It was objected to because the certificate of acknowledgment does not show that the grantor was known to the notary taking the acknowledgment. The deed was executed on August 3, 1876, and filed and recorded April 6, 1877. The time of the acknowledgment does not appear, but it must have been between the date of the deed and its record. At that time the statute did not require the certificate of the officer taking an acknowledgment to a deed to show that the grantor was known to him. *Watkins v. Hall*, 57 Tex. 1.

The next assignment of error is that "the court erred in admitting in evidence the three deeds,—one from Andrew Prather to Rice, dated March 1, 1877; and one from G. W. Brumfield to W. B. Thompson, dated October 27, 1886; and one from W. B. and Kate Thompson to Jacob Miller, dated September 21, 1889." The assignment is too general, but could not be sustained if more specific. The statement by appellants upon the point is that "each of these deeds was objected to on account of the uncertainty and insufficiency of the description of the land, it being described as follows: 'Beginning at the original beginning, corner of said David Sloan survey, 188 varas S., 30 E., from the N. E. corner of a 320-acre survey in the name of — Meader, [this name is spelled Meader in first deed mentioned, and Meadows in second and third deeds mentioned,] a stake, whence two post oaks bear N., 8½ varas; thence,' etc., with proper calls back to the beginning." We cannot understand how the call for the Meader or the Meadows survey, or the bad orthography in the name, with no other facts, could produce uncertainty in the description of the land, the other calls being correct and proper. The beginning corner of the Sloan will fix the beginning corner of the survey conveyed.

The next assignment of error is that "the court erred in rendering judgment against plaintiffs for the interest in said 320 acres of land that they inherited from their deceased brothers and sisters, who died between the date of the death of David Sloan and the institution of the suit against them by the said Andrew Prather." "David Sloan died about 1855. Andrew Prather instituted suit against David Sloan's heirs in 1875. Between 1855 and 1875, several, to wit, Alexander, Archey, and John, of the children of David Sloan, died, and their brothers and sisters inherited from them their interests in said land." We are cited to no authority upon this assignment. Our opinion is that all persons claiming by inheritance in the succession of David Sloan were concluded by the judgment, whether inheriting immediately from him or as successors of those so in-

beriting. This seems to be the object of the statute. It authorizes the action against the heirs of the deceased person, their heirs or legal representatives, as the heirs of their ancestor, describing them by his name. 2 Pasch. Dig. art. 5460.

The next assignment of error is too general. It merely says: "The court erred in overruling plaintiffs' motion and amended motion for a new trial."

The last assignment of error is that "the court erred in not filing among the papers his conclusions of law and fact, as requested in plaintiffs' motion, and to which motion the attention of the court was called in open court." We are referred by appellants' brief to page 13 of the transcript for the facts stated in the assignment. On that page we find only a motion requesting the filing of conclusions of law and fact. It does not appear that the motion was insisted on, or was called to the attention of the court, nor is there any bill of exceptions upon the point in the record. In such case we cannot say that there was error. Without a bill of exceptions, we cannot consider the assignment. *Hess v. Dean*, 66 Tex. 663, 2 S. W. Rep. 727; *Cotulla v. Goggan*, 77 Tex. 32, 13 S. W. Rep. 742. Plaintiffs' title failed by the recovery in the cause of Prather against the heirs of David Sloan, and, having no title, there was no error in the judgment of the court below in favor of the defendants, who derelined title to all the land sued for from Prather. The judgment of the lower court is affirmed.

LUCKEY v. WARREN et al.

(Court of Civil Appeals of Texas. Oct. 23, 1893.)

APPEAL—REQUISITES—NOTICE.

The court of civil appeals has no jurisdiction to try a case where the transcript fails to show that notice of appeal was given in the court below, as required by Rev. St. art. 1387.

Appeal from Travis county court; William Von Rosenberg, Judge.

Action between J. F. Luckey and J. K. Warren and others. Judgment for Warren and others. Luckey appeals. Appeal dismissed.

Walton, Hill & Walton and L. A. Hill, for appellant. Geo. F. Pendexter, for appellees.

KEY, J. In this case the transcript fails to show that notice of appeal was given in the court below, as required by article 1387 of the Revised Statutes. For this reason, this court has no jurisdiction to try the case. *Lyell v. Guadalupe Co.*, 28 Tex. 58; *McLane v. Russell*, 29 Tex. 129; *Bonner v. Ferrell*, 22 S. W. Rep. 418, (decided by this court at its last term.) It follows that the appeal must be dismissed.

BROWN et al. v. SHANNON et al.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

Appeal from Bell county court; John M. Furman, Judge.

Action between J. P. Shannon & Co. and J. D. Brown and others. From a judgment for J. P. Shannon & Co., Brown and others appeal. Affirmed.

A. M. Monteith, for appellants. Alexander & Campbell, for appellees.

FISHER, C. J. We find no reversible error in the record, and the judgment of the court below is affirmed.

ALDERSON v. GULF, C. & S. F. RY. CO.¹

(Court of Civil Appeals of Texas. Oct. 23, 1893.)

RAILROAD COMPANIES—DETENTION OF FREIGHT AND BILL OF LADING—DAMAGES.

1. An exception is properly sustained to that part of a petition which seeks to recover of a railroad company the statutory penalty for failure to deliver freight at the place of destination, the penalty being fixed by the amount of charges due as shown by the bill of lading, and the petition alleging, and the bill of lading showing, that there were no charges due.

2. Exception was also properly sustained to the claim of the petition for damages based on the allegation that, by reason of defendant's failure to deliver lumber, plaintiff was unable to build a house for which she would have received certain rent, this being too remote.

3. A petition alleging that defendant's agent wrongfully, willfully, and wantonly took possession of and withheld a bill of lading on which lumber was shipped to plaintiff, and that the agent's acts were authorized and ratified by defendant, states a tort for which actual and exemplary damages may be recovered.

Appeal from district court, McLennan county; A. C. Prendergast, Special Judge.

Action by Emma Alderson against the Gulf, Colorado & Santa Fe Railway Company for failure to deliver freight and for detention of a bill of lading. Judgment for plaintiff. Defendant appeals. Affirmed.

J. W. Terry and C. K. Lee, for appellant. S. L. Samuels and Williams & Evans, for appellee.

KEY, J. The trial court did not err in sustaining the exception to that portion of the plaintiff's petition wherein she sought to recover the statutory penalty for failure to deliver the lumber to the plaintiff's agent at Crawford, Tex., the place of destination. The amount of such penalty is to be determined by the amount of freight charges due, as shown by the bill of lading. In this case the bill of lading did not show that any freight charges were due, and the plaintiff stated in her petition that all freight charges had been prepaid. *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. Rep. 1014.

Nor did the court err in sustaining the ex-

¹ Rehearing pending.

ception to plaintiff's claim for damages based upon the allegation that, because of defendant's failure to deliver the lumber, she was unable to build a house for which she would have received \$25 per month rent. This was too remote.

It is contended, in behalf of the railway company, that its exceptions to that portion of the plaintiff's petition claiming \$100 actual, and \$500 exemplary, damages for the willful and wrongful act of defendant's agent in taking possession of and withholding the bill of lading upon which the lumber was shipped, should have been sustained. Of course, as contended by counsel for the railway company, if these exceptions were well taken, the district court was without jurisdiction, because eliminating these items and those stricken out by the court would leave the amount involved less than \$500. We think, however, that the court's ruling on the pleading in question was correct. The petition charged that the acts of the defendant's agent complained of were wrongful, willful, and wanton, and that they were authorized and ratified by the defendant. If the averments of the petition were true, they constituted an actionable tort, for which both actual and exemplary damages might be recovered. *Craddock v. Goodwin*, 54 Tex. 578; *Sedg. Dam.* §§ 363, 366; 1 *White & W. Civil Cas. Ct. App.* §§ 415, 763; 2 *White & W. Civil Cas. Ct. App.* § 453; and 3 *White & W. Civil Cas. Ct. App.* § 154. The bill of lading in question was property, and, although it did not show on its face that it secured any right to the plaintiff, it was transferred in due form to A. J. Robertson, her agent acting for her, and it was evidence, at least against the Southern Pacific Railway Company, of valuable rights to the plaintiff; and the taking and withholding of it from her for six months without her consent was an invasion of a legal right, for which she could maintain an action for damages.

The court rendered judgment for the plaintiff for \$213.37, the value of the lumber and interest. The evidence sustains the judgment. After considering all assignments of error, we conclude that no grounds for reversal are shown. The judgment of the court below is affirmed.

GULF, O. & S. F. RY. CO. v. BROWN.
(Court of Civil Appeals of Texas. Oct. 25, 1893.)

ACCIDENT AT STATIONS — JUMPING FROM MOVING TRAIN — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS ON NEGLIGENCE — CARE OF INJURY.

1. Whether it was contributory negligence for a passenger, at the direction of a brakeman, to jump off a train at a station, in the dark, while the train was moving, is a question for the jury, the speed of train not being such as to make apparent the danger of jumping from it.

2. The duty of a carrier to a passenger be-

ing to exercise the highest degree of care, it could not complain of the failure of the court to define "negligence," as relating to its duty.

3. The fact that plaintiff used, and applied to his hurts, a patent medicine, is not evidence of a want of care in treating his injury, there being no evidence as to the curative qualities of the medicine.

Error from district court, McLennan county; L. W. Goodrich, Judge.

Action by J. W. Brown against the Gulf, Colorado & Santa Fe Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

The other facts fully appear in the following statement by FISHER, C. J.:

Plaintiff alleged that, as a passenger, he got aboard defendant's south-bound train at Morgan, with the intention of going to McGregor, on 19th January, 1890. That both of said places were regular stations, and that he paid fare, etc. That just before the train reached McGregor the name of the station was called out, and he prepared, with diligence, to get off, but, before he could alight, the train had stopped, and again started, not having stopped as long as 30 seconds. That he asked defendant's brakeman on said train if that was the depot, or place to get off. Being answered that it was, the said brakeman then took hold of plaintiff's sleeve, and told him to get off. That, at the time plaintiff was so told to jump off, the train was moving, apparently, slowly. That there were no lights at said depot. That when plaintiff jumped from said train, which was immediately upon his being advised and directed so to do by said brakeman, it appeared to him that it would be safe to do so, and that but for the direction to alight by defendant's agent, and but for it appearing safe to alight, to plaintiff, he would not have done so. The defendant made no effort to stop said train, but simply directed appellee to jump off. That appellant's platform, at the time plaintiff jumped, owing to want of proper lights, appeared to be the prairie. That he struck the platform on his shoulder, breaking his shoulder and collar-bone, by reason of which he suffered damage in amount, to loss of time, \$50; expenses in medical treatment, \$5; physical injury and mental suffering, \$10,000. Defendant, besides a general denial, pleaded contributory negligence; that the negligence imputed to defendant was not the proximate cause of the injury; and that plaintiff had not secured proper treatment, or taken proper care of himself, thereby aggravating his injuries. A jury trial resulted in a verdict for plaintiff, in amount, \$3,362, for which judgment was rendered.

Alexander & Clark and J. W. Terry, for plaintiff in error. Clark, Dyer & Ballinger, for defendant in error.

FISHER, C. J., (after stating the facts.) We find that the appellee was a passenger on board the appellant's train when injured, as alleged, and that he was injured without

fault or negligence upon his part, in the manner and form as stated in his petition, by reason of the negligent conduct of the appellant, as stated in the petition, and that the appellant was guilty of negligence in its conduct towards appellee, as alleged, and that the verdict of the jury is supported by the evidence, and that there is no evidence in the record showing that the appellee, after he received said injuries, did not use proper care and caution in the cure of himself.

There is no merit in appellant's third and fourth assignments of error, and the evidence of the witness Albright, objected to, is harmless. The court excluded that part of his evidence in which he undertook to give his opinion as to the duties of the conductor. He did not testify that the conductor was present, and stated that he did not know whether the conductor was there or not.

Our findings of fact dispose of the eleventh assignment of error. The question of contributory negligence, under the circumstances, was a question for the jury. The train was not going at such a rate of speed that would render the danger of leaping from it obvious and apparent. It was a question of fact, for the jury, and the evidence supports their verdict in this respect.

We do not think there is any merit in the contention that the charge of the court is erroneous because it fails to define "negligence," nor is it subject to the objection that it does not inform the jury under what circumstances they may find for the appellant, or for the appellee. The charge did not specifically define "negligence," as relates to the duty of the appellant, but instructed the jury that they could only find for the plaintiff "if they found from the evidence that said injuries were caused wholly by the negligence of the defendant, as alleged by plaintiff." The petition, in terms, alleged the acts constituting the negligent conduct of the appellant, and alleged that such acts were negligence upon the part of the appellant. But it seems to us, if it is the duty of the trial court, in cases of this character, to define "negligence," in its charge to the jury, that the failure to do so in this case was harmless error, of which the appellant cannot complain. The charge defined the extent of care imposed upon the appellee, and gave to the jury, in effect, a definition of "contributory negligence." The duty to be observed by the appellant in its conduct to its passengers is the highest degree of care; and, if the charge had defined the negligence of the carrier that would make it liable, it would have imposed upon it the high degree of care exacted by the law. The failure to define the degree of care, when the highest is imposed by law upon the carrier, could not well be a matter of complaint by the appellant, but might be reversible error if the verdict had gone against the plaintiff, and he had complained of the charge for that reason. But the facts in this case clearly show

that the appellant was wanting in ordinary care, in its conduct towards the appellee, and was guilty of negligence in the manner stated; and, under the circumstances, we do not see how the failure of the court to instruct the jury as to higher degree of care upon the part of appellant—which he should have instructed them, if he had charged upon this subject—could be reversible error.

The sixth and seventh assignments of error are too general to be considered. The ninth assignment of error is not well taken, because there are no facts in the record that would warrant the court in submitting the issue stated in appellant's special charge, requested and refused. There is no evidence showing that the appellant did not exercise reasonable care and caution in the cure of himself. The fact that he used, and applied to his hurts, a patent medicine, is not evidence of the want of care in treating his injuries. A patent medicine may or may not be a curative agent. There ought to be some evidence upon this point before an issue of fact is raised. The judgment of the court below is affirmed.

YOAKUM et al. v. RICHARDS.¹

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

Appeal from McLennan county court; E. Y. Serrall, Judge.

Action between S. L. Richards and B. F. Yoakum and J. S. McNamara. From a judgment for Richards, Yoakum and McNamara appeal. Affirmed.

John T. Duncan, for appellants. W. H. Pray, for appellee.

FISHER, C. J. We find no reversible error in the record, and the judgment of the court below is affirmed.

FREELAND v. GULF, C. & S. F. RY. CO.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

Appeal from district court, McLennan county; L. W. Goodrich, Judge.

Action by J. P. Freeland against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Robertson & Davis, for appellant. J. W. Terry, for appellee.

FISHER, C. J. The court below instructed the jury as follows: "There being no evidence before you connecting the defendant with the wrongs, injuries, and trespasses alleged in plaintiff's petition, you are instructed to return a verdict for the defendant." This charge is assigned as error. The verdict of the jury was in response to the

¹ Rehearing pending.

charge. We will not go into the facts of this case, nor will we at this time express an opinion as to the evidence. But we think, from all of the facts disclosed by the evidence, that it was a question for the jury to determine whether or not the appellee was connected with the trespasses and wrongs alleged in the appellant's petition. The court should have left this issue to the determination of the jury. The judgment of the court below is reversed, and the cause remanded.

DRAKE et al. v. STATE.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

LIQUOR LAWS—REPEAL—ALLOWING MINORS ON PREMISES.

The liquor law of 1893, expressly repealing all parts of acts inconsistent therewith by making it a breach of a retail liquor dealer's bond to permit a minor to enter and remain on the premises, only where the liquors are kept for sale "to be drunk on the premises," repeals the provision of the liquor law of 1887, making it a breach of the bond to allow a minor on the premises, though liquors are kept for sale merely to be carried away and used.

On rehearing. Reversed. For former report, see 23 S. W. Rep. 308.

JAMES, C. J. This appeal, decided at this term in favor of appeal, is now before us on a motion for rehearing. One of the grounds is that the evidence was not sufficient to authorize the verdict. This matter was fully disposed of in the judgment heretofore rendered, and we see no reason to change our ruling on that point.

The other ground assigned—one not heretofore presented—raises the question of whether or not the act of 1893 repealed the act of 1887 in such manner as to condone the offense upon which the judgment was obtained. Certain propositions made by appellants require no discussion, as they are well-settled principles of law, viz.: That if the law of 1893, either expressly or by necessary implication, repealed the former act, no prosecution could be maintained under the former act, and all prosecutions pending, or judgments rendered thereunder and not final, when the latter act became a law, would be ipso facto dissolved. If such is the effect of the later statute on the former statute, or on that portion of it whereon the judgment in this cause was had, it follows that the judgment ought not to be affirmed, but the proceeding should be dismissed. The act of 1887 concerning the regulation of the sale of liquors was amendatory of certain sections of two acts on the same subject passed at the session of 1881, and appears to have left in force other sections of said acts, and it contained no repealing clause. The act of 1893 was evidently designed to be a compilation and re-enactment of the sever-

al laws appertaining to this subject, reducing them to one act and one system, making certain new provisions, amending certain provisions of the former laws, and, it may be, carrying into it others as they formerly were. This act does not leave to implication what effect it shall have upon the prior laws; it declares the effect to be a repeal of all laws and parts of laws in conflict with it. The matters of difference between the act of 1887 and that of 1893, as pointed out by appellants in their argument, are as follows: In the first place, under the law of 1887, every liquor dealer, including dealers in malt liquors, exclusively, must give bond in the sum of \$5,000, while under the law of 1893 dealers in malt liquors give bond in the sum of \$1,000 only. Under the old law a retail liquor dealer could sell only in quantities less than a quart, while under the present law he may sell one gallon or less. Act 1893, § 1. Nor are the conditions the same. Under the old law the sureties became liable for a principal selling, etc., in "quantities less than a quart," whereas under the present law they are responsible for his selling "in any quantity." Besides this, under the present law the sureties are made expressly responsible for his "agent or employe." Under the old law the principal and sureties covenanted that they would not rent or let, etc., any part of the house, etc., in which they have undertaken to sell liquor, etc., in quantities "less than a quart," while the new law again says "in any quantity." The definition of an open house in the new law is again different from that given in the old law, the new law using the terms "where liquors are sold to be drunk on the premises," while the old statute uses the language, "where intoxicating liquors are sold in quantities less than a quart." After comparing and considering fully the statutes in question, we have come to the conclusion, on one ground only, that section 9 of the act of 1893 has a repealing effect on section 4 of the act of 1887, this being the particular section upon which this suit was instituted. The bond provided to be given by the act of 1887 and all of its conditions related to the business of selling the specified kinds of liquors generally, regardless of whether or not the liquors were sold to be drunk upon the premises. That act constituted a breach of the bond the act of permitting a minor to enter and remain upon the premises; such premises being a place where such liquors were for sale, without any distinction based upon how or where the liquors were to be used. It would have been a breach of that bond if a minor was permitted by the dealer to enter and remain upon the premises if the dealer kept no saloon or place where the liquor could be drunk, but instead kept the liquors designated, in the quantities designated, for sale, to be carried off and used. This is entirely changed by the section in the act of 1893

prescribing the bond. Under it the dealer would not be liable for a breach of the bond by permitting a minor to enter and remain upon his premises, unless the further fact were shown that he there kept for sale the liquors designated for sale, "to be drunk on the premises." It is apparent to our minds that this material difference renders the acts, to that extent, at least, inconsistent and in conflict with each other. Had the provisions of the earlier act in regard to the bond been repeated in the new act, there would have been no conflict between the acts on this subject, and consequently no repeal. Under the authorities, the later act would to that extent have been a continuation of the first one, and would have had only a prospective effect. The repealing clause of the act of 1893, however, obliterates all portions of the previous laws in conflict with its various provisions, and as we see a material change in respect to the provisions of the bond, affecting the act involved in this prosecution, we must, on account of the conflict thus presented, hold that the statutory authority for the existence and continuance of this proceeding has been abrogated. It may be that the legislature did not have in contemplation the remission of penalties incurred under the previous act; but, as stated before, they have declared the effect which the last act has upon those then in existence, and we can inquire no further as to their intention, and the legal effect of a repeal is as before stated. *Rogers v. Watrous*, 8 Tex. 62; *State v. International & G. N. Ry. Co.*, 57 Tex. 534; *Railway Co. v. Kay*, 85 Tex. 558, 22 S. W. Rep. 665; *Suth. St. Const.* §§ 147, 162, 163. We conclude that the judgment of affirmance passed at this term should be set aside, and the cause dismissed.

INTERNATIONAL BLDG. & LOAN ASS'N v. BIERING.¹

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

BUILDING AND LOAN ASSOCIATIONS—USURY

1. Where a member of a building and loan association, holding seven shares of stock, on which he pays \$1 per month, on each share, borrows \$700 from the association, and gives his note for \$1,400, payable at maturity of the stock, with interest at 6 per cent. per annum, and providing for the payment of a "further sum of \$14 per month," with nothing to show for what the latter sum is payable, the contract is usurious, the legal rate of interest being 12 per cent.

2. Without considering the payment of \$14 per month, the note is usurious for the further reason that, although the interest provided for amounts to the highest legal rate on the \$700 actually borrowed, the note is made for \$1,400.

3. A member of a building and loan association borrowed \$700, and gave his note to the association for \$1,280, the \$560 being a bonus. The note provided for the monthly payment of \$3.50 on his stock, and \$6.25 as inter-

est on the note, this being less than the legal rate of 12 per cent. on the \$700, and was payable on the maturity of that series of stock. *Held*, that the note was not usurious, as the time of payment was uncertain, and the difference in the interest paid and the lawful rate might, at the time of maturity, exceed the \$560 bonus.

4. Though defendant in an action on a note may set up as a defense usurious interest paid, he cannot recover the excess of the amount paid over the amount necessary to wipe out the debt, without first deducting the amount of interest due at the legal rate.

5. The fact that a note is usurious because it includes a bonus does not entitle the promisor to recover the interest paid thereon where it does not amount to more than the legal rate on the amount actually received by him.

6. Where, after payment of interest on a usurious note, a supplemental contract is made, supported by a valuable consideration, releasing the payee from all claims whatsoever, it precludes the promisor from setting up such payments of interest in an action on the note.

7. A stockholder borrowed \$700 from a building and loan association, and gave a note, secured by pledge of his stock, which was usurious because it included a premium of \$700 being for \$1,400 in addition to full legal interest on the \$700. Afterwards, a new contract was made, releasing the association from all claims for usurious interest theretofore paid, and by which the obligation was reduced to \$1,280. Under a by-law any borrower had the right to repay the loan, and redeem his stock by paying the amount actually loaned and a certain percentage of the premium. *Held*, that the release was supported by a sufficient consideration, as the second contract, in reducing the premium, allowed the redemption of the stock on less onerous terms.

8. Even if the second contract were usurious, it would be affected thereby only as to interest, and would not make the release invalid.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Charles W. Biering against the International Building & Loan Association. From a judgment for plaintiff, defendant appeals. Reversed.

B. L. Aycock, for appellant. Upson & Bergstrom, for appellee.

JAMES, C. J. The appellee applied for an injunction to restrain a sale of real estate advertised under a trust deed given by appellee to secure a note to appellant for a loan of money, and a temporary injunction was granted. Plaintiff, Biering, alleged, in substance, that on March 31, 1885, he borrowed of said association \$700, and gave therefor his obligation to pay the association \$1,400, with 6 per cent. per annum, payable at the maturity of plaintiff's seven shares of stock in the association, and for the payment thereof pledged said stock and gave said deed of trust; that said obligation was usurious, and plaintiff had paid \$405.25 interest, which, deducted from the \$700 received by him, left due by him, on account of said loan, \$204.75; that plaintiff was further entitled, from the hands of the association, to the withdrawal value of his stock, which amounts to \$562.25, having, as he alleges, qualified himself to receive the same; that

¹For opinion on rehearing, see 28 S. W. Rep. 1025.

therefore plaintiff owed nothing on the debt for which the sale was being made,—and asked for judgment against defendant for the difference of \$357.50, and prayed, also, for cancellation of the stock, and for perpetual injunction against the sale by the trustees. The defendant association by its answer admitted various allegations of the petition, but denied being indebted to plaintiff, and alleged that plaintiff was owing defendant a large sum of money; and by way of cross action alleged that complainant was indebted to it in the sum of \$700 and a reasonable attorney's fee, and the said trustee's commission and expenses of advertising the property,—in all, \$900,—and set up a contract between the parties, May 20, 1887, by which the premium of \$700 represented in the note for \$1,400 was reduced to \$560, and from and after that time the interest was reduced to \$6.25 per month on the reduced note, to wit, \$1,260, instead of \$1,400; and that one-half share of stock was canceled by said new contract; and that there was no usury in the original transaction, and none in the new transaction; and that complainant continued, after the new contract, till June, 1891, to make his payments of dues, \$6.50 on stock, and \$6.25 as interest on the \$1,260, but that since then he refused to go on with the payments; and that the stock of that series had not matured; also, alleged that defendant corporation, by its directors, had fixed the value of shares of stock in the third series at \$99.50 per share on the 11th of June, A. D. 1891. Defendant prayed for judgment for its debt, principal, cash, \$700 actually received by plaintiff March 31, 1885, and unpaid accrued interest, and an attorney's fee of \$150, etc., and, if court should allow defendant a withdrawal, that he be charged one-eighth of the \$560 for the term of years as prescribed in the by-law alleged in the complaint, and that the credit for value of stock go on his note, reduced, as aforesaid, to \$1,260. On the trial, the matters of law and of fact being submitted to the court, a judgment was rendered for complainant perpetuating the writ, and also for the sum of \$448, against appellant. There is no statement of facts in the record, and the case is before us in the conclusions of fact filed by the trial judge, which are necessarily our conclusions, also, and for that reason they are here given:

Conclusions of Fact.

"(1) That in September, 1884, the plaintiff, Charles Biering, became the owner of seven shares of stock of the third series in defendant's corporation, and, under and in accordance with the defendant's by-laws, paid thereon \$1 per month per share until the 1st day of May, 1887, and thereafter paid \$1 per share per month on $6\frac{1}{2}$ shares, up to and including the month of July, 1891, aggregating the sum of \$562.25.

"(2) That on or about the 31st day of

March, 1885, plaintiff applied to the International Building & Loan Association for a loan of the sum of \$700 which the said defendant association did agree to loan, and did loan, to plaintiff. That in consideration thereof the said plaintiff executed to defendant the following note: '\$1,400.00. San Antonio, Texas, March 1st, 1885. On or before the maturity of the third series of the stock of the International Building & Loan Association, I promise to pay to the order of said International Building & Loan Association at its principal office in San Antonio, Texas, the sum of \$1,400.00, with interest at the rate of 6 per cent. per annum from the date thereof until paid; also, the further sum of \$14.00 per month from this date until the maturity of the aforesaid series of stock, as provided for in the by-laws of said association, which by-laws are made and taken to be a part hereof.' And, to secure the payment of said sum of \$1,400, plaintiff conveyed to William Holland, as trustee, the property set out and described in plaintiff's petition, and also the seven shares of stock held and owned by plaintiff in defendant corporation, conditioned that, 'if the party of the first part shall well and truly pay all that is required of him in this instrument and the by-laws of the association, the third party hereto, until the maturity of the (3rd) third series of stock aforesaid, then the debt hereby contracted will have been fully paid, and this instrument shall thereafter be null and void, so far as the real estate herein described is affected, and the payment of the debt shall be satisfied by the cancellation of the shares of stock aforesaid, as provided by the by-laws of the association;' and provided, further, that if the trustee proceeded to enforce the trust he should be entitled to a commission of 5 per cent. for making sale and all expenses of advertising, etc., and, if judicial proceedings were resorted to in the collection of said amount, the borrower bound himself to pay all reasonable attorney's fees.

"(3) That thereafter the said plaintiff paid interest on said sum of money in accordance with said contract at the rate of \$7 per month, up to and including the month of May, 1887, amounting to the sum of \$189, and thereafter paid interest on said loan at the rate of \$6.25 per month up to and including the month of July, 1891, making the further sum of \$306.25, or a total payment, on account of interest on said loan, of \$495.25. That on the 26th day of May, 1887, the following supplemental contract was entered into between the plaintiff and defendant:

"State of Texas, county of Bexar. Whereas, heretofore, I borrowed from the International Building & Loan Association a sum of money, and executed an instrument in writing therefor, giving a lien on real property to secure the payment of said money, all of which will more fully appear by reference to said instrument, which is of record in said Bexar county, and the obligations

therein appearing burdensome to me, and I having applied to the directory of said association for relief, and the same being granted, this instrument witnesseth that in consideration of the said association canceling and forgiving a portion of said debt, and lowering the interest and premium that I then agreed to pay and have heretofore paid, and the said association granting to me a less rate of dues and interest to be by me heretofore paid monthly, this is therefore a reaffirmance of said recorded instrument, and of the debt therein cited, together with all the stipulations in it contained, except as to the amount of said debt, which is hereafter to be twelve hundred and fifty dollars instead of the amount in said instrument mentioned, and that monthly payments for dues and interest are to be reduced, and are hereafter to be twelve and seventy-five hundredths dollars per month. And I hereby relinquish to said association one-half shares of stock by me now owned, and the same are by my authority canceled and made void; and this is to be a complete accord and satisfaction between myself and said association of any and all claims whatsoever, not hereinbefore specially provided for. In witness whereof, I hereto sign my name on this 26th day of May, 1887. Charles W. Biering. Witness: William Schultz. M. Lindner.'

'That at the time plaintiff acquired the said shares of stock, and at the time he made said loan and entered into said contract, defendant's by-laws provided as follows:

"Article 2. It is hereby declared that the purpose of the formation of this corporation is to purchase and sell real estate in the city of San Antonio, and in Bexar county, Texas, and to improve the same; to lend money on real-estate security in said city and county on the stock of the members of this corporation; and principally to aid and assist its members in acquiring, improving, and holding real estate in said city and county; and particularly to aid and assist its members in acquiring homesteads for themselves and their families; also, to borrow money of other persons not members of this association.'

"Article 5. The shares of stock in this corporation may be issued in one or more successive series, in such amounts as the board of directors may determine or the by-laws prescribe. The said stock to be paid in in monthly installments of \$1.00 (one dollar) per month per share. Each and every shareholder of each and every share of stock held by him or her in this corporation shall pay into the treasury in lawful money, on or before the second Monday of each and every month, the sum of one (\$1.00) dollar until such shares of the series of stock upon which such monthly payment is made shall receive the value of two hundred dollars, (\$200.00,) when he or she, or they, shall be paid for each share of such stock the sum of two hundred

dollars, (\$200.00,) and the said stock shall thereupon revert to the corporation, and shall be canceled. Each and every share of stock held by any shareholder shall be liable for and subject to a lien for the satisfaction of any unpaid installments by such shareholder.

"Article 6. The board of directors shall hold stated meetings on the second Thursday of each and every month. At each stated meeting the money in the treasury shall be offered to loan in open meeting, at a rate of interest not to exceed eight per cent. per annum, and the stockholder who shall bid the highest premium to be fixed in the by-laws for the preference of the priority of loan shall be entitled to receive a loan, not to exceed in amount the sum of two hundred (\$200.00) dollars per share of stock held by such borrowing shareholder. The premium bid by the borrowing stockholder for the preference of loan shall be paid in cash before the loan is consummated, not as a part of the loan, not as interest, but for the priority right as against other stockholders to receive the loan.'

"(4) That at said date of said organization of defendant corporation, and since then at all times, its by-laws provided as follows, to wit:

"Article 1, sec. 2. Each share of stock shall entitle the holder to a loan of two hundred (\$200.00) dollars.

"Article 2, sec. 1. On each share of stock there shall be paid in, on or before the second Monday of each and every month, the sum of one dollar. Sec. 2. Whenever it shall appear on the books of the association that the stock of any particular series is worth two hundred (\$200) dollars per share, all arrears of monthly dues, fines, and otherwise shall become at once due, and the directors shall cause to be paid to the holder of each unpledged share in such series the sum of two hundred (\$200.00) dollars, less all arrears of fines due or otherwise, and payment of dues on the stock of that series shall cease.

"Article 3, sec. 1. Any stockholder wishing to withdraw stock not pledged to the association shall give thirty days' notice in writing, to be filed with the secretary. At the expiration of the said thirty days, the withdrawing stockholder shall be entitled to receive the amount actually paid in on such stock, together with such interest or proportion of the profits as the board of directors shall fix and determine, deducting, however, all dues and fines charged against such withdrawing stockholder; provided, however, that at no time shall more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the board of directors.

"Article 9, sec. 1. The president shall at each monthly meeting of the directors offer the money in the treasury, if over two hundred (\$200) dollars, for loan in open meeting; such loan to be disposed of to the high-

est bidder for priority right. The board of directors may, from time to time, fix a rate of premium, below which shares shall not be redeemed.' 'Sec. 4. If the interest on any loan, or the dues on the shares upon which such loan is based, remain unpaid for more than three months, the board of directors may compel payment of principal, interest, and fines, by proceeding on the securities according to law.' 'Sec. 8. Each stockholder, for each and every share of stock held by him in this association, shall be entitled to receive a loan not exceeding two hundred (\$200.00) dollars, and he shall pay interest monthly at the rate of 12 per cent. per annum for such loan, from the first day of the month in which the award of loan is made. The premium paid for the preference of loan shall be paid in cash when the loan is consummated. Sec. 9. Every share of stock upon which a loan is effected shall be transferred to the association as collateral security, and every transfer of stock shall be on the books of the association, and no transfer shall be made while the owner thereof is indebted to the association. Sec. 10. Any stockholder may have a loan upon his stock at twelve per cent. per annum interest, payable monthly; provided, that such loan shall not be allowed for a less period than six months; and provided, the dues paid in by such borrowing stockholder on the stock to be pledged are equal to, or exceed, the amount so loaned on said stock. Sec. 11. All loans made by this association, except as provided in section 10 of this article, shall be secured by lien upon real estate.' 'Sec. 13. Should any borrower desire to repay to the association the money advanced in order to redeem his shares, he shall repay to the association the money actually received, and one-eighth of the premium for which such loan was made, for each year, or fractional part thereof, such borrower has had the use of the money.'

"(5) On the 11th day of July, 1892, plaintiff delivered to defendant's secretary the following notice: 'International Building and Loan Association, San Antonio, Texas—Gentlemen: You will please take notice that your association having, without my consent, changed and amended your by-laws and entire mode of doing business, I desire to withdraw all shares of stock in your association, and now tender and offer to pay you all sums of money, if any, that may be owing to you, except usurious interest,'—and on delivering said notice tendered to the defendant the sum of \$204.75; and at that time defendant had sufficient money in its treasury so that it would have taken less the one-third thereof to pay the withdrawal value of plaintiff's shares of stock, and that the withdrawal value of plaintiff's shares of stock was, when he discontinued payment, June 11, 1891, the sum of \$99.50 per share.

"(6) I further find that the defendant Wil-

lam Holland had advertised plaintiff's property for sale to satisfy the said sum of \$1,400, which sale was enjoined by a writ of injunction sued out herein, and that the said defendant association has paid \$15 for advertising the same, and, if they had been entitled to recover herein, a reasonable attorney's fee incurred by defendants is \$150."

Conclusions of Law.

A question in the case is whether or not the contracts disclosed in the record are usurious in their nature. The plaintiff became a stockholder and member of defendant building and loan association. As holder of seven of its shares of stock of what was called the "third series" he was obligated by the by-laws to pay seven dollars per month (one dollar per month on each share) as stock dues. Borrowing \$700 from the association, he gives the latter a note for \$1,400, dated March 1, 1885, payable on or before the maturity of the third series of stock, with interest at 6 per cent. per annum from date until paid, and the further sum of \$14 per month from date until maturity of said stock, as provided by the by-laws of the association, which by-laws were made a part of the note. There is in this record no explanation concerning the promise in said obligation to pay \$14 per month in addition to the \$7 per month interest. The borrower was obligated by the by-laws to pay \$7 per month as dues on his stock, and if the \$14 was intended for these dues, and a mistake was made in the figures, it is not shown by the evidence. We regard the contract as usurious in providing, in connection with the loan, for the payment of interest and \$14 per month besides, which necessarily constituted a rate in excess of 12 per cent. It is usurious also from the fact that the interest contracted for and paid amounted to the highest conventional rate of interest then allowed by law on \$700 actually received, and the note was given for \$1,400 principal, which would be usurious under the cases of *Association v. Lane*, 81 Tex. 369, 17 S. W. Rep. 77, and *Gilder v. Hearse*, 79 Tex. 120, 14 S. W. Rep. 1031. The contract would likewise be adjudged usurious if the test prescribed by the supreme court in *Association v. Abbott*, 20 S. W. Rep. 118, is to be applied to his particular transaction, because one-eighth of the \$700 premium would be in excess of the yearly interest on \$700 at 12 per cent. The question of usury, however, is not necessary to be considered, except with reference to a small balance, as will be explained hereafter. We will first discuss the reasons why in our opinion, under the pleadings and facts of this case, it was error to render any money judgment against the defendant.

The plaintiff, Bierling, applied to the court for a writ of injunction to restrain a sale under a trust deed he had given, stating usury

as one of the grounds. It is well settled that, if the issue had remained simply whether he should or not have the writ, the court would have refused to interfere with the sale unless he performed such equitable terms as it saw fit to impose; such, for instance, as allowance of all interest that was lawful. *Goldfrank v. Young*, 64 Tex. 432; 2 Pom. Eq. Jur. § 937; *High, Inj.* §§ 76, 447, 1116. But the association, by its pleadings, changed the character of the suit from one for injunction, solely, to one of personal judgment and foreclosure of its lien, and thus by its cross bill enabled the borrower to interpose all defenses he had that went towards liquidating the debt, including that of usury; that is to say, the borrower was placed in position, on the affirmative pleadings of the association, to have the interest paid by him credited upon the debt to the extent of extinguishing it, for to that extent it would serve him as a defense. 1 Pom. Eq. Jur. § 391. But he was in no position, after thus canceling the debt, to recover of the association a judgment for usurious interest paid, without being required to pay at least the then highest lawful rate. In this cause, following the conclusions of the judge, the amount of the debt was \$700, the withdrawal value of the stock, with an additional payment thereon, was \$646.75, thus leaving a balance of \$53.25 without consulting any payments of interest that had been made. To discharge this balance of \$53.25 the borrower had the right to apply so much of usurious interest paid in as was necessary to do so; but beyond that it ceased to be a defense, and the borrower stood in the attitude of one affirmatively asking to recover back usurious interest voluntarily paid, and the law is settled in this state that he will not be permitted to do this, except for that part of the interest which exceeds the highest rate allowed, which in this case was 12 per cent. *Association v. Robinson*, 78 Tex. 163, 14 S. W. Rep. 227; *Smith v. Stevens*, 81 Tex. 461, 16 S. W. Rep. 986, and citations above. There had been no interest paid over 12 per cent., and plaintiff stood on this question the same as if there was no usury in the contract; and it would follow that any judgment for money, under these circumstances, against the association, would be erroneous. From the fact that, after crediting him with the withdrawal value of his stock, there was still a balance against plaintiff of \$53.25, he would certainly be permitted to extinguish it by the application of any usurious interest he had paid. Hence it is necessary to consider his position in this respect. A construction of the second, or supplemental, contract of May 26, 1887, is necessary to decide this question. The court found that up to and including May, 1887, the interest paid was \$189, and afterwards \$306.25. It seems to us that, if the supplemental contract was supported by any valuable consideration, the

release therein expressed, of any and all claims whatsoever, would, under the authority of *Stout v. Bank*, 89 Tex. 384, 8 S. W. Rep. 808, preclude the plaintiff from recovering back the \$189 interest that had then been paid, as all such payments were expressly on account of interest. This contract reduces the amount of the borrower's obligation from \$1,400 to \$1,260, and, as the amount borrowed remained the same, \$700, the premium or bonus, was reduced from \$700 to \$500. One of the privileges of the plaintiff under the by-laws of the association (by-law No. 13) was as follows: "Should any borrower desire to repay to the association the money advanced in order to redeem his shares, he shall repay to the association the money actually received, and one-eighth of the premium for which such loan was made for each year, or fractional year thereof, such borrower has had the use of the money." This provision was intended to permit the borrower to settle with the association in advance of the maturity of his obligation at any time, and was a privilege of which he could, or not, avail himself. The premium being lessened by the supplemental contract, he thereby obtained by it the right to settle upon less onerous conditions than he formerly had. It seems to us that this more advantageous privilege was a valuable concession or consideration, and supported the new contract. At the time of the making the second instrument, Biering had the right to recover the interest he had paid, or, more properly speaking, he had the right, in this instance, to have it credited upon his debt; but the law did not compel him to insist on it, and, if he chose to part with it in favor of the creditor for a valuable consideration, he was at liberty, in our opinion, to do so. There is no pretense that Biering signed the second contract through fraud, mistake, or ignorance of its terms. It may be urged that the premium was usury, (and in respect to the second contract we think it was not, as hereinafter explained,) and for that reason the payment of one-eighth or any part thereof would be founded upon a usurious provision of the contract. But we are of opinion that he could nevertheless have enforced this right against the association, for the question of usury is personal with the borrower, and the creditor can never invoke it. 2 Pom. Eq. Jur. § 937. For these reasons we conclude that plaintiff had no right on the trial to have the \$189 paid as interest allowed him. Even if this second contract were to be deemed usurious, it would be affected thereby only as to the interest; in all other particulars it would remain a valid contract.

But we believe the second contract was not usurious. It appears that the monthly payments therein contracted, of \$12.75, were composed of \$6.50, monthly dues on $6\frac{1}{4}$ shares of stock and the balance, \$6.25 constituted the future interest. This inter-

est, with reference to the \$700 actually received, was not at the rate of 12 per cent., but less, and it would follow that, this feature considered, the giving of the obligation for a greater sum than what was received would not necessarily constitute usury, and the rule of *Association v. Lane* has no application. Where the rate was precisely 12 per cent., any increase of principal in the obligation over the actual sum received would be a contract to pay more than 12 per cent. for the use of the money; but this does not necessarily follow when the rate is less than the highest permitted. The date of the maturity of the obligation is not fixed, and the stock might not mature for so long a time that the interest and the excess of principal would not amount to 12 per cent. Had the evidence shown a fixed date of maturity of this obligation, or afforded some means of arriving at the time the stock would probably mature, we might, by a calculation, ascertain that it provided for usury; but there is nothing in the record on this subject. The test applied by the supreme court in the case of *Association v. Abbott*, and above referred to, would make this second contract usurious, but we do not believe that this is properly applicable to these contracts. The court determined the usury by comparing the one-eighth of the premium with what 12 per cent. upon the money loaned would amount to, and when it exceeded 12 per cent. the contract was to be declared usurious. It appears to us that the by-law No. 13 gives the borrower a mere option or privilege to exercise or not, as he pleases. It brings into the contract no stipulation which the association can enforce. It permits the borrower to withdraw prior to the time allowed by the contract upon certain terms, if he sees fit to avail himself of it. He is not required to do so, and, if the contract is otherwise free from usurious features, it is not to be left with the borrower to render it usurious or not, as he may elect. In the opinion of Judge Henry in the above Case of *Abbott*, he held the contract not usurious because, by applying the test of the by-law, the amount reached was slightly less than 12 per cent.; but he evidently overlooked the interest which was directly stipulated in the contract, and paid from month to month, for the test should certainly have included this, and it would have made the contract grossly usurious. For the reasons given, we believe the supplemental or second contract in this case is not usurious, and the \$306.25 interest paid under its provisions was therefore not recoverable.

Our conclusions, therefore, are as follows: First. In no event was plaintiff entitled to a judgment for money against the association. Second. Plaintiff was not entitled to have the \$189 interest, or any part thereof, credited, because he had released it for a valuable consideration. Third. Plaintiff was not entitled to have the \$306.25 interest credited or allowed, because it was not usurious.

It follows, then, that the \$53.25 was recoverable by the association, and, by reason of the contract providing for reasonable attorney's fees if judicial proceedings were resorted to for the collection of the debt, the plaintiff was liable for such attorney's fees, which the court found to be \$150, (2 Jones, *Mortg.* § 1606;) and the expense of advertising the side that was enjoined, found by the court to be \$15, should likewise be adjudged against plaintiff. Therefore the judgment is reversed, and here rendered in favor of the association against appellee for the sum of \$218, with foreclosure of the lien on the real property, and perpetuating the injunction as to any indebtedness of appellee to the association other than what is adjudged, and canceling appellee's stock in said association.

GULF, C. & S. F. RY. CO. v. WILLIAMS.
(Court of Civil Appeals of Texas. Oct. 26, 1893.)

CARRIERS—SHIPMENT OF STOCK—CONNECTING LINES—POWERS OF AGENT.

1. A shipping contract stipulated that defendant carrier should not be liable for injury to the stock shipped, after it left its road, and that no suits should be sustainable for damages, unless brought within 40 days after the damage occurred. *Held*, that a connecting carrier, the use of whose road was necessary to complete the shipment, did not become, by such use, the agent of defendant, to such extent that it had the power to waive for defendant the 40-day rule.

2. Defendant having limited its liability to its own line, as it had a right to do, the connecting line was not the agent of defendant, even for the purpose of forwarding the shipment. *McCarn v. Railroad Co.*, 19 S. W. Rep. 547, 84 Tex. 352, followed.

3. It was error to admit in evidence plaintiff's statement that it was the duty of the agents of the connecting line in question to investigate and settle all claims, for, if such a relation existed between the roads, it should have been proven, and its legal effect left to the court and jury.

4. Plaintiff's testimony that the two roads in question "were connecting lines, and that they were acting together at the time of the shipment," was too indefinite to establish a partnership or other relation between them, such as to enable the agents of one to bind the other.

Appeal from Austin county court; S. R. Blake, Judge.

Action by H. G. Williams against the Gulf, Colorado & Santa Fe Railway Company to recover damages for the alleged breach of a stock-shipping contract. Judgment was entered in favor of plaintiff, and defendant appeals. Reversed.

J. W. Terry, for appellant. John Dowell and Chesley & Haggerty, for appellee.

WILLIAMS, J. By the contracts of shipment, for damages for breach of which these actions were commenced, appellant undertook to carry the cattle from Sealy, Tex., to Arkansas City, Kan., which was a station upon the line of the Atchison, Topeka &

Santa Fe Railroad, beyond the terminus of appellant's road. The contracts contained the usual stipulations exempting defendant from liability for loss or injury occurring to the stock after it had left its road. They also contained stipulations that no suits should be sustainable for recovery of any claim by virtue of them, unless brought within 40 days after the damage occurred. Both of these clauses were set up in the defendant's answer.

These suits were brought more than 40 days after the damage is claimed to have occurred, and the clause of the contract last quoted operates as an effectual bar, unless the plaintiff succeeded in showing that defendant or its agent had waived it. The acts of the parties by whom plaintiff claims to have been induced to delay his suits might be held sufficient for this purpose, had there been a sufficient showing of authority in them to make the waiver. It is shown that all of them, except one, were agents of the Atchison, Topeka & Santa Fe Railroad; and it is not claimed that any of them, except one, were in the employment of the defendant, or had any authority to represent it, other than such as resulted from the contract of defendant to ship the cattle to the point of destination, necessitating the use of the line of the Atchison, Topeka & Santa Fe Company as a connecting carrier, and thus, as plaintiff contends, making that company the agent of defendant to complete the contract. From this fact, it is claimed that authority resulted to the agents of the connecting carrier to waive the provision in question. If the legal effect of the contracts were what plaintiff contends for, i. e. to bind defendant absolutely, as a common carrier, to carry the cattle through to Arkansas City, we cannot see that any such legal consequence as that asserted would follow. The connecting carrier, in such case, would be regarded as the agent of the defendant for the purpose of completing the shipment, but not for any other purpose. Its authority to bind defendant would extend only to things done within the scope of such agency. The waiving of a defense would hardly fall within its purview. A liability on defendant's part might result from default in the connecting line in carrying out defendant's engagement, but, beyond that, its admissions and engagements would not affect defendant. But, however that may be, the defendant, as far as we have seen, limited its liability to its own line. This it had the right to do. We cannot distinguish the case of *McCarn v. Railroad Co.*, 84 Tex. 352, 19 S. W. Rep. 547, from this. The connecting line was not, therefore, the agent of the defendant, even for the purpose of forwarding the shipment.

The court erred in admitting in evidence the statement of the plaintiff that it was the duty of the agents of the Atchison, Topeka & Santa Fe road to investigate and

settle all claims. If it was their duty to represent defendant in such matters, such duty must have resulted from some relation between the two companies not shown by the evidence. If such a relation existed, it should have been proven, and its legal effect left to the court and jury.

One of the persons upon whose promises plaintiff relied, in not bringing his suit, appears to have been an agent of defendant. The extent of his powers as such is not proven, otherwise than by the testimony offered by defendant, which shows that he was never intrusted with, and did not exercise, authority, such as that claimed for him. Whether he had ever adjusted and paid such claims, or had waived such conditions, as those in question, is not indicated, further than this; nor are any circumstances disclosed from which an inference that his acts and statements, by which it is sought to bind the defendant, were within the scope of his apparent authority. The evidence fails to show authority to waive the stipulation in question, in those whose acts are relied on, and for this the judgment must be reversed.

The plaintiff testified that the two roads "were connecting lines, and that they were acting together at the time of shipment." This is too indefinite to establish a partnership or other relation between them, such as to enable the agents of one to bind the other. How they were acting together—whether simply as connecting lines or otherwise—is not shown.

The charge of the court and verdict of the jury made the defendant liable for injuries to the cattle which occurred anywhere on the route. Under the evidence, it was only responsible for damages sustained by the property while in its hands. The evidence showed affirmatively that part of the loss occurred after the stock left defendant's line, and while it was in the hands of the second carrier.

The contract, when offered in evidence, was found to contain the following clause: "And said party of the second part further agrees that he will load, unload, and reload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk, while it is in the stock yards of the party of the first part, and while on the cars, or at feeding and transfer points, or where it may be unloaded for any purpose." The agents of plaintiff, who accompanied one train load of cars, left them while they were in the pens at Ft. Worth for the purpose of being fed, and when they returned some of the cattle had escaped, or had been taken away. Defendant asked the court to charge, in substance, that defendant would not be liable for the animals thus lost. This part of the contract was not alleged in the pleadings of either plaintiff or defendant. Whether, in view of the fact that plaintiff's servants were to attend and

look after the stock in transit, the burden was on him to negative the conclusion that a particular loss occurred through his own negligence, and prove that it resulted from the fault of the carrier; and, if so, whether or not, when he offered the contract in evidence, the defendant could avail itself of this provision without having pleaded it,—are questions which we do not feel inclined to decide without further argument, and more time than we can bestow upon them. We will simply remark that such limitations are held valid, and that in such cases it has been held that the burden rests upon the plaintiff, who accompanies and agrees to care for his stock, to show how the loss occurred; to clear himself of negligence, and trace the damage to the fault of the carrier. We do not think it necessary to definitely decide these questions. See *Railway v. Sherwood*, (Ind. Sup.) 31 N. E. 781; 3 Amer. & Eng. Enc. Law, pp. 16b, 16g, and authorities cited. The judgment is reversed, and the cause remanded.

HOUSTON CITY ST. RY. CO. v. JAGEMAN.

(Court of Civil Appeals of Texas. Oct. 26, 1893.)

EJECTION FROM STREET CAR—DAMAGES.

In an action for damages for wrongful ejection from defendant's street car, the evidence showed that plaintiff was put off with the use of but little force; that he received no physical injury, and sustained no pecuniary loss.—so that his sense of shame was the only result of the alleged wrongful act. *Held*, that a charge that the jury were to consider plaintiff's sense of shame, "or other disagreeable emotions of the mind, resulting to him from such wrongful acts, if shown to be wrongful," gave the jury too much latitude in estimating the damages.

Appeal from district court, Harris county; James R. Masterson, Judge.

Action by J. H. Jageman against the Houston City Street Railway Company to recover damages for an alleged wrongful ejection from one of defendant's cars. Judgment was entered in favor of plaintiff, and defendant appeals. Reversed.

Jones & Garnett, for appellant.

GARRETT, C. J. This is an action for damages brought by J. H. Jageman against the Houston City Street Railway Company for an alleged wrongful ejection of the plaintiff from one of defendant's street cars by its servants, the conductor and the motorman of said car. Plaintiff alleged that he was ejected in a violent and insulting manner, and rendered an object of disgrace and ridicule before the public. Upon the trial the court instructed the jury "that, in ascertaining and measuring such actual damages, the jury will say from the evidence what, if any, actual damages the plaintiff may have shown he has sustained by reason of the wrong

complained of, and a sense of shame, or other disagreeable emotions of the mind, resulting to him from such wrongful acts, if shown to be wrongful, are to be considered by the jury." According to plaintiff's testimony, he had waited at the corner of Main and Franklin streets for a car to the Fifth ward about 20 minutes, and when the car approached he said to the conductor, "Why in the hell did you stay so long?" and proceeded to take a seat in the car; that the conductor said "It is none of your damn business," and told him to come out of the car, that he was drunk, and said he would put him off. Plaintiff replied that he could not do it, when the conductor called the motorman, and the two took him, and shoved him out. Plaintiff said that he had taken two or three glasses of beer, but was not under the influence of liquor; that the conductor said he was drunk, and that made him mad, because he knew that he was not drunk. There was other evidence as to what occurred at the time, and evidence on the part of the defendant justifying the acts of its servants; but it remained that the plaintiff was put off the car with the use of but little force; that he received no physical injury or pain, and sustained no pecuniary loss. The jury returned a verdict in favor of the plaintiff for \$350, for which amount he recovered judgment.

Upon appeal the charge of the court is complained of because it allowed the jury too great a latitude, and authorized it to consider, in estimating the damages, such disagreeable emotions of the mind as the plaintiff may have experienced from anger, rage, resentment, or malicious feeling. In an action for damages for injuries to the feelings it would be difficult to lay down a rule as to what emotions of the mind, produced by a wrongful act, resulting in such injuries, should be considered as cause for damages; but from the evidence in this case it seems that the sense of shame which is stated in the charge would be, perhaps, the only one that would be the result of the wrongful act complained of. We think the charge gives rather too much latitude to the jury, especially when we consider the large amount of the verdict, which is complained of as excessive, and we are of the opinion that the defendant should be granted a new trial. While there is no rule by which damages for injuries to the feelings can be at all accurately ascertained, still there should be a reasonable limit to the amount. In support of his judgment, plaintiff has shown the violation of an implied contract on the part of the defendant to transport him a short distance, but does not show any loss resulting therefrom, so the damage for this would be only nominal, and, further, that he was ejected by a force that does not amount to more than a simple assault, and received no injury except such as his feelings may have sustained from a sense of shame at being wrongfully ejected from the car. We will not consider the assign-

ment of error which questions the sufficiency of the evidence to sustain the verdict. The judgment of the court below will be reversed, and the cause remanded.

ABBOTT et al. v. INTERNATIONAL BLDG. & LOAN ASS'N et al.¹

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

BUILDING AND LOAN ASSOCIATION — INTEREST ON LOAN—USURY.

A member of a building and loan association, in consideration of a loan of \$1,440 made to him by the association, gave it his note for \$2,600, payable on or before the maturity of a certain series of the association's stock, with interest at 6 per cent. until paid. *Held* that, as the date of maturity was not fixed, the aggregate of the excess of principal, together with interest, might not exceed the legal rate of 12 per cent. on the loan made, and the contract was not usurious.

Appeal from district court, Bexar county; W. V. King, Judge.

Petition by Thomas H. Abbott and others against the International Building & Loan Association and one Holland for an injunction. From a judgment for defendants, petitioners appeal. *Affirmed*.

Upson & Bergstrom, for appellants. B. L. Aycock, for appellees.

JAMES, C. J. The appellant Abbott applied for an injunction to restrain a sale of real estate advertised under a trust deed given by himself and wife to secure a note to appellee for a loan of money, and a temporary injunction was granted. By an amended original petition, plaintiff, joined by his wife, Joanna Abbott, alleged, in substance, that they had on April 12, 1886, borrowed of said association \$1,440, and gave therefor their obligation to pay the association \$2,600, with 6 per cent. interest per annum, payable at the maturity of plaintiff Abbott's 13 shares of stock of the association, and the further sum of \$26 per month from said date until maturity of the stock, and for the payment thereof pledged said stock, and gave said deed of trust; that said obligation was usurious, and plaintiffs had paid \$715 as interest; that 7 of the shares of stock had matured, and were worth in cash \$200 per share, less \$42 dues not paid thereon,—and asked that the above sums, \$715 and \$1,358, be allowed to extinguish the \$1,440 borrowed, and that plaintiffs have judgment for the difference, \$633, against the association, and for decree awarding to plaintiffs the other 5 shares of stock, and for perpetuation of the injunction. Defendant, by its answer, required Joanna Abbott to be made a party, alleged that the payment of \$26 per month provided for in the note was a mutual mistake, and was intended to be \$13 per month, as representing the monthly stock

dues; and further alleged, in substance, that on April 16, 1886, plaintiff applied for a loan of \$2,600, and that a premium of 50 per cent. was bid by plaintiff for such loan, under a by-law, (setting it out,) to secure the preference or priority for the loan; and alleged plaintiff's default in the payment of dues and interest for a period that, under the by-laws, authorized foreclosure, viz. three months' default in the payment of interest and dues on stock; denying that said shares had ever matured; and prayer for judgment for the amount due on the contract, with interest, attorney's fees, insurance paid on account of plaintiff, and the expense of advertising the sale, and for foreclosure of its lien on the premises and shares of stock. The judgment was in favor of the association, against Abbott, for \$743.85, with foreclosure of the lien on the real property. There is no statement of facts in the record, and the case is before us on the conclusions of fact of the judge, and his conclusions of law. His conclusions of fact are necessarily our conclusions also, and, in order that appellants may not be deprived of anything affecting their rights on an appeal from this judgment, the conclusions are here given in full:

"Conclusions of Fact.

"(1) That on or about January —, 1884, plaintiff Thomas H. Abbott purchased seven shares of stock of the first series in defendant corporation's capital stock, and thereafter, in 1886, purchased 6 shares of the fifth series in and of defendant corporation's stock, and paid into the defendant corporation, on account of said stock, monthly, after he acquired the same, at the rate of \$1 per month per share, aggregating the sum of nine hundred and twenty-three (\$923) dollars.

"(2) That on the 16th day of April, 1886, the plaintiff borrowed from the defendant corporation the sum of \$1,440,—that is to say, he bid for the sum of \$2,600, and obtained the same at a premium of 50 per cent., and therefore was entitled to obtain from said defendant corporation the sum of \$1,800; but, having been a member of defendant's corporation for two years prior thereto, he was given \$140 additional, being in all the sum of \$1,440 in cash, and in consideration of such loan the said plaintiffs, Thomas H. Abbott and wife, executed to the defendant the following note: '\$2,600.00. San Antonio, Texas, April 12th, 1886. On or before the maturity of the 1st and 5th series of stock of the International Building & Loan Association, we promise to pay to the order of the International Building & Loan Association, at its principal office, in San Antonio, Texas, the sum of twenty-six hundred dollars, with interest at the rate of 6 per cent. per annum from the date hereof until paid; also, the further sum of twenty-six dollars per month from this date until maturity of the aforesaid stock, as provided for in the by-laws of said association, which by-laws are made and

¹ Rehearing denied.

taken to be a part hereof.' That defendant explained to plaintiffs, at the time of making the bid for said loan, the manner of operating the business of said corporation, and intended to make said instrument for the sum of \$2,600, with interest thereon at the rate of 6 per cent. per annum from the date thereof, and the further sum of \$13 per month, instead of \$26 per month, as stated in said note, but said note and the accompanying deed of trust were presented to plaintiffs for signature, and nothing said of any mistake therein until this suit was brought. That thereafter plaintiffs did in fact pay to the said defendant the sum of \$13 per month as interest, and \$13 per month as dues on stock, up to the month of November, 1890, when plaintiffs discontinued all payments on account of said stock.

"(3) That to secure said loan the plaintiffs, Thomas H. Abbott and wife, executed to the defendant Holland, as trustee, a conveyance of the property set out in plaintiffs' petition, conditioned that, if said note was paid according to its terms and conditions, then the said instrument should become null and void, but if the plaintiffs failed to pay the said sum of money, or any interest payments thereon, or any dues on their stock, in the manner and the time provided by defendant's by-laws, that then the defendant might proceed to foreclose its lien on the said property and shares of stock to satisfy said debt; and, further, that, if the plaintiffs fail to keep the property insured for the benefit of the defendants, then the defendants should insure the same, and charge the premium therefor to the plaintiffs; and, if any judicial proceedings were resorted to for the purpose of enforcing the said note or deed of trust, that then plaintiffs should further pay the reasonable attorney's fees therefor.

"(4) That thereafter plaintiffs did pay to the defendant, as interest on said loan, the sum of \$13 per month, up to and including the month of November, 1890, aggregating the sum of \$715, and thereafter plaintiffs ceased and refused to make any further payments on account of the said interest.

"(5) That thereafter, during the years 1891 and 1892, plaintiffs failed and refused to insure said property for the benefit of defendant, and defendant caused the same to be insured, and paid as premiums for said insurance the sum of \$20.

"(6) That thereafter, in the month of June, 1891, the defendant William Holland, as trustee, under and by virtue of the terms of said deed of trust, advertised the said property for sale to satisfy the said claim for \$2,600, and paid for advertising the sum of \$13.35, when such sale was enjoined, at the instance of plaintiffs in this suit.

"(7) That defendant's by-laws, at the time plaintiffs acquired their stock and borrowed the said sum of money, provided as follows:

"Art. 2. It is hereby declared that the purpose of the formation of this corporation is

to purchase and sell real estate in the city of San Antonio, and in Bexar county, Texas, and to improve the same; to lend money on real-estate security in said city and county, on the stock of the members of this corporation, and principally to aid and assist its members in acquiring, improving, and holding real estate in said city and county, and particularly to aid and assist its members in acquiring homesteads for themselves and their families; also, to borrow money of other persons, not members of this association.'

"Art. 5. The shares of stock in this corporation may be issued in one or more successive series, in such amounts as the board of directors may determine, or the by-laws prescribe. The said stock to be paid in in monthly installments of \$1.00 (one dollar) per month per share. Each and every shareholder of each and every share of stock held by him or her in this corporation shall pay into the treasury, in lawful money, on or before the second Monday of each and every month, the sum of one dollar, (\$1.00,) until such shares of the series of stock upon which such monthly payment is made shall reach the value of two hundred (\$200.00) dollars, when he or she or they shall be paid for each share of such stock the sum of two hundred dollars, (\$200.00,) and the said stock shall thereupon revert to the corporation, and shall be canceled. Each and every share of stock held by any shareholder shall be liable for and subject to a lien for the satisfaction of any unpaid installments by such shareholder.

"Art. 6. The board of directors shall hold stated meetings on the second Thursday of each and every month. At each stated meeting, the money in the treasury shall be offered to loan, in open meeting, at a rate of interest not to exceed 8 per centum per annum, and the stockholder who shall bid the highest premium to be fixed in the by-laws for the preference of the priority of loan shall be entitled to receive a loan not to exceed in amount the sum of two hundred (\$200) dollars per share of stock held by such borrowing shareholder. The premium bid by the borrowing stockholder for the preference of loan shall be paid in cash before the loan is consummated.'

"That at said date of said organization of defendant corporation, and since then, at all times, its by-laws provided as follows, to wit:

"Article 1, sec. 2. Each share of stock shall entitle the holder to a loan of two hundred (\$200) dollars.'

"Article 2, sec. 1. On each share of stock there shall be paid in, on or before the second Monday of each and every month, the sum of one dollar. Sec. 2. Whenever it shall appear on the books of the association that the stock of any particular series is worth two hundred (\$200) dollars per share, all arrears of monthly dues, fines, and otherwise, shall become at once due, and the directors

shall cause to be paid to the holder of each unpledged share in such series the sum of two hundred (\$200) dollars, less all arrears of fines due, or otherwise, and payment of dues on the stock of that series shall cease.'

"Article 8, sec. 1. Any stockholder wishing to withdraw his stock not pledged to the association shall give thirty days' notice, in writing, to be filed with the secretary. At the expiration of the said thirty days the withdrawing stockholder shall be entitled to receive the amount actually paid in on such stock, together with such interest or proportion of the profits as the board of directors shall fix and determine, deducting, however, all dues and fines charged against such withdrawing stockholder: provided, however, that at no time shall more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the board of directors.'

"Article 9, sec. 1. The president shall, at each monthly meeting of the directors, offer the money in the treasury, if over two hundred (\$200) dollars, for loan in open meeting; such loan to be disposed of to the highest bidder for priority right. The board of directors may from time to time fix a rate of premium, below which shares shall not be redeemed. * * * Sec. 4. If the interest on any loan, or the dues on the shares upon which such loan is based, remain unpaid for more than three months, the board of directors may compel payment of principal, interest, and fines by proceeding on the securities according to law. * * * Sec. 8. Each stockholder, for each and every share of stock held by him in this association, shall be entitled to receive a loan not exceeding two hundred (\$200) dollars, and he shall pay interest monthly at the rate of 6 per cent. per annum for such loan, from the first day of the month in which the award of loan is made. The premium paid for the preference of loan shall be paid in cash when the loan is consummated. Sec. 9. Every share of stock upon which a loan is effected shall be transferred to the association as collateral security, and every transfer of stock shall be on the books of the association, and no transfer shall be made while the owner thereof is indebted to the association. Sec. 10. Any stockholder may have a loan upon his stock at 12 per cent. per annum interest, payable monthly: provided, that such loan shall not be allowed for a less period than six months: and provided, the dues paid in by such borrowing stockholder on the stock to be pledged are equal to or exceed the amount so loaned on said stock. Sec. 11. And, if any borrower shall fail or neglect to keep in force his policy of insurance upon the property given this association as security for a loan, the secretary shall immediately cause a policy of insurance to be issued, and shall charge the same to the borrower with his next month's dues, and the borrower shall be fined one dollar at the direc-

tion of the board of directors. * * * Sec. 13. Should any borrower desire to repay to the association the money advanced in order to redeem his shares, he shall repay to the association the money actually received, and one-eighth of the premium for which such loan was made, for each year, or fractional part thereof, such borrower has had the use of the money. Sec. 14. Any borrower who has been a member of this association for one year, or who shall have paid twelve (12) monthly installments upon his stock, shall receive a deduction of one-tenth of the premium bid by such borrower for every year he has been such member, or for every year since the issuance of the stock to be pledged.

"Article 10, sec. 1. Each and every stockholder who shall refuse or neglect to pay his monthly dues as often as the same may become payable shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him; dues of each month to be taken separately. * * * Sec. 4. Any stockholder who shall neglect to pay the monthly interest on his loan when the same becomes due shall be fined for such neglect ten cents upon each dollar of the interest due for that month.'

"That in June, 1891, the shares of stock in the first series of defendant corporation were declared to be matured at the rate sum of \$133.50 per share, and all the stockholders in defendant corporation in said series, whose shares were not pledged, were paid said sum of \$133.50 per share in cash, and all holders of stock in the fifth series, whose shares were not pledged, were given paid-up stock in defendant corporation at the rate of \$68 per share, and from said date—June 1, 1891—the by-laws of the defendant corporation, and its mode of doing business, were changed so that no dues on stock theretofore issued at the rate of \$1 per month per share was collected, and no further stock issued under such arrangement, but all holders of shares in said association were given receipts for full paid-up stock, at their withdrawal values, as before set out, to which arrangement or change the plaintiffs did not consent.

"(8) The reasonable attorney's fees incurred by the defendants in this suit in enforcing the payment of their claim is \$250.

"(9) That the plaintiffs have given no written notice of withdrawal of their shares of stock to the defendants, and the withdrawals of \$133.50 per share of the first series to other stockholders was made, in all cases, where some had given written notice of withdrawal, and others had not, and the issuance of paid-up stock at withdrawal values was given to other shareholders without any written notice of withdrawal."

The appellants' assignment of error is as follows: "The court erred in its conclusion of law that the contract entered into between Thomas H. Abbott and wife and the International Building & Loan Association was

not usurious, because it appears from said contract and the evidence that the appellant Thomas H. Abbott had borrowed from said International Building & Loan Association the sum of \$1,440, and bound plaintiff by said contract to repay in satisfaction of said loan, at the maturity of his stock, the sum of \$2,600, together with interest thereon at the rate of 6% per annum, making, together with interest and premium, more than 12% per annum, and, in order to pay said debt before maturity, is required to pay, in addition to said 6% per annum on \$2,600, the sum of \$1,440, the amount originally borrowed, together with one-eighth of said premium of \$1,160, being \$145 per annum for each year that the said appellant had said money, making greatly in excess of 12% per annum for the use of the sums of money actually borrowed; and therefore the court should have rendered judgment in favor of plaintiff, and against defendant building and loan association, for the sum of \$553.50, and should have allowed defendants nothing for attorney's fees, interest, insurance, and advertising."

Conclusions of Law.

The question to be first considered is whether or not the contract was usurious. The plaintiff became a shareholder and member of defendant building and loan association. As holder of 13 shares of its stock, he obligated himself to pay to the association \$13 per month (\$1 for each share) as stock dues. Borrowing \$1,440 from the association, he, joined by his wife, gives a note for \$2,600, dated April 12, 1886, payable on or before the maturity of the first and fifth series of the defendant's stock, with interest on said sum at 6 per cent. per annum from date until paid; also, the sum of \$26 per month until maturity of said stock, as provided by the by-laws of the association, which by-laws are made and taken as a part of the note. It was shown that the \$26 mentioned in the note was a mistake, and should have been \$13, and was intended to represent the stock dues. This presents a case where the borrower gives his obligation for \$2,600, receiving \$1,440 only, and promises to make monthly payments of interest amounting to less than 12 per cent. (a rate then allowed) on the sum actually received. This case is not, therefore, brought within the cases of *Asso lation v. Lane*, 81 Tex. 369, 17 S. W. Rep. 77, and *Gilder v. Hearne*, 79 Tex. 120, 14 S. W. Rep. 1031, and might have been so if, in addition to an excess of principal, the contract had been to pay fully 12 per cent. interest per annum. It does not follow in this case that, because a large excess of principal appears in the note, it, considered with the rate of interest contracted for, would amount to usury. This could be determined if the date of maturity were fixed, but from this record the maturity of the note is not fixed. When this maturity

of the stock was to happen, or could reasonably be expected to happen, is not disclosed by anything in the record. It might be delayed by adventitious circumstances so long as not to make the combined amount of the excess of principal and the current interest aggregate more than 12 per cent. on what was received. The existence of usury must be made to appear by the party claiming it, and it does not appear from the face of this note that it was usurious. In a previous appeal of this cause the supreme court (20 S. W. Rep. 118) arrived at the conclusion that the same obligation was not usurious, placing it upon another ground. One of the by-laws of the association, and referred to as a part of the contract entered into by Abbott, reads as follows: "Should any borrower desire to repay to the association the money advanced in order to redeem his shares, he shall repay to the association the money actually received, and one-eighth of the premium for which such loan was made, for each year or fractional part thereof such borrower has had the use of the money." The court gave to this by-law a controlling effect in determining whether or not the contract was usurious; and dividing the foreclosure premium (which, upon the record before us, appears to be \$1,300) by 8, in order to determine the amount that might be payable per year under such by-law, it would show less than 12 per cent. per annum on what had been borrowed, and therefore the court held the contract not usurious. In another appeal before the supreme court at the same time, the sum so arrived at proved to be greater than 12 per cent. on what had been received, and the contract was pronounced usurious. *Hensel v. Association*, 20 S. W. Rep. 118. Applying this test to the contract before us, it would not be usurious. We entertain grave doubt as to the correctness of this method of testing these contracts for usury. In the first place, it appears to us that the by-law above quoted gives the borrower a mere option or privilege, to exercise or not, as he pleases. It brings into the contract no stipulation which the association can enforce, and constitutes, in our judgment, no part of the contract proper, but simply permits the borrower to withdraw prior to the maturity of the stock upon the terms of the by-law, if he sees fit to avail himself of it. While the borrower may exercise the privilege of so withdrawing, there is nothing in the contract that requires it of him.

Again, appellants' counsel very pertinently asks, if the one-eighth of the premium annually is to be considered in determining usury, what becomes of the amount per month paid as interest under the express terms of the contract? It appears to us that the interest stipulated to be paid monthly must have been overlooked by Justice Heury in considering the above two cases, for, pursuant to the test applied in the opinions rendered by him, the interest clearly contracted for and paid

monthly being considered, it would lead us to the conclusion that this contract was grossly usurious. In the deed of trust it was provided that, if plaintiffs should fail to keep the property insured, defendant could do so, and charge the premium to plaintiffs, and, if any judicial proceedings were resorted to for the purpose of enforcing the note and deed of trust, plaintiffs should pay a reasonable attorney's fee. The insurance, attorney's fee, and the cost of advertisement of trustee's sale were properly charged against plaintiff Abbott, (2 Jones, Mortg. § 1006,) and we see no reason for revising the court's finding as to the amount allowed as reasonable attorney's fees. We believe the conclusions of the district court were correct, and the amount of the debt, \$1,440, with \$290 interest from November, 1890, to October, 1892, and \$20 paid by defendant for insurance, and \$13.35 costs of advertisement, and \$250 attorney's fees, to wit, the aggregate sum of \$2,022.35, represents plaintiffs' debt to the association, and that their proper credit is \$1,278.50, the withdrawal value of the stock, as appears from the findings, leaving the balance, as adjudged by the court, \$743.85. The judgment is affirmed.

TEXAS, S. V. & N. W. RY. CO. v. GUY.¹

(Court of Civil Appeals of Texas. Oct. 26, 1893.)

INJURY TO EMPLOYE—NEGLIGENCE—PROXIMATE CAUSE.

1. In an action for damages for injuries received while a brakeman on the defendant's train, the evidence showed that plaintiff was standing on the rear of the tender of an engine which was backing onto a side track to connect with a car; that as the tender approached the car, with plaintiff ready to make the coupling, the two drawheads missed, and passed each other, plaintiff being caught between the car and the tender. The evidence showed that the failure of the drawheads to meet was caused by the sinking of the track. Held, that plaintiff could recover, it being the duty of defendant to inspect its track, and keep it in a reasonably safe condition, which duty plaintiff had a right to presume had been performed.

2. The fact that the track on which the car stood was on a curve, and that plaintiff was on the inside of the curve to make the coupling, would not bar a recovery, even if the act would ordinarily constitute negligence, for the injury neither resulted from nor was contributed to by the risk therein incurred.

3. The court properly refused to charge that, "if said defect was as equally open to the inspection of the plaintiff as to the railway company, then, in that event, defendants would not be liable."

Appeal from district court, Panola county; W. J. Graham, Judge.

Action by W. J. Guy against the Texas, Sabine Valley & Northwestern Railway Company to recover damages for personal injuries received while acting as a brakeman for defendant. Judgment was rendered in favor of plaintiff, and defendant appeals. Affirmed.

¹ Rehearing denied.

The other facts fully appear in the following statement by WILLIAMS, J.:

Appellant prosecuted an appeal from the judgment rendered against it in the district court in favor of appellee upon a bond to secure the costs only, and filed the transcript in due time. It subsequently sued out a writ of error in proper form, giving a supersedeas bond; its object being only to supersede the judgment pending the appellate proceedings. Another transcript was brought up, containing all the proceedings in the cause, including those by which the writ of error was sued out; but this transcript was not filed within 90 days after the service of the writ of error. Defendant in error filed in this court a certificate of the district clerk, and asked for an affirmance, without reference to merits in the proceeding of writ of error, because of the failure to file the transcript in due time. This the court refused to allow, on the ground that the transcript on an appeal, duly perfected, was pending; and held that it was competent for the appellant to still give a supersedeas bond to suspend the execution of the judgment pending the appeal, and that this might be done in the manner adopted in this case in connection with a writ of error. The adoption of this proceeding was not regarded as an abandonment of the appeal, when it had been properly prosecuted by filing a transcript and briefs in this court within the prescribed time. The filing of a transcript in the writ of error proceeding brought the supersedeas bond before the court, and put it within its power to render such judgment upon it as might be found to be proper; and the court ruled that for this purpose such transcript would be considered in connection with that filed in the appeal. The action was one in which appellee, Guy, as plaintiff, sought to recover of appellant damages for personal injuries received by him while in its service as a brakeman, through its negligence. The pleadings raised the questions decided in this opinion.

Several of the assignments complained of the overruling of exceptions to the petition. The answer contained a general demurrer and several special exceptions, but the record does not show that they were presented to the court and ruled upon. Appellant has filed in this court an affidavit of the district clerk, stating that the judge's docket showed that the general demurrer was urged and overruled, but that this action was omitted from the minutes of the court. With this affidavit is an agreement of the parties that it may be filed as a part of the record. We cannot consider this agreement. A paper or proceeding existing in the district court, which properly forms a part of the record on appeal, and which has been inadvertently omitted from it in the preparation of a transcript, may be supplied by an agreement of parties; for it could be brought up on certiorari, the necessity of which is obviated by the stipulation. But the entries upon the judge's

docket are mere memoranda, which form no part of the record upon appeal. The orders of court are to be found in the minutes, which are the exclusive evidence of such action of the court. If the minutes are imperfect, they may, in proper cases, be corrected in the district court; but this court cannot look elsewhere to ascertain what they should show. An examination of the petition has, however, convinced us that it is good on general demurrer, and the point is of no consequence in the case. We notice it only to avoid the appearance of countenancing an irregular practice.

The facts of the case upon which the decision must be based are as follows: Appellee was in the employ of appellant as a brakeman, and among his duties was that of coupling and uncoupling cars. At Carthage, the southern terminus of the road, appellant had a switch, or "house track," as it was called, upon which cars were placed to be coupled in making up trains. At the time of appellee's injury, a passenger coach was standing upon this track. An engine went in after it, appellee accompanying it, to couple the coach to the tender. As the engine approached the coach, with appellant standing between to make the coupling, the two drawheads missed, and passed each other, and appellee was caught between the cars and hurt. There was evidence sufficient to show that if a track is in proper condition the drawheads will not pass each other, but will come together, and prevent further approach of the cars together. The cause of the passing of the drawheads is stated by appellee to have been the fact that the end of the cross ties where the rails rested had rotted, and had allowed the end of one of the rails upon which the coach stood to sink, causing the coach to lean to that side of the track, while the end of another rail on the opposite side of the track had also sunk, which caused the tender to lurch in that direction, thus producing the stated result. Whether or not the track was in that condition was a question upon which the testimony conflicted, and we must hold that it was, and that appellant ought to have known it, and was guilty of negligence in allowing its track to be in that condition. It was shown that for several months prior to the time when he received his injury appellee had been engaged in the same employment, in which he had passed over this side track in switching and coupling cars as many as three times, and often as many as four and five times, daily; and it was contended in the court below and in this court that he either knew, or with proper care ought to have known, of the condition of the track, if it was as he claimed. To meet this, however, he testified that he did not in fact know of the defects in the road, but saw the motion of the car too late to get out before he was hurt, and learned the condition of the ties and rails by subsequent examination; that he had never walked over

the part of the track where he was hurt, but generally rode on the ladder of the car; that brakemen generally ride when the car is moving; and that he did not remember that he ever rode over that portion of track. While there was evidence for defendant which tended to show that plaintiff ought to have known of the defect, if it existed, the jury was warranted in accepting his statement as true, and in deciding that he did not know the fact, and was not guilty of negligence in not knowing it.

It was and is also contended that appellee was guilty of contributory negligence in the manner of coupling the cars—First, in going between them on the inside of the curve; and, second, in leaving the link in the drawhead of the tender, a common drawhead, and endeavoring to insert the link in the drawhead of the coach, which was what is called a "Miller drawhead." There is also a conflict of testimony as to the custom in these matters. Some of the witnesses claimed that it is not proper, because dangerous, to go in between the cars in the inside of the curve; others that the danger is about the same on both sides. Of course, this depends on circumstances, which in this case are not fully developed. A curve might be so sharp as to throw the cars on the inside so close together that a person between them would be endangered; and, on the other hand, it might be so slight as not to appreciably increase the risk. These are all questions of fact. As before stated, it is shown that the drawheads of these cars missed each other, and that this would not have occurred had the track been in proper condition. The jury were warranted in finding that appellee's injury was caused by this fact, and that his entry in the inside of the curve did not cause or contribute to it. The same may be said in regard to the manner of making the coupling. The facts show that the link was hanging in the drawhead of the tender as it approached the coach. Appellee testified that he did not have time to get it out and insert it first in the Miller drawhead of the coach, and that one of the methods of coupling was as safe as the other. Other witnesses testified differently, but this again only makes a conflict of evidence. It was claimed by appellant's witnesses that it was safer to first insert and fasten the link in the Miller drawhead, because that when it entered the hole in the common drawhead in the tender it would not allow them to pass, unless the link or pin should break; while, if fastened in the common drawhead first, and inserted in the Miller drawhead, when the engine was moving, the link could slip out through the slot in the side of the latter drawhead, and thus allow the two to pass. The verdict, we think, settles the conflict in favor of appellee, and we conclude that he was not guilty of contributory negligence in making the coupling.

E. F. Young, Levy & Hines, and W. S. Davis, for appellant. H. N. Nelson, for appellee.

WILLIAMS, J., (after stating the facts.) The foregoing statement of facts practically disposes of the case. It was not the duty of the plaintiff to inspect the track of the defendant, nor to examine for defects. He was bound to take notice of such things as were patent to his observation, and which would have been seen by persons of ordinary prudence situated as he was. It was the duty of the defendant, on the other hand, to inspect its track, and keep it in such reasonably safe condition as could be done in the exercise of the care required of it. The plaintiff had the right to presume, until he should have known the contrary, that this duty had been performed by his employer; and unless he knew or ought to have known otherwise he had the right to assume, in entering between the cars, that there was no such defect in the track as he says there was; for, obviously, if it existed, it was of such a character that defendant, with proper care, could have discovered and remedied it. If the fact thus assumed had existed, we cannot see that he would have incurred risk of the injury which he sustained in entering inside the curve and in making the coupling as he did. The danger to himself resulting from the coupling to the Miller drawhead only arose because the defect existed in the track to allow the drawheads to pass each other. If his act would not have been negligent if performed with a good track, it could not have become negligent because of an unforeseen danger, resulting from an unknown defect in the track; and, on the other hand, if his act would ordinarily constitute negligence, because it subjected him to danger of injuries from other causes than that from which his hurt proceeded, that negligence would not bar a recovery if his injury neither resulted from nor was contributed to by the risks therein incurred. His act might constitute contributory negligence in relation to consequences which it helped to cause, but not in relation to the consequences attributable alone to other and independent causes. This doctrine was involved in the case, and the court correctly stated the rule in the charge complained of in appellant's fourth assignment of error.

The fifth assignment complains of the refusal of six special charges, and is too general to be considered.

The sixth assignment complains of the refusal of the court to charge "that, if said defect was as equally open to the inspection of the plaintiff as to the railway company, then, in that event, the defendants would not be liable, and you will find for the defendants." This charge would have been misleading. It might be true that the servant, by examination or inspection, could know all the master should know; and in

this sense the condition of the road and all of the appliances may be said to be as open to the inspection of one as to that of the other. Still the duty of each is not the same. A master is bound to inspect and the servant is not.

The second and seventh assignments, and the proposition based upon them, are not supported by any facts stated from the record.

The remaining assignments question the sufficiency of the evidence, and what we have already said disposes of them. The judgment will be affirmed against appellant and against the sureties on the supersedeas bond in the writ of error.

BRYMER et al. v. TAYLOR et al.
(Court of Civil Appeals of Texas. Nov. 1.
1893.)

COLLECTION OF TAXES—LEVY AND SALE—ADVERSE POSSESSION—EVIDENCE—PAYMENT OF TAXES.

1. Under Acts 1876, p. 262, authorizing the collector to levy upon and seize any property of the taxpayer, for the purpose of collecting the taxes due, a levy and sale of one survey of land, not homestead or exempt, may be made, in order to satisfy the taxes due on another survey.

2. On an issue as to whether one who claimed land under the five-years statute of limitations had paid the taxes thereon, evidence may be introduced to show that certain tax receipts, reciting payment of the taxes on another piece of land, were intended to be receipts for taxes paid on the land in controversy.

3. Testimony by defendant that the land in controversy had been in her possession for 10 years, and that she had paid taxes thereon for that time, but had never seen it, and did not know how it was inclosed, if inclosed at all, and that she did not know what sort of possession her tenants had, but that she knew she had possession of it by tenants who paid the rents regularly every year, does not show the "actual and visible appropriation of the land" required by Sayles' Civil St. art. 3198, to constitute adverse possession.

Appeal from district court, Bell county; W. A. Blackburn, Judge.

Action by J. D. Brymer and others against M. E. Taylor and others. From a judgment for said M. E. Taylor and another defendant, plaintiffs appeal. Reversed.

Monteith & Furman, for appellants. Harris & Sanders, for appellees.

FISHER, C. J. Action of trespass to try title, brought in 1889, by appellants against the appellees, to recover a part of the William Wills survey. The appellees plead not guilty, and the 3, 5, and 10 years statutes of limitation, except defendant Vernon, who disclaimed. In replication to the pleas of limitation, the plaintiffs pleaded infancy and coverture. The court below rendered judgment in favor of some of the plaintiffs for a part of the land, and that plaintiffs J. D. Brymer, M. E. Brymer, W. W. Arnold, and M. E. Arnold take nothing by their suit. The court also decreed to appellee Mrs. M. E.

Taylor an undivided 14-24 interest in the land. The judgment in favor of appellees M. E. Taylor and Bell county is based upon their pleas of limitation under the 5 and 10 years statutes. The main question presented for our determination is the sufficiency of the evidence to support the judgment in this respect.

Objections below were urged by the appellants to the admission in evidence of a tax deed executed by the collector of Bell county, which was introduced by appellees Taylor and Bell county under their pleas of five years' limitation. The objection is that it appears from the face of the deed that the taxes for which the land in controversy was sold were assessed against the unknown owners of the Reuben Wills survey,—another and different survey from that in controversy,—and that the lands in controversy were sold under that assessment for the taxes due on the Reuben Wills survey. The deed recites: "That, whereas, certain taxes are due the state of Texas and the county of Bell by unknown owner or owners, as assessed against him or them for the year 1877 upon the following described tract or parcel of land: 20 acres of land out of the Reuben Wills survey,—which taxes amount to the sum of \$1.67, as appears from the tax roll of said county for the year 1877; and, whereas, the time provided by law for the payment of said taxes having expired, and, though demanded of the said unknown owner or owners by proper legal notice, the same remaining unpaid, I, W. S. Rather, tax collector of Bell county, in compliance with the law, and by virtue of the tax roll aforesaid, levied upon and seized a certain tract of land as belonging to said unknown owner or owners, and hereafter described, to be sold to make the said amount," etc. The "hereafter described land" is set out in the deed, and is described as the same land in controversy, a part of the William Wills survey, and as sold to appellee Taylor as the property of the unknown owners. It will be seen from this statement that the land in controversy, the William Wills survey, was levied upon and sold as the property of the unknown owners for taxes due by said unknown owners on the Reuben Wills survey. This raises the point, can a levy and sale of one survey be made in order to satisfy the taxes due on another survey of land? Section 14 of the Act of 1876, p. 269, regulating the assessment of lands for taxes, requires that when the name of the owner is not known the property shall be assessed as that of the "unknown owner." Section 14 of the Act of 1876, p. 262, regulating the collection of taxes, authorizes the collector to levy upon and seize any property of the taxpayer for the purpose of collecting the taxes due. He is not limited, in the right of seizure and levy, to the identical property upon which the assessment is made, but can seize and sell any property subject

to sale in order to collect and satisfy the taxes due on any other property. The homestead and exempt property may not be subject to this rule. The record does not show that such is the character of the property involved in this controversy. We measure this tax sale by the Act of 1876, as the sale was made under that law.

Another objection is, that it does not appear that the taxes upon the lands in controversy were paid by the appellees for five years, continuously, as required by law in prescribing under the statute of limitation of five years. The appellee Taylor testified that she had paid the taxes on the land continuously for 10 or 11 years, and introduced tax receipts for the years 1878 to 1890, excepting the years 1879 and 1882. The tax receipts of the years 1883 and 1886 recited payment of taxes on the Reuben Wills survey, and not on the William Wills survey, the one in controversy. The evidence shows that there is a Reuben Wills survey and a William Wills survey in Bell county. There is some evidence tending to show that, although the tax receipts for the years 1883 and 1886 recite payment upon the Reuben Wills, they were in fact payments upon the William Wills survey. The tax receipts are not conclusive, and may be explained by parol evidence, and the payment of taxes can be proven, independently of the receipts, by either direct evidence to that effect, or by circumstances. We cannot say, in this respect, that the judgment is not supported by the evidence, although it is somewhat indefinite. See *Muller v. Thornton*, 77 Tex. 156-159, 18 S. W. Rep. 846. There was no error in admitting the tax deed and the receipts in evidence.

The last objection urged to the evidence is that it is not sufficient to show such an actual, adverse possession as is required by law in order to support the pleas of limitation. The only evidence of possession is that of appellee Mrs. M. E. Taylor, to the effect that the land in controversy has been in her possession, and that she has paid taxes on the same, for 10 or 11 years, and that she had never seen the land; did not know how the same was inclosed; that Mr. Rowlett and Mr. Miller had been her agents; did not know whether the land was fenced or not; did not know what character of possession her tenants had of said land, but she knew she had possession of it by her tenants, who always, regularly, paid the rents from year to year. "Adverse possession," as defined by article 3196, *Sayles' Civil St.*, is "an actual and visible appropriation of the land." The evidence upon this point does not fill the measure furnished by the law. At most, it only shows the assertion of a right through the tenants of appellee, and falls far short of showing that they have an actual and visible appropriation of the land. *Richards v. Smith*, 67 Tex. 611, 4 S. W. Rep. 571; *Dutton v.*

Thompson, (Tex. Sup.) 19 S. W. Rep. 1027; Donlon v. Lyons, (Tex. Sup.) 15 S. W. Rep. 578. The last two cases cited are not upon the question of possession, but are useful in illustrating the certainty of the evidence required in showing the right of the defendant to prescribe under the statutes of limitation. For the error last discussed, the judgment of the court below is reversed, and the cause remanded.

PETERSON et al. v. WARD et al.
(Court of Civil Appeals of Texas. Nov. 1,
1893.)

DEED—DESCRIPTION—ADVERSE POSSESSION BY
TRUSTEE.

1. The board of land commissioners of R. county issued to the assignee of M. a headright certificate for a league and labor of land, but in a subsequent conveyance by such assignee it was described as "one-half league of land, being the headright claim of M., * * * issued by the board of land commissioners of R. county." Under the constitution and laws of Texas at the time the certificate to M. was issued, a headright certificate could be issued only for a league and a labor, or for one-third of a league. *Held*, that the land's being described as a half a league instead of a league and labor, would not vitiate the deed, for, when the headright claim of M. was referred to, it would show what the quantity was, and, by rejecting the inconsistent word "one-half," and giving the other words the only meaning possible without rendering the deed nugatory, the true meaning was evident.

2. When the assignee deeded the land it had not been patented, though located, so that when the patent issued to him he held the legal title in subordination to the equitable title of his grantee, for whom he became simply a trustee, and the trust relation continued for over 30 years, and during the life of the trustee. There was no evidence of an intention on the part of the trustee or his heirs to hold adversely to the grantee until this suit was filed by the heirs. *Held*, that they could not recover the land.

Appeal from district court, Uvalde county; Thomas W. Paschal, Judge.

Trespass to try title by G. W. Ward and others against R. Peterson and others. Judgment was rendered in favor of plaintiffs, and defendants appeal. Reversed.

Edward Guthridge, for appellants. Clark & Old, for appellees.

NEILL, J. The appellees G. W. Ward, Nancy Peters, and Sarah A. Humphris brought their suit in trespass to try title in the district court of Uvalde county on August 2, 1889, against Maria M. Fowler, Della, Etta, Nora, and Dora Fowler, the last four of whom were then minors, and D. H. Scott, as the guardian of their estate, N. B. Pulliam, and the appellant Richard Peterson, to recover a survey, No. 60, of 26 labors of land, patented to James J. Ward, assignee of Mathew McCabe, on February 25, A. D. 1847. The defendants answered by pleading not guilty, the three, five, and ten years statutes of limitation. The case was tried by

the court without a jury, and judgment was rendered for the appellees for the north half of the survey, from which judgment this appeal is prosecuted.

Conclusions of Fact.

(1) On the 23d day of March, 1838, a certificate for a league and labor of land was issued by the board of land commissioners of Red River county to James J. Ward, as assignee of Mathew McCabe.

(2) On the 16th day of October, 1838, the land in controversy was located by virtue of said certificate, and the field notes returned to the general land office on December 31, 1838.

(3) On the 25th day of February, 1847, patent to the land was issued by virtue of said certificate and survey to James J. Ward, as assignee of Mathew McCabe.

(4) For some years prior to the issuance of said certificate, and up to A. D. 1858, James J. Ward lived in Red River county, during which year he moved to Palo Pinto county, where he resided until he died, in 1870. He was married at the time he acquired the certificate, and his wife survived him, dying in 1875.

(5) At the time of his death he left surviving him a daughter, who is the plaintiff Sarah A. Humphris, and two grandchildren, who are the other plaintiffs.

(6) On the 20th day of February, 1843, J. J. Ward executed the following deed to A. J. Fowler:

"Know all men by these presents that I, James J. Ward, of the county of Red River, in the republic of Texas, for and in consideration of the sum of eight hundred and seventeen dollars, the receipt whereof I hereby acknowledge, have bargained, sold, and transferred and conveyed, and do by these presents bargain, sell, transfer, and convey, to A. J. Fowler, of the county of Lamar, in the republic aforesaid, all my rights, title, and interest that I have in and to certain lands of the following description, to wit: An undivided interest of one-third of one league and labor of land, being the claim of the headright of Minerva Boren; one undivided interest of one-third in and to the headright claim of John Pew of one-half league and labor of land, being the headright claim of Rebecca McGown, located on the waters of the Cypress; an undivided interest of one-third in and to one league and labor of land, being the headright claim of Adam Hampton, located and situated in Lamar county, aforesaid, on Crocket's creek, adjoining the surveys of the headright claims of Mathew Cline and Richard Thomas; an undivided interest of one-third in and to one-half league of land, being the headright claim of Mathew McCabe; all of which said claims being issued by the board of land commissioners of Red River county, giving to said A. J. Fowler a quit-

claim to the same, to have and to hold from me and my heirs to him and his heirs forever. In testimony whereof I have hereunto set my hand and affixed my seal this the 20th day of February, in the year of our Lord eighteen hundred and forty-three.

"J. J. Ward.

"A. S. Skidmore.

his

"David X Friley."

mark.

(7) On the 15th day of April, 1873, A. J. Fowler made a deed to J. H. Fowler, reciting therein that on the 20th day of January, 1844, he had transferred to J. H. Fowler all his interest in certain lands conveyed to him by J. J. Ward on the 20th day of February, 1843, including "an undivided interest of one-third in one-half league of land, being the headright claim of Mathew McCabe;" and that the written transfer referred to had become worn and defaced; and that he made the deed of April 15, 1873, in lieu of the one referred to.

(8) On March 7, 1847, J. J. Ward wrote the following letter to A. J. Fowler:

"Mr. A. J. Fowler—Dear Sir: John H. Fowler alleges that he has bought of you all the lands I sold you, and proposes to make sale of a portion of them, and I feel it my duty to give you information of that fact; and I would further state that the lands I sold you, as well as I recollect, were one-third of the partnership lands owned by Shelton, Fowler, and myself, to wit, a league and labor, Adam Hampton's headright; a league and labor, Rebecca McGown's headright; one-half league, headright of Mathew McCabe; also Minerva Boren's headright league; one-half of John Pew's headright league; and also one-half of Adam Hampton's headright league. The one-third of the above lands you will recollect I gave you a quitclaim conveyance, for which you satisfied me; and if I rightly recollect I also sold you part of William B. Ward (deceased) headright, one section less than one-third of a league; and also one section in part of Joseph Cox headright. I have been thus particular that, if there is anything wrong in J. H. Fowler's making sale, you might do well to look to it; and while I give you this information as a friend, I want it distinctly understood that there is no additional obligation of the sale of said lands, only in evidence of the sale as above specified, March 7, 1847. J. J. Ward."

(9) On August 1, 1868, J. H. Fowler, by his deed of that date, conveyed to R. Peterson and John L. Fowler, together with other tracts of land, one-half of a league and labor of land in Uvalde county, describing it as the land located and patented by virtue of the headright certificate of Mathew McCabe, which was acknowledged on August 1, 1868, and recorded in Frio county June 3, 1875.

(10) About the 26th day of September, 1856, James J. Ward conveyed to Amos Murrill an undivided one-half interest in the league

and labor sued for, which interest was transferred by mesne conveyances to Thomas Hannahan.

(11) On the 26th day of October, 1878, in a suit by Hannahan against J. J. Ward, in which Ward was cited by publication, his residence being alleged unknown, for partition of the land, Ward not answering or otherwise appearing in the case, the south half of the survey was allotted to Hannahan and the north half to Ward.

(12) Peterson and Fowler paid taxes on the land for 30 years next preceding the trial of this case in the district court.

(13) Neither Ward nor his heirs asserted any claim hostile to appellants' title until the institution of this suit, nor paid any taxes on it after Ward sold to Murrill.

Conclusions of Law.

Does the conveyance by Ward to A. J. Fowler of an undivided one-third interest in and to one-half league of land being the headright claim of Mathew McCabe, issued by the board of land commissioners of Red River county, describe the land in controversy, or give data from which the description may be found and made certain? If it does, the description is sufficient. Catlett v. Starr, 70 Tex. 488, 7 S. W. Rep. 844; Norris v. Hurt, 51 Tex. 614; Bowles v. Beal, 60 Tex. 324; Coker v. Roberts, 71 Tex. 602, 9 S. W. Rep. 615; Overand v. Menczer, 83 Tex. 123, 18 S. W. Rep. 301. Under the constitution and laws of Texas in force at the time the certificate to McCabe was issued, a headright certificate could not issue for one-half of a league of land. It must have been for a league and labor, if issued to the head of a family; or for one-third of a league, if issued to a single man. McCabe was entitled to, and there was issued to James J. Ward as his assignee, by the board of land commissioners of Red River county, a headright certificate of one league and labor. It was an undivided one-third interest in "land, being the headright claim of Mathew McCabe, issued by the board of land commissioners of Red River county," that was conveyed by Ward to Fowler; and its being described as "a half of league" instead of "a league and labor" was not such a misdescription as would vitiate the deed, for, when the headright claim of McCabe issued by the board of land commissioners was referred to, it would show that the quantity of the land was a league and labor, and not a half of a league. If, in construing the deed, any force should be given to the word "one-half," preceding the word "league," it would, on account of the inconsistency between the terms and the descriptive words following, render the deed nugatory; for we have seen that there could be no such a "headright claim" as a half a league of land in this state.

In construing a deed, when several particulars are named, descriptive of the premises conveyed, if some are false or inconsistent,

and the true be sufficient of themselves, they will be retained, and the others rejected. *Worthington v. Hilyer*, 4 Mass. 196; *Jackson v. Clark*, 7 Johns. 217; *White v. Heramann*, 51 Ill. 243; *Vose v. Handy*, 11 Amer. Dec. 101. Applying this principle, rejecting the false and taking the true, and giving to them their full meaning, it is evident that a one-third undivided interest in the headright claim of Mathew McCabe, issued by the board of land commissioners of Red River county, which is the league and labor of land in controversy, was conveyed by the deed. When the deed was made by Ward to A. J. Fowler, the land, though located, had not been patented. When the patent issued to Ward, he held the legal title in subordination to the equitable title of Fowler to a one-third undivided interest, which vested in him by virtue of the conveyance. As to Fowler's interest, the legal title was a bare naked trust in the patentee. Ward was a trustee simply, without interest in the third he had conveyed, for his vendee; and the trust relation continued until it was repudiated by Ward's heirs in instituting this suit, for there is no evidence showing any intention on the part of Ward or his heirs to claim or hold the land adversely to Fowler or his assignees until this suit was filed. *Gibbons v. Bell*, 45 Tex. 423; *Robertson v. Dubose*, 76 Tex. 10, 13 S. W. Rep. 300. In *Gibbons v. Bell*, supra, the court said: "Even when a court of equity might refuse to entertain a bill to divest the legal title out of the trustee, it would not permit it to be used as a sword to destroy the superior equitable title to which it was previously held in subordination." It was never used or attempted to be used as such weapon by James J. Ward during his lifetime. He was true to his trust for a period of over 30 years. His heirs cannot now recover possession of the property from his vendees, who hold possession of the land by virtue of an equitable title superior to the legal title of appellees. Under our view of the law, arising from the facts in this case, we are of the opinion that the judgment of the district court should be reversed, and such judgment rendered here as it should have rendered. James J. Ward, having conveyed an undivided one-third interest in the Mathew McCabe headright of one league and labor to A. J. Fowler, owned four-sixths of it in his own right when it was patented. Of this he sold three-sixths (one-half) to Amos Murrell, leaving him one-sixth, which, upon his death and the death of his wife, descended to appellees, which they are entitled to recover. Therefore, no partition being prayed for, the judgment of the court below is reversed, and judgment is here rendered against appellants in favor of appellees for one-sixth only of the entire league and labor of land in controversy, without regard to the decree of partition in the case of *Hannahan v. Ward*, to which appellants were not parties, and by

which they were not affected. It is further ordered and adjudged that appellees recover of appellants all costs in the court below, and that appellants recover of appellees all cost incurred on this appeal.

BAINES v. JEMISON et al.

(Supreme Court of Texas. Nov. 2, 1898.)

WRONGFUL ATTACHMENT—VENUE—EFFECT OF STATUTE.

Gen. Laws 1889, p. 48, providing that a suit for damages growing out of the suing out of a writ of attachment or sequestration may be brought in any county from which such writ was issued, or in any county in which such levy was made in whole or in part, applies only to suits to be brought after such act takes effect, and does not affect the venue of an action begun before, but not tried till after, such act went into effect.

Certified question from court of civil appeals, first supreme judicial district.

Action by James H. Baines against Jemison, Groce & Co. and others. From a judgment for defendants, plaintiff appeals to the court of civil appeals, which court submits to the supreme court, for determination, the question on which the correctness of the judgment turns. Affirmed.

N. B. Short and Bryarly, Brewer & Brewer, for appellant. Geo. W. Davis, T. C. Davis, and Davidson & Minor, for appellees.

GAINES, J. The court of civil appeals for the first supreme judicial district submits for our determination the following question: "The appellant instituted suit in the district court of Shelby county on the 16th day of March, 1887, for the recovery of damages for the alleged wrongful issuance of an attachment, by the procurement of appellees Jemison, Groce & Co., from the district court of Galveston county, and the wrongful and illegal levy of the same in Shelby county, on the 27th of October, 1886, upon appellant's property, by the sheriff of Shelby county, at the instance and request of appellees. The appellees Jemison, Groce & Co., among other pleas, alleged their residence to be in Galveston county, and claimed the privilege of being sued in the county of their domicile. The cause came on for trial on the 14th day of November, 1891, and on that day the jury returned the following verdict: 'We, the jury, find for the defendants upon the plea to the jurisdiction.' And thereupon judgment was rendered that the plaintiff take nothing by this suit, and that the defendants recover costs. The court, in its instruction to the jury upon the question of venue, gave in charge the law as it stood at the institution of the suit, and ignored both the act approved March 25, 1887, and the act approved March 29, 1889. The defendant Sims was made a party subsequent to the 16th of March, 1887, the day on which the original petition was filed, but as to when he was

made a party the record is silent. His first answer was filed November 11, 1887. The defendants Jemison, Groce & Co. filed their original plea and answer on May 13, 1887. The issue of law submitted for adjudication is, did the court err in giving in charge the law regulating the venue of suits, as it existed when the suit was instituted, rather than the law as it is declared in the act of March 29, 1889?"

We are of opinion that the trial judge did not err in his ruling. Since the venue of a suit affects only the remedy, it is clear that it is in the power of the legislature to amend the laws in relation to that matter, and to make the amendment applicable to causes of action that may have accrued before the passage of the act; and it may be that it would be competent to so change the law as to confer local jurisdiction of a suit already pending upon the court in which it was instituted, although such court did not have jurisdiction at the time the action was brought. But upon this question we need give no opinion. Admitting the power of the legislature in such a case, its intention would have to be clear before the courts would give the statute such a retroactive effect. The act approved March 29, 1889, amends the previous statute upon the subject so as to make it read as follows: "That any suit for damages growing out of the suing out of any writ of attachment or sequestration, or for the levy of any such writ, may be brought in any county from which such writ was issued, or in any county in which such levy was made in whole or in part within this state." Gen. Laws 1889, p. 48. This clearly applies to suits to be brought after the act should take effect. It contains no language indicating an intention that pending actions should be embraced within its provisions. A party who has been sued in a court which cannot take jurisdiction as to his person, in the particular action, without his consent, has the right, upon his plea of privilege, to have the suit abated, and to recover his costs. The legislature might well decline to deprive him of that right, even had it the power to do so. We think, therefore, that the act in question was intended to apply only to future actions, and that it did not affect the suit under consideration, as originally brought. The case is clearly distinguishable from that of *Railroad Co. v. Graves*, 50 Tex. 181. Under the law as it existed at the time that suit was brought, there was a doubt as to plaintiff's right to sue in Collin county. The statute was subsequently amended so as to confer jurisdiction upon the district court of that county. The plaintiff then amended his petition so as to avail himself of the privilege conferred by the new statute. Upon the trial the defendants' plea to the jurisdiction was held bad, and upon appeal that ruling was sustained. There the filing of the amended petition was the same as the in-

stitution of a new suit, and, since this accrued after the new law had taken effect, the point was correctly decided. Being of opinion that the trial court did not err in its decision upon the question presented for our determination, it will be so certified.

RICHARDSON et al. v. VAUGHAN et al.
(Supreme Court of Texas. Oct. 23, 1893.)

CLAIM DUE DECEDENT'S ESTATE — SUIT BY HEIRS — WHEN ALLOWABLE — LIMITATIONS — MUTUAL ACCOUNTS.

1. Though no letters of administration have been granted on the estate of a decedent, his heirs cannot sue to recover a debt due the estate, when it is not alleged that there are no debts against the estate, and it does not appear that any emergency exists which renders suit by the heirs necessary to preserve the claim. 22 S. W. Rep. 1112, affirmed.

2. An account for goods sold, which contains no credits, is not a "mutual or current account," within the meaning of Rev. St. art. 3203, excepting from the two-years statute of limitations generally applicable to accounts "mutual or current accounts" arising in certain mercantile transactions.

Error from court of civil appeals, first supreme judicial district.

Action by Ella O. Richardson and others against C. V. Vaughan and Imogene Vaughan, his wife, upon certain accounts. A judgment for defendants was affirmed by the court of civil appeals, (22 S. W. Rep. 1112.) and plaintiffs bring error. Affirmed.

Preston & Spencer, for plaintiffs in error.
N. N. Boone, for defendants in error.

GAINES, J. This case comes before us upon a writ of error to the court of civil appeals of the first district. The plaintiffs in error, who are the surviving widow and the children of John P. Richardson, late of Mississippi, brought this suit against the defendant in error C. V. Vaughan to recover upon certain open accounts for goods sold. The wife of Vaughan was also made a party defendant, in order to subject the rents of certain real estate claimed by her to the payment of the debt. Some of the accounts were for goods alleged to have been sold to defendant C. V. Vaughan by John P. Richardson in his lifetime. The others were for goods sold to Vaughan by Kelfer Bros. The latter's accounts were alleged to have been assigned to the estate of Richardson since his death. The plaintiffs averred that they were the sole heirs of John P. Richardson, and the sole owners of the accounts sued on. The trial court held that the plaintiffs were not entitled to maintain the action, and dismissed the suit. This judgment was affirmed by the court of civil appeals. 22 S. W. Rep. 1112.

Since our statute casts the legal title of property belonging to the estate of deceased persons directly upon the heirs, (subject, however, to the payment of debts,) we think it might properly have been held that, after

the lapse of a reasonable time without administration upon the estate, they should have the right to sue for the recovery of any chose in action or other property which had descended to them. But from an early day a different doctrine has been announced in this court, and it is now too late to depart from it. As a general rule, the holding has been that the heirs cannot sue without alleging and proving that there is no administration upon the estate, and that there is no necessity for one. In *Walker v. Abercrombie*, 61 Tex. 69, an exception was recognized. There three years had elapsed since the death of the ancestor, and no administration upon his estate had been applied for. The estate was alleged to be insolvent, and it appeared that the debt which was sought to be recovered was about to be barred by limitation. It would seem that, where a suit is necessary to preserve the property, the right of the heirs to bring it ought to be maintained, especially where a considerable time has elapsed without administration. Creditors who have not seen proper to attempt the collection of their claims through the probate court are not likely to suffer any injury in such a case by permitting the heirs to sue. But in this case the allegations in plaintiff's petition do not bring them within any of the exceptions to the rule that the administrator must sue. It is not alleged that there are no debts against the estate, and it does not appear that any emergency existed which made a suit by the heirs necessary in order to preserve the claim. It is urged that the accounts were about to be barred by limitation, but the answer to that contention is that all of the accounts appear, as we think, to have been barred when the suit was instituted. From the time the Kelfer Bros.' accounts fell due, more than two years had elapsed when they were transferred to the estate of Richardson. All the accounts for goods sold by Richardson save one are distinctly alleged to have matured in 1888. He is alleged to have died "on or about the — day of —, 1891," so that they had been due more than two years when he died. Admitting that, according to the averments in the petition, one of the accounts for goods sold by Richardson did not become payable until January, 1890, even that, in our opinion, was clearly barred in July, 1892, when this suit was brought. Under our statute, limitation, if running, was suspended for one year after the death of the intestate; but when this action was commenced more than three years had elapsed from the time the last account matured.

Now, it is alleged in the petition that "John P. Richardson was a wholesale merchant, trading and doing business in the city of New Orleans, in the state of Louisiana, and the said C. B. Vaughan was a merchant trading and doing business in the city of Navasota, Grimes county, Texas, * * * wherefore plaintiffs aver that the said sale

and delivery of goods was as between merchant and merchant, trading and doing business as between each other as such." A similar allegation is made as to Kelfer Bros., and as to the accounts for goods sold by them. We infer that the purpose of these averments was to show that the claims sued upon were such accounts between merchant and merchant as were not barred in a less time than four years. But we think the allegations fail to bring the action within the exception to the general rule that all suits upon open accounts shall be brought within two years. The act of February 5, 1841, contained this provision: "All actions upon open accounts other than such as concern the trade of merchandise between merchant and merchant their factors and servants, shall be commenced within two years next after the cause of such action or suit and not after." Pasch. Dig. art. 4604. This was construed to except only mutual or reciprocal accounts; that is to say, only such running accounts as embraced items both of debit and credit. *Leavitt v. Gooch*, 12 Tex. 96; *Guichard v. Superville*, 11 Tex. 523; *Judd v. Sampson*, 13 Tex. 19. Our Revised Statutes are more explicit, and expressly declare the law as it had been formerly decided. The provision is that "actions upon stated or open accounts, other than such mutual or current accounts as concern the trade of merchandise between merchant and merchant, their factors, or agents," shall be barred in two years. Rev. St. art. 3203. The accounts sued on in this case contain no credits, and are not such "mutual or current accounts" as are excepted from the operation of the statute last quoted. We conclude that the plaintiffs have not brought themselves within any of the excepted cases in which the courts of this state have held that the heirs of a deceased person are authorized to sue for debts due the estate, and that the trial court and the court of civil appeals did not err in so holding. The judgments of those courts are accordingly affirmed.

SANBURN v. SCHULER et al.

(Supreme Court of Texas. Oct. 26, 1893.)

SEPARATE PROPERTY OF DECEASED HUSBAND—RECORDED TITLE—INNOCENT PURCHASER.

Where a deed conveying land to a married man does not show that it was paid for with his separate property, and therefore, from the records, the land appears community property, which would pass to the wife on the husband's death without issue, one purchasing it from the wife after the husband's death, without notice that it was paid for with his separate property, gets good title against those who would inherit it as his separate property.

Trespass to try title by Mary D. Sanburn against Matilda M. Schuler and H. B. Schuler, her husband. A judgment for defendant was affirmed by the court of civil appeals, and plaintiff applies for writ of error. Writ denied.

Millard Patterson, for Mary D. Sanburn, applicant.

STAYTON, C. J. The land in controversy was conveyed to Barron F. Deal, while he was the husband of Tina Deal, by a deed reciting a consideration of \$1,000 paid, but there was nothing to show that the land was paid for with his separate estate, though this was the case. Barron F. Deal died without leaving any children, but one sister and his wife survived. After his death his widow, for a valuable consideration, conveyed the land to a person who conveyed it to defendant on like consideration, and neither of the persons had notice that the land was paid for by Barron F. Deal with his separate means. This action was brought by the sister of Barron F. Deal, as his sole heir, to recover the land, but judgment was rendered against her by the trial court, and on appeal that judgment was affirmed by the court of civil appeals. 22 S. W. Rep. 119.

On application for writ of error, applicant insists that the decision is contrary to the rulings made in many cases, and especially to the decisions in *Edwards v. Brown*, 68 Tex. 329, 4 S. W. Rep. 380, and 5 S. W. Rep. 87, and *Patty v. Middleton*, 82 Tex. 586, 17 S. W. Rep. 909. Since the decision of the case of *Cooke v. Bremond*, 27 Tex. 457, it has been steadily held that a purchaser for valuable consideration from a husband, of property acquired during marriage, will be protected against the claim of the wife, although the deed through which the property was acquired in terms conveyed the property to the wife, though the property was paid for with the separate funds of the wife, or was intended as a gift to her, unless the purchaser, through recitals in the deed or otherwise, was put upon inquiry or had notice of facts giving to the wife the superior right. No reason exists for giving effect to this rule as to transactions occurring during the marriage, and for denying it in transactions occurring after the death of husband or wife. It must be kept in mind, when dealing with a question of this kind, that the purchaser is protected because he purchases from and pays a valuable consideration to the person who apparently has title, through such means for transmitting title as the law prescribes. The effect of a deed made to husband or wife during marriage must necessarily be the same after the death of one as while both are alive; and if from that, in connection with the statutes under which it must be construed, property appears to belong to the common estate, then a bona fide purchaser from the survivor must be protected against the claims of persons entitled to take, by inheritance only, the separate estate of the deceased member. This necessarily results from the fact that the bona fide purchaser is entitled to rely upon the deed construed under the law; and this, nothing to the contrary appearing, made the land in contro-

versy, acquired by onerous title during the marriage, common estate. Such appearing to be the character of the property, the purchaser was bound to inquire who inherited the share of the deceased husband, and upon inquiry he ascertained that the deceased left neither child nor children, and thus knew that the wife, under the statute, was the heir. The property appearing to be common property, an inquiry as to what persons would inherit the separate estate of the deceased husband was irrelevant. If any fact had been known to the purchaser which would have shown the superior right of the husband to the land, then a purchaser from the wife could not be deemed an innocent purchaser on the ground that he did not know that the deceased husband left a sister. For every purchaser must ascertain who is entitled to take by inheritance any particular property belonging to the estate of a deceased person dying intestate. If the property be community property, in fact or presumptively, the purchaser must ascertain who is the heir of the deceased as to such property; but, if it be really or apparently the separate estate of the deceased, then he must ascertain who takes that by inheritance. In so far as the right of the bona fide purchaser to protection is concerned, the operation of the statute of descent and distribution on the apparent title was to pass that to Mrs. Deal as fully as would a conveyance by one having the apparent superior right pass that apparent right, even to a purchaser with notice of the superior right of some third person, so that she, as well as a person holding apparent title by deed, could make a conveyance to a bona fide purchaser that would be protected against an unknown but superior right to that held by the vendor. The statutes of descent and distribution are as effective in their operation to pass apparent title as is a deed, and a purchaser is entitled to rely upon title evidenced in the one way as fully as when evidenced in the other. There is nothing in the opinion of the court of civil appeals in conflict with the rules announced in the cases cited in the opinion of that court, nor to the rules announced in the cases of *Edwards v. Brown*, 68 Tex. 329, 4 S. W. Rep. 380, and 5 S. W. Rep. 87, and *Patty v. Middleton*, 82 Tex. 586, 17 S. W. Rep. 909. The motion to reconsider will be overruled.

TEXAS & P. RY. CO. v. FRENCH.

(Supreme Court of Texas. Oct. 26, 1893.)

INJURY TO EMPLOYE — ACTION AGAINST EMPLOYER — INSTRUCTIONS.

1. In an action for injuries caused plaintiff while in defendant's employ by the caving in of a ditch in which he was at work under the weight of a piece of timber intended to be used as a skid in launching a barge, an allegation in the petition that he was injured through the negligence of defendant in placing a piece of timber "on the ground and causing the ditch

to be dug so close to it that the weight of the timber caused the bank to cave," does not justify a charge that it was defendant's duty to adopt such plans as would afford a reasonable degree of safety to its employees, and that, if it failed in this respect, it would be liable for injury resulting therefrom. 22 S. W. Rep. 866, reversed.

2. Plaintiff was of mature years, and, while it was alleged that he was inexperienced in the work, it appeared that the danger of the bank caving in was open to the observation of any man of ordinary mental capacity. *Held*, that it was error to refuse a charge that, if such danger was open to the observation of plaintiff, as it was to that of defendant's foreman, under whose direction he was digging the ditch, plaintiff could not recover, as in such case plaintiff assumed the risk of the bank's caving in. 22 S. W. Rep. 866, reversed.

3. Such refusal to charge was not covered by a clause in the general charge to the effect that plaintiff was bound to use ordinary diligence to protect himself from danger, and that he was chargeable with notice of such defects as he might discover by the exercise of such diligence.

4. The court charged that "if, with the log as it was, in digging the ditch there was no danger that could have been known to either plaintiff or" defendant's foreman, "C., (assuming C. to be a competent man in his business,) by the exercise of ordinary care," plaintiff could not recover. *Held*, that in the absence of any allegation or evidence of C.'s incompetency, the insertion of the parenthetical clause was erroneous. 22 S. W. Rep. 866, reversed.

Error from court of civil appeals of first supreme judicial district.

Action by W. J. French against the Texas & Pacific Railway Company for personal injuries. A judgment for plaintiff was affirmed by the court of civil appeals, (22 S. W. Rep. 866,) and defendant brings error. Reversed.

F. H. Prendergast, for plaintiff in error. Scott & Jones and Jas. Turner, for defendant in error.

BROWN, J. W. J. French sued the Texas & Pacific Railway Company in the district court of Harrison county to recover damages for injuries alleged to have been received by him while in the employ of the defendant as a member of a bridge gang, engaged at the time preparing to launch a barge on the Atchafalaya river in the state of Louisiana. He was working under the direction of one Collins, who was also in the employ of the defendant, and foreman of the gang, with power to employ and discharge the hands so engaged under his direction. The injury is alleged to have occurred by reason of the negligence of Collins. The case was tried in the district court, and a verdict was rendered by the jury, and judgment entered by the court in favor of the plaintiff, from which the defendant appealed to the court of civil appeals, which affirmed the judgment of the district court. 22 S. W. Rep. 866. Motion for rehearing was overruled in the court of civil appeals, and a writ of error was granted by this court. Appellant presents as grounds for the revision of the judgment of the court of civil appeals its failure to sustain three assignments of error.

First assignment of error: "The court erred in charging the jury 'that it was the defendant's duty to adopt such plans and methods for the conducting of the business in which plaintiff was engaged at the time of the happening of the injury, as, if they had been properly pursued and carried into effect, would have afforded a reasonable degree of safety to those employees engaged in said work at the time; and, if they failed in this respect, defendant would be liable, if injury to plaintiff resulted from such failure.' This was error, because there was no complaint in the pleading or evidence that such plans and methods for conducting the business had not been adopted." In the case of *Railway Co. v. Hennessey*, 75 Tex. 157, 12 S. W. Rep. 608, this court said: "It is elementary and statutory in this state that the petition shall set forth a full and clear statement of the cause of action; that is, the facts which constitute the cause of action. This is necessary in order to apprise the opposite party of the facts that are expected to be proved. * * * Hence it follows that an act done or omitted which is relied on to establish negligence must be alleged, or proof will not be admitted." Again, on page 158, 75 Tex., and page 610, 12 S. W. Rep., the court in the same case says: "It was good pleading on the part of the plaintiff to set out every material fact upon which he relied for recovery, but he would not be allowed to prove other material facts upon which the petition did not rely." The petition in this case complied with the rule announced, and set out the cause of action as follows: "The plaintiff was digging the ditch by order of his foreman, W. T. Collins;" that W. T. Collins negligently placed a heavy piece of timber on the ground, which said piece of timber was to be used as a skid; that plaintiff was ordered by Collins to dig the ditch alongside of the skid; that the bank gave way under the weight of the timber; that plaintiff was injured by reason of the negligence of Collins in placing the timber on the ground, and causing the ditch to be dug so close to it that the weight of the timber caused the bank to cave. The objection urged by appellant under this assignment is that the allegations of the petition did not make the issue of negligence in failing to furnish plans for the work. The court of civil appeals in passing upon this assignment says: "There was also evidence that this was not the best and safest way in which to do the work, but that there were other methods sufficient for the purpose which were safer." Again, the court says: "The court properly submitted the question of negligence in the planning of the work to the jury." It is clear that the jury was authorized by the charge to conclude that the question as to whether or not the appellant had provided reasonably safe plans for the work was submitted for their determination, and, indeed, could not have arrived at any other conclusion. From all the facts in the case the result of a ver-

dict against the appellant must have been reached by a determination of this issue against it. If the issue was not made by the pleading, the giving of the charge was such error as will require the reversal of the judgment. *Lovins v. Dixon*, 56 Tex. 79; *Railway Co. v. Terry*, 42 Tex. 451; *Markham v. Carothers*, 47 Tex. 22. The negligence charged in the pleading was that the foreman, Collins, negligently "placed a heavy piece of timber on the ground, and caused a ditch to be dug" too close to it, from which cause the dirt caved in, and caused the log to fall on the plaintiff. From this allegation the appellant could not know—"was not apprised"—that the plaintiff expected to prove that this was not the best and safest method in which the work could be done, or that there were other methods "sufficient for the purpose which were safer." Nor was the appellant apprised that the plaintiff would attempt to prove that it had "failed to furnish reasonably safe plans for the performance of the work." It is probable that the error committed by the court in giving this charge caused injury to the appellant, and it is therefore of such importance as to require a reversal of the judgment.

Second assigned error: "The court erred in refusing special charge No. 1 asked by the defendant, as follows: 'If the danger to be expected from the caving of the bank was open to the observation of French, as it was to the foreman, Collins, then plaintiff cannot recover, because in such case French assumed the risk of being injured by the caving of the bank.'" The plaintiff was a man of mature years, and, while it is alleged that he was inexperienced in this work, it is not alleged that there was any danger in the performance of the work that was of a character that required any experience to understand it; but the facts do show that the danger was such as was open to the observation of any man of ordinary mental capacity, and equally apparent to plaintiff as to Collins. The charge expressed the law upon that question, and should have been given. *Railway Co. v. Lempe*, 50 Tex. 22. In the case quoted the court says: "Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself if he goes on with it." The facts of this case do not bring it within any exception to the rule. The injury resulted from the operation of the laws of nature. The log was heavy; the ditch was dug too near to the log; and, the lateral support being removed, the dirt gave way, causing the log to roll towards the ditch, catching the plaintiff, and injuring him. He was bound to take notice of the operation of the ordinary laws of nature that brought about the result. *Railway Co. v. Lempe*, supra; *Railway Co. v. Bradford*, 66 Tex. 738, 2 S. W. Rep. 595; *Railway Co. v. Williams*, 72 Tex. 164, 12 S. W. Rep. 172. If there was anything in the condition of the soil to

make it unusually hazardous, no one could discover that fact quicker, nor know it with more certainty, than the man who was digging the ditch. Appellee claims that the point was covered in a clause of the general charge given by the court, which is as follows: "If it should appear that plaintiff knew that in performing said duty in the manner that he undertook to do so, or by the exercise of ordinary care might have known, that it was dangerous, and he still continued performing said work, then plaintiff cannot recover. It was the duty of the plaintiff, for his own safety, to exercise that degree of care that a reasonably prudent person would have exercised under the same circumstances; and if his injury resulted to him from a failure on his part to use such care, then you will find for the defendant, and that without regard to whether said Collins had or had not failed to perform the duty required of him." That the servant must use ordinary diligence to protect himself from danger, and that he is chargeable with notice of such defects as he might discover by the exercise of such diligence, is a different proposition from that embraced in the charge asked and refused. While the charge given is correct, yet the appellant was entitled to have both propositions submitted to the jury, since both issues arose upon the evidence and under the pleadings. It was error to refuse the charge.

Third assigned error: "The court erred in refusing special charge No. 2 asked by defendant, as follows: 'If in the digging of the ditch with the log as it was, there was no danger that could have been known by either French or Collins by the exercise of ordinary care, then plaintiff cannot recover; and also erred in qualifying the charge given on that subject, because there was no pleading or evidence to justify the qualification.'" The court gave the following charge: "If with the log as it was, in digging the ditch, there was no danger that could have been known to either plaintiff or Collins (assuming Collins to be a competent man in his business) by the exercise of ordinary care, then plaintiff cannot recover." The only material difference between the charge given and that asked by defendant and refused by the court consists in inserting in parentheses the words "assuming Collins to be a competent man in his business." In passing upon this assignment, and speaking of the qualifying language, "assuming Collins to be a competent man in his business," the court of civil appeals says: "The responsibility placed upon the defendant by the qualification is no greater than the law imposes." This is true, and, if there had been such an issue made by the pleading and evidence, the charge would not have been improper. There being no allegation in the pleading that Collins was incompetent, and no evidence to that effect, it was not proper to give the jury any charge which submitted to

them the question of his competency or incompetency. We think that the jury from this charge must have understood that, in order to apply this test to the facts as to whether the appellant was to be held liable for the results of a danger that could have been discovered by neither Collins nor plaintiff, they must first determine whether or not Collins was a "competent man in his business." If he was competent, and the danger could not be known to either, then plaintiff could not recover; and, if Collins was not competent, then plaintiff would not be debarred of his right of recovery by the fact that the danger could not have been known to either of them. This placed Collins' competency in issue before the jury without pleading or evidence, which was error. For the errors committed by the district court, and the failure of the court of civil appeals to sustain the assignments presenting those errors, it is ordered that the judgment of the court of civil appeals and of the district court be reversed, and that this cause be remanded to the district court for further trial; and it is further ordered that the appellant recover of the appellee all costs of this court and of the court of civil appeals.

CABELL, Marshal, et al. v. ARNOLD.

(Supreme Court of Texas. Oct. 26, 1898.)

ARREST WITHOUT WARRANT — CIVIL LIABILITY OF OFFICER.

When a lawful warrant for an arrest has been issued, and placed in the hands of a marshal or sheriff, the fact that his deputy makes the arrest without having the warrant in his possession does not render the principal civilly liable to the person arrested. 22 S. W. Rep. 62, reversed.

Error from court of civil appeals of second supreme judicial district.

Action by H. D. Arnold against W. L. Cabell and others, on the official bond of said Cabell as United States marshal, for false imprisonment. Judgment for plaintiff was affirmed on appeal by the court of civil appeals, (22 S. W. Rep. 62,) and defendant's bring error. Reversed.

A. T. Watts, for plaintiffs in error. B. G. Bidwell, for defendant in error.

STAYTON, C. J. W. L. Cabell, as United States marshal, held a valid warrant authorizing the arrest of H. D. Arnold, on a charge of felony, under the laws of the United States. That warrant was issued by a commissioner at Dallas, and delivered to Cabell, who remained in Dallas, and retained the warrant, but, by telegram, directed one of his deputies to go to Palo Pinto county, and arrest Arnold and others named in the warrant. The deputy and a special deputy made the arrest in Palo Pinto county without any warrant being in their possession, authorizing the arrest, and conveyed Arnold from the place where arrested to Dallas,

and there delivered him to the marshal. Arnold was confined in jail one night, and then brought before the commissioner, by whom he was admitted to bail until final examination, upon which, after considerable delay, he was discharged. This action was brought against Cabell and the sureties on his official bond to recover damages for false imprisonment, based on the proposition that the arrest and detention until Arnold was placed under the control of the marshal were illegal, because the deputies had not the writ in their possession at the time the arrest was made, nor during the journey to Dallas. The jury were instructed that the arrest and detention by the deputies without having the warrant in their possession were illegal, and that Arnold was entitled to recover for the arrest and detention until he was delivered to the marshal, at Dallas; and, under this instruction, verdict and judgment went in his favor. On appeal the same ruling was made by the court of civil appeals, and from that decision writ of error is now prosecuted.

The arrest and detention all occurred within the district within which Cabell was marshal, and the material facts transpiring at the time are thus stated by Arnold: "Sisk [one of the deputies] then told me that they wanted me to go to Dallas, Tex.; that Gen. Cabell had telegraphed him to arrest me. They then told me that they would have to carry me. I asked them if they had any papers for my arrest. Sisk said he had none. They did not show me any, but Sisk said there were some at Dallas for me. Gerrin [the other deputy] said, later on, that, if ordered by Cabell, he would arrest one as quick without a warrant as with one. I told them I had to go by home. They carried me by home, and I got my clothes. I did not resist arrest. They carried me to Weatherford, and carried me to Dallas." No facts are shown which would have justified the arrest of Arnold without the issuance of a warrant, and we have the question whether, when a lawful warrant has been issued, and placed in the hands of a marshal or sheriff, his deputy may make an arrest without having the warrant in his possession at the time, without subjecting his principal to liability in a civil action brought by the person arrested. The determination of this question must depend upon the laws in force in this state, prescribing the powers and duties of sheriffs and their deputies. Rev. St. U. S. § 788.

The sufficiency of the warrant that went into the hands of the marshal is not questioned, and the statutes bearing on the question of its proper execution provide that all reasonable means are permitted to be used to effect it; that no greater force shall be used than is necessary to secure the arrest and detention of the accused; and that "in executing a warrant of arrest it shall always be made known to the person accused

under what authority the arrest is made, and if requested the warrant shall be exhibited to him." Code Crim. Proc. arts. 255, 257. When the Code of Criminal Procedure fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law must be applied, and govern. Code Crim. Proc. art. 27. It will not be questioned that the deputies had the same authority to arrest as would have had the marshal, under the same circumstances. It has been held in England, and in some of the courts of this country, that a person may use necessary force to resist arrest, in a case in which a warrant is necessary to authorize it, unless the officer, at the place and time he attempts to make the arrest, has the warrant in his possession, and that such violence towards the officer will not constitute a battery, or other like offense, and, further, that the absence of the warrant may affect the grade of offense committed by violent resistance resulting in the death of the officer. *Gallard v. Laxton*, 9 Cox, Crim. Cas. 127; *Codd v. Cabe*, 1 Exch. Div. 352; *Reg. v. Chapman*, 12 Cox, Crim. Cas. 4; *People v. McLean*, (Mich.) 38 N. W. Rep. 231; *Webb v. State*, (N. J. Sup.) 17 Atl. Rep. 113. In those cases, warrants existed which would have authorized an arrest. In crimes such as assault, battery, or homicide, the animus with which the act is done becomes an element of the offense; and it may very properly be held, where the arrest of a person is attempted without warrant, in a case in which warrant is necessary, that resistance was under the belief that the act was an unauthorized interference with right to personal liberty, which every person has the right to resist by the use of such force as is necessary. In such cases the existence of the writ, if not present, ought not to deprive the person resisting arrest of the right to act and base his belief upon the facts as they then appeared to him, and to have his intent, upon being charged with crime, determined thereby. The cases referred to, in general terms, declare arrest illegal, in cases in which warrant is necessary, unless the warrant be in the possession of the officer at time and place of arrest; but they were all criminal cases, in which the animus of the party resisting was a vital question. It ought not to be denied that the law contemplates that the warrant directing the arrest of a person charged with crime will be in the possession of the officer when he makes an arrest under it, for he is required to exhibit it, if called upon to do so; and this is based on a wise public policy, one purpose of which is that the officer may have to exhibit such evidence of his authority to make the arrest as will be deemed sufficient to take from the person whose arrest is commanded all right to question the authority of the officer. Does it, however, follow from this that the absence of the warrant at the time and place of arrest, if

in fact a valid warrant was in possession of the officer commanding him to make the arrest, will entitle the person arrested to maintain a civil action as for trespass or false imprisonment? The correct answer to this must depend upon a determination of the facts which confer authority on an officer to arrest a person charged with crime, for, if the authority exists, an irregular exercise of it cannot give cause for civil action, unless that irregularity or mode of execution be of a character to work loss or deprivation of freedom of action to the person arrested, which would not have followed arrest in every respect regular. When it is said that arrest may be made without warrant, it is meant that the issuance of warrant is unnecessary; but, as no facts are shown to have existed that would have authorized the arrest of Arnold without warrant, it is unnecessary to inquire when such arrests may be made.

The first fact necessary to confer authority on a sheriff, or officer of like powers, in a case in which warrant is necessary, is the existence of a warrant, issued by some magistrate or court having power under the law to issue it, commanding him to make the arrest. If the warrant be issued by such magistrate or tribunal, and be in the form prescribed by law, so far as the officer is concerned to whom it is directed, it must be treated as conclusive evidence that the preliminary facts were shown which authorized it to issue. The next step is the delivery of the warrant to the person who is commanded to execute it, and, when so delivered, the officer's obligation, and duty to obey its command, become fixed, and it is clear that authority to do the act commanded must coexist with the obligation or duty. These are the essentials which confer on a sheriff, or like officer, the authority to arrest on warrant, and so long as they continue operative the authority must exist. The manner and circumstances of execution relate not to the authority, unless expressly or by necessary intendment made to; and, if the law prescribes the modes of execution, this is either to secure the execution of the process, or to guard the person whose arrest is commanded from unnecessary annoyance or oppression, and a departure in this respect ought not to affect the question of authority. But if legal injury results to the person arrested, through departure from the procedure prescribed, this would give ground for civil action; but no legal injury could result if the officer, acting within the territory to which his duties pertain, uses no more force in executing a valid warrant than is necessary, and in other respects obeys the writ. If an officer uses more force than is necessary to arrest and detain, he becomes civilly liable, in so far, as would any other wrongdoer; and if he refuses to exhibit the warrant, when called upon to do so, or to make known under what authority he as-

sumes the right to arrest, he may thereby forfeit the right he would otherwise have to compensation for hurt received by force, and in resisting arrest. *State v. Phinney*, 42 Me. 390. If a person arrested should ask a court to discharge him on the ground that more force was used than necessary to arrest and detain him, on the ground that he was not informed at time of arrest of the authority under which the officer was acting, or that the warrant was not exhibited to him on demand, no court would discharge him, if it appeared that the arrest was made under a valid warrant delivered to an officer authorized to execute it, who, in person or by deputy, had made the arrest. This would follow because the arrest and detention would be under the authority of law, and therefore legal. "If the officer expressly declare that he arrests under an illegal precept and on that only, yet he is not guilty of false imprisonment, if he had, at the time, a legal one; for the lawfulness of the arrest does not depend on what he says, but what he has. *State v. Kirby*, 2 Ired. 201; *State v. Elrod*, 6 Ired. 250. Undoubtedly, if the jailer had discharged the plaintiff, the sheriff would have been liable for an escape on Jones' execution; for the jailer is the sheriff's deputy, and bound to take notice of the writs in the hands of his superior, and a detention by the jailer is justified, if one by the sheriff himself would have been, by the same process." *Meeds v. Carver*, 8 Ired. 298. The same rule as to legality of arrest was asserted by Lord Holt in *Grenville v. College of Physicians*, 12 Mod. 386.

In the case before us, it is not shown that any act was done in arresting and detaining the plaintiff that would not have been strictly lawful, had the warrant been in the possession of the deputies at time and place of arrest, nor does it appear that plaintiff suffered any loss, indignity, inconvenience, or deprivation of freedom which he would not have suffered, had the warrant then been in their hands, and every step in the procedure contemplated by the statute strictly followed; under such circumstances we are of opinion that the charge of the court, to the effect that the warrant did not justify the arrest unless it was in possession of the deputies at time and place of arrest, was erroneous. Authority to make the arrest existing, the manner in which that power was exercised ought not to be held ground for civil action, unless therefrom hurt resulted to plaintiff, which would not necessarily have followed, had the exact procedure contemplated by the statute been pursued. Only one case has been found in which the rulings made in this case were sustained in a civil action based on like facts. Such seems to have been the ruling of the court of errors and appeals of New Jersey in the case of *Smith v. Clark*, 21 Atl. Rep. 491; but the authorities cited in that case all had application to the question that arises

in a criminal case, where a person is charged with assault, assault and battery, or homicide growing out of force in resisting arrest, which are not believed to be applicable to this case. For the errors in the charge of the court, the judgments of the district court and court of civil appeals will be reversed, and the cause remanded. It is so ordered.

HALSELL et al. v. McMURPHY et al.

(Supreme Court of Texas. Oct. 26, 1893.)

EXECUTION SALE—VALIDITY—ERRONEOUS ENTRY OF JUDGMENT—SUIT AGAINST PARTNERSHIP.

1. Where the pleadings in an action show that it was against "Gilbert L. M.," and the judgment shows that it was rendered against the M. who was a defendant in the action, the judgment is not insufficient to support an execution sale thereunder because entered against "Gabriel L. M." 21 S. W. Rep. 777, affirmed.

2. An execution sale of partnership property is valid, though the judgment under which the execution was issued was invalid as to one of the partners because erroneously entered.

Error from court of civil appeals, second supreme judicial district.

Trespass to try title by Charles A. McMURPHY and others against Julia F. Halsell and others. A judgment for plaintiffs was reversed in the court of civil appeals, (21 S. W. Rep. 777,) and they bring error. Affirmed.

A. K. Swan and B. L. Frost, for plaintiffs in error. Soward & Martin, for defendants in error.

STAYTON, C. J. Inspection of the record shows clearly that the name of "Gabriel L. McMurphy," found in the judgment entered, was simply a clerical mistake. The petition shows the true name, as well as the further fact that the action was brought against James L. Thompkins and Gilbert L. McMurphy, as partners, and, in addition to the judgment being entered against the McMurphy who was a defendant, that entry shows that the McMurphy against whom judgment was in fact rendered was only liable with Thompkins as surety on the note sued on, which was, in effect, the position of Gilbert L. McMurphy, for they are shown by the petition to be only indorsers. We fully concur with the court of civil appeals as to the law governing the case, and, in view of the entire record, in the conclusion that it shows that the judgment was in fact rendered against Gilbert L. McMurphy.

There is, however, another view of the case, decisive against the claim of any of the plaintiffs. The land in controversy belonged to the partnership composed of James L. Thompkins and Gilbert L. McMurphy, insolvent and dissolved at the time the judgment was rendered under which the land was sold. The petition showed that the action was against them on a partnership liability, and if there had been no judgment binding on Gilbert L. McMurphy, under

which execution might run against property owned solely by him, the judgment rendered authorized the sale of the land, as it was partnership property, and no question is made as to the validity of the judgment against Thompkins. *Alexander v. Stern*, 41 Tex. 193; *Railroad Co. v. McCaughey*, 62 Tex. 272; *Sanger v. Overmier*, 64 Tex. 57; *Henderson v. Banks*, 70 Tex. 398, 7 S. W. Rep. 815; Rev. St. arts. 1224, 1346. If it were believed that the form of the judgment or execution, or any irregularity in them, caused the property to sell for an inadequate price, of which there is no suggestion, then relief might have been granted, if the facts justified it, in a direct proceeding to set aside the sale on that ground, but, as there was nothing to render the sale void, title passed by it to the purchaser. Judgment of the court of civil appeals will be affirmed.

SIDWAY v. LAWSON et ux.¹

(Supreme Court of Arkansas. Oct. 21, 1893.)

STATUTES—REPEAL—EFFECT—CONVEYANCE OF HOMESTEAD—DEFECTS—HOW CURED.

1. Act March 18, 1887, provides that no conveyance affecting the homestead shall be valid unless the wife joins in executing and acknowledging it. Act April 13, 1893, declares that all such conveyances executed since March 18, 1887, which are deficient because not executed and acknowledged in accordance with the act of March 18th, shall be as valid as though such act had never been passed. *Held*, that where a decree in an action to set aside such a conveyance for defective execution and acknowledgment was rendered before the passage of the latter act, but the appeal therefrom was not decided till after its passage, it was the duty of the appellate court to decide the appeal according to the latter act, and not according to the act of March 18th.

2. Where the name of the wife did not appear in the granting part of such conveyance, nor anywhere else in the conveyance, except in a clause declaring that she released to the grantee all her right and possibility of dower, no third person having acquired any interest in the land conveyed, the defect, if any, was cured by the act of April 13th.

Appeal from circuit court, Carroll county; Edward S. McDaniels, Judge.

Action by N. L. Lawson and wife against L. B. Sidway. From a decree for plaintiffs, defendant appeals. Reversed.

Rose, Hemingway & Rose and W. F. Pace, for appellant. Crump & Watkins and W. S. McCain, for appellees.

BATTLE, J. This was an equitable action commenced by Lawson and wife against L. B. Sidway to set aside a deed of mortgage on account of usury. The defendant answered, denying the usury, and, making his answer a cross complaint, asked for a decree for the possession of the land conveyed by the deed, according to the terms thereof; and then the plaintiffs answered, saying that

the mortgage was void because the property mentioned therein was their homestead.

The circuit court found that the mortgage, and the note which it was given to secure, were tainted with usury, and declared the mortgage canceled, set aside, and held for naught; and the defendant appealed.

Upon a careful consideration of the evidence adduced at the hearing in the court below, we are of the opinion that there is no usury in the note or mortgage.

The mortgage was signed and delivered by the appellees to appellant, and purports to convey to him certain land of the husband, which constitutes their homestead, in trust to secure the payment of a promissory note of Lawson. Appellees contend that it was not executed in accordance with the requirements of the act entitled "An act to render more effectual the constitutional exemptions of homesteads," approved March 18, 1887, because the wife did not "join in the execution" of the same, and is therefore void; and appellant insists that, if the contention of appellees be correct, it was validated by the act entitled "An act to cure defective conveyances and acknowledgments," approved April 13, 1893.

Section 1 of the act of March 18 provides "that no conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instruments and acknowledges the same;" and the act of April 13th, declared that all such conveyances, mortgages, and instruments, which have been executed since the 18th of March, 1887, and are defective or ineffectual because they were not executed and acknowledged in compliance with section 1, and the record thereof, shall be as valid and effectual as though the "act to render more effectual the constitutional exemptions of homesteads" had never been passed.

The final decree of the circuit court in this action was rendered on the 24th day of August, 1891. It is contended in behalf of appellees that the latter act does not affect the mortgage in question, because this decree was pronounced on a day prior to its enactment. *Wright v. Graham*, 42 Ark. 140, supports this contention, but appellant insists that it is clearly erroneous, and should be overruled.

As to the power of the legislature to cure defects in proceedings, conveyances, and acknowledgments by a retrospective statute. It is said: "If the thing wanting or failed to be done, and which constitutes the defect in the proceedings, is something, the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by a subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act,

¹ Rehearing denied.

which the legislature might have made immaterial by prior law. It is equally competent to make the same immaterial by a subsequent law." *Green v. Abrahams*, 43 Ark. 420; *Cooley, Const. Lim.* (6th Ed.) 457.

This power is further limited. The legislature cannot, by the enactment of a retrospective statute, exercise a power in its nature clearly judicial. It is prohibited from so doing by the constitution. The powers of the government are divided into three distinct departments,—the legislative, executive, and judicial; and every "person or collection of persons, being of one of these departments," is prohibited from exercising "any power belonging to either of the others," except wherein it is expressly directed or permitted by the constitution. *Const.* 1874, art. 4.

Under our constitution, it is within the exclusive province of the courts to determine adversary suits within their jurisdiction pending between litigants, according to established principles, "and to enforce their decisions by rendering judgments and executing them by suitable process." The legislature cannot control them in the exercise of such jurisdiction by declaratory statutes designed to interpret previous enactments; or determine the rights of such litigants by substituting, in the place of the well-settled rules of law, its arbitrary will; or set aside or annul final judgments or decrees; or grant or authorize a new trial, or direct a rehearing of a cause after it has been finally determined, and the judgment therein has become final and conclusive on the parties; or allow an appeal from a judgment or decree after the time for taking it has expired. *Denny v. Mattoon*, 2 Allen, 361; *Richards v. Rote*, 68 Pa. St. 248; *McDaniel v. Correll*, 19 Ill. 226; *Lewis v. Webb*, 3 Greenl. 327; *Mayor, etc., of Baltimore v. Horn*, 26 Md. 194; *Prior v. Downey*, 50 Cal. 388; *Dorsey v. Dorsey*, 37 Md. 64; *Yeatman v. Day*, 79 Ky. 186; *Moser v. White*, 29 Mich. 59. This power cannot be constitutionally exercised by the legislature, because, if it could, the legislature would have the right to deprive the judiciary of its most essential prerogative. In that case the courts could no longer finally adjudicate and determine the rights of litigants. "The will of the legislature would be substituted in the place of fixed rules and established principles, by which alone judicial tribunals can be governed. The power to correct errors, and to revise and reverse judgments, which, in the strictest sense of the word, has always been deemed essentially judicial, would be transferred to the legislative branch of the government, even to the extent of controlling the final decrees of the tribunal of last resort." An exercise of such authority "would lead to the entire destruction of the order and harmony of our system of government, and to a manifest infraction of one of its fundamental principles."

But the legislature can enact statutes on subjects which properly come within the cognizance of courts, which may form the basis of judicial consideration and judgment in suits pending at the time of their enactment. Curative statutes, when valid and applicable, should govern the courts in such cases, unless pending suits are excepted. They govern on the ground that "the bringing of the suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered." *Green v. Abrahams*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. Rep. 701; *Cooley, Const. Lim.* 468, 469.

In *Wright v. Graham*, *supra*, the court said: "The acknowledgment of the mortgage was defective, in that it did not state that it was executed by the mortgagor for the consideration therein set forth. * * * It is urged that this defect was cured by an act of 1883, passed for the purpose of curing defective acknowledgments. But this cause was decided before the passage of that act, and we cannot consider it. The question on appeal is, did the chancellor err? That must be determined by the law as it then existed, or we would overrule a decision which was correctly made." But this is not a correct statement of the law. The final order appealed from in that case was a decree in chancery. The question in that case was not, "did the chancellor err?" The appeal transferred the action to the appellate court, and it stood for rehearing upon the same pleadings and evidence upon which it was heard in the court below. Upon that record the appellate court had the right to decide questions of law and fact, and was as untrammelled in the exercise of this right as the court below. We therefore see no good reason why the curative statute, in the absence of vested rights acquired by third persons before its enactment, should not have governed the appellate court, in this state of the case, as it did inferior courts in suits pending in them at the time of its passage. The rights of the parties were undetermined, and the appellate court occupied the position of the court below at the time it heard the cause, and before the rendition of its final decree; and it was the duty of the appellate court to have rendered judgment according to the law in force at the time, as it was of the inferior court when it acted. Such a construction of the curative act would not have constituted its enactment an exercise of judicial power, or violated the constitution, or infringed any fundamental principle of our government. *Cooley, Const. Lim.* (6th Ed.) 468, 469.

Did the act of April 13th cure the defects in the mortgage in question, if any? The name of the wife does not appear in the granting part, nor anywhere else in the mortgage, except in a clause which declares that

she releases to the grantee all her right or possibility of dower. If defective, it was because the wife did not join in its execution according to the act of March 18, 1887. That act made every instrument affecting the homestead of the husband invalid if the wife failed to join in its execution, and acknowledge the same. It vested no additional interest in the wife. The husband could abandon the homestead, and it would become liable to his debts, notwithstanding the act of March 18, 1887. *Pipkin v. Williams*, (Ark.) 21 S. W. Rep. 433. The legislature undertook to create no interest or estate by the act, but to prescribe the manner in which instruments affecting the homestead of a married man should be executed and acknowledged, at the same time recognizing the homestead as the husband's, and not the wife's, or as the joint property of the husband and wife.

Assuming that the mortgage in question was invalid, the defect in the execution of it was cured by the act of 1893, no third party having acquired an interest in the land affected by it. It was such an instrument as the legislature can make valid by a retrospective statute. *Green v. Abrahams*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365; *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. Rep. 102; *Cupp v. Welch*, 50 Ark. 204, 7 S. W. Rep. 139; *Cooley*, Const. Lim. 457. In validating it, the legislature has only given effect to the act of the parties, according to their intent.

This being an action in equity, the decree appealed from does not prevent the curative act of 1893 healing the defects in the mortgage, and giving it effect according to the intention of the parties. It is now a valid mortgage.

The decree of the circuit court is therefore reversed, and the cause is remanded for proceedings consistent with this opinion.

HEMPSTEAD COUNTY v. ROYSTON et al.¹

(Supreme Court of Arkansas. Oct. 14, 1893.)
CHANGE OF VENUE IN CRIMINAL CASE—COSTS OF
SUIT—BY WHAT COUNTY BORNE.

Acts 1889, p. 120, § 1, provides that within 30 days after termination of any cause in any circuit court, that was tried on change of venue from another county, the clerk of such court shall make out an itemized list of "all the expenses incurred" by his county in the trial of the cause, and present it to the county court of the county where the cause originated. Section 2 provides that the county court to whom "any such bill of costs" is presented, properly authenticated, shall allow the same as though the case had terminated in its own county. *Held*, that the word "costs" in section 2 should be interpreted as "expenses," and that the county in which an action was begun was liable, on change of venue, for all the expenses incurred by the trial court by reason of the change, including

"current expenses of the court," as well as those for which it was already liable.—the costs in the cause.

Appeal from circuit court, Hempstead county; Rufus D. Hearn, Judge.

Action by C. E. Royston and another, clerk and sheriff of the county of Hempstead, against the county of Hempstead, for fees. There was judgment for plaintiffs, and defendant appeals. Reversed.

The other facts fully appear in the following statement by WOOD, J.:

Appellees, clerk and sheriff of Hempstead county, filed in the county court of Hempstead accounts for fees, as follows:

Fee Bill Hempstead County, Oct. Term Ct. Ct., 1891.

Change Venue Clark Co.

State of Arkansas vs. Wm. and Ab. Easter.
To C. E. Royston, clerk, issuing 35 jurors' certificates of attendance..... \$17 50
To J. C. Jones, sheriff, summoning 42 extra jurors..... 21 00

State of Arkansas vs. Luke Sullivan.
To C. E. Royston, clerk, issuing 12 jurors' certificates of attendance..... \$ 6 00
To J. C. Jones, sheriff, to summoning 20 extra jurors..... 10 00

State of Arkansas vs. Joe J. Richardson.
To C. E. Royston, clerk, to issuing 12 jurors' certificates..... \$ 6 00
To J. C. Jones, sheriff, to summoning 35 extra jurors..... 17 50

This fee bill was disallowed by the county court. Appellees appealed to the circuit court, where the case was tried de novo by the court sitting as a jury, and upon the following agreement as to the facts, viz.: The cases of the state of Arkansas against Wm. and Ab. Easter, and the state of Arkansas against Luke Sullivan and J. J. Richardson, were tried in Hempstead circuit court upon change of venue from Clark county, and the plaintiffs C. E. Royston, as clerk of Hempstead county, and James C. Jones, as sheriff of Hempstead county, performed the services herein charged for. The defendants, Wm. and Ab. Easter and Luke Sullivan, were acquitted, and J. J. Richardson was convicted. As shown by the fee bill, the services charged for were rendered in connection with the several juries which tried said cases. Under the act of the general assembly approved April 6, 1889, (Acts 1889, p. 120,) is Hempstead county liable for the services rendered, or Clark county?

Jos. H. McCollum, for appellant. R. B. Williams, for appellees.

WOOD, J., (after stating the facts.) The act of 1889 is as follows: "Section 1. That within thirty (30) days after the termination of any cause in any circuit court of this state, that was tried on change of venue from another county, it shall be the duty of the clerk of said court to make an itemized statement of all the expenses incurred by his county in the trial of any such cause, and present it to the county court of the

¹ Rehearing denied.

county in which the cause originated. Sec. 2. That the county court to whom any such bill of costs are presented, properly authenticated, shall allow the same as if though the case had terminated in his own county." Prior to the passage of this act, the county where the offense was committed was liable only for those expenses which were proper to be taxed against the defendant when convicted, and not having property to pay, or, in other words, for the "costs in the cause." The county trying the case was liable for all the "current expenses of the court" during the progress of the trial. This often placed heavy burdens upon the trial county. Capital cases and other felonies on change of venue have been known to consume days, and even weeks, in their adjudication. The expenses incident to holding a court are necessarily great, and, although incurred by reason of an offense committed in another county, they had to be borne by the trial county under the law before the passage of the act of 1889. Applying the general rules for the construction of statutes to the above act, we conclude that the legislature intended to relieve the trial county by making the initial county liable for "all the expenses incurred by the trial county by reason of the change, including the 'current expenses of the court' as well as those for which it was already liable, to wit, the costs in the cause." Hence the word "costs" in section 2 should be interpreted "expenses." *Haney v. State*, 34 Ark. 263; *Reynolds v. Holland*, 35 Ark. 56; *State v. Jennings*, 27 Ark. 419; *State v. Smith*, 40 Ark. 431; *Sedg. St. & Const. Law*, 354, note; *Potter's Dwar. St.* 214. See, also, *Suth. St. Const.* 341, where the following language is used: "Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent." This view, we think, gives meaning to the legislative enactment. Under the former law, the court, upon motion of the prosecuting attorney, or any one interested, or on its own motion, could have ordered the clerk to certify the costs to the proper county, and it was not necessary to pass the act in order to have the clerk certify the costs within a certain time. The clerk, who might reasonably be supposed to be interested in costs due his county scarcely needed a legislative reminder to cause him to promptly discharge his duty. It follows from what we have said that, whether the services charged for be considered as expenses of court or costs in the cause, in neither case is Hempstead county liable. This court refuses to consider and determine the question as to whether there is anything due the appellees. I do not concur with the majority in that view. True, the amount involved in this controversy is of small consequence, but it is certainly an

important question as to whether the clerk is entitled to any fee for issuing certificates to jurors, and whether the sheriff is entitled to any fee for summoning same. So far as the clerk is concerned, the decision of this court in *Logan Co. v. Trimm*, (April 8, 1893,) 22 S. W. Rep. 164, is conclusive of the issue as to him. But this court has never yet passed upon the question as here presented, as to whether the sheriff is entitled to fees for summoning extra jurors, and I deem this question one of sufficient public importance to demand an authoritative announcement from this court, and I think it is squarely presented, fully argued, and should be decided.

STINSON et al. v. SCHAFER et al.

(Supreme Court of Arkansas. Oct. 14, 1893.)
BILL OF EXCEPTIONS—PREPARATION — EXTENSION
OF TIME—FILING.

Under Mansf. Dig. § 5157, providing that time to reduce exceptions to writing may be extended to the end of the succeeding term, where an extension to a certain day in that term is given, in which to prepare and tender bill of exceptions, "which, when approved, signed, and filed, * * * shall be and become a part of the record," the bill of exceptions must not only be presented to the judge, but must be filed, within the time specified in the extension, there being no implied extension to the end of the term for filing.

Appeal from circuit court, Lafayette county; William S. Eakin, Special Judge.

Action by Schafer, Swarts & Co. against Frank S. Stinson and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by WOOD, J.:

The court below gave time beyond term to perfect bill of exceptions in the following order, viz.: "On further motion, it is granted said defendants until the 25th day of March, 1891, in which to prepare and tender their bill of exceptions herein to the present judge of this court, which, when approved, signed, and filed with the clerk of this court, shall be and become a part of the record in this cause." The bill of exceptions was presented to the judge on the 23d of March, 1891, was signed by him the latter part of May, and filed with the clerk on the 12th day of June following.

L. A. Byrne, for appellants. Scott & Jones and Montgomery & Moore, for appellees.

WOOD, J., (after stating the facts.) Former decisions of this court have settled the practice as to reducing exceptions to writing beyond the trial term. *Garibaldi v. Carroll*, 33 Ark. 568; *Walker v. State*, 35 Ark. 386; *Tolliver v. State*, Id. 395; *Carroll v. Saunders*, 38 Ark. 216; *Carroll v. Pryor*, Id. 283; *Railway Co. v. Rapp*, 39 Ark. 558; *Adler v. Conway Co.*, 42 Ark. 483; *Davies v. Nichols*, 52 Ark. 554. 13 S. W. Rep. 129; *Watson v. Watson*, 53 Ark. 415, 14 S. W. Rep. 622. In *Watson v. Watson*, 53 Ark. 415,

14 S. W. Rep. 622, the appellant was allowed "until the third day of the Bradley circuit court to present his bill of exceptions." In the present case, appellants were allowed until the 25th of March, 1891, in which to prepare and tender their bill of exceptions. Thus far it will be seen that the two orders are, in legal effect, exactly the same. But counsel for appellants contends that the latter clause of the order in the present case, "which, when approved, signed, and filed with the clerk of this court, shall be and become a part of the record," takes the case out of the rule established in *Watson v. Watson*. We do not think so. A bill of exceptions, when signed by the judge, and filed with the clerk in proper time, becomes, proprio vigore, a part of the record. *Bullock v. Neal*, 42 Ark. 278. Bills of exceptions frequently conclude with this language, but it is merely pro forma. If the object of the learned counsel in adding this language to the order was, as he states, to get the benefit of the statutory limit in the event the bill was not perfected on or before the day named, then he should have compassed his purpose by an order to that effect, in pointed and definite terms. It is conceded that this language, of itself, fixes no time at all, but we are asked to construe it to mean the statutory limit. No such sweeping phraseology can have that effect. The time may be extended to the last day of the succeeding term, (*Manuf. Dig. § 5157*), but, when extended, a day certain must be fixed to come within the prescribed limit. In *Garibaldi v. Carroll*, 33 Ark. 563, the court say: "It is not implied by the language of the statute that the time, when given, if not specifically limited, will extend to the last day of the next term; * * * and, again, it cannot be conceived, with any reason, that giving time to a party for the mere purpose of reducing an exception to writing can have the effect, if no day is named, of suspending the judgment until the end of the next term." The supreme court of Kentucky, whose statute is the same as ours, requires that the bill of exceptions be signed and filed during term time, and, where time is extended, it shall be to a day certain at the succeeding term. The authorities are uniform, so far as we have been able to investigate, on that point. *Meadows v. Campbell*, 1 Bush, 105; *Smith v. Blakeman*, 8 Bush, 479; *Freeman v. Brenham*, 17 B. Mon. 608; *Allard v. Smith*, 2 Metc. (Ky.) 298; *Vandever v. Griffith*, Id. 426. It is important for the profession and litigants, in the speedy administration of justice, that this practice be adhered to. *Stare decisis et non quæta movere*. The statute is exceedingly liberal in its provisions, and circuit courts, while granting indulgence under it, must exercise and exact diligence in seeing that their orders are complied with. There being nothing presented by the record for the consideration of this court, the judgment of the lower court is affirmed.

SMITH v. LOUISVILLE & N. R. CO.
(Court of Appeals of Kentucky. Oct. 10, 1893.)

BRAKEMEN—IMPLIED AUTHORITY—EJECTING TRIPASSER—SCOPE OF EMPLOYMENT—VIOLENCE—PLEADING.

1. A brakeman has an implied authority to remove from his train, in a lawful manner, a trespasser found on a car platform.

2. Where a brakeman, in removing a trespasser, kicks him from the train while in rapid motion, the railroad company is liable for injuries caused thereby, the act being within the scope of the brakeman's employment.

3. The allegation of the petition, in an action against the railroad company for such injuries, that defendant "willfully" kicked plaintiff, does not charge the act to have been malicious on the part of the brakeman, and therefore beyond the scope of his authority, the company, and not he, being charged with committing the act willfully.

4. The allegation of the answer that plaintiff swung himself off the train is not an affirmative averment requiring a reply, being merely in emphasis of the denial that he was kicked off.

Appeal from court of common pleas, Franklin county.

"To be officially reported."

Action by Alexander Smith, by next friend, against the Louisville & Nashville Railroad Company, for injuries from ejection from train. Judgment for defendant. Plaintiff appeals. Reversed.

James Andrew Scott and Rufus K. Dinkle, for appellant. John W. Rodman, for appellee.

HAZELRIGG, J. The plaintiff, a minor, suing by his next friend, alleged that while he was riding on the defendant's car from Collins' Station to the city of Frankfort, and while the car was in rapid motion, "the defendant willfully, negligently, and carelessly, by one of its agents and servants, to wit, a brakeman, kicked and threw" him off of its train, thereby breaking his arm and causing him other serious injury. The defendant denied these averments, and for a further defense alleged that the plaintiff secretly got on the rear end of one of its trains for the purpose of obtaining a free ride to Frankfort, and while so riding was discovered by its agent and servant, and thereupon voluntarily jumped off the car when in rapid motion, and whatever injury he received was caused by his own act. The plaintiff, who was 17 years of age, and whose home was in Frankfort, testified that he had been working at Collins' Station, some two miles west of the city, and, becoming sick, had gotten on the train for the purpose of stealing a ride home. That he was sitting on the platform, with his feet on the steps, and was discovered by the brakeman, who demanded his fare, and, upon his not having either a ticket or any money, he was told that he must get off. He replied that he would if the train would stop. The brakeman then said, "I thought

I told you to get off of here," and at the same time kicked him upon the hip, which broke loose his hold on the railing, and he fell headlong on the ground, becoming unconscious. The brakeman testified that when he discovered the plaintiff, and ascertained that he had neither a ticket nor money, he told him that he must get off when the train got to the bridge, and that before he finished the sentence the plaintiff answered that he would get off now, and swung himself off in the cut, etc. He also testified, over the objection of the plaintiff, that "he had no authority from the conductor, or in any way, to put persons off the train," and that it was not his duty to do so, but that it was his duty to look after the comfort of the passengers, and to assist them in getting on and off at stations, and, in the absence of the conductor, to take up tickets and collect fares for the convenience of the conductor when he was engaged in other parts of the train; that if the plaintiff had paid him he would have handed it to the conductor, etc. The conductor testified that the brakeman had no authority to put any one off for nonpayment of fare, and he gave him no such instruction. "It is his duty," testified the conductor, "to look after the safety and comfort of passengers, to assist them on and off the train, and to assist me in ejecting an unruly passenger or one who has no right to ride, and, when I am otherwise engaged, to collect tickets and fare, and give them to me," etc. Upon this state of case the court told the jury that if they believed from the evidence "that it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off of the train persons who failed or refused to pay their fare, and they shall further believe that the brakeman kicked plaintiff off the cars while in motion, or used unnecessary force in putting him off the car, they should find for the plaintiff such damages as he sustained thereby not exceeding \$10,000;" but that if they believed from the evidence "that the plaintiff jumped off the train, and was not kicked off by the defendant's employe, they should find for the defendant," and, lastly, that if they believed from the evidence "that the brakeman was not charged or required, as part of his duty under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant." The jury found for the defendant, and did so possibly because, without regard to the question of whether the brakeman kicked the plaintiff off the train, the proof submitted to them was conclusive that the brakeman had not been instructed to put persons off the train, and that such service was no part of his duty.

We are of opinion that the only question under the pleadings and the proof, which should have been submitted to the jury, was whether the brakeman kicked the plaintiff from the

train. It was admitted that the brakeman was an employe of the defendant, and that the train was in rapid motion when the plaintiff got off or was kicked off. Whether or not what the brakeman did was in the scope of his authority or in the line of his employment was a question of law, or of mixed law and fact, to be determined by the court alone from the proof, if, indeed, that were required, and from common observation and experience, from knowledge of the nature of the business, and the daily practices which obtain in its exercise. Now, we know it to be held universally that the conductor, using no unnecessary force, may remove from the car persons who refuse to pay their fare, or are drunk, riotous, or unruly. It is an authority conceded to him,—indeed, a duty required of him,—and we would refuse to hear a railroad company's effort to plead or prove that it gave no such authority to its conductors, or did not charge them with such duties; and such, we believe, should be the rule with respect to brakemen. Even from the proof in this case, if we were to be so confined, we learn that he was to assist in the ejection of persons who had not the right to ride, and, upon the conductor's being engaged in another part of the train, he was to collect fares, and necessarily to enforce the regulations of the company to whatever extent the conductor might himself enforce them. We are so fully in accord with the view of the subject taken by the court in *Hoffman v. Railroad Co.* that we quote its language: "It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train concerned in its management, and fully cognizant of the obvious fact that intruders who jump upon the trains for a ride without intention of becoming passengers are wrongfully there. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience. But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car while the train is running at a

speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff the act was flagrant, reckless, and illegal. But the point is, was the act within the scope of the employment and authority? * * * In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it." And the company was held responsible. 87 N. Y. 25. In this case the brakeman sought to collect the fare from the defendant, not for himself, but for the company. Upon his failure to pay, he sought to eject him from the car, not to accomplish his own ends, but to subserve the interests of the company. The company, it is true, owed the plaintiff no duty arising out of a contract to carry him or to protect him; nevertheless it might not violate the common instincts of humanity, or treat the plaintiff brutally, in its process of ejecting him from the car. Undoubtedly, where the object of the servant—the end sought to be reached by him—is the intentional or malicious infliction of an injury upon the person of the trespasser, the company is not liable for his act, and the existence of malice or intentional and willful design is a question of fact to be ascertained from all the circumstances of the case. If the end sought by the employee was the infliction of an injury,—if the purpose he had in view, when he kicked the plaintiff off the train, if he did kick him off, was to injure him,—then the company is not liable, because the act would be malicious and willful. But if the end sought was the ejection of the intruder,—if his purpose was devoid of evil design and merely to protect the interest of his employer,—then, however careless or reckless the means employed, the company is liable. The case cited by counsel for the appellee, and said to be directly in point, illustrates the distinction. The plaintiff, a boy and a trespasser, was driven off the train by a brakeman, who threw coal at him so as to cut and blind him, and cause him to slip and fall on the track, whereby he was injured. The company was held not to be liable. *Coal Co. v. Heeman*, 86 Pa. St. 418. So, this court, in the case of *Winnegar's Adm'r v. Central Pass. Ry. Co.*, 85 Ky. 547, 4 S. W. Rep. 237, said: "If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible." The principle involved and stated by this court in *Sherley v. Billings*, 8 Bush, 147, in this language, that "if the servant goes beyond the scope of his employment he is as much a stranger to his master as to any third person, and his acts can in no sense be regarded as the acts of his master," is easy of announcement, but sometimes difficult of application. In all cases where unnecessary force is used it may be said that the serv-

ant acted without authority, express or implied. It can truthfully be claimed in all cases, and by all companies, that the authority of their servants is limited to the exercise only of force sufficient to eject a trespasser or passenger in a lawful manner. Nevertheless, the company is liable if the servant in the exercise of his authority, within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would be seriously injurious to the person ejected. In this case it does not matter that the act of ejection is charged in the petition as having been done willfully as well as negligently and carelessly. The willfulness is charged against the defendant company, and for this reason it cannot be said that the use of the term "willful" in itself shows the act to have been malicious on the servant's part, and therefore beyond the scope of his authority. The servant is not charged with committing the act willfully, but the company is charged to have willfully done it by its agent and servant.

The allegation of the answer that the plaintiff voluntarily swung himself off the train is not such an affirmative averment as required a reply. The simple issue was presented whether or not the brakeman kicked him off. The statement that he swung himself off is merely in emphasis of the denial that he was kicked off. It is mere surplusage, and at any rate is in direct conflict with the averment of the petition that the plaintiff was kicked off, and is in substance a denial of that averment. We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off of the car, as testified to by the plaintiff, and whether he did so with or without malice or evil design, as indicated above; and upon the determination of these issues depends the question of the company's responsibility for the plaintiff's injury. Judgment reversed, with directions to proceed as indicated by this opinion.

ARMSTRONG v. COMMONWEALTH.
(Court of Appeals of Kentucky. Oct. 24. 1893.)

HOMICIDE—INSTRUCTIONS—MALICE AFORETHOUGHT—PROVOCATION.

1. An instruction in a prosecution for homicide that malice aforethought is a predetermination to kill without lawful excuse, and that it is immaterial how suddenly or recently this predetermination is formed, is not objectionable as allowing the presence of such malice in a lawful killing in self-defense.

2. Where the only provocation for killing deceased testified to by defendant was an assault accompanied by a battery, a definition of considerable provocation as meaning an assault and battery of some force is harmless error.

On rehearing. Refused. For former report see 22 S. W. Rep. 750.

HAZELRIGG, J. It is true that in *Bohannon v. Com.*, 8 Bush, 481, it is said that when self-defense is relied on it is error to instruct that "malice aforethought means a pre-determination to kill, however suddenly or recently formed in the mind of the person killing." This was said because a lawful killing—a killing in self-defense—might by this definition be made a legal murder. "A killing," says the court, "to constitute murder, must be done unlawfully, and, unless it be unlawful, it cannot have been done with malice aforethought, although it may have been predetermined." In this case under consideration, malice aforethought is said to mean a predetermination to do the act without lawful excuse, and it is immaterial how suddenly or recently this predetermination is formed. Thus, it will be seen that the precise objection to the definition criticised in the *Bohannon* Case is met and cured by the one given in this case. If the predetermination to do the act is with a lawful excuse as to defend oneself, it is not malice aforethought, in the meaning of the instruction. Complaint is also made that the phrase "considerable provocation" is defined to mean an assault and battery of some force, etc., and that this definition is condemned as unsound in *Slaughter v. Com.*, (June 8, 1893,) 22 S. W. Rep. 645. This is true, but in this case the only provocation asserted by the appellant is that the deceased, upon his refusal to marry her, violently struck him on the head with a rock. Manifestly, therefore, the definition, as given, could do no harm. The only provocation to which he testifies was not merely an assault, but an assault accompanied with an actual battery. Petition for rehearing overruled.

COMMONWEALTH v. MURPHY.

(Court of Appeals of Kentucky. Oct. 19, 1893.)

SALE OF LIQUOR ON ELECTION DAY.

Giving a drink of liquor to a person between 9 and 10 o'clock P. M. on election day is a violation of Acts 1891-92, chapter on Elections, (article 18, § 10,) making it a misdemeanor to sell or give liquor to any person "upon the day" of any election, although the statute prescribes that voting shall cease at 4 o'clock P. M.

Appeal from circuit court, Marion county.
"To be officially reported."

George W. Murphy was indicted for giving liquor to a person on election day. The court below directed a verdict for defendant, and the commonwealth appeals. Reversed.

Wm. J. Hendrick, for the Commonwealth.
W. E. & S. A. Russell, for appellee.

LEWIS, J. G. W. Murphy, now appellee, was indicted for violation of section 10, art. 13, of the chapter on Elections, Acts 1891-92, which is as follows: "Whoever sells loans

gives or furnishes to any person or persons either directly or indirectly spirituous vinous or malt liquors, or any other intoxicating drink in any precinct town city or county of this commonwealth upon the day of any general or primary election therein shall be guilty of a misdemeanor and upon conviction thereof shall be fined the sum of not less than twenty-five nor more than fifty dollars for each offense which may be recovered by proceedings in any court of competent jurisdiction, or by indictment in the circuit court. It shall be the duty of the circuit judges throughout the commonwealth to make special mention of this section in charge of the grand juries of said court." The evidence on trial of defendant showed that between 9 and 10 o'clock P. M., November 8, 1892, being the day of the presidential election, he gave a drink of whisky to a person, and thereupon the court instructed the jury to find for him, which was done; so that the only question on this appeal by the commonwealth is whether the gift of liquor, as proved, was made, in terms and meaning of the statute, upon the day of a general election. Section 148 of the constitution provides that "all elections by the people shall be between the hours of six o'clock A. M. and seven P. M., but the general assembly may change said hours;" which has been done, and 4 o'clock P. M. is the time prescribed by statute when voting on an election day shall cease. Section 154 made it the duty of "the general assembly to prescribe such laws as may be necessary for the restriction or prohibition of the sale or gift of spirituous vinous or malt liquors on election days." An election day, or the day of any general or primary election, would, in legal contemplation, mean 24 hours, including the period during which the election is actually held, for it is a maxim applicable to every transaction or occurrence that the fraction of a day is not regarded in law; and, consequently, the sale or gift of spirituous, vinous, or malt liquors at any time during the 24 hours of an election day must be held an infraction of section 154 of the constitution, as well as of the statute enacted in pursuance of it, unless we assume, contrary to the language used, and without reason, that it was intended such sale or gift might be made with impunity up to a moment before beginning of the voting, though the people had assembled for the purpose, and immediately after close of the polls, though a crowd still remained on the ground. The objection to the statute that it prohibits the sale or gift of liquor for medicinal or sacramental purposes, even if well founded, cannot be relied on or avail defendant, Murphy, as it is apparent he had neither purpose in view. In our opinion, it was error to give the peremptory instruction mentioned, and the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

WILSON et al. v. TAGUE et al.

(Court of Appeals of Kentucky. Oct. 21, 1893.)

WARNING ORDER TO NONRESIDENT—REGULARITY OF ISSUE—PRESUMPTIONS—LAPSE OF TIME.

In a proceeding by an administrator against the heirs and creditors of his intestate to settle the latter's estate as an insolvent one, the petition alleged the nonresidence of certain heirs, and a warning order issued against them recited that it was made on proof heard as to their nonresidence. An attorney was appointed for the nonresidents, and he acted for them thereafter. Subsequently plaintiff swore to his petition, and the judgment which was finally entered, and under which decedent's property was sold, was not rendered till a year after this affidavit was made by plaintiff. *Held*, that after the lapse of 15 years it would be presumed that the warning order was made after proof of nonresidence, or that the order was re-executed and re-adopted by the court after the making of the affidavit.

Appeal from court of common pleas, Whiteley county.

"To be officially reported."

Action by W. W. Wilson and others against C. C. and Ben Tague to recover an interest in land. From a judgment for defendants, plaintiffs appeal. Affirmed.

Hill & Denham, for appellants. Lester & King, for appellees.

BENNETT, C. J. Peter Wilson died in 1874 intestate. His administrator brought suit against his heirs and creditors to settle his estate as an insolvent estate. Three of the heirs were nonresidents at the time, and have been continuously ever since. The fact that they were nonresidents was set out in the petition, which was signed by the administrator, and they were proceeded against by warning order. A nonresident attorney was duly appointed, and answered. The court gave judgment for the sale of the land in controversy, and it was sold in 1876, and possession delivered. The appellants, the said nonresident heirs, bring this suit to recover their interest in said land, upon the ground that the judgment and sale as to them was void, because, as they allege, the warning order was obtained without the affidavit required by the Civil Code then in force. As said, the allegation as to the nonresidency of the appellants was contained in the petition; and it has been expressly decided by this court that if the requisite facts are set out in the petition to entitle the party to a warning order, and are sworn to by the plaintiff, etc., it is sufficient. The order of warning recites the fact that it was made upon proof heard as to the nonresidency of the parties, and the record also shows that the plaintiffs did thereafter swear to their petition, and that the court treated the order of warning as sufficient, and rendered judgment accordingly. The affidavit was made at least a year before the rendition of the judgment, and the attorney for the nonresidents acted for them thereafter, and the

court likewise acted upon said order after the affidavit was made, and rendered judgment, and the order of warning itself shows that it was not made without proof of nonresidency.

Now, then, after the lapse of nearly 15 years, the appellants ask the court to declare the order of warning void, and restore to them land that was sold by virtue of the judgment rendered in the case to satisfy the debts of these parties, and for the judgment of which the land was bound and which it did pay. It would be trifling with and a mockery of justice to now take the land away from the purchasers whose money went to pay these debts, and give it to the appellants, freed from the debts for which it was originally bound and sold, unless there be some inexorable rule requiring us to do so. Happily there is no such rule; for, according to the facts stated, the order shows that it was made upon proof of nonresidency, doubtless by appellee himself, as an affidavit to his petition, but the clerk failed to write it in the usual form. At least, to prevent an absolute defeat of justice, we should so presume, after the long lapse of time; and, thus presuming, the order was erroneous merely, and not void, and, as long as it stands unreversed, the appellants are bound by it. Besides, the proper affidavit having been made, and the court subsequently acting on the order of warning, we must presume that the order was re-entered and re-adopted by the court. The judgment is affirmed.

MOORE et al. v. OFFUTT et al.

(Court of Appeals of Kentucky. Sept. 23, 1893.)

VESTED REMAINDER.

Land was conveyed to a trustee in trust to pay the grantor's debts, and then to equalize his children for advancements, with a direction that one-half of what was coming to each child should be paid in money, and the other half invested in land, title to be taken to each child for life, remainder to his heirs. The deed then provided that the surplus, after settling advancements, should be divided into six equal parts, corresponding to the number of the grantor's children, "and invested for and paid over" to them "in the same manner as provided for in the accounts of equalization." *Held*, that each child took a vested interest in fee in one-half of his share of the surplus, and a life interest in the other half, and the fact that each child's right to the enjoyment of the fee was postponed until after the payment of the grantor's debts and the equalization of advancements did not make his interest contingent.

Appeal from chancery court, Campbell county.

"Not to be officially reported."

Suit between Elizabeth A. Moore and others and Marion L. Offutt and others to determine the construction of a will. From the decree, Moore and others appeal. Affirmed.

O'Harra & Bryan, for appellants. Simrall & Bodley, for appellees.

PHYOR, J. Col. James Taylor, of Newport, Ky., prior to his death, and with a view of making a disposition of his estate between his children as provided in his will, executed a deed of trust to one William H. Lape, conferring upon the trustee large powers in reference to the sale of his realty. He first declares that all of his real estate conveyed to the trustee shall be chargeable with his debts, and the latter is empowered to sell so much of his lands as may be necessary for that purpose. The trust further provides: "After my debts are paid by my trustee, he will take the advance book, and settle the accounts among my children and the children of my son James. In making the settlement, whatever is coming to Barry and my daughters, one-half will be paid them in money, and the other half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs forever. When the matter of advancements is settled, after paying all costs and expenses incident to the management of the estate, the surplus or whatever remains of the sale of real estate, or what may be coming from any other source, will be divided into six equal parts, and invested for and paid over to my children and the children of my son James and their mother in the same manner as provided for in the accounts of equalization. If, at the time the equalization takes place, any of my children are dead, no investments will be made for their children, but the amounts coming to them will be paid to each in equal proportions." The grantor of the trust had five children living, and one—a son, James—dead, at the date of the deed. His plain purpose seems to have been to equalize his children in the distribution of his estate, and to see that this was done in his lifetime, reserving to himself a competency until his death. The question in this case arises from a will made by Barry Taylor, a son of the grantor, who died after his father, by which he attempts to dispose of the estate conveyed to him, or to the trustee for his benefit, by the deed of trust to Lape. Barry Taylor, the son, had been twice married, having one child by his first wife, and two children by his last wife. At his death he made a will, by which he disposed of his interest in the trust estate to his last wife and her children. Logan Taylor, the child by the first wife, contends that under the provisions of the deed of trust to Lape the whole estate, at his father's death, passed to his children, or that his father had no interest in the trust estate, he dying before the equalization was made, or the estate of the grantor settled, and his debts paid.

We have set forth so much of the deed of trust as affects the question involved, and it seems to us it is plain, by the terms of the deed, that Barry Taylor, the son of the grantor, took a vested interest in the one-half of the one-sixth of the real estate and

a life interest in the other half. The language used is plain and unambiguous, and made still more so by subsequent provisions of the same instrument. His purpose was to secure one-half of Barry's interest to his (Barry's) children at his son's death; and this having been done by giving Barry, as to this half, a life interest, the grantor then provides that when the matter of advancements is settled the estate will be divided into six equal parts, "and invested for and paid over to my children and the children of my son James and their mother in the same manner as provided in the accounts of equalization." Now, the provision in reference to the accounts of equalization gives one-half to Barry in fee, and the other half to him for life, remainder to his children. The deed further provides that "if, at the time the equalization takes place, any of my children are dead, no investments will be made for their children," and the amounts coming to them will be paid to each in equal portions. This was to secure the one-half to Barry's children, and therefore he required the investment of this one-half to be made by the trustee, giving to Barry an estate for life, with remainder to the children; but, Barry having died, no investment was necessary, or required by the trust, because, in express terms, it is stated that no investment, in that event, is to be made, but the sum is to be reinvested only if Barry should be alive. The object of the trust, in securing the one-half interest to the child of the deceased son,—a daughter,—having been accomplished, there was no necessity for the reinvestment. The grantor further provided by this trust, to enable his children to live, that the trustee should pay over to the children annually the sum of \$2,000 each, as they will need money before distribution and investments can be properly made. The grantor evidently supposed that much time would elapse before his large landed estate could be sold, and before an account of advancements could be taken, and therefore required the trustee to pay over to the children this \$2,000 annually. The right of Barry Taylor to demand of the trustee, Lape, his (Barry's) half of the one-sixth interest could not arise until the debts of the grantor were settled, and the accounts of advancements made. These matters the trustee had to ascertain, and before he could distribute; but this did not make the interest of Barry in the one-half of the one-sixth contingent. It was a vested interest, to be received into possession and enjoyed after the happening of certain events that must take place. A devise to the son of one-half of an estate, to be paid over when the estate is settled and debts paid, vests in the devisee an absolute estate. The time of possession is only postponed, and nothing more. It has been said by both Blackstone and Kent, and often quoted, that "it is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that en-

joyment, which makes a distinction between a vested and contingent interest." The chancellor, in our opinion, properly held that Barry Taylor had a vested right in the one-half of the one-sixth of the estate, and could therefore devise it. The fact that the grantor had provided in his will for the child of Barry by his first wife cannot affect the construction given the trust deed. The other provisions of the trust must alone control, and the child by the first wife, Logan Taylor, takes only an interest with his half-brothers in the one-half of the one-sixth that was held by their father for life. *Bank v. Ballard's Assignee*, 83 Ky. 481. Judgment below affirmed.

HERBERT et al. v. LONG et al.

(Court of Appeals of Kentucky. Nov. 2, 1893.)

WILLS—CONTEST—UNEQUAL DIVISION—UNDUE INFLUENCE—TESTAMENTARY INCAPACITY—INSTRUCTIONS.

1. Testator, when he made his will, was rational, and capable of understanding his relation to his family; and the will was written by his attorney, wholly at his dictation, after which he read and subscribed it, and had it attested. Though he afterwards declared that he intended to change it because it was unequal and failed to carry out his wishes, no alterations were ever made; and, when spoken to about the division he has made of his land, he said "that, if his children were not satisfied with what they got, they could just let it alone, and let some one else have it." *Held* not to show grounds sufficient to set aside the will.

2. Where a will is contested for want of testamentary capacity, and undue influence, it is misleading to charge that, if one has capacity to make a will, he may dispose of his estate as he sees proper, but an equal or unequal disposition of it is a circumstance, in common with other circumstances, to be considered in determining testamentary capacity, since it singles out, and gives undue prominence to, the inequality in the devise, as a circumstance to be considered. *Zimlick v. Zimlick*, 14 S. W. Rep. 837, 90 Ky. 637, followed.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Contest of the will of Lewis Herbert, deceased, instituted by George W. Long and others against James Herbert and others. From a judgment for contestants, the contestees appeal. Reversed.

Robt. Richardson and Robt. O. Simmons, for appellants. Chas. H. Fisk, for appellees.

PRYOR, J. The last will of Lewis Herbert, deceased, was assailed in the court below upon two grounds: The first is that the writing purporting to be his will failed to express the intention of the testator as to the disposition of his property; second, the undue influence exercised by James Herbert, a son of the testator, in its execution. The writing was admitted to probate in the county court, and on an appeal the probate was denied.

The judgment below must be reversed, for two reasons: First, the instructions were er-

roneous; and, secondly, there is an entire absence of evidence to support the finding of the jury, and the judgment upon it. While the testator was about 78 years old at the time the paper was executed, he was possessed of a rational mind, capable of understanding his relation to his family, and of determining the objects of his bounty, and the manner in which he should dispose of his property between his children. The will was written by his attorney, and wholly dictated by the testator. He knew its contents, and, when read to him, subscribed his name thereto, and it was then attested as required by the statute. The will was executed in August of the year 1886, and was substituted for a will written and signed in the year 1880. The only difference in the two papers consists in changing the provisions of the first will, by which the fee was given to his children, into a life estate, remainder to their children, except as to his son James, his portion by the first will having been given in trust to his sister, Mrs. Long. By the provisions of the paper in controversy, James is given a life estate, remainder to his children, without power on the part of James to alienate or incur a debt during his life. The will that was canceled, the testator had in his possession until the last paper was executed, and lived four years after the last paper was signed; and although the devisees and one or more witnesses prove the declarations of the testator that he intended to change it because it was unequal, or failed to carry out his wishes, no alteration was ever made. And, if such had been his real purpose, the attorney who wrote his will lived in the same city, and was accessible to him at almost any time; yet he kept the paper in his own custody, and, when solicited by a disinterested party to give to Mrs. Long her interest in fee, his reply was that he had given it to her as long as she lived, and that was as long as he wanted her to have it; and to another witness, who had spoken to him about the division he had made of his land, "that, if his children were not satisfied with what they got, they could just let it alone, and let some one else have it." When the first will was executed, his daughter Mrs. Long was unmarried, and having been married for several years, and without children, he seems to have restricted her interest, as he had that of his other children, to an estate for life. In this there is nothing irrational or unreasonable, and to destroy this paper because the division was unequal, and upon testimony as to the statements of the testator that he intended to alter its provisions, would be to reform or cancel every will that failed to produce exact equality between children, and upon proof of statements made by the deviser, by reason of the importunities of those in interest, who, from their ideas of what was just and right, had con-

ceived that their testator had failed to equalize them when distributing his bounty.

There is no testimony conducing to show a want of mental capacity when this paper was prepared by the draughtsman, and signed by the testator. That he became enfeebled by disease after this, and was nursed and cared for by an affectionate and kind daughter, whose services were of more value than the devise made to her, affords no reason for setting aside his will, and when there can be no doubt that the manner he has disposed of his property was the offspring of his own mind.

It is argued, however, that the first will was canceled because James Herbert did not want his sister to act as his trustee, and that James importuned the old man to so fix the devise to him as that some one of the devisees could not make out of the estate devised to James a debt that James was owing. It is plain the purpose of the devisor was to secure the estate devised to his grandchildren by giving them a remainder interest; and the fact that James may have solicited his father to make his will, or so alter it, as to keep the estate in the family of the son, is not the exercise of an undue influence, unless there is something else showing that one mind controlled and subordinated the other, so much so as to cause the will to be executed contrary to the wishes of the testator. The provision itself is rational, and made when James was not present, and just such a provision as should have been made, when it clearly appears the purpose of the testator was to make his grandchildren the recipients of his bounty, as well as his children. There is no evidence of the want of capacity to make this paper, or the existence of an undue influence operating on the mind of the testator when he signed it.

The jury was told, in Instruction No. 4, that if one has capacity to make a will he may dispose of his estate as he sees proper, but an equal or unequal disposition of it is a circumstance, in common with other circumstances, to be considered by the jury in determining testamentary capacity. Such an instruction has been held misleading in more than one instance by this court, as it singles out the fact of inequality in the devise made as a circumstance the jury must consider, and makes it more prominent than any other fact or circumstance in the case bearing on the question of mental capacity. A jury, with this circumstance against mental capacity, and the kind and considerate care of the daughter affected by it, on the one side, and the propounders, who have received a little more of the estate in value, on the other, will not long hesitate in making for the testator such a will as, in their judgment, produces equality between those entitled to his bounty. This has been done in this case, by disregarding the wishes of the testator,

and the rendition of a verdict under which his property passes by operation of law. The cases of *Zimlick v. Zimlick*, 90 Ky. 657, 14 S. W. Rep. 837; *Stokes v. Shippen*, 13 Bush, 180; *Broadbuss v. Broadbuss*, 10 Bush, 299,—determine the error in instruction No. 4; and in this case, as there was an absence of any other testimony, it was, in effect, saying to the jury, "If there was inequality in the disposition of the property, you must find against the will." It follows the judgment below must be reversed, with directions to grant a new trial, and for proceedings consistent with this opinion.

COCKRELL v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 12, 1893.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. An instruction that the jury may acquit if they believe that, when defendant shot, he was in immediate danger, etc., is error, as it requires the jury to find that the danger was real, and not merely apparent.

2. One who has been summoned by a deputy sheriff to aid in suppressing disorder is not bound to seek means of escape from a disorderly person threatening his life with a knife; nor, having been forced to retreat, is he in fault for returning armed.

3. An instruction that if the jury believe, beyond a reasonable doubt, that defendant, after quarreling with deceased, left the place, and afterwards, being in no danger, and away from deceased, voluntarily returned and renewed the quarrel, he cannot rely on the law of self-defense, unless, after such return, he abandoned the quarrel, in good faith, before the shooting, is erroneous, as requiring defendant to prove his abandonment of the quarrel beyond a reasonable doubt.

Appeal from circuit court, Estill county.

"To be officially reported."

Hal Cockrell, convicted of manslaughter, appeals. Reversed.

Geo. Denny, Jr., Robt. Riddell, and John Bennett, for appellant. W. J. Hendrick, for the Commonwealth.

HAZELRIGG, J. Upon his fourth trial under an indictment for the murder of James Amerine, in Estill county, in November, 1887, the appellant was found guilty of manslaughter, and sentenced to confinement in the penitentiary for the term of four years. He insists that his conviction was at last secured by reason of the misinstruction of the jury by the trial court, the misconduct of the prosecuting attorney in his speech to the jury, and the misconduct of certain members of the jury during the trial. Stated briefly, the commonwealth's proof established that, after a hasty controversy with the deceased in the courthouse yard in the town of Irvine, the appellant rapidly left the yard, and, procuring a gun from a neighboring house, came back hurriedly, approached his antagonist, and, after deliberate aim, fired the fatal shot. The facts and circumstances attending the killing, and relied on by the appellant as

showing the homicide to have been excusable, and as establishing a case of self-defense on his part, are about these: It was county court day, and late in the evening a row was in progress in a saloon. The deputy sheriff was sent for to quell the disturbance. He succeeded in arresting one Puckett, who was drunk and disorderly, and, while attempting to take him to jail, was resisted and assailed by a large number of the excited and drunken friends of the prisoner. Among these latter, the deceased, Amerine, was one of the most active and unruly. He swore that Puckett should not be taken. He cut at the deputy with a knife which he flourished in his hand from the inception of the trouble until he was killed. The deputy was sorely pressed, and summoned as his aid in suppressing the mob, and in landing the prisoner in jail, the appellant, Cockrell, Butterworth, and perhaps others. The officers, with the prisoners and the crowd, had surged across the street, and into the courthouse yard. The deputy was thrown to the ground, and his nephew, young Park, a lad of some 18 years, was pushing through the mass of yelling men, towards his uncle, when he was roughly accosted by the deceased, knife in hand; and, while the boy was crying, the appellant, seeing his danger, said to Amerine, "Don't hurt him," or "Jim, don't hurt him. He is nothing but a boy." The deceased turned upon the appellant, saying, "What in the hell have you got to do with it?" And, when assured that no offense was intended, he advanced on the appellant, who backed away, protesting all the time that he had nothing against him, until, reaching the yard gate, he sprang through it, followed by the angry and insulting words of his assailant. Amerine then proceeded towards the front of the courthouse, and, flourishing his knife, said he would "sink that in him." Cockrell procured a gun; walked up the pavement towards the still struggling, resisting crowd, and Amerine. He stops, levels his gun at Amerine, taking deliberate aim. There is nothing in the way of the expected shot. Suddenly, he voluntarily takes down his gun, lowering the breach, and, extending the muzzle upward, the expected report is not heard; and the trouble between them is supposed to be over. But Richardson and Wilson, having seen the appellant's hurried return with his gun and his approach towards Amerine, rush on him, and, when they reach him, seize him, and hold him and his gun "as in a vise." Amerine, who was only a few steps away, seeing the situation of the appellant, stooped forwards, and with his left hand extended as if to grab the muzzle of the gun, and with his right hand grasping the open knife, made at the appellant. The latter, seeing his danger, with an extraordinary effort, pressed down the gun, and fired from his hip, calling on the persons holding him not to let the deceased cut him.

This is the defendant's side of the case, and there is much proof to sustain this account of it. On the important point that the appellant was summoned as an aid to the deputy sheriff, there is no contradiction. Thereupon the court gave the usual instruction on the subject of murder and manslaughter. By a third instruction, the jury were told that they might acquit the defendant "if they believed from the evidence that at the time he did the shooting, if he did do it, he (defendant) was in immediate danger of death or great bodily harm then about to be inflicted upon him by said Amerine, and from which he had no other safe, or to him apparently safe, means of escape." Here, the right of the defendant to strike in defense of his life or person is made to depend, not on his own reasonable belief that he was in immediate danger of death or great bodily harm, but on the belief of the jury that such danger actually existed. It is true that the immediate infliction of the danger need only to have been reasonably apparent to the defendant. Nevertheless, the jury, under this instruction, must believe the danger to have been real, before they could acquit. This instruction has often been condemned as highly prejudicial to the substantial rights of persons charged with homicide, and who seek to excuse the act—and the law does excuse it—upon the ground that the danger was apparent, and not necessarily real. Moreover, notwithstanding that the danger must be so established, to the satisfaction of the jury, as in fact existing, and as being about to be inflicted on him, yet he may not still act, if perchance he may seek some other safe, or to him apparently safe, means of escape. Does this mean that the defendant must seek to escape by means not absolutely safe, but merely apparently so? The language is easily susceptible of this construction. But, upon broader grounds, the requirement of the instruction that the defendant must seek safety by flight, or means other than by defending himself from the impending danger, and that, too, by such active and aggressive resistance as may appear sufficient to safely protect himself from the attack made on him, must be condemned. Assuming the case as made out for the defendant by the proof,—and we must so assume, in fitting or applying the law of self-defense to the particular facts shown in support of his proffered excuse for the homicide,—he was upon the ground as an appointed aid to the deputy sheriff. When driven off the grounds, at the point of the knife, by the unruly assistant of the resisting prisoner, to arrest and imprison whom he was summoned by the officer, shall the defendant fail or refuse to return, or, returning, shall he be required to escape impending danger by flight? Not even the rigid requirements of the common law would demand this of him.

The fourth instruction was as follows: "If the jury believe from the evidence, beyond a

reasonable doubt, that the defendant, after engaging in the difficulty in which Amerine was killed, left the place of said difficulty, and that afterwards, at a time when he was in no danger, and away from said Amerine, he voluntarily returned to the place where Amerine was, and of his own volition and choice renewed said difficulty with deceased, then and in that event he cannot rely upon the law of self-defense and apparent necessity, unless, after such return, he abandoned said difficulty, in good faith, before the shooting of Amerine." For the reasons already indicated, explanatory of the right of the defendant to return to the grounds from which he had been driven, it is obvious that that leaving and returning should not form the basis of an instruction depriving him of the right of self-defense. But, if the defendant had not been summoned to aid the deputy, the instruction is erroneous. There are three things charged, the doing of which by the defendant is made the basis of a denial to him of the right to defend himself, and one upon which that right is regained: First, that he left the difficulty; second, that he returned to it; third, that he renewed it; and, fourth, that he abandoned it. Now, all four of these propositions are preceded by the requirement of a belief on the part of the jury beyond a reasonable doubt. The first three are facts material and necessary to constitute the guilt of the defendant. The last one is a condition upon which he may establish his innocence. And to require the jury to believe it as indicated in the instruction is to require the defendant to establish his innocence beyond a reasonable doubt.

Upon the whole, we do not know of a case in which the usual instructions as to murder, manslaughter, and unrestricted self-defense could more appropriately be applied, as the whole law of the case, with perhaps an additional instruction on the duty of the defendant to aid the deputy in arresting and imprisoning disorderly persons, and remain on the ground for that purpose. This, however, if given, should be qualified so as not to afford the defendant a cloak to shield any wrongdoing of his own. It is improbable that the minor errors complained of can occur again, and they are, therefore, not noticed. Let the judgment be reversed, and a new trial be had according to the principles of this opinion.

HARDY et al. v. LOGAN COUNTY COURT. (Court of Appeals of Kentucky. Oct. 14, 1893.)

Tax-Collector—Action on Bond.

1. A tax collector's bond to the county court, that he will collect the taxes named, and pay them over to said court, may be sued on by the court without joining the county, under Civil Code, § 21, empowering persons who have made contracts as agents, and for the benefit of others, to sue on them without joining the beneficiaries.

2. A special act empowering a county to issue railroad aid bonds, and to levy a tax

therefor on the same property as is subject to state revenue taxes, makes the powers and liabilities of the collector the same as those of the sheriff in collecting state taxes; and, since the latter is entitled to credits for delinquents, exonerations, or removals from the county only after these have been passed on by the county court, the sinking fund commissioner has no power to allow the collector other or larger credits on the same accounts, when settling with him for the railroad tax, and the county court's subsequent confirmation of the commissioner's unauthorized acts will not bind the county.

3. A tax collector is not chargeable with interest on taxes collected and not paid over by him to the sinking fund commissioner within the time prescribed by statute, when he had been requested to retain them by said commissioner, with the sanction of the county court.

4. The rule that when the county court has levied a tax to pay claims against the county, the sheriff failing to pay over the tax collected is suable only by the creditors, not by the county court, does not prevent said court from suing the sheriff for a surplus in his hands collected on a levy that has turned out to be larger than was needed for its special purpose.

5. The sheriff's collection of taxes that had been reported and allowed him as delinquent is *prima facie* shown by tax receipts signed by the sheriff and given to the reported delinquents. Such receipts may be explained or rebutted by the sheriff's books or by other evidence.

Appeal from circuit court, Logan county.

"Not to be officially reported."

Actions in equity by the Logan county court against George S. Hardy and others on said Hardy's bonds as sheriff and tax collector. Judgment for plaintiff. Hardy appeals. Affirmed.

Wilbur F. Browder, Bowden & Bowden, and John S. Rhea, for appellant. John Feland, for appellee.

LEWIS, J. This is an appeal from a judgment rendered in seven actions in equity consolidated and tried together, all instituted by Logan county court November 3, 1887, against G. S. Hardy and sureties in that number of bonds; three executed for collection by him of taxes imposed and assessed for the years 1878, 1879, and 1881, to pay interest on bonds issued in payment of subscription by Logan county to capital stock of Owensboro & Russellville Railroad Company, and four for collection by him as sheriff of county levy taxes imposed at the October terms of the county court in 1878, 1879, 1880, and 1881. It appears that Hardy, as collector of railroad taxes, made partial settlements for each of the three years mentioned with the county judge, who was ex officio commissioner of the sinking fund, and a final settlement on the — day of —; all of which settlements were confirmed by the county court. But it is alleged in each of the petitions that the settlements were made by the commissioner of the sinking fund and confirmed by the county court through mistake of law and facts, and that Hardy did not fully account for and pay over all the taxes it was his duty to collect and pay over, but is in fact indebted to the

county large sums by reason of such failure. The defendants first made question, to be now determined by this court, whether Logan county court can bring and maintain these actions. But it seems to us there is no room for controversy on that subject, for Hardy and his sureties in terms of each bond covenanted and bound themselves to Logan county court that he would collect the taxes levied for the purpose mentioned, and pay same over to the Logan county court or to any person upon its order. And, as the several contracts evidenced by the bonds of Hardy and sureties were thus made by Logan county court as agent of and for benefit of Logan county, the right of that court to maintain the actions, without even joining Logan county as party plaintiff, clearly exists in virtue of section 21, Civil Code. There does not appear to be a great deal of difference between the result of settlements made by the commissioner of the sinking fund with Hardy as collector of railroad taxes and that stated in the report of the special commissioner appointed by the court. But the lower court disapproved of both in respect to the amount allowed Hardy, collector, as credits on account of delinquents, exonerations, and removals of taxpayers; and the question to be now determined is whether the commissioner of the sinking fund had authority, in making settlements with him, to allow as credits any other lists, or to a greater amount, than fixed by the county court at the time and in the manner prescribed by law in regard to collecting the state revenue. If he did not have such authority, subsequent confirmation by the county court did not validate his settlements in that respect so as to prejudice the interests and rights of Logan county. The taxes in question were collected under special acts of the legislature, and no power or discretion was thereby conferred upon the commissioner of the sinking fund to give credit to the collector on account of delinquents, exonerations, or removals from the county in excess of what had been fixed by the county court. On the contrary, it is manifest it was the intention of the legislature that he should in settling with the collector for each year be controlled by the lists of delinquents, exonerations, and removals allowed by the county court as credits to the sheriff in collecting the state revenue; for the provision of the special acts that the railroad tax shall be levied on the same property subject to taxation for state revenue purposes, fairly construed, means that the collector of railroad tax shall not merely have the same power, but be subject to the same duties and responsibilities, as the sheriff in collecting the state revenue; otherwise, while the sheriff, in collecting state revenue,

cannot be allowed any such credits until the lists have been duly and according to law examined and passed on by the county court, composed of the county judge and justices of the peace, the collector of the railroad tax, who in this case was the sheriff, may, at the mere discretion of the sinking fund commissioner, be allowed credits without limit or reason.

The judgment complained of in this case is simply for the amount of taxes for which the commissioner of the sinking fund allowed the collector credit for in excess of what he was entitled to according to the lists allowed as credits to the sheriff by the county court; and, in our opinion, it is not erroneous. The appellee, Logan county court, insists upon cross appeal that the court erred in failing to charge the collector with interest on taxes collected, and not paid over at the time prescribed by the statute; but, as the taxes in question were retained at request of the commissioner of the sinking fund, by sanction of the county court, it would not have been proper to charge interest.

Judgment was also rendered in favor of the plaintiff on account of county levy taxes collected for two of the four years, and not paid over and accounted for by Hardy as sheriff. The doctrine is well settled by this court, as argued by counsel, that when tax levies are made by the county court to pay claims against a county, the creditors only, not the county court, can maintain an action against the sheriff for defaulting paying the same. But that doctrine has no application when, as seems to have been this case, appropriation has been made for a specific purpose, which afterwards turns out to be in excess of the amount needed or used therefor. In that event the duty of the sheriff is simply to return such surplus to the county court, for it clearly belongs to the county, and he has no pretense of right to withhold it. The judgment against the sheriff was partly on account of county levy thus collected and not paid over or accounted for by him, and in part for taxes collected from delinquents, after he had been allowed credit therefor. The mode by which the plaintiff undertook to prove such payments to the sheriff was by procuring and filing tax receipts given by him to persons whom he had previously reported and satisfied the county court were delinquents. We do not think such evidence is, as argued, incompetent, or by any means inconclusive, especially as the sheriff may, as was the case here, have an opportunity to show by his books or other evidence such receipts were not in fact given by him to persons he had previously reported as delinquents; wherefore the judgment is affirmed on both original and cross appeal.

DOOLIN et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 14, 1893.)

HOMICIDE—BY OFFICER MAKING ARREST—SELF-DEFENSE—TRIAL—INSTRUCTIONS.

On trial of an officer for shooting a person when pursuing him to make an arrest for breach of the peace, it was error to charge that if the officer gave deceased reasonable ground to believe that he intended to take the life of deceased, or to do him great bodily harm, and deceased thereupon tried to shoot the officer, to prevent the apprehended danger, the officer could not avail himself of the threatening conduct of deceased as a ground of self-defense.

Appeal from circuit court, Pulaski county.
"To be officially reported."

W. R. Doolin and G. W. Cope were convicted of shooting one Watson, and appeal. Reversed.

W. O. Bradley, G. W. Shaddan, and W. A. Morrow, for appellants. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. As the case must go back for another trial, no facts will be noticed in the opinion, further than is necessary to make it intelligible. There was a Sunday-school meeting held at Oak Grove meeting-house, and during the meeting Watson and Gastineau fired their pistols within a short distance of the meeting-house, which created a disturbance. The minister requested the appellant Doolin, who was a constable in good standing, to arrest the persons creating the disturbance; and, in obedience to the request, he, together with Cope, who was summoned to assist, started out to make the arrest. Apprehending some trouble, they procured a rifle gun, and finally they overtook Watson and Gastineau, and ordered them under arrest. Gastineau obeyed, but Watson moved on, not obeying. He finally began to run, and the appellants pursued; Doolin being armed with the rifle gun, and Cope with a stick. The witnesses for the commonwealth say that Cope said to Doolin, "Shoot him, shoot him, I say, and don't let him get away," and immediately Doolin fired the gun, and Watson fell wounded, from which he died. The evidence for the appellants is that Cope did not say, "Shoot him," etc., but that while they were pursuing Watson in order to arrest him, and telling him that they did not wish to hurt him, but only to arrest him, he said that if they followed him any further he would shoot them, and threw his pistol over his shoulder, in the direction of them, and snapped it at them, and that, they believing that the pistol was loaded, and that Watson intended to kill them, Doolin fired in their necessary self-defense.

The court instructed the jury that the appellants had the right to pursue and arrest Watson without a warrant, the offense hav-

ing been committed in the hearing of Doolin; but, the offense being only a breach of the peace, Doolin had no right to shoot Watson, in order to compel him to stop his flight, and that, if he (Doolin) did so, they must find him guilty; but if Watson snapped his pistol at Doolin, as if to shoot him, in order to prevent the arrest, and Doolin believed that his life was in immediate danger at the hands of Watson, then he had the right to shoot Watson in his own defense. But the court gave this other instruction: "If Doolin, in pursuit of Watson, gave him reasonable grounds to believe, and he did believe, that it was the purpose of Doolin to take his (Watson's) life, or do him great bodily harm, then he had a right to protect himself from such danger, and take the life of Doolin; and if, in an attempt to protect himself from such danger, he did endanger the life of Doolin, and Doolin shot to protect himself from danger brought on by his own conduct in endangering the life of Watson, he cannot be excused on the ground of self-defense." It seems to us that this instruction is erroneous, for its meaning is that if Doolin, in the pursuit of Watson, gave him reasonable ground to believe that he (Doolin) intended to take his life, or do him great bodily harm, and he tried to shoot Doolin in order to prevent the danger to himself, apprehended, which might not have existed in fact, then Doolin could not avail himself of Watson's threatening conduct towards him as a ground of self-defense. If Watson had shot Doolin, and was on trial for the shooting, the circumstances indicated in the instruction would avail him as self-defense. Under the plea of self-defense, it is not necessary that the apprehended danger should exist in fact; but if the facts and circumstances are such as to give the party a reasonable ground to believe, and he does believe, in the existence of such danger, then he may act in his own defense, although the danger does not exist in fact. Hence, it may sometimes occur that each party may be mistaken as to the existence of danger, and both be entitled to the law of self-defense, as this case illustrates, for Watson might have been induced to believe, from the fact that Doolin was armed and pursuing him, and the shouts, "Shoot him," that Doolin's purpose was to shoot him, and therefore he would have acted in self-defense; and Doolin, not intending to shoot Watson, but to pursue and arrest him, as he had the right to do, might have believed that Watson intended to shoot him to prevent being arrested, and shot to protect himself. So in such case, each would be mistaken as to the purpose of the other, and each might be excusable on the ground of self-defense. No instruction should have been given on that subject. For the error indicated, the judgment is reversed, and the case is remanded for new trial.

HAVERLY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 17, 1893.)

MURDER—SELF-DEFENSE—INSTRUCTIONS—REVIEW ON APPEAL—FACTS NOT APPEARING IN RECORD—OBJECTIONS.

1. Defendant and deceased were fellow workmen, and deceased, who was of an overbearing nature, interfered with defendant's work, and in the presence of the workmen placed a pistol in his drawer. Shortly before the killing he threatened to kill defendant, and on several occasions shoved him off the pavement when he met him on the streets. *Held*, that an instruction that if defendant, at the time of the shooting, in good faith believed, and had reasonable grounds to believe, that he was in immediate danger of loss of life or of great bodily harm from deceased, he might use such means as were necessary, or apparently necessary, to protect himself from impending danger, and if, in so doing, he shot and killed deceased, he was excusable, embraced the law of self-defense as applicable to the facts.

2. Objections to the action of the trial court in permitting the jury to retire to their room, in the absence of defendant's counsel, without taking with them the pistol and knife of deceased, and because, while consulting in their room, the sheriff was with them, cannot be considered, where such facts only appeared in the motion and grounds for new trial, and are not shown in fact to have occurred.

Appeal from circuit court, Harrison county. "To be officially reported."

John Haverly was convicted of manslaughter, and appeals. Affirmed.

A. H. Ward, for appellant. W. J. Hendrick, for the Commonwealth.

HAZELRIGG, J. Under an indictment for the murder of Lewis Lang, the appellant was convicted of the crime of manslaughter, and sentenced to confinement in the penitentiary for the term of two years. He complains of various errors, and, his motion for a new trial having been overruled, he has appealed to this court.

It is contended by his counsel that the facts leading up to the killing are of such a character as authorized, or rather required, the lower court to give to the jury instructions similar in character to those given in the Bohannon Case, 8 Bush, 481, and in the Oder Case, 80 Ky. 32. In the first-named case it is recited that Bohannon's life had been repeatedly and openly threatened by a desperate and lawless enemy, who had in fact made an actual attempt to assassinate him upon the public highway with a deadly weapon, and the accused had escaped death only by deserting his house and concealing himself in the fields, after which the deceased pursued the friends of the accused riding with him, and who were members of his family residing at his house, and mistreated them, and declared to them that he intended to kill Bohannon on sight. Under these circumstances, it is said of Bohannon: "He may leave his house for the transaction of his legitimate business, or for any lawful and proper purpose; and if, on such an occa-

sion, he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed." But it is said, further, that "the threats of even a desperate and lawless man do not, and ought not, to authorize the person threatened to take his life; nor does any demonstration of hostility short of a manifest attempt to commit a felony justify a measure so extreme." In the second-named case, Hall, having a grievous charge against Oder connected with his daughter, threatened to kill him, waylaid him several times, assaulted him with a pistol, and sought to hire, for money, an ex-convict to kill him. The court said "that when a person has been merely threatened, by even the most lawless character, it furnishes no legal excuse for taking his life; but when a person has been threatened, waylaid, menaced, and assaulted with a deadly weapon, and he afterwards casually meets his foe, if from his character, antecedent conduct, and the circumstances of the meeting and his presence he believes, and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict on him loss of life or great bodily harm, or will then and there carry into execution his design to kill him or do him such harm, unless prevented, he is not bound to wait until actually assaulted, but he may lawfully use such force as shall be necessary to avert such impending danger." In these two cases, which are extreme instances of vindictive bloodthirstiness on the part of the persons killed, it will be seen that the very presence of their enemy put into actual and imminent peril the lives of the accused persons, and gave them reasonable grounds to believe that further murderous assaults with a deadly weapon were about to be made on them. After a careful reading of the record before us we are of opinion that the facts of this case fall short of authorizing an instruction similar to those given in the cases relied on.

The appellant and the deceased had been fellow workmen in the same shop. The deceased was overbearing toward his comrades, and would put bucks or sticking horses in the way leading to the appellant's bench. He took off his pistol in the presence of the workmen, and placed it in his work drawer. He rendered himself unpopular with the workmen, and was put to work at his residence by the proprietor. Shortly before the killing he threatened to "do up," or "fix," the defendant, and on several occasions, when passing him on the streets of the town, he would crowd against him, and shove him

off the pavement; on one such occasion he put his hand in his pocket, as if to draw a weapon, and the accused got behind a tree. These were assaults, contend counsel, and so they were; but we cannot say that any deadly intent is apparent. No hostile demonstration manifesting an attempt to commit a felony is so clearly evidenced by these exasperating intimidations as to require their submission to a jury in an instruction. These circumstances and threats, this display of the pistol, and, adopting the language of this court in *Kennedy v. Com.*, 14 Bush, 352, "any other fact tending to show that the slayer was in peril at the time of the homicide, or that he had reasonable grounds upon which to believe he was in such peril, may all be given in evidence for the purpose of showing that there were grounds to believe he was then in danger; but if, notwithstanding all these things, he had no reasonable ground for believing he was then in danger, they will not excuse him on the ground of self-defense, although they may have justified him in believing he would be in such danger at some future time. This is in consonance with the philosophy of the law of self-defense, which is based on necessity, real or apparent. When there is no necessity, or apparent necessity, to slay an adversary to save one's own life or person from great harm, there cannot, in the nature of things, be a right to kill in self-defense." The usual instructions on the subject of murder and manslaughter were given, and by the third the jury were told that "if they believed from the evidence that the accused, at the time of the shooting, in good faith believed, and had reasonable grounds to believe, that he was in immediate danger of loss of life or of suffering great bodily harm at the hands of said Lewis Lang, then he (the accused) had the right to use such means as were necessary, or apparently necessary, to protect himself from such impending danger; and if, in so doing, he shot and killed Lewis Lang, he (the accused) is excusable, and should be acquitted." This instruction is unobjectionable, and embraces the law of self-defense as applicable to this case.

To the complaints made that the court permitted the jury to retire to their room, in the absence of the defendant's counsel, without taking with them certain papers, and without the pistol and knife of the deceased, and that while consulting in their room the sheriff went in to them, and shut himself in with them, it is sufficient to say that the circumstances indicated only appeared in the motion and grounds for a new trial. They are not shown to have in fact occurred.

We have examined the objections taken with regard to the exclusion and admission of testimony, and perceive no error in anywise affecting the substantial rights of the accused. We have not deemed it necessary to review the facts immediately attending

the homicide. From the testimony of the accused, and the declaration of the deceased made just after the shooting that he "rushed at" the accused before the latter fired a shot, from the range of the ball in the neck, showing the deceased to have "ducked" his head, as if rushing on the accused, and from the hostile intentions of the deceased, gathered from his previous conduct, it would seem that a case of self-defense had been made out; but of the truth of this testimony, and of the weight to be given it, the jury must be left to judge. Perceiving no error of law, we must affirm the judgment.

HANSFORD v. BERRY.

(Court of Appeals of Kentucky. Oct. 24, 1893.)

RIGHT OF WAY—HOW ACQUIRED—PRESCRIPTION.

A road through plaintiff's woodland, by which he had to travel to reach the public road, had been used by him for that purpose for 50 years, and by defendant for 20 years, during which time defendant had kept it up as his passway. During the whole time of its use the road had been in substantially the same place and had a well-defined bed, and any change therein had been such as resulted from the fall of a tree across it, or other similar obstructions. *Held*, that the road was used by defendant as a matter of right, and not of permission, and that he had a right to its continued use.

Appeal from circuit court, Daviess county.

"To be officially reported."

Action by W. W. Hansford against V. E. Berry. There was judgment for defendant, and plaintiff appeals. *Affirmed*.

Sweeney, Ellis & Sweeney, for appellant.
H. M. Haskins, for appellee.

BENNETT, C. J. The appellant brought his action of trespass against the appellee for removing the fence on appellant's land. The appellee justified upon the ground that the fences removed obstructed his right of way, and that they were only removed to the extent of removing the obstruction. The appellee claims a right of passway over the appellant's woodland. The appellant denies the right of passway, and claims that the use of the passway was by his permission only. So the question is, was the passway over the appellant's woodland by right, or by permission only? The lower court decided that it was by right, and the appellant has appealed.

There is no proof that the right to pass over the appellant's land was ever given by any court, but the right to the passway is claimed by adverse use for more than 50 years. The case of *Bowman v. Wickliffe*, 15 B. Mon. 84, is relied on as sustaining the position that no presumption arises in favor of the adverse use of a passway over woodland, but that the presumption is that the passage over woodland is by permission of the owner. It will be seen from the *Bowman* Case that for many years there were several passways over the owner's wood-

land; that they were changed from time to time by the owner, and one or the other discontinued as he cleared the land, and new ones opened; and that no one claimed the passway as a matter of right, but all claimed it by permission only. Under the circumstances, the court held that there was no presumption of adverse use, although such permission had continued for many years; that, in order to create a right of way by presumption, it must be shown that it was claimed and used as an adverse right for at least 15 years, and, as long as it was used permissively, no presumption of adverse use could arise. *O'Daniel v. O'Daniel*, 88 Ky. 185, 10 S. W. Rep. 638; *Talbott v. Thorn*, (Ky.) 16 S. W. Rep. 88. It was held in the first-named case that the *Bowman Case*, supra, was unlike the *O'Daniel Case*, because there the passway had not only been practically upon the same ground for many years, but the circumstances of the locality, and constant and necessary use, made it evident that it had been used adversely and under a claim of right. The case of *Conyers v. Scott*, (Ky.) 21 S. W. Rep. 530, reviews the *O'Daniel* and *Bowman Cases*, and points out the distinction very clearly; the *Talbott Case* does the same thing. The doctrine established by the three cases supra is that a right to a passway may be created by prescription over woodland if continued the requisite length of time. In such case the question is, was the passway used as a matter of right for the period of 15 years or more? If it was, and not in the manner indicated in the *Bowman Case*, the right will be established over woodland as well as inclosed land. Now, let us see what the weight of the evidence establishes. It is—First, that the appellant has no other way to reach the Livermore public road, which leads to the county seat, than the way in controversy; second, that it has been used for such purposes at least 50 years, and by the appellee at least 20 years; and, third, that the passway has been all the time substantially at the same place, and all the time has had a well-defined road bed; fourth, that the way has been kept up by the appellee as his passway; that the changes in it are only such as resulted occasionally from the fall of a tree across the roadbed, or similar obstructions. These facts clearly create the presumption that the passway was used as a matter of right, and, having been so used for 15 years and more, the appellee's right to its continued use is established. If it be a fact that appellant wants to clear his ground and fence it up, there is nothing in this opinion that precludes him from applying to the county court to discontinue the right of way established in this case, and have another right of way opened for the benefit of the appellee, in which case the court will take into consideration the equities of all the parties, and act accordingly. The judgment is affirmed.

WATSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 28, 1893.
HOMICIDE — ASSAULT WITH INTENT TO KILL — MUTUAL COMBAT.

Where, on trial of a person for willfully and maliciously shooting and wounding another with intent to kill him, the testimony shows a mutual combat, in which both parties were anxious to engage, it is error to give instructions which make the guilt of defendant depend on whether or not he brought on the altercation.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

John Watson was convicted of an assault with intent to kill, and appeals. Reversed.

Bush & Worten and John K. Hendrick, for appellant. W. J. Hendrick, Atty. Gen., for appellee.

PRYOR, J. Under this indictment the appellant was found guilty of willfully and maliciously shooting John Minitree and wounding him, with the intention to kill him. On the trial the testimony on both sides developed the fact of a mutual fight between these parties; both no doubt willing and anxious to engage in mutual combat. The court gave instructions 1, 2, 3, 4, and 7, that embraced the law of the case, but in instructions 5 and 6 made the guilt of the accused depend upon whether or not he brought on or sought the altercation in the first place, when from the testimony it was a quarrel between the two, originating from some misunderstanding as to what a third party had said in relation to a fight the father of the accused had with one Dugan Alley. It is immaterial, in a case like that, who brought on the trouble or sought the quarrel. If one becomes angry with another, and uses harsh language merely, it is no justification for the party aggrieved by it to take the life of the one speaking the words, or even to inflict a blow with his fists. Where death ensues, the circumstances may reduce the offense from murder to manslaughter, but the use of bad language is not a provocation that will in law justify an assault. The jury may have supposed in this case that the language used by the one party or the other was seeking the difficulty, and, if so, the right of self-defense no longer existed. The simple question in the case is was this shooting and wounding done by the accused willfully and maliciously with the intention to take the life of the injured man? If so, it is a felony; if in sudden heat and passion, it is a misdemeanor; if the shooting was in self-defense, the accused is not guilty. Instructions 1, 2, 3, 4, and 7 cover the law of the case. The only criticism they are subject to is the failure of the court to follow the language of the statute, but this is no cause for reversal, as the language used embraces the same meaning. Judgment reversed for a new trial in conformity with this opinion.

LEWIS et al. v. CITIZENS' NAT. BANK.

(Court of Appeals of Kentucky. Oct. 28, 1893.)

TRUSTS—WILLS—CONSTRUCTION.

1. Where a testamentary trustee purchases property with the trust funds, and takes a deed as trustee, the character of the trust is determined by the will, and not by the deed.

2. Where property is left by will to a person "as a trustee * * * for the use of his children," and there is an explanatory clause stating that "this gives him the power to use the principal for his children, or any of them, equally or unequally," such construction is controlling, and the children have only a contingent interest, subject to be defeated by the exercise of the power of appointment.

Appeal from chancery court, Louisville county.

"To be officially reported."

Bill by the Citizens' National Bank against Thomas A. Lewis and others. Decree for complainant. Defendants appeal. Reversed.

Blanton Duncan and O'Neal, Jackson & Phelps, for appellants. W. O. Harris, for appellee.

HAZELRIGG, J. The question involved in this case is the right of the appellee to subject to sale an undivided one-fourth interest in two houses and lots on Main and Market streets, in the city of Louisville, in satisfaction of a judgment against Blanton Duncan, one of the appellants, for \$1,750, with interest at 6 per cent. per annum from April 17, 1872, for two years, and with 10 per cent. interest per annum from that time on until paid. The title to this property, as shown by deed of November 12, 1878, was in Blanton Duncan, as trustee of his daughters, Kate B. Duncan and Georgette Duncan. Georgette having died intestate, her father and mother, appellees contend, inherited her one-half of the property,—that is, one-fourth each,—the sister Kate owning the other half. It is this undivided one-fourth interest of the father, the judgment debtor, the sale of which is sought. The conveyance in the deed spoken of was from Blanton Duncan, trustee of Mary T. Duncan, and Mary T. Duncan, to Blanton Duncan, trustee of Kate B. Duncan and Georgette Duncan, and was in consideration of the payment of \$9,000 cash paid the grantors by the grantee as such trustee, and \$4,000 to be paid thereafter. The terms of the conveyance were such that the trustee of the daughters was empowered at any time, without the intervention of the Louisville chancery court, to sell and convey the property, and reconvert the same into personality. From the conveyance itself, there is nothing to indicate the nature of this trusteeship for the daughters, or the terms or conditions of the trust. But from the record it appears that Blanton Duncan, in 1873, had been appointed trustee for his children under the will of his father, Garnett Duncan, and from the funds of that estate, be-

longing to himself as such trustee, he had made the cash payment of \$9,000. The character of the holding by the trustee, therefore, and the ultimate disposition of the interest of Georgette at her death, are matters to be controlled by the will of Garnett Duncan.

The chancellor seems to have regarded this deed of November, 1878, as alone creating this trust, and from this premise correctly construed the holding to be in fee. But this instrument, though it declared, did not create, any trust. The will of Garnett Duncan alone did that. The acceptance of the trust and its management are shown by the exhibits in the various chancery suits referred to, and the settlements in the Jefferson county court made by the trustee. Looking to this will, we find the following provisions: "Eighth. I give and bequeath and devise to my three granddaughters, Mary, Kate, & Georgie, all the shares that I may own at the time of my death in the East London Railway Company, and also my lands in Indiana, near Jeffersonville. * * * Ninth. * * * The remainder that may be left in the hands of my executors, together with the unpaid notes of Mr. Thompson, I give to my son Blanton, as a trustee, to be invested in his discretion in improving the Indiana land, or otherwise, for the use of his said three daughters. [Signed, etc.]" "Codicil. * * * In lieu of the 8th clause I give and devise all my East London Railway shares, and all my land in Indiana, that may be owned by me at the time of my death, to my son Blanton Duncan, as a trustee, for his use and support for life, and at his death to be equally divided among his children, and their descendants, such descendants to take per stirpes. * * * The ninth clause is thus modified: * * * In the latter part of this ninth clause I substitute the word 'children' for the words 'said three daughters,' so that any future child or children will be embraced in this trust, which is independent of that created by the 8th clause, for this last trust gives him power to use the principal for his children, or any of them, equally or unequally." Whatever doubts may have existed as to the power given the trustee by the language of the original ninth clause, we must admit the right of the testator to construe it for himself. That construction is a part of his will and is controlling. By it he enlarges the trust, or converts it into a power, by the exercise of which the son may use absolutely the estate—its body or principal—for his children, or any of them, and by such a distribution as he pleases,—that is, to them in equal or in unequal portions. This is a power of appointment, which can be exercised at any time during the lifetime of the life tenant. The existence of this power does not destroy the limitation over to the remainder-men after the life estate, but the power may be so executed by the life tenant

under this power of apportionment as to substantially destroy the interest of any particular remainder-man. The existence of this power, and the possibility of its exercise, is inconsistent with the view that the deceased daughter took a vested remainder. From the very nature of the case, her holding was contingent. Manifestly, her death does not affect or circumscribe the power given under the will. The investment is only temporary. Whether, as a matter of fact, the trustee expended for her use largely more than her proportionate share of the estate, as contended by him, we need not inquire. The chancellor conceded that, if the property were held under the trust and power created by the will of Garnett Duncan, it could not be subjected to the payment of the plaintiff's debt; but it was thought that the evidence establishing this trust was secondary and incompetent, and seemingly held that the deed itself must present the evidence of the nature of the trust. The contrary doctrine is abundantly shown by all the authorities. *Perry, Trusts*, §§ 77-99; *1 Lewin, Trusts*, pp. 169-405. The judgment is reversed, with directions to dismiss the petition.

FERGUSON v. CRICK.

(Court of Appeals of Kentucky. Oct. 31, 1896.)

ESTABLISHMENT OF BOUNDARY LINE — ORAL AGREEMENT—STATUTE OF FRAUDS.

An agreement between adjoining owners, establishing the boundary line between their lands, is not within the statute of frauds.

Appeal from court of common pleas, Christian county.

"Not to be officially reported."

Action by W. D. Ferguson against Noah Crick. From a judgment for defendant, plaintiff appeals. Affirmed.

J. I. Landes and Harry Ferguson, for appellant. Petree & Downer, for appellee.

HAZELRIGG, J. Whether the 200-acre survey of Wristin, made in 1816, and under which the appellant asserted title, covered the 50 acres of land claimed by the appellee, was the question submitted to the jury on the first trial of this case. Upon that issue the jury failed to agree. Thereupon, the appellee set up, by an amended answer, that the appellant had procured this old patent to be processioned in 1876, and that while the lines were being located, and in compromise and settlement of certain differences between the appellant and one James Crick, under whom the appellee claims title, the appellant and said Crick agreed upon the southern boundary line as fixed by the processioners, by which the appellant took the land north of this agreed line, and Crick the part south of it. The appellant denied making such an arrangement. The issues thus presented were transferred to the equity docket, and upon final hearing were decided for the appellee.

There is abundant proof sustaining the appellee's contention. The report of the processioners shows the establishment of this southern line as contended for by the appellee, and reports its location as having been made by the consent of the parties, Ferguson and Crick. The same fact is shown by a number of witnesses, while the appellant's testimony to the contrary is substantially unsupported. But it is contended that, even if this be true, the alleged arrangement, being, in effect, a sale of land by Ferguson to Crick, was not in writing, and hence is within the statute of frauds. We are of a different opinion. In *Grigsby v. Combs*, 21 S. W. Rep. 37, this court said that such amicable arrangements between disputing claimants of coterminous boundaries have been sanctioned by repeated adjudications. Here, Crick, who had entitled himself to certain equities in the land by the erection of buildings on it, and otherwise clearing it up and improving it, agreed to surrender all further claim if the line, as fixed by the processioners, should be marked and returned as the true line by the consent of the parties. This was done. The processioners' report is conclusive of that fact. The agreement merely fixed the southern boundary line of the appellant's survey. The appellant is concluded by the report, and by his agreement. Judgment affirmed.

BENGE v. BENGE.

(Court of Appeals of Kentucky. Oct. 31, 1893.)

EQUITABLE MORTGAGE—STATUTE OF FRAUDS.

1. Plaintiff alleged that, by oral agreement between them, defendant bought land for \$700, defendant paying \$650 and plaintiff \$50; that defendant was to take the deed to herself, and allow plaintiff two years to pay her the \$650, with interest, and on payment was to convey him the land; that within the two years he tendered payment, and demanded the deed, which was refused. *Held*, that since plaintiff did not make, and was not bound by, the deed, and there was no mutuality in the contract, the deed could not be held a mortgage.

2. The agreement was also void under the statute of frauds.

Appeal from circuit court, Clay county.

"Not to be officially reported."

Suit by James W. Benge against E. J. Benge to be allowed to redeem certain land, etc. Judgment for defendant. Plaintiff appeals. Affirmed.

A. W. Baker and D. Y. Little, for appellant. John L. Scott, for appellee.

BENNETT, C. J. The appellant contends that by a verbal agreement with the appellee she purchased the land in controversy, and paid therefor the sum of \$650, the appellant paying \$50, the balance of the purchase money; and that the appellee was to take a deed to the land to herself, and was to allow the appellant two years in which to pay her the purchase money that she had paid, and 10 per cent. interest per annum

therefor, and upon the payment of which she was to convey the land to him; and that, before the time allowed for the payment had expired, he tendered payment, and demanded the deed, which was refused. He asks that the deed to the appellee be treated as a mortgage, and that he be allowed to redeem, etc. The lower court gave judgment for the appellee for the possession of the land, deciding that the facts proven did not entitle the deed to be treated as a mortgage; that appellant was a mere lessee, tortiously holding over. The facts relied on by the appellant would not, under the former equity practice of this state, establish a resulting trust, because in order to create such trust it was necessary that the deed should be made to one person, and that the consideration should be paid by another. But article 1, § 19, c. 63, Gen. St., expressly abolishes such trusts. See *Com. v. Maysville & B. S. R. Co.*, (Ky.) 21 S. W. Rep. 342, and the authorities there cited. And it has been expressly decided by this court (see *Fischli v. Dumaresq*, 3 A. K. Marsh. 23) that, when the equity of resulting trust does not apply, the statute of frauds declares all agreements involving the title to land void, unless in writing. It is equally clear that the said deed cannot be treated as a mortgage, because the appellant did not make the deed, and he is not bound by it; for it is well settled that, in order to make an alleged agreement binding, there must be a mutuality of obligation. Here the appellant was not bound to accept a deed from the appellee had she tendered it. As to the question of the \$50 and improvements, there was evidence pro and con, and the court rendered its decision thereon, and we think the evidence sustains it. The judgment is affirmed.

CUMMINS v. SHAWHAN et al.

(Court of Appeals of Kentucky. Oct. 31, 1903.)

Resulting Trusts—Evidence.

S., who held a mortgage on L.'s land, purchased a smaller tract of L.'s, not covered by the mortgage, at a sale thereof under execution, and the mortgaged tract was afterwards conveyed to S. in payment of debts owed by L. After the latter conveyance, S. said that L. would still have the small tract left, and L. appropriated the rents therefrom with his consent. On trying to sell it, L. declared that it belonged to S., and that he was to receive all over \$3,000 that it would sell for, and, on the last application to him to rent it, he told the person applying to see S., who owned it. He then moved off it, declaring that he owned no land, and that a rumor that it was held secretly for him by S. was false. Held insufficient to show that the land was purchased and held by S. in trust for L.

Appeal from chancery court, Harrison county.

"Not to be officially reported."

Action by P. P. Cummins against H. C. Shawhan and others to enforce a trust in land held by defendants. There was judg-

ment for defendants, and plaintiff appeals. Affirmed.

J. Irvine Blanton, for appellant. A. H. Ward, for appellees.

PRYOR, J. H. E. Shawhan and Pleasant Lilly were partners in certain business transactions, and both died in the year 1882. Lilly, during his life, became insolvent, and largely indebted to Shawhan. Shawhan paid debts for him amounting to \$9,000, and took a mortgage on his land to secure it. This note was bearing 10 per cent. interest. After the execution of this mortgage, Shawhan took an absolute deed to the land mortgaged, with a consideration expressed of \$13,200. Lilly owned a small tract of land not embraced by the mortgage, of about 100 acres. This was sold under executions, and also purchased by Shawhan. The land brought less than two-thirds of its value, and, the equity of redemption having been sold, the purchaser, upon being paid by Shawhan, transferred to Shawhan his right, thereby investing Shawhan with the equitable title to this tract, also. This was all done before the execution of the deed to Shawhan by Lilly of his main tract. After Lilly and Shawhan had both died, and several years after these transactions took place, the creditors of Lilly instituted this action against Shawhan's heirs and devisees, claiming that the tract of 100 acres was purchased by Shawhan for Lilly, and held in trust, and that, when the deed was made for the principal tract, all matters were settled between them, and the land was that of Lilly, and never belonged to Shawhan. There is no evidence of any agreement by Shawhan to make the purchase for Lilly, except such as might be implied from the relation of the parties to each other and the circumstances surrounding them, nor is there proof of any final settlement between them. Still, the deed to the larger tract was made, and testimony introduced showing that Shawhan stated more than once that Lilly would have a few hundred dollars and this small tract of land left; and Lilly did in fact use and appropriate the rents of this small tract for his own use after the deed to the larger tract had been executed, and this must have been with the consent of Shawhan. It appears, however, that when the deed was executed for the large tract nothing was said or done by Lilly or Shawhan towards releasing Shawhan's lien, but, on the contrary, Lilly after that date, in trying to sell the land, stated that it belonged to Shawhan, and he was to get all over \$3,000 that the land brought. He made this statement to two or more persons, and must have regarded Shawhan's claim as still existing and unpaid, as there was no reason for his making such declarations to those who had no interest in the matters between himself and Shaw-

han. Besides, after renting this land, when the last application was made to him to rent it, he told the party applying that he must now see Shawhan; that it belonged to him. Besides all this, he surrendered the possession to Shawhan and left the premises, removing to another part of the county, and, when told of the rumor existing, to the effect "that Shawhan was secretly holding this land for him," he said it was not so; that he owned no land. That he was utterly insolvent, without any property, is conceded, unless, as the creditors insist, he owned this land; and why he should abandon it in his destitute condition is inconsistent with the fact of ownership. It is evident that he and Shawhan lost money in the mule venture south, and the note for \$1,600 paid for him by Shawhan and McGibben shows other indebtedness than that Shawhan had actually assumed. If Shawhan was the man of integrity that both parties show him to have been, and that he no doubt was, he never would have taken possession of this land or held it in the manner it is proven he did, without giving to Lilly some unmistakable evidence of the latter's right to it. It is apparent from the whole case that Lilly was struggling to sell this land, and make something out of it, and, finding that he could not accomplish this and satisfy Shawhan, he abandoned it, leaving Shawhan the owner and in the possession. We concur with the conclusion reached by the chancellor, and must affirm the judgment.

**SHINKLE'S ASSIGNEES v. BRISTOW.
SAME v. BISHOP et al.**

(Court of Appeals of Kentucky. Oct. 28, 1893.)

DOWER — WIFE OF ASSIGNOR FOR BENEFIT OF CREDITORS — RELINQUISHMENT BY SEPARATE DEED—TRUSTS—RIGHTS OF BENEFICIARIES.

1. Where a wife does not join her husband in an assignment of lands for the benefit of creditors, but afterwards, by separate deed, relinquishes her dower in the lands, except the homestead, in consideration of the reconveyance by the assignees of the homestead, she cannot afterwards claim dower in the lands described in her deed because the homestead was reconveyed to the husband, and not to her and him jointly, as previously agreed between them and the assignees, in the absence of fraud.

2. Gen. St. c. 63, § 22, art. 1, provides that no sale of real estate by a trustee under a deed to secure payment of debts shall be valid, nor shall the conveyance by him pass title, unless the sale is under a judgment of court, or the maker of such deed shall join in the writing evidencing the sale. Chapter 24, § 20, relating to conveyance of real estate by married women, provides that the conveyance may be by joint deed of husband and wife, or by separate instrument, but in the latter case the husband must first convey. *Held*, that where a wife, after her husband alone executed a deed of assignment of real estate for benefit of creditors, relinquished her dower therein by separate deed, her potential right passed to the assignees, though the latter have no power to sell except as provided by statute.

3. Where such assignor, with the knowledge of the assignees, used notes held by him in trust for his children with which to discharge a lien on a certain lot assigned to them, such children, in the absence of laches affecting creditors, are entitled to be paid by the assignees, out of the proceeds of the sale of such lot, the amount of such notes and interest.

4. The fact that such notes were the proceeds of investments made for the children by the assignor, does not affect their rights where at the time of the investments he was in a prosperous pecuniary condition.

Appeal from chancery court, Kenton county.

"To be officially reported."

Action by William Fenley and R. T. Miller, assignees for benefit of creditors of Vincent Shinkle, to sell the real estate assigned to them, and to wind up the estate. After the sale under the judgment of the chancellor. Emily Bristow, formerly the widow of the assignor, filed a petition to be made defendant, alleging the death of her husband, and asserting her right to dower in the lands conveyed by him to the assignees. R. H. Bishop and others also filed a petition, claiming a portion of the proceeds of the sale of such lands, on the ground that property held by the assignor in trust for them was used to discharge a lien on a portion of such lands, with the knowledge of the assignees. From separate judgments in favor of Bristow and Bishop and others the assignees appeal. Reversed as to Bristow, and affirmed as to Bishop and others.

Chas. H. Fisk, O'Hara & Bryan, J. W. Bryan, and Collins & Fenley, for appellants James P. Lerrin, for appellee Bristow. L. H. Noble, for appellee Champion Coal & Tow Boat Co. Richard P. Ernst, for appellees Bishop and others.

PRYOR, J. These two appeals, being involved in the same litigation, will be considered together. Shinkle, in the month of August in the year 1883, being largely indebted, and the owner of much valuable real estate in the county of Kenton, made a deed of assignment of all his property, real and personal, to William Fenley and R. T. Miller, for the payment of his debts. The assignment was general in its character, and vested in his assignees the title to his real and personal estate. The deed was put to record, and his assignees, upon investigating the condition of his estate, ascertained that one Sinton held a mortgage upon his residence property in Covington and a vacant lot for a large sum of money. Shinkle's wife had not united with her husband in the deed of conveyance to the assignees, and therefore had a potential right of dower in all the realty it purported to convey. Shinkle and his wife, being desirous of retaining their Ganrard street residence, proposed to the assignees to take the Ganrard street residence subject to the mortgage of Sinton for \$17,000, the household furniture, buggy, harness, and certain stocks in insurance and

bridge companies, and in consideration therefor would release the mortgage on the vacant lot, valued at \$6,000, so as the assignees would hold it free of incumbrance, and Mrs. Shinkle would also release her dower interest in all the real estate conveyed except the residence property, etc. The proposition was submitted in writing, signed by both husband and wife, and accepted by the creditors; the assignees being directed to make such conveyances as required upon the compliance by Shinkle and wife with the terms of their proposition. Shinkle and wife having released the mortgage on the vacant lot, or the one valued at \$6,000, the assignees, on the 29th of August, 1883, reconveyed the Ganrard street residence to Vincent Shinkle, subject to Sinton's lien; and Mrs. Shinkle on the same day executed a conveyance relinquishing her dower in all the realty but the family residence. After the assignees had obtained a perfect title to all the realty but that reconveyed to Shinkle, they instituted an action to sell the realty, and wind up the estate, filing with their petition the exhibits or evidences of title. After the real estate had been sold under the judgment of the chancellor, Mrs. Shinkle filed her petition to be made a defendant, alleging the death of her husband, and asserting her right to dower in all the real estate conveyed by her husband to the assignees, and, if not allotted to her in the realty, that its value be paid over to her from the proceeds of sale. Her right to dower is claimed, because, as she alleges, the deed to the family residence was, by the terms of the proposition, to have been made to herself and husband jointly, and that when the deed was executed to the husband alone she did not understand its purport; that it was represented to her, when the written proposition was made, that the residence property was to have been conveyed to her. While the written proposition was not binding on the wife, by executing its provision by the deed relinquishing her potential right of dower, it passed her interest to the assignees, and is irrevocable, unless the parties to it practiced a fraud upon her in order to obtain her relinquishment. That she knew the manner in which the terms of the compromise or settlement were carried out and fully executed is apparent, and there is no pretense that any fraud was practiced upon her by any of the parties interested in the settlement; and the only question of such importance as demands consideration is the effect to be given the deed of the wife relinquishing dower in which the husband has not united. He had previously conveyed all this realty to his assignees by an absolute conveyance for the benefit of creditors, but it is argued this only vested in the assignees an equitable interest, with no power to sell or convey the title, unless empowered to do so by the judgment of the chancellor. Article 1. § 22, c. 63, Gen. St., is relied on by the wife, who obtained the

judgment below, as settling this question. It provides: "No sale made of any real estate by a trustee, by virtue of a deed of trust or pledge to secure the payment of debts, shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge, unless the sale thereof shall be in pursuance to a judgment of court, or the maker of such deed or pledge shall join in a writing evidencing the sale." It is plain the trustee has no power to sell or pass the title except in the manner provided by this statute, and equally clear that but for the statute the trustee could sell and pass the fee. The title, however, must be in the assignee or the grantor, and under the common-law rule it is evidently in the assignee or trustee; but the statute intervenes, and places a limitation on the power of the trustee for the protection of the grantor and creditors, and prohibits a sale and conveyance by him unless by the direction of the chancellor or the consent of the grantor. It does not divest the trustee of the title, but says, in effect, "You have the title, but shall not pass it except in the mode prescribed by the statute." It will not be contended that the trustee would be without power to convey in the absence of this statute, and the limitation placed on his right to sell by its provisions only requires the passing of the title from the assignees in a prescribed mode, for without this limitation the trustee, being invested with title, could sell and convey at his own will and pleasure. Section 20, c. 24, Gen. St., in regard to the conveyance of real estate by married women, reads: "The conveyance may be by the joint deed of the husband and wife, or by separate instrument; but in the latter case the husband must first convey or have theretofore conveyed." The husband having conveyed to the assignee, the subsequent conveyance by the wife relinquishing her dower in the land previously conveyed by the husband passes her potential right. In *Cantrill v. Risk*, reported in 7 Bush, 158, the conveyance was held to have been in contemplation of insolvency, and inured to the benefit of creditors. The wife set up her claim for dower in the real estate conveyed, and this court held that "It was a valid deed, and the fact that it was held to be an assignment did not restore to her the right to dower which had been alienated by it." The law may step in and prevent the alienation of property by the grantee, although the legal title passes, when others become interested by reason of the conveyance to him, and he holds it merely in trust for beneficiaries; and in this class of cases many reasons exist why the rights of creditors as well as the grantor should be protected against improvident sales and conveyances by those vested with the title, holding it alone for the benefit of others. In our opinion, the conveyance by the feme passed her potential right of dower, and the judgment is reversed, with directions to en-

ter a judgment dismissing the petition of the appellee.

In the other branch of this case is involved the right of the children of Vincent Shinkle to recover of the assignees the amount of a trust fund held by Shinkle in trust for his children, and which was appropriated by Shinkle, with the knowledge of the assignees, in releasing the lien of Sinton on the lot that Shinkle and wife had agreed to release in the settlement already referred to by which Shinkle was permitted to retain his family residence. Shinkle, in the year 1872, subscribed for his children nine shares of stock in the Home Security Building & Loan Association in the city of Covington. Some of the dues were paid by Shinkle and some by the children. In the year 1879 this corporation ceased to exist, and in payment of what was coming to these children handed over to their father two notes on one Leopold for \$752 each; one due on the 1st of January, 1884, and the other on the 1st of January, 1885. These notes were assigned to V. Shinkle in the following manner: "Pay to the order of V. Shinkle. Home Building Association." Shinkle held these notes until he made his assignment in August, 1883, and in order to release the lien on the vacant lot valued at \$8,000, and to enable him to retain his family residence under the contract between himself and his wife on the one part, and his creditors, as stated in the opinion, applicable to the wife's claim for dower, he pledged to one Collins both of these notes as collaterals, and obtained from him the money that was applied to the extinguishment of the Sinton lien. Collins collected the notes on Leopold in satisfaction of the amount he had let Shinkle have, holding the notes as collaterals. The children sued Collins on the ground that he had notice of the trust when he received the notes as collateral; but, the court holding otherwise, there was a judgment against them. The children of Shinkle, the appellees, filed a cross petition in the case against Collins, asking the chancellor, in the event that Collins was not liable, that they be allowed out of the proceeds of the sale of this lot the amount of the two notes, with interest. The assignees claim the

notes as the property of their grantor and assignor, and deny the right of the children to the money. It is evident from the facts of this case that neither the assignee nor V. Shinkle regarded the Leopold notes as a part of V. Shinkle's estate. Shinkle held the notes, and, when endeavoring to raise the money to release this lien, the assignees, or one of them, disclaimed any interest in them, and for that reason Collins took them as collaterals, and advanced the money, as the assignee well knew, for the purpose of releasing this lot from the incumbrance upon it. The money obtained from Collins having been actually paid on the lien claim, and the assignee for creditors occupying no better position than Shinkle himself would, we see no reason why, when the proceeds of this trust fund have been applied in removing these liens, the beneficiaries of the trust are not in equity entitled to a judgment for the amount of these notes, with the interest, to be paid out of the proceeds of this sale of the lot. Shinkle paid the proceeds of the trust notes over to Sinton. The assignee informed Collins that he had no claim on the notes. The fund realized from the two notes has been traced directly into the fund belonging to the creditors. It has been applied to the payment of the debts of the trustee, with a knowledge of and consent to its appropriation by the assignee. The money is in court out of which this trust can be secured. There has been no laches on the part of the children affecting creditors. But for the payment of this lien out of the trust fund, the assignee would have been compelled to furnish the money out of the estate of Shinkle, or submit to a sale by Sinton to satisfy the lien. The fund is in court for distribution, and the claims of creditors must be held subordinate to that of the beneficiaries of this trust. While it appears the grantor and father of these children paid the premiums or monthly dues, it is not claimed that he was insolvent at the time, but, on the contrary, the facts show that he was then in a prosperous pecuniary condition. The judgment in the case of Bishop and others is affirmed, and reversed as to the widow, now Mrs. Bristow.

LACEY v. LACEY.

(Court of Appeals of Kentucky. Nov. 2, 1898.)

ALIMONY—ALLOWANCE TO DEFENDANT—PLEADING.

1. The statute which provides that if the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable, does not deprive the wife of alimony merely because she did not institute the suit for divorce. When, therefore, a husband has sued for and obtained a decree on the mere statutory ground of having lived apart from his wife for five years, and it appears that defendant had given him no cause to desert her, and was herself entitled to bring suit, she may be allowed alimony.

2. Alimony may be allowed a defendant though her answer is not styled a counterclaim, when plaintiff has replied, and joined issue on the matter pleaded.

3. When a wife sues for alimony, and the husband pleads his suit pending against her for divorce, and the suits are thereupon consolidated and heard together, the court may in the consolidated suit decree the divorce, and allow her alimony, though alimony be only allowable to a plaintiff, or to a defendant pleading it as a counterclaim.

4. The wife was beyond middle age, and the husband 10 years younger. The separation was caused by no fault of hers. Her estate was about \$700, and she had been allowed \$75 pendent lite. The husband had had several hundred dollars of her separate property, and was worth \$2,500 to \$3,000. *Held*, that she should be allowed \$1,000 as alimony.

Appeal from court of common pleas of Wolfe county.

"To be officially reported."

Action by A. P. Lacey against E. J. Lacey for a divorce. Divorce decreed. From an order dismissing her claim for alimony, defendant appeals. Reversed.

Thos. H. Hines, Jo. M. Kash, and T. O. Johnson, for appellant. Wm. H. Holt, for appellee.

HAZELRIGG, J. The appellee sought and obtained a divorce from his wife, the appellant, on the sole ground of his having lived apart from her without cohabitation for five consecutive years next before the institution of his action. The fact of separation was not denied, but the wife sought alimony upon the ground that the appellee without cause had abandoned her when she was without fault; that she had sheltered him in a home provided by her for the nine years of their married life, and been patient with his shortcomings; that she had very little property left, having been compelled since his desertion of her, and in order to provide the means of subsistence, to sell her house and lot where they had lived during the marital relation; that her husband had appropriated to his own use some eight or nine hundred dollars belonging to her, which he had collected from a sale of a small tract of land inherited from her father's estate; that she was old, and in feeble health, while her husband was strong, without children or

others dependent on him, and worth some four or five thousand dollars in real estate, etc. The appellee admits that he abandoned his wife, but denies that he was in fault, and sets up a series of petty grievances against her, evidently having little, if any, excuse for his conduct. He was about 38 years of age and she 48 when they married, in 1876. She was a widow with two daughters. They kept a boarding house, and the wife was industrious and economical. The husband was addicted to frequent speers, but was a proficient salesman and clerk, and contributed to a considerable extent to the support of the family. In his deposition he says that while he was married he bought a town lot for \$150, and a small tract of land for which he paid \$200; that just before the separation he had bought a piece of land and owed a sale bond amounting to \$301, and was without money to pay it; that he told his wife and her daughter and son-in-law that if they would pay to him some \$245 that the son-in-law owed for board he would stay at home, and assist his wife in keeping the boarding house, otherwise he would be forced to leave, in order to make money enough to pay his debts; that they refused to let him have it, and he left. We cite these alleged reasons given by the appellee to show the utter want of legal excuse for his abandonment; and, except for the arbitrary statutory provision as to the separation for five years, it is evident the appellee would not have been entitled to the divorce. The chancellor seems to have been of the opinion that because the divorce was not obtained by the wife in a proceeding by her for that purpose, she is not entitled to alimony; and such would seem to be the effect of a literal construction of the statute. It reads: "And if the wife have not sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable," etc. We do not think, however, that this statute deprives the wife of alimony, if otherwise entitled to it, simply because she may not have instituted the suit for divorce. It was intended to apply in all cases where the separation occurs without her fault, and embraces cases where she is entitled to obtain a divorce, though the husband is seeking it. Such was the effect of the decision of this court in *Davis v. Davis*, 86 Ky. 32, 4 S. W. Rep. 822. It is true that in that case the judgment of divorce obtained by the husband should not have been granted. Here it was properly granted by reason of the statute, yet the point upon which the right of the wife to alimony rested was the conduct of the husband. Her equities are the same in this case. Although either party, without reference to which one was in fault, might have obtained the divorce by making the application, yet their conduct was a proper subject-matter of in-

quity for the purpose of equitably determining and adjudging their property rights. It is insisted, however, that because the wife's answer was not styled a "counterclaim" she is not entitled to a judgment for allimony. If this requirement of the Code be applicable to cases of this kind, yet the appellee, by replying to and joining issue on the matter set up in the alleged counterclaim, waived his right to make this objection. *Cason v. Cason*, 79 Ky. 558. Moreover, after the institution of the suit of appellee the wife instituted an independent action for allimony. There was an answer, relying, among other things, on the pendency of the first action, and the claim to allimony therein. This action could not be prosecuted independently of the first one, but the suits were consolidated, and heard together. If we hold that the statute does not allow allimony to the wife in the first action because it would not be on a divorce obtained by her, or hold that the appellant did not waive objection to the wife's pleading by replying to it, yet there seems no reason why she is not entitled to allimony in this independent suit brought by her. It is urged as an objection to this that only a partial record of this second suit is brought up; but when an amended petition is tendered, and an order made permitting it to be filed, yet, if it be not in fact in the record, which is certified to be a complete transcript, the presumption must be that, although the plaintiff had permission to file it, it was not in fact filed. The only allowance to the wife was \$75 pending the suits. The extent of her estate seems to be about \$700. The husband seems to have gotten several hundred dollars of her separate property, and is worth some \$2,500 or \$3,000. We think she should have been allowed as allimony the sum of \$1,000. The judgment below dismissing her claim is reversed, and a judgment in her behalf is directed to be entered for this sum.

LOUISVILLE TRUST CO. v. MUHLENBURG COUNTY et al.

(Court of Appeals of Kentucky. Oct. 14, 1893.)

TAXATION—LIENS—ENFORCEMENT IN EQUITY.

Where the machinery provided by law for the collection of taxes levied by a county has failed because of the refusal of the county court to appoint tax collectors, and the refusal of the sheriff to act in their behalf, the liens of the county on property taxed for the payment of bonds cannot be enforced in a court of equity by holders of the bonds, as the chancellor cannot be transformed into a tax collector.

Appeal from circuit court, Muhlenburg county.

"Not to be officially reported."

Petition by the Louisville Trust Company against the county of Muhlenburg and others to enforce liens for taxes. Defendants demur. Demurrer sustained, and petition dismissed. Petitioner appeals. Affirmed.

E. H. Brown and D. M. Rodman, for appellant. Johnson & Wickliffe, for appellees.

HAZELRIGG, J. By virtue of an act of the general assembly of the commonwealth of Kentucky approved February 24, 1868, the county of Muhlenburg subscribed to the capital stock of the Elizabethtown & Paducah Railroad Company the sum of \$400,000, and issued and delivered to that company its bonds for that amount. Under the provisions of a further act, approved March 18, 1878, the county compromised a sufficient amount of the original bonds to aggregate the sum of \$100,250, and issued new bonds therefor. The appellant, for itself and others, as owners of certain of these unpaid bonds, old and new, brought its suit in equity against the county and a number of the property owners thereof, seeking to enforce the tax liens alleged to be existing on the property of the defendants, as provided by the acts mentioned. It appears from the petition that the machinery provided by law for the collection of the taxes levied by the county court for the payment of these bonds had, up to the institution of this suit, failed to accomplish the end sought, the county court failing or refusing to appoint collectors, and the sheriff, when one existed, failing and refusing to act in their behalf. Hence this appeal to the chancellor.

The liens under which the estate of the property holder is alleged to be placed are created by this clause of the act of February 24, 1868: "And all taxes levied under this act shall be a lien on the real estate of the person taxed, which shall lie in the county in which such tax is levied," (section 12, c. 548, p. 626, vol. 1, Acts 1867-68;) and by this clause in the act of March 18, 1878: "Said county shall have a lien on all property taxable or taxed under this act, and on all other property of each taxpayer, for the payment of all taxes payable by such taxpayer, which shall not be defeated by gift, sale, devise, alienation, or any other means whatever," (section 7, c. 519, p. 604, vol. 1, Acts 1878.) It will be observed that the language of these provisions is substantially the same as that employed in the General Statutes of the state (section 2, art. 1, c. 92) creating similar tax liens, so that there was no intention to give the county any other lien than that which existed prior to the passage of these acts, or to afford any additional or extraordinary remedy for the enforcement of such lien. These liens cannot be enforced in courts of equity; courts cannot be transformed into tax collectors. In speaking of the power of the chancellor in a similar case, this court said: Because "the remedy had been suspended by reason of the failure or refusal of those living within the precinct to accept the office, [meaning the office of tax collector,] or had been temporarily obstructed by reason of a defect in the law under which the collection was to

be made, did not enlarge the jurisdiction of the chancellor, or confer upon him the exercise of such an extraordinary power." *McLean County Precinct v. Deposit Bank of Owensboro*, 81 Ky. 254. To the same effect are the decisions of this court in *Johnston v. City of Louisville*, 11 Bush, 527, and *Pennington v. Woolfolk*, 79 Ky. 13. These powers and duties belong exclusively to the legislative department of the government, and their exercise by the executive or judiciary departments would be subversive of the fundamental principles of our organic law. Section 2, art. 1, Const. Ky. The judgment sustaining the demurrer and dismissing the petition is affirmed.

FIRST NAT. BANK OF COVINGTON v. D. KEEFER MILLING CO. et al.

(Court of Appeals of Kentucky. Oct. 31, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — ATTACHMENT—PRIORITY—UNLAWFUL LOAN.

1. Though Gen. St. c. 24, § 10, provides that no deed of trust or mortgage conveying a legal or equitable title shall be valid against creditors until acknowledged and lodged for record, a general assignment for benefit of creditors, duly executed and delivered to the assignee, vests in him an equitable title, though not yet recorded; and a creditor then attaching acquires only an equitable right to which an equity prior in point of time is superior.

2. A bank loaning a corporation more money than the latter's recorded articles empower it to borrow does so at its peril, and its claim against the assignee will be allowed only to the amount which the corporation was entitled to borrow.

Appeal from chancery court, Kenton county.

"To be officially reported."

Action and attachment by the First National Bank of Covington against the D. Keefer Milling Company and others on money demands. Judgment for defendants. Plaintiff appeals.

J. F. & C. H. Fisk, for appellant. James P. Tarvin and Cleary & Hamilton, for appellees.

LEWIS, J. Prior to December, 1888, the D. Keefer Milling Company, incorporated under chapter 56, Gen. St., of which D. Keefer was president and principal stockholder, had done a large and apparently profitable business; but by reason of the fraudulent conduct of George M. Keefer, son of the president, and secretary of the company, in discounting and receiving from the First National Bank proceeds, amounting to a large sum, of drafts purporting to have been drawn by the company, with which he fled the state, it was rendered insolvent, and December 31, 1888, a meeting of its directors and stockholders was held, when a deed of assignment was directed made, and was executed by D. Keefer, the president. But, without delivering the deed to the assignee.

D. Keefer, with hope and purpose of continuing the business, proposed an arrangement with the First National Bank of Covington whereby his wife was to furnish a large sum of money to enable the company to eventually pay its debts, and the bank was to advance a considerable sum to aid in carrying on the business in the mean time, about \$14,000 of which was actually paid. That arrangement was not, however, fully carried out, because D. Keefer died January 5, 1889; and January 7, 1889, the First National Bank of Covington brought an action against the D. Keefer Milling Company for judgment on numerous demands, aggregating about \$77,000, seeking and obtaining at the same time an attachment, for the second class of causes provided in section 194, Civil Code. It appears plaintiff's petition was filed in the clerk's office, and the attachment issued and placed in the hands of the sheriff, at 1:15 o'clock P. M.; but the evidence shows that there was on the same day a meeting of stockholders of the D. Keefer Milling Company, by whom W. S. Keefer was elected president, in place of D. Keefer, deceased, and a resolution passed for execution of a deed of assignment for benefit of creditors; and in pursuance thereof a second deed was executed and acknowledged by W. S. Keefer, president, and the secretary of the company, and delivered to the assignee about 9 o'clock A. M., but the assignee, B. F. Graziani, did not lodge the deed for record until 2:45 o'clock P. M. of the same day, withholding it to await the result of a meeting with the president and directors of the First National Bank of Covington, which it appears was, on January 5th, the day of D. Keefer's death, agreed to be held on January 7th. Subsequently, a second action was instituted by the bank and another attachment obtained, which was consolidated and tried with the first; but upon final hearing both attachments were discharged, the deed of assignment adjudged valid and effectual, and proceeds of property conveyed, amounting to about \$30,000, directed to be distributed and paid pro rata to creditors of the D. Keefer Milling Company, only the amount of \$30,000 of the \$77,000 claimed by the First National Bank being, however, adjudged to be thus ratably paid.

The first question naturally arising is whether the deed of assignment is effectual for any purpose. There is no evidence that it was executed with any other intention on part of the grantors than to thereby secure a fair, legal, and just distribution of the estate of the D. Keefer Milling Company, then insolvent, among all its creditors. Nor do we think, as counsel argues, the deed is invalid by reason of the want of authority in W. S. Keefer to make it as president; for the evidence shows there was a regular election by the stockholders, and he was duly chosen. Moreover, the summons on

plaintiff's petition was served on, and a copy of the order of attachment was delivered by the sheriff to, W. S. Keefer, as president of the defendant, which it is to be presumed was done by direction of the plaintiff. As the second action was not commenced until after the deed was lodged for record, clearly the attachment in that case cannot prevail. The reason stated by the lower court for discharging the attachment issued in the first action is that although defendant did not, as stated in the petition, have property in this state subject to execution, or not enough thereof to satisfy the plaintiff's demand, the collection of it would not, as alleged, have been, in meaning of section 194, Civil Code, endangered by delay in obtaining judgment, or a return of "No property found." According to the language there used, the single fact that a defendant has no property in this state subject to execution, or not enough thereof to satisfy the plaintiff's demand, is not sufficient to authorize an attachment; but the additional and independent fact that the collection of the demand will be endangered by delay in obtaining judgment, or a return of "No property found," must also be alleged and shown. It was, it is true, held in *Burdett v. Phillips*, 78 Ky. 246, that the two facts are concomitant, and the latter followed as a consequence of the former; but in *Francis v. Burnett*, 84 Ky. 30, the ruling in which is adhered to, it was held that the legislature evidently intended the latter to have an independent meaning, and that it did not always or necessarily follow that, because the defendant did not have property enough subject to execution to satisfy plaintiff's demand, the collection of it would be endangered by delay in obtaining judgment, or a return of "No property found." But whether the plaintiff in this case did actually show existence of both facts we need not consider, because the judgment appealed from can, and ought to, be affirmed upon another ground.

The deed of assignment having, as we think, been clearly executed with no fraudulent intent, the contest is between the First National Bank of Covington, seeking in virtue of attachment to absorb the entire estate of the insolvent company, and other creditors, claiming under the deed a pro rata distribution, as provided by statute. Section 10, c. 24, Gen. St. is as follows: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record." The evidence shows the deed of assignment was duly executed, acknowledged, and delivered to the assignee, and he thus acquired an equitable title to the estate before plaintiff commenced its action

or the order of attachment was issued; and as, according to repeated decisions of this court, a creditor acquires by attachment only a lien upon, or an equitable right to, property levied on, it necessarily follows that we have in this case simply a contest between equities; and, applying the doctrine that in such state of case the equity which is prior in time must prevail, there is no other alternative but to decide that the deed of assignment in this case prevails against the attachment. Such has been the construction and application so often given by this court to the statute quoted that it is needless to even cite the cases.

It appears that there was in the articles incorporating the D. Keefer Milling Company a provision that the company should not, in any event, incur any liability or indebtedness in the aggregate in excess of one-half its capital stock bona fide subscribed, which was \$60,000. The articles of incorporation were, as required by statute, recorded, and independent of presumed notice by First National Bank of Covington of the provision in regard to the limit of indebtedness the D. Keefer Milling Company was empowered to contract, it is a well-settled rule that a person dealing with a corporation must at his peril take notice of its charter or articles of incorporation. See 2 Mor. Priv. Corp. §§ 591, 592. Whether, if this was simply a contest between the bank and milling company, violation and disregard of the provision of the articles of incorporation would be a sufficient defense, we need not determine. But the enforcement of that provision is demanded by the assignee for benefit of other creditors, who had been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and in such case a participant in the fraudulent transaction, not other innocent creditors, should suffer. The judgment is affirmed.

SLOAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 2, 1893.)

MANSLAUGHTER—ACCESSORY—SUFFICIENCY OF EVIDENCE.

A finding that accused was accessory to the killing of deceased, and guilty of manslaughter, was warranted by evidence which showed that deceased and a friend went to the house of accused to play cards with accused and D.; that, while there, notes passed between deceased and a woman with whom D. was criminally intimate; that D. and accused went out of the house for a few minutes; that, on their return, D. got into trouble with deceased's friend, knocked him down, shot him while down, and then shot deceased; that, when the trouble began, accused rushed upstairs, got his gun, returned, and would have shot deceased, but was prevented by the woman; that deceased requested accused not to shoot, as he was already killed; and that accused said he would not hurt him, and left the house with D.

Appeal from circuit court, Johnson county.
 "Not to be officially reported."

Andy Sloan was convicted of manslaughter, and appeals. Affirmed.

Stewart & Stewart, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. One evening, Rice and Cunningham went to the house of the appellant to have a social game of cards with the appellant and one Draughan, who was staying with the appellant; and also a Mrs. Smith was staying there, and with whom Draughan was evidently criminally intimate. There were facts before the jury to the effect that Cunningham, during the evening, was writing notes to Mrs. Smith, and handing them to her across the table, and that she was responding. That, a short time before the difficulty occurred, appellant and Draughan went out of the house together, and remained out about 10 minutes. That they returned, and Draughan wrote Cunningham's name so as to give it a vulgar sound, and handed it to Rice to read, and Rice said that that was an insult to any man; and some say that Rice struck Draughan, but he says he did not, but that Draughan accused him of striking him, and then knocked him down, and shot him while down, and then he turned and shot Cunningham, who was in his seat, and resting his head on the table, and was taking no part whatever in the difficulty. That the appellant, who was sitting down at the time the trouble commenced, rushed upstairs, and got his gun, and returned immediately with the gun presented at Cunningham, and would have shot him, but was prevented by Mrs. Smith and Mrs. Sloan. That Cunningham asked him not to shoot him, as he was already killed. He then said he would not hurt him, and went out of the house with Draughan, threatening to kill Rice. That he mocked Mrs. Cunningham, the mother, who had arrived, and was weeping. That he then took Cunningham's cap, and he, Draughan, and Mrs. Smith ran away. Notwithstanding the evidence for the appellant, the jury found him guilty of the crime of manslaughter, and fixed his confinement in the penitentiary for the term of two years.

It seems to us that the jury was authorized to believe that Draughan became offended at Cunningham's conduct with the woman, and was determined to have a row with him, and that the appellant was to stand by him. Besides, it is so well settled that this court, in criminal cases, can only reverse for errors of law occurring on the trial that are prejudicial to the substantial rights of the accused, that to reargue it would be time thrown away. The instructions given were clearly correct, and covered the whole case. The appellant was not accused of doing the shooting, but only aiding and abetting. The evidence as to the dying declaration was clearly sufficient to admit

the declaration. We adhere to the rule that one assaulted in his own house is not bound to retreat, in order to avail himself of the law of self-defense, but the appellant was not assailed in his own house. On the contrary, he was the assailant. The judgment is affirmed.

MALONE v. CONN et al.

AMES v. SAME.

(Court of Appeals of Kentucky. Oct. 31, 1893.)

PARTITION SALE—PROCEEDING BY LIFE TENANT—
 INFANT REMAINDER-MEN.

Code, § 490, providing that a vested estate in realty jointly owned may be sold in an action brought by one of the joint owners if the share of each owner be worth less than \$100, or if the estate be in possession, and the property cannot be divided without materially impairing its value, does not authorize a sale in an action brought for the purpose by the owner of a life estate against the infant remainder-men.

Appeal from chancery court, Louisville county.

"Not to be officially reported."

Actions by J. L. Conn and others against Thomas Malone, and by the same plaintiffs against John W. Ames. From a judgment for defendant in each action, plaintiffs appeal. Reversed.

Bullitt & Shield and C. M. Lindsay, for appellants. John S. Jackman, for appellees.

PRYOR, J. These cases involve the same question, and are considered together. These were actions below to enforce the execution of contracts for the sale of realty, by which the vendors bound themselves to make a good title. The defense is a want of title in the vendor, or such a title as the purchaser should not be required to accept. Mrs. Winstanly owned this land in fee, and, dying, the land descended to her four children, two of whom are now infants. Her husband, the father of these children, became tenant by the curtesy. He held, therefore, an estate for life, with remainder to the children. Winstanly qualified as guardian of the children, and filed an action in the law and equity court of the city of Louisville, asking to have the realty sold, alleging that the owners had a vested estate in possession, were joint tenants, and the property could not be divided, etc., filing the evidences of title. There was no effort to have the estate or its proceeds reinvested, or a bond executed for that purpose, as provided by section 491 of the Code, but the parties proceeded to sell under section 490, upon the idea that the remainder-men were in the possession, and were holding as joint tenants. There was no surrender of the life estate, by which that interest was merged in the remainder; on the contrary, the value of the life estate was deducted from the purchase price. The father and guardian became the purchaser, and, it is manifest, held by his purchase as trustee for his children. But whether subse-

quent purchasers would be affected with notice by reason of the judicial proceedings presents a very different question, as the chancellor might authorize or sanction the purchase by the guardian when for the benefit of his wards. In this case the life tenant is proceeding against the remainder-men, and the chancellor derives his power to sell the estate of these infants from the statute. Its provisions must be substantially followed. Section 491 provides the manner in which a reversion or remainder interest may be sold belonging to infants. The owner of the particular estate may institute the proceedings against those in remainder, or the remainder-men against the life tenant; but the property must be sold for investment in other real estate. This is, therefore, not a proceeding under section 491. Section 490 provides that a vested estate in realty jointly owned may be sold by order of a court of equity if the share of each owner be worth less than \$100; and, secondly, if the estate be in possession, and cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein. This statute applies only to estates in possession by those holding jointly, and cannot be held to apply in cases where the possession is with the particular estate, or the estate for life. Nor will the court construe the statute as permitting the life tenant to surrender the possession, and vesting it in the remainder-men, by merely asking that his life estate be sold; for, if this can be done, there is no necessity for section 491, as in every instance where parties, when the owner of the particular estate saw proper, or the guardians of the infants, a petition could be filed, and the land sold under section 490, without making any investment for the infants out of the proceeds. Section 491 was evidently enacted to protect infant remainder-men, and section 490 to give relief to joint tenants in possession when the land cannot be divided without materially injuring the parties in interest. This court has placed a liberal construction on these statutes, with a view of upholding sales where purchases had been made in good faith, and the interest of infants benefited by a sale under them; but to permit the life tenant to proceed as in this case would be to disregard the plain letter and meaning of the two sections. The case of *Power v. Power*, (Ky.) 15 S. W. Rep. 523, was not a construction of this section, the court holding only that the widow acquired the title by virtue of the assignment, and not before. The title vests, in such a case, in the heirs, subject to the widow's right of dower, and there the title remains until dower is assigned. Says Mr. Minor, in his *Institute*: "There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife. On the other hand, dower is not in any sense an estate until

assigned." 11 Minor, Inst. 157. This is the common-law rule, the widow not being vested with the title or the possession. She had no legal seisin or right of entry until dower is assigned. 2 Scrib. Dower, 27. Whether or not this right of entry is affected by our statute is not necessary to determine, as it is plain the vested interest in remainder without the possession did not authorize the sale under section 490. In the case of *Kean v. Tilford*, 81 Ky. 600, where the parties held as tenants in common, their several interests being different, this court held that, as the parties before the court all owned the realty, the mere fact of one interest being greater than another did not prevent the sale under the statute. There may not be a unity or equality of interest, but where the parties, plaintiffs and defendants, all own the estate, and are in the possession, the fact that one of the unities required to create a joint tenancy at the common law is absent, will not preclude a sale under the statute. It follows that the title exhibited is not such as the chancellor should require the appellees to accept. Reversed, and remanded for proceedings consistent with this opinion.

MCDONALD v. HOOKER.

(Supreme Court of Arkansas. Oct. 21, 1893.)

APPEAL—ACTION TO ESTABLISH TRUST—DECREE FOR VENDOR'S LIEN—MODIFICATION.

Where one has prosecuted an action to have a trust declared in land, she cannot on appeal, after reversal of a favorable decree, have a decree therein to enforce a vendor's lien on the theory of a sale.

Motion to modify decree. Denied.

For former report, see 22 S. W. Rep. 655.

Sanders & Cockrill, for appellee, on motion to modify.

HUGHES, J. This action was brought by the appellee to have the appellant declared a trustee as to land conveyed by appellee's grandfather to the appellant, by absolute deed reciting a consideration of \$8,000, which the evidence in the case showed had never been paid. The court below rendered a decree for the appellee, which, upon appeal to this court, was reversed, upon the ground that there was no written evidence of the creation or declaration of a trust, and that an express trust could not be created or declared in any other way than in writing, that express trusts not in writing are within the statute of frauds, and void. 22 S. W. Rep. 655. A motion for a rehearing and a modification of the decree is filed, in which the appellee seeks to enforce the vendor's lien for the purchase money, which was never paid. The suit was brought to establish a trust, and not to enforce a vendor's lien, and the pleadings, evidence, and argument in the cause were all directed solely to

the question whether there was a trust. Nothing, prior to the filing of this motion, was said about a vendor's lien in the case, and no issue as to the existence of such a lien was made. The contention that there was a trust is not consistent with the contention that there was a sale and a vendor's lien for purchase money. The appellee prosecuted her suit to establish a trust alone, and, having failed in this, seeks to have a vendor's lien enforced. It is said "that one who, without mistake induced by the opposite party, has taken a particular position, deliberately, in the course of a litigation, must act consistently with it; one cannot play fast and loose." *Bigelow, Estop.* p. 717; *Pickett v. Bank*, 32 Ark. 348; *Millington v. Hill*, 47 Ark. 309, 1 S. W. Rep. 547; *Railway Co. v. McCarthy*, 96 U. S. 287. This is no arbitrary rule, but is one demanded by the very object of courts of justice. *Bigelow, Estop.* p. 722. The motion is denied.

JONES v. MALVERN LUMBER CO.

(Supreme Court of Arkansas. Oct. 21, 1898.)

INJURY TO EMPLOYE — DEFECTIVE MACHINERY — NEGLIGENCE — EVIDENCE — INSTRUCTIONS — IMPEACHING WITNESS — HARMLESS ERROR.

1. Exclusion of evidence is harmless error where there is other uncontradicted testimony to the same effect.

2. In an action by an engineer against his employer for injuries from the explosion of a boiler, plaintiff introduced evidence that the hammer test used by defendant in trying the boiler's strength was not effective, or the test usually applied. *Held*, that evidence in rebuttal that the hammer test was the one generally used by mill men in the vicinity was admissible to show that it was the test usually employed by persons operating similar machinery.

3. Evidence that a certain company used the test was inadmissible, it having no tendency to prove the usual and customary test.

4. A witness cannot be impeached by the contradiction of immaterial statements.

5. An instruction that, in order to find for plaintiff, the jury must be satisfied by a preponderance of the evidence that the boiler was unsafe, that defendant might have known this by ordinary diligence, and that plaintiff was free from contributory negligence, is erroneous, as compelling plaintiff to prove the absence of contributory negligence.

Appeal from circuit court, Hot Spring county; Alexander M. Duffie, Judge.

Action by Ed. Jones against the Malvern Lumber Company. Judgment for defendant. Plaintiff appeals. Reversed.

Wood & Henderson, for appellant. N. B. Richmond and Sanders & Watkins, for appellee.

MANSFIELD, J. This was an action to recover damages for a personal injury received by the appellant while he was running an engine for the appellee on a tramway used for carrying logs to its lumber mill. The injury was inflicted by the explosion of the engine's boiler, and the complaint alleged that the explosion resulted from the appel-

lee's negligence in using a defective boiler. This allegation was denied by the answer, which charged that the explosion was caused by the appellant's own negligence.

A short time before the accident the boiler was repaired by Joseph Wilbert, a machinist, who was not in the appellee's service, but was sent by his employers at the appellee's request to do the work, and performed it under the direction of W. B. Lovell, the lumber company's master mechanic. On the trial Wilbert was sworn as a witness for the appellant, and testified that at the time he repaired the boiler he declared it unsafe. Subsequently the appellant called John Smith, by whom he offered to prove that he heard Wilbert make the declaration referred to, but the court excluded Smith's testimony. This ruling was not prejudicial to the appellant for the reason that the evidence it excluded related to a fact already before the jury in the testimony of Wilbert himself, whose statement that he made the declaration at the time fixed by Smith was uncontradicted.

It was shown that the only tests of the boiler's strength made after it was repaired were made by sounding its rivets and braces with a hammer, and by the pressure of steam raised for that purpose; and testimony was adduced by the plaintiff to prove that the "hammer test" was not effective, and was not the test usually applied. In rebuttal the defendant introduced J. A. Bratt, a person engaged in the milling business, and asked him what tests the mill men of the vicinity generally applied to the steam boilers used in their business. The question was objected to, but the court permitted the witness to answer, and he stated that the "hammer test was the one usually applied, so far as he knew." The defendant's duty to its servants did not require it to resort to unusual or impracticable tests, and we think the question was proper as eliciting evidence tending to show that one of the tests applied by the company's master mechanic was that usually employed by persons engaged in operating similar machinery. *Railroad Co. v. Allen*, 78 Ala. 504; *Railroad Co. v. Huntley*, 38 Mich. 537. If the answer was regarded as objectionable on the ground that it did not disclose the extent of the witness' knowledge of the subject, the plaintiff should have moved to exclude it, or insisted upon a more definite statement.

But the court erred in permitting Ryan to testify that the "hammer test" was used by the Hot Springs Railroad Company, for the practice of a single company had no tendency to prove the usual and customary test.

So, also, the testimony of Lovell as to acts of negligence committed by the plaintiff in running the engine prior to the day of the explosion was improperly admitted. The witness did not state when the acts occurred, and it does not otherwise appear that they had any relevancy to either of the questions

which the jury had to decide. *Railway Co. v. Eubanks*, 48 Ark. 473, 3 S. W. Rep. 808. It is submitted that they were competent, because they contradicted a statement previously made by the plaintiff as a witness in his own behalf. But that statement was itself made with reference to a matter entirely immaterial, and the plaintiff could not be impeached by its contradiction. *Billings v. State*, 52 Ark. 303, 12 S. W. Rep. 574.

There was, however, other and competent evidence tending to prove the facts to which the evidence thus improperly admitted was directed, and the errors of the court in receiving the latter would not of themselves justify us in disturbing the verdict. *Owen v. Jones*, 14 Ark. 503; *Sharp v. Johnson*, 22 Ark. 79; *Greer v. Laws*, 56 Ark. 37, 18 S. W. Rep. 1068.

One of the assignments made in the motion for a new trial is based upon the court's refusal to give the plaintiff's twelfth and thirteenth requests. These both apply to the question whether there was a proper test of the boiler after it was repaired, and we think the jury were sufficiently charged on that point by the instruction given by the court of its own motion, when taken in connection with other instructions given on the motion of the plaintiff.

As to the incompleteness pointed out by counsel in the defendant's sixth instruction, it is enough to say that it was probably rendered harmless by the instruction just mentioned, which appears to have been given in immediate connection with it.

The defendant's second request is in harmony with a rule approved by this court in cases analogous to this, and we think it is not open to the objection urged against it. The objection is that it made it the appellant's duty to search for the defects in the boiler; but, as we construe the instruction, it only required him to notice such as were patent, and bound him to assume the risk of these to the same extent as if their existence had been within his actual knowledge. *Railway Co. v. Marker*, 41 Ark. 542; *Railway Co. v. Leverett*, 48 Ark. 383, 3 S. W. Rep. 50.

These points, made in the argument of appellant's counsel, have been thus noticed with a view to a new trial, which we think should be granted because of the court's action in giving the defendant's fourth request. That instruction is as follows: "The jury are instructed that, in order to find for the plaintiff in this case, you must be satisfied by a preponderance of evidence that the boiler furnished by the defendant for use by the plaintiff was not reasonably safe and suitable, and that the defendant knew, or by the use of ordinary diligence might have known, that the said boiler was unsafe and defective, and that the plaintiff was free from contributory negligence on his part in operating and running said boiler." The defense of contributory negligence presented an is-

sue as to which the burden of proof was upon the defendant. *Railway Co. v. Leverett*, 48 Ark. 384, 3 S. W. Rep. 50; *Railway Co. v. Eubanks*, 48 Ark. 473, 3 S. W. Rep. 808; *Railway Co. v. Orr*, 46 Ark. 182. But the instruction quoted by its terms places the burden upon the plaintiff, and requires him to prove, by a preponderance of the evidence, not only the negligence charged in the complaint, but also, as a further fact essential to his recovery, the absence of negligence on his part contributing to the injury. Such is the obvious import of the language used, and we are unable to find in the rest of the charge a reason for believing that it was intended to have any other meaning. Certainly we cannot presume that the jury might have reasoned out of the whole charge a different meaning. The instruction is embraced in a single sentence of not unusual length, and the proposition it asserts with respect to the boiler in the first clause is equally and directly applicable to what is said of contributory negligence in the second clause; and the form of the instruction appears to us to be hardly less objectionable than that of the instruction condemned in *Railway Co. v. Atkins*, 46 Ark. 436. As to the facts relied upon to sustain the charge of contributory negligence the evidence was conflicting, and we are unable to see from the record that the verdict was not probably controlled by that question, or that the last clause of the instruction copied above did not affect the finding of the jury upon it. With reference to the same instruction it should be added that the use of the word "satisfy" was also improper. See *Railway Co. v. Canman*, 52 Ark. 517, 13 S. W. Rep. 280. Reversed and remanded.

NICHOLS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1896.)

CRIMINAL LAW—REVIEW—OBJECTION NOT RAISED BELOW — CONFESSIONS — STATUTES — TITLES OF LAWS—AMENDMENTS OF PENAL CODE.

1. It cannot be objected, on appeal, that a witness between 10 and 11 years old did not show that she understood the nature of an oath, where no exception was taken to the ruling of the trial court that the witness was competent.

2. The court, on the withdrawal of the jury, investigated the circumstances under which a confession to a sheriff was made, and all the statements of the accused were denied by the sheriff, who stated that he used no persuasion, promise, or force, but cautioned accused that what he said would be used against him, and could not be used for him. The accused did not take the stand before the jury, or introduce evidence questioning the sheriff's testimony. *Held*, that it was not error to permit the sheriff to testify before the jury to the confession.

3. Under Const. art. 8, § 36, providing that no law shall be amended by reference to its title, the title of an act for the amendment of a provision of the Penal Code is sufficient, which contains a statement of the article, chapter, title, and name of the Code to be amended, without naming the crime to which the amendment relates.

Appeal from district court, Travis county; F. G. Morris, Judge.

Ed Nichols was convicted of rape of a girl between 10 and 11 years of age, and appeals. Affirmed.

Walton & Calhoun, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant, a negro, was convicted of rape of a white girl between 10 and 11 years of age. His punishment was fixed at death, from which he appeals.

1. Appellant complains that the court erred in permitting Sheriff White to detail the statements made to him by defendant, who was under arrest, and was not cautioned as required by law. There was no error. In his statement before the jury the witness shows that he had duly cautioned the defendant. The defendant did not deny this before the jury, or raise any issue before them as to its truth.

2. Appellant further complains that the court erred in permitting Annie Straka, the injured girl, to testify, as she did not show that she understood the nature of an oath. There was no exception taken to the ruling of the court that the witness was competent, and we think, from the answers of the witness, she was clearly competent to testify.

3. The defense was an alibi, but the testimony to sustain it was not only weak and unsatisfactory, but signally fails to rebut the inculpatory facts. The evidence clearly sustains the charge. The appellant, a large negro man, waylays and seizes the little girl as she is going along the road to her home in the evening, and, finding her too young and small to successfully accomplish his purpose, uses his hand to assist him and tears her parts asunder. When released she crawls, bleeding and suffering, for three-quarters of a mile, where she is found by her father. The punishment assessed is death. The law is humane. The judgment is affirmed.

On Rehearing.

(Nov. 4, 1893.)

Appellant asks a rehearing upon the grounds (1) that it was error to permit Sheriff White's testimony to go to the jury; (2) that the act of 1891, under which appellant was tried, is unconstitutional and void.

As to the first ground. The record shows that, before Sheriff White was allowed to testify, the jury were withdrawn, and the court investigated the circumstances under which the confession was made; that appellant stated that he had not sent Meredith for Mr. White, but that Mr. White asked him if he was guilty, and told him it was best for him to tell the judge he was guilty, but that he had told Sheriff White he had done nothing. Mr. White denied this entire statement absolutely, and stated he had used no persuasion, promise, or force, and had cautioned him that what he said would be used

against him, and could not be used for him. On the jury being brought into court, Sheriff White was placed upon the stand, and testified substantially as he had stated it to the court. The appellant did not take the stand, or introduce any evidence before the jury in any way questioning the evidence of witness White. Had he done so, it would have become the duty of the court to have instructed the jury to disregard the confession, if they believed that it had not been voluntarily made, after being duly cautioned. There was no error in admitting the testimony.

2. Appellant insists that this case should be reversed and remanded upon the ground that the act of April 13, 1891, changing the age of consent from 10 to 12 years, is unconstitutional and void, in that the title to the act does not, in compliance with Const. art. 3, § 35, express the subject of the act. The twentieth legislature passed an act, approved February 25, 1887, more fully defining rape, under the following title: "An act to amend article 528, chapter 7, title 15, of the Penal Code." The change made was extending the protection of the law to females so mentally diseased as to have no will. The twenty-second legislature amended this act by an amendatory act, approved April 13, 1891, with the following title: "An act to amend article 528, chapter 7, title 15, of the Penal Code of the state of Texas, as amended by the act of the 20th legislature, approved February 25, 1887." Const. art. 3, § 35, declares: "No bill (except appropriation bills) shall contain more than one subject which shall be expressed in its title," and section 36 of same article provides that no law shall be revived or amended by reference to its title, but in such case the act revived or section amended shall be re-enacted and published at length. The objection of appellant is that the title of the amendatory act of April 13, 1891, is fatally defective in not stating the subject of the amendment, to wit, "the definition of rape," and it is not sufficient to merely state the article, chapter, and title of the Penal Code of Texas which the act purports to amend. If there was ever any force in this objection, as applied to amendments of the Criminal Codes of Texas, it is now no longer an open question. Ever since the enactment of the Penal Code and Code of Criminal Procedure, successive legislatures, with this provision, or a similar one, before them, have amended these Codes by acts the titles of which only gave the article, chapter, title, and name of the Code sought to be amended. They have recognized "the Penal Code" as a single act, designed to embrace all offenses against the laws, complete within itself, arranged and classified into titles, chapters, and articles, and have always deemed an amendment made as above stated was a sufficient compliance with the constitutional requirement, and sufficiently specified the subject sought to be amended by the

act. If, therefore, uniform legislative construction, supported by judicial decision and recognition, can settle anything, we must hold the title of the act in question to be sufficient. It seems to be universally conceded that the object of the constitutional requirement that "an act should express the subject in its title" was to prevent the vicious legislation of uniting in the same bill incongruous matters, having no relation to, or connection with, each other, and germane to the subject of the bill, as expressed in its title, operating as a surprise and fraud on the public and the legislature itself, and facilitating the passage of bills engineered by private interests. Hence the necessity of stating in the title in what department of human affairs it proposed to act. Still, the degree of particularity with which the title of an act should express the subject is not defined by the constitution, and rests in the discretion of the legislature, and, when they act in the selection of a title, courts are not disposed to question its sufficiency. The authorities, almost without dissent, agree that this constitutional provision should receive a most liberal construction, because to require precision would needlessly embarrass legislation. *Sun Mut. Ins. Co. v. Mayor, etc., of New York*, 8 N. Y. 241; *Brewster v. City of Syracuse*, 19 N. Y. 117; *People v. Briggs*, 50 N. Y. 564; *People v. McCallum*, 1 Neb. 194; *Cooley, Const. Lim.* 174. Thus it is held that if the title fairly gives notice, so as to lead to inquiry, it is sufficient, (*Mauch Chunk v. McGee*, 81 Pa. St. 438; *Mills v. Charleton*, 29 Wis. 407;) and if the title be unmeaning as to purpose, yet distinct as to subject, it is sufficient, (*People v. Lawrence*, 36 Barb. 192; *People v. McCallum*, 1 Neb. 194.) In Texas, where this objection has been often urged against criminal and civil acts, the doctrine has been repeatedly laid down, in accord with the general current of authority, that the provisions of a statute are to be sustained as long as they are of the same nature, and come legitimately under the general subject expressed in the title. *Stone v. Brown*, 54 Tex. 342; *Giddings v. City of San Antonio*, 47 Tex. 555; *Breen v. Railroad Co.*, 44 Tex. 306; *Austin v. Railroad Co.*, 45 Tex. 267; *Albrecht Case*, 8 Tex. App. 216; *Day Land & Cattle Co. v. State*, 68 Tex. 542, 4 S. W. Rep. 865. In *Gunter v. Mortgage Co.*, 82 Tex. 503, 17 S. W. Rep. 840, it may be inferred that the court would have sustained the law had its title read, "An act to amend title 3, articles 9 and 10, of the Revised Statutes of Texas." But the considerations that would require a more specific designation of subject in the title of an act apply almost entirely to civil matters, and have but little, if any, application to criminal law. Such law must be always general in its nature, affecting all alike. It cannot be ex post facto, and can rarely be made the vehicle of private interest. While, therefore, it is true

the constitutional provision controls both criminal and civil law in their enactment or amendment, and the subject of every separate criminal act should be stated in its title, yet where criminal law is codified into a system complete in itself, with a definite name fixed in the law itself, relating to one subject,—crime,—there could not, in reason, be a more distinct expression of the subject in the title of the act than a statement of the article, chapter, title, and name of the Code to be amended. In *Hasselmeyer's Case*, 1 Tex. App. 690, the very objection here considered was passed upon by this court, and the title of the amendatory act, which only read, "An act to amend article 766 of the Penal Code," was held sufficient. So, in the *McCracken Case*, 42 Tex. 385, in replying to the same objection that the object of the amendatory act was not expressed in its title, *Roberts, C. J.*, says: "It [the Penal Code] has been amended continually, ever since its adoption, by referring to it in the titles of the amendatory acts as the 'Penal Code,' not meaning thereby, generally, a body of criminal laws in force in the state, but, specially, the Penal Code that was adopted as one act of the legislature, approved August 26, 1856." The motion for a rehearing is overruled.

TUCKER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

THEFT—PRINCIPAL—INSTRUCTIONS—EVIDENCE.

1. Where, on a prosecution for theft of hogs, the defense was that defendant was not connected with the original theft of the property, a charge by the court, after defining "principals," that defendant must be acquitted unless the evidence satisfied the jury that defendant took the hogs, or that some other person took the hogs, and that defendant was so connected with such taking as would make him a "principal," as before defined, is sufficient.

2. Though it was shown that the hogs were driven to the place where they were killed by others than defendant, the jury were authorized to infer that he was connected with the theft, where it was shown that he, with three others, was driven away from the dead hogs, and that he was afterwards overheard to say in his home that one of the state's witnesses had given them away.

Appeal from district court, San Saba county; *W. M. Allison, Judge*.

Jim Tucker was convicted of theft, and appeals. Affirmed.

Leigh Burleson, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of the theft of hogs, and his punishment assessed at two years in the penitentiary, from which judgment he appeals. The only question that we need consider is the sufficiency of the general charge of the court. The defense in the case was that the appellant was not connected with the original theft of the

property. The court, after defining who are principals in the commission of an offense, further charged the jury that they must acquit the defendant unless the evidence satisfied them that defendant took the hogs, or that some other person took the hogs, and defendant was so connected with such taking as would make him a principal, as before defined. We think the charge sufficient. As to the sufficiency of the evidence, while it is true the defense proved that the hogs were driven to the pen by other parties, yet the jury may have disbelieved the defense, or believed he was connected with the theft, especially as the state proved that a short time after appellant was run with three others from the dead hogs he was overheard at his home in angry terms charging that one of the state's witnesses had given them away. We think the jury were authorized to infer his presence and connection from the evidence before them. We desire, however, again to call the attention of the prosecuting officers of the state to the fact that it is the settled rule since the decision in Brown's Case, 15 Tex. App. 581, that theft and receiving stolen property are distinct offenses, and require different counts in order to sustain a conviction. No one charged simply with theft can be convicted of receiving stolen property. It would seem that the constant reversal and consequent escape of guilty parties would ere this have impressed upon prosecuting officers the duty and necessity of adding a count for receiving stolen property to every indictment for theft, to meet the testimony that might be developed upon trial. The judgment is affirmed.

PETERS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

CRIMINAL LAW—INDICTMENT—SUFFICIENCY.

The use of the word "avocation" for "vocation" in an indictment charging defendant with keeping a disorderly house is not such error as will vitiate the indictment, where there is no doubt of the meaning of the pleader.

Appeal from McLennan county court; W. H. Jenkins, Judge.

Annie Peters was convicted of keeping a disorderly house, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of keeping a disorderly house, and her punishment assessed at \$200, from which judgment she appeals. There is no statement of facts that can be considered, and no bill of exceptions reserved to the evidence or charge of the court. The court did not err in refusing to quash the indictment or arrest judgment. It clearly and sufficiently charges appellant with keeping a disorderly house. While the word "avocation," was improperly

used for "vocation," yet it is a misuse that is by no means infrequent, and there is no question of the meaning of the pleader. Judgment affirmed.

HAMILTON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

CRIMINAL LAW—APPEAL—DISMISSAL—ESCAPE OF APPELLANT.

Where a person convicted of crime escapes from jail pending the appeal, and does not return to custody voluntarily within 10 days, the appeal will be dismissed.

Appeal from district court, Williamson county; F. G. Morris, Judge.

Bob Hamilton was convicted of assault with intent to rape, and appeals. Dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This appeal is prosecuted from a conviction of assault with intent to rape. Having escaped from jail pending his appeal, and failing to return into custody voluntarily within 10 days, the motion of the assistant attorney general to dismiss the appeal is sustained, and the appeal is dismissed.

STEWART v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

CRIMINAL LAW—SEPARATION OF JURY—OBJECTIONS TO EVIDENCE.

1. In a prosecution for keeping a disorderly house, it was not error to allow the jury to separate pending the trial, such action being authorized by Code Crim. Proc. art. 688.

2. Alleged errors in admitting certain testimony, and in permitting a re-examination of a certain witness, will not be reviewed, when exceptions to such rulings are not preserved by the bill of exceptions.

Appeal from Travis county court; Von Rosenberg, Judge.

Elsie Stewart was convicted of keeping a disorderly house, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This appeal is prosecuted from a conviction of keeping a disorderly house. The record contains neither a statement of the facts, nor bill of exceptions.

1. The action of the court, as stated, permitting the jury to separate pending the trial, is authorized by article 688, Code Crim. Proc.

2. The supposed error of the court, admitting the testimony of Thorp, will not be reviewed, because exceptions were not preserved by bill of exceptions.

3. The same reason operates for pretermittting a discussion of the action of the court in permitting a re-examination of the witness Walker.

Had the matters complained of been properly presented for our consideration, we think the rulings of the court were not erroneous. The judgment is affirmed.

DOWNS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

DISORDERLY HOUSE—EVIDENCE—REVIEW ON APPEAL.

1. In a prosecution for keeping a disorderly house, a witness who swears that he knows the general reputation of the women who frequented the house in question is competent to testify to such reputation, though he has no personal acquaintance with them.

2. Even if testimony of a witness as to the conduct of parties coming to his house by mistake for the house of defendant was inadmissible, yet, where the circumstances as shown by the record were so conclusive as to the character of defendant's house that no honest jury could find any other verdict than they did, the appellate court will not reverse.

Appeal from McLennan county court; W. H. Jenkins, Judge.

Maggie Downs was convicted of keeping a disorderly house, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of the offense of keeping a disorderly house in the city of Waco, and was fined in the sum of \$200, from which judgment she appeals. The court did not err in permitting the witness Ray to testify as to the general reputation of the women who frequented the house of appellant. It is certainly not necessary that one must be personally acquainted with another to speak as to his or her general reputation. If he knew the general reputation of the women in question, as he swears he did, his testimony was admissible.

2. If the testimony of the witness Joblanoski, as to the conduct of parties coming to his house by mistake for the house of appellant is inadmissible, still, where the facts and circumstances as shown by the record are so conclusive as to the character of appellant's house that no honest jury could find any other verdict than they did, this court will not reverse. The judgment is affirmed.

REINEKE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

CRIMINAL LAW—TRIAL—CONDUCT OF JURORS—DETERMINING PENALTY BY LOT.

Where on a criminal trial the jury, in assessing the fine, agree to average the several assessments of each juror, but disagree to the amount so found, and impose a fine larger in amount than that determined by lot, there is no such error as will justify a new trial.

Appeal from Milam county court; R. Y. Terral, Judge.

Fritz Reineke was convicted of disturbing the peace, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of disturbing the peace by going near a private house, and there unlawfully using loud and vociferous language, in violation of article 314, Pen. Code, and was fined in the sum of \$30, from which he appeals.

The only question that requires consideration, as set up in the motion for a new trial, is that the verdict was obtained by lot; that is, that the amount of the fine was obtained by averaging the several assessments of the individual jurors. The record clearly shows that such was the original agreement, but after the amount was ascertained it was disagreed to, and after another discussion of the evidence in the case they finally agreed upon a fine a little higher than the amount determined by lot. The court did not err in overruling the motion for new trial, and the judgment is affirmed. Wilson's Crim. St. § 2541.

ZARDENTA v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

CRIMINAL LAW—DISMISSAL OF APPEAL—ESCAPE OF APPELLANT.

Where, pending an appeal in a criminal trial, appellant escapes, and is still at large when the appeal comes on for hearing, the appeal must be dismissed.

Appeal from district court, Webb county; A. L. McLane, Judge.

R. Zardenta was convicted of embezzlement, and appeals. Appeal dismissed.

Nichols, Dodd & Mullally and Bethel Woodward, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Appellant was convicted of embezzlement, and prosecutes this appeal. Pending said appeal, he effected his escape, and is still at large, as has been satisfactorily shown to this court. The motion of the assistant attorney general to dismiss the appeal is sustained, and the appeal is dismissed.

DAVIS v. STATE. (No. 619.)

(Court of Criminal Appeals of Texas. Oct. 14, 1893.)

ROBBERY—EVIDENCE.

On a trial of an indictment for robbery, evidence that defendant first raped the prosecuting witness and then forcibly took money from her is admissible as part of the res gestae.

Appeal from district court, Harris county; E. D. Cavin, Judge.

John Davis was convicted of robbery, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of robbery, and prosecutes this appeal. Because the indictment failed to jointly charge the offenses of robbery and rape, it is urged by defendant, by bill of exceptions reserved, that the court erred in admitting evidence showing that he slapped the assaulted party, "choked her down," and committed the rape upon her, and, further, that immediately upon the completion of the rape he forcibly took \$14 from her. The objection is not tenable. The testimony was *res gestae*, and so closely connected and interwoven with the robbery that, if excluded, an intelligent relation of the facts establishing such robbery could not be made. The indictment is sufficient to charge the offense of robbery, and is not subject to the criticisms sought to be imposed upon it by the motion to quash. The judgment is affirmed.

DAVIS v. STATE. (No. 615.)

(Court of Criminal Appeals of Texas. Oct. 14, 1893.)

Appeal from district court, Harris county; H. D. Cavin, Judge.

John Davis was convicted of rape, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This appeal is from a conviction of rape. The offense charged in this case was perpetrated at the same time as, or rather immediately preceding, the robbery in cause No. 619, 23 S. W. Rep. 694, (just decided.) The questions involved in this appeal are substantially the same as in said cause No. 619, and, for the reasons indicated in the opinion in said cause, the judgment herein is affirmed.

FORGE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 18, 1893.)

Appeal from district court, Limestone county; Rufus Hardy, Judge.

Houston Forge was convicted of murder in the second degree, and appeals. Affirmed.

C. S. Bradley, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This appeal is prosecuted from a conviction of murder in the second degree. The testimony shows appellant killed his stepfather, and his punishment was assessed at 15 years' confinement in the penitentiary. The questions presented for revision involve only the sufficiency of the evidence to support the conviction. We deem it unnecessary to review the facts in

an opinion. After a careful investigation of the testimony, we are of opinion that it supports the conviction; wherefore the judgment is affirmed.

SCOTT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1893.)

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—FAILURE TO INSTRUCT.

Where the evidence relied on to sustain a conviction is wholly circumstantial, the court's failure to charge on the law relating to that kind of evidence is reversible error. *Montgomery v. State*, (Tex. Cr. App.) 20 S. W. Rep. 926, followed.

Appeal from district court, San Saba county; W. M. Allison, Judge.

M. M. Scott was convicted of crime, and appeals. Reversed.

Leigh Burleson, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The conviction in this case is wholly dependent upon circumstantial evidence. The court overruled a charge upon the law relating to this character of evidence, and this omission was made one of the grounds of the motion for a new trial. The facts are not in such close relation or juxtaposition to the main fact, or original taking of the cattle charged to have been stolen, as to bring the case within the rule laid down in *Montgomery v. State*, (decided at the Dallas term, 1892, of this court,) 20 S. W. Rep. 926. We are of opinion, under the facts of this case as found in the record, that such omission requires a reversal of the judgment. We desire here to reaffirm the doctrine announced in the *Montgomery Case*. The remaining questions have no merit in them as we view the record. For the error indicated the judgment is reversed, and the cause remanded.

ALDERMAN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 18, 1893.)

THEFT—INSTRUCTIONS.

Where, on a trial for theft, the evidence was circumstantial, and based on the fact that defendant was found with the stolen property some months after the theft, an instruction as to the law of circumstantial evidence should have been given.

On rehearing. For former report, see 22 S. W. Rep. 1096.

DAVIDSON, J. The judgment in this case was affirmed at the Austin term of this court. A motion for rehearing having been granted, the cause was transferred to this place for adjudication. The statement of facts, which was not considered by the court in the former opinion, is now properly before

us. A ground of the motion for a new trial in the court a qua was the omission of the trial judge to instruct the jury in reference to the law of circumstantial evidence. This conviction is wholly dependent upon that character of evidence. The appellant was found in possession of the stolen property some months after the theft, with the brand upon the animal changed. While the evidence may be sufficient to sustain the conviction, yet the facts tending to connect the appellant with the original taking are not in such close proximity to such taking as to relieve the court of the duty of instructing the jury in regard to the law governing cases of circumstantial evidence. *Montgomery v. State*, (Tex. Cr. App.) 20 S. W. Rep. 926; *Scott v. State*, 23 S. W. Rep. 685, (just decided.) The remaining questions were correctly, we think, decided in the former opinion. The judgment is reversed and remanded.

TROTTER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 18, 1893.)

Appeal from district court, Bandera county; Eugene Archer, Judge.

Appeal by A. L. Trotter, indicted for murder, from an order refusing bail. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This is an appeal from a judgment of the court below refusing bail, the appellant being charged with murder. The only question suggested for our consideration is the sufficiency of the evidence to support the judgment. Adhering to the rule followed by this court, we refrain from discussing the testimony. After a careful revision of the facts, we are of opinion the court did not err in refusing bail; wherefore the judgment is affirmed.

MARQUEZ v. STATE.

(Court of Criminal Appeals of Texas. Oct. 18, 1893.)

CRIMINAL LAW—EVIDENCE—INSTRUCTIONS.

Where, on a trial for burglary, the only evidence as to defendant's age was that of defendant himself, who testified that he was 15 years old, but that he did not know the year he was born in, the court did not err in failing to submit the question of his age, and consequent punishment in the reformatory, if found to be 16 years old or under, as his testimony does not suggest his age to be 16 years or under.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Eugenio Marquez was convicted of burglary, and appeals. Affirmed.

Ilewellyn H. Davis, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for burglary. The record does not disclose any bills of exception to the rulings of the court. The contention of appellant is that the evidence tended to show his age to be under 16 years, and the court committed an error in failing to charge the jury in reference to this question. Defendant testified in his behalf, and said: "I am fifteen years old. I am a free man, and wear my hat on the back of my head. I don't know the year I was born in. Can read." He further stated that he did not know when he was born. His evidence constitutes the testimony on this point. We are of opinion that the court did not err in failing to submit to the jury the question of his age, and consequent punishment in the reformatory, if found to be 16 years of age or less. The testimony does not suggest his age to be 16 years or under. We find no error in the record, and the judgment is affirmed.

GOLDSTEIN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

CRIMINAL LAW—TRIAL—FINING COUNSEL—EVIDENCE—INDICTMENT.

1. On a trial for larceny, one of defendant's counsel was grossly insulting to a witness and to the court, and the court imposed a fine on him, and refused to allow him to proceed until it was paid, and defendant's other counsel then finished the argument. *Held*, that error could not be predicated of the action of the court.

2. A witness for defendant, on being asked by the district attorney if he had ever made a certain statement to E., denied it. E., who was under rule, was brought in and pointed out to witness, and the statement was again repeated, and defendant asked if he had made it to E., which he denied. *Held* not a violation of the rule; the statement which witness denied making being the only part of his testimony that E. heard.

3. An indictment for theft alleging the property stolen to be "forty dollars of the current money of the United States, of the value of forty dollars," etc., is sufficient.

Appeal from district court, Harris county; E. D. Cavin, Judge.

L. Goldstein was convicted of theft, and appeals. Affirmed.

Lindley & Fagan and Jones & Garnett, for appellant. R. L. Henry, Asst. Atty. Gen. for the State.

SIMKINS, J. Appellant was convicted of the offense of theft of \$40 from the possession of Annie Schinskie, and his punishment assessed at two years in the penitentiary, from which judgment he appeals.

1. We see no error in the first bill of exception of which appellant can complain. It seems that in his argument before the jury one of the appellant's counsel, in the bitterness of his attack on the prosecuting witness, passed beyond all bounds of courtesy

and respect due to the witness or the court, and the witness began crying and sobbing, and was removed from the court room by the judge, who also reproved and reprimanded counsel, and, upon his replying, imposed a fine of \$25, which he ordered to be paid before the said attorney could proceed further; and appellant's other counsel then finished the argument for the defense. The counsel had only himself to blame.

2. Neither was there any error in permitting the state's counsel to ask the witness Weichholtz, in the presence of City Marshal Erichson, if he did not make a certain statement to said Erichson. This witness in his testimony denied that he knew Marshal Erichson by sight, and had ever made the statement mentioned by the district attorney; whereupon the said Erichson, then under rule, was called into court, and pointed out to witness, and the district attorney, again repeating the statement, asked if he had made such a statement to said Erichson. Witness again denied making the statement. There is no injury to appellant's rights. No part of the testimony of said witness save witness' denial of making a certain statement was heard by Marshal Erichson, and the witness was afterwards directly contradicted by said Erichson when placed upon the stand by the state. We can see no violation of the rule in this proceeding. The objection made here is that the district attorney had no right to repeat in the presence of Erichson, who had been placed under rule, the statement which witness denied making.

3. There is nothing in the motion to arrest; the indictment is sufficient. It alleged the property stolen to be \$40 of the current money of the United States, of the value of forty dollars, etc. *Lewis v. State*, 28 Tex. App. 141, 12 S. W. Rep. 736; *Green v. State*, 28 Tex. App. 495, 13 S. W. Rep. 784.

4. The evidence is sufficient, and the judgment is affirmed.

HOLMES v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

BURGLARY—ARREST—CONFESSIONS.

On a prosecution for burglary, it appeared that a detective, who had a description of the stolen property, met a boy with a stolen coat, and, on asking where he got it, was taken to defendant, who had on clothes stolen from the place burglarized. Without telling defendant that he was an officer, or that he intended to arrest him, he charged defendant with the burglary, and defendant confessed it. *Held*, that defendant was not under arrest when he made the confession, though the detective went to him with the purpose of arresting him if the boy identified him as the one who stole the coat, and that the confession was admissible.

Appeal from district court, Bexar county; G. H. Noonan, Judge.

Richard Holmes was convicted of burglary, and appeals. Affirmed.

Tarleton & Altgelt and Edward Dwyer, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of burglary, and his punishment assessed at two years in the state penitentiary. The only question that need be considered is, did the court err in admitting the confession of appellant? The state witness Bowen was a detective, and had been a policeman. Obtaining a description of the property burglarized from the Dodic store, he met a boy with a coat stolen,—not, however, from the store. On asking where he got it, he was carried by the boy to appellant, as the one from whom he received it. While questioning appellant about it, he recognized the pants and shoes then worn by appellant as the Dodic goods, and charged him with the theft. Appellant admitted he had burglarized the store by going in over the transom. The witness says: "I had not arrested him at this time, nor informed him I intended to arrest him. I wanted to investigate the matter before I arrested him. I did not tell him I was an officer. I went there to arrest him, if identified by the boy as the one he got the coat from. I did not intend to let him go, and at no time after I came in his presence would I have permitted him to escape." Appellant insists that this purpose was in itself an arrest. The proposition contended for seems to be that no policeman or detective or other officer can receive the confession of a criminal, who may know or have reason to believe he is such. Such is not the law. There is no evidence here showing that appellant was under arrest at the time of making the confession, and the court did not err in admitting it. *Williams v. State*, 19 Tex. App. 279. Judgment is affirmed.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

BURGLARY—INDICTMENT—CONFESSIONS—CONTINUANCE—ABSENCE OF WITNESS.

1. The statement, made by one while in jail on the charge of burglary, that a certain article with which the building was broken into, and a certain article taken therefrom, would be found in a certain place under a building, is, in connection with evidence that they were so found, admissible against him, under Code Crim. Proc. art. 750, making the confession of one in confinement admissible, where, in connection therewith, he made statements of facts, that are found to be true, which conduce to establish his guilt.

2. Overruling defendant's motion for a continuance for absence of a witness cannot have injured him, where the facts to which affidavit is made that he would testify do not meet the case made by the state.

3. An indictment for burglary need not describe the property stolen.

Appeal from district court, Orange county; Stephen P. West, Judge.

Arthur Davis was convicted of burglary, and appeals. Affirmed.

E. A. Cheatham and Bullitt & Gillespie, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of burglary, and his punishment fixed at two years in the penitentiary, from which he appeals.

1. The appellant claims that the court erred in permitting the witness Philips to testify, over objection, as to the confession of appellant, then under confinement, as to where the meat spike, with which the burglary was effected, was to be found, and Bolin's pistol, which had been taken out by the burglar. On the morning after the burglary, and after appellant had been arrested, and the missing money found in his clothes, at his boarding house, the witness Philips went to the jail, and told him what had been found, and asked where Bolin's pistol was, and the meat spike, and promised to help him. Appellant directed him to look upon a sill under his boarding house, to the right of the front door. The missing articles were found, as described. There can be no question as to their incriminative character, and the evidence was admissible, under Code Crim. Proc. art. 750; Willson, Crim. St. § 2473.) *Nolen's Case*, 14 Tex. App. 484, citing Whart. Crim. Ev. 678; *Neeley's Case*, 27 Tex. App. 323, (bottom of page,) 11 S. W. Rep. 376; *Strait's Case*, 43 Tex. 486.

2. The appellant complains that the court erred in overruling the motion for a continuance. The application was based upon the absence of one Popple, and stated what he expected to prove by said witness. Now, we can concede the facts he expected to prove were true, and they were in fact proven on trial,—that Popple had a room in the same building where the saloon was, that it was furnished and usually occupied by him; that he had a key to the saloon; that on the night of the burglary, in company with three or four others, including appellant, Popple unlocked the door, and went in, and they all got a drink, the appellant going behind the bar, and mixing drinks for the crowd. Still, these facts do not meet the case made by the state,—that, after the drinks were taken, Popple turned out the whole crowd, and locked the door, and left on the morning train to visit a neighboring town, and after he left the window was forced open with a meat spike, and the money in the drawer, a pistol, and other things were taken out. There was no injury to appellant in overruling his motion for a continuance.

3. The indictment is sufficient. It is not necessary that an indictment for burglary should describe the property stolen. *Martin v. State*, 1 Tex. App. 525; *Black v. State*, 18 Tex. App. 124. The judgment is affirmed.

BLEVINS v. STATE

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

RECOGNIZANCE—SUFFICIENCY.

On appeal from conviction under an indictment charging the selling and giving intoxicating liquor to a minor without the written consent of persons authorizing him so to do, a recognizance reciting that defendant was charged and convicted of selling and giving whisky to a minor is insufficient. *McDaniel v. State*, (Tex. Cr. App.) 20 S. W. Rep. 1108, followed.

Appeal from Morris county court; J. W. Bolin, Judge.

J. W. Blevins was convicted of a violation of the liquor laws, and appeals. Appeal dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant, having been convicted of the offense of having sold and given intoxicating liquor to a minor without the written consent of persons authorizing him so to do, entered into a recognizance reciting that defendant was charged and convicted of the offense of selling and giving whisky to a minor. On motion of the assistant attorney general the appeal is dismissed for insufficiency of recognizance. *McDaniel v. State*, (Tex. Cr. App.) 20 S. W. Rep. 1108.

COBB v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

Appeal from Rains county court; W. H. Teague, Judge.

J. W. Cobb was convicted of an aggravated assault, and appeals. Dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of an aggravated assault, and fined \$25, from which judgment he appealed, and entered into a recognizance conditioned to abide the judgment of the court of appeals. Upon motion of assistant attorney general, this appeal is dismissed for want of a sufficient recognizance.

GILBREATH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

Appeal from Rains county court; W. M. Lamb, Judge.

James Gilbreath was convicted of larceny, and appeals. Dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant being convicted of the theft of 45 cross-ties, worth six dol-

lars, appealed, and entered into a recognizance conditioned to abide the judgment of the court of appeals. On motion of the assistant attorney general, the appeal is dismissed for insufficient recognizance.

LYNN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

HOMICIDE — ASSAULT WITH INTENT TO MURDER — SUFFICIENCY OF EVIDENCE — INSTRUCTION.

1. On a trial of a person for an assault with intent to murder his wife, the evidence showed that defendant had quit her for a year, and she had returned to her parents; that he suddenly appeared at night, on the gallery, and, pointing a gun in the room where his wife was, snapped a cap, and began cursing the gun; and that he warned his father-in-law and others not to come to him. Defendant testified that the gun was not loaded. *Held*, that a verdict of guilty was supported by the evidence.

2. A charge as to the failure of the gun to fire, qualified by an instruction to acquit of an assault with intent to murder if the jury believed it was not loaded, is not a charge on the weight of evidence, nor improper.

Appeal from district court, Upshur county; Felix J. McCord, Judge.

Isaac Lynn was convicted of an assault with intent to murder, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of an assault with intent to murder his wife, and his punishment assessed at two years' confinement in the penitentiary.

1. We do not think that the charge of the court as to the failure of the gun to fire, qualified as it was, and preceded by an instruction to acquit of an assault with intent to murder if they believed it was not loaded, was a charge upon the weight of evidence; nor was it improper. The charge was not excepted to, nor any special charge requested, and certainly there is no injury apparent therefrom.

2. The evidence, while not so clear as could be desired, is sufficient to sustain the verdict of the jury. The only evidence showing that appellant did not intend to kill his wife was his own testimony on trial that his gun was unloaded. But the evidence shows he had quit his wife for a year, and she had returned to her parents; that at night he suddenly appeared, on the gallery, and, pointing the gun in the room where his wife was, he snapped a cap, and began cursing the gun, and threatening to break it, and warned his father-in-law and others not to come to him. In view of the surrounding facts and circumstances the jury disbelieved the appellant's statement. If appellant so acted as to make the witnesses as well as jury believe he intended to kill his wife, while in fact he only intended to frighten her, he has only himself to blame. The judgment is affirmed.

v.23s.w.no.13—44

AUGUSTINE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

BAIL—DISCHARGE—REINDECTMENT FOR SAME OFFENSE—RES JUDICATA.

1. Where a person indicted for murder is admitted to bail, and the cause is afterwards dismissed, he is, in case he is again indicted, entitled to bail, even in the absence of any statute on the subject, since his right to bail is *res judicata*.

2. Code Crim. Proc. art. 187, provides that where, after indictment found, the cause of defendant has been investigated on habeas corpus, and an order made, admitting him to bail, he shall not be subject to be again placed in custody, except when surrendered by his bail, or when the trial of his cause commences before a petit jury. *Held* that, after a person has once been admitted to bail, the state cannot again arrest and incarcerate him for the same offense.

3. Whether he was admitted to bail on account of the facts developed by such investigation, or because of ill health, is immaterial.

Appeal from district court, Gonzales county; B. R. Abernathy, Special Judge.

Habeas corpus proceeding by Dave Augustine, who is in custody under a warrant issued on an indictment charging him with murder. From a judgment refusing to admit him to bail, he appeals. Reversed.

Kleberg & Grain and Glass & Burgess, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The appellant, having been denied bail, prosecutes his appeal. The questions presented are legal, arising upon an agreed statement of facts, substantially as follows, to wit: On the 21st of December, 1876, the grand jury of De Witt county preferred an indictment against appellant and others, charging them with the murder of Phillip Brassell. That on the 29th of the same month the cause was, on change of venue, transferred to Bexar county. That on account of sickness, rendering it dangerous to longer confine appellant, he was admitted to bail in the sum of \$10,000, and this occurred in December, 1882. The following January the state, after exhausting diligence, could not secure the attendance of the witnesses for the prosecution, and, being unable to longer continue the cause, dismissed it, as to the relator. On the 31st day of December, 1891, the grand jury of De Witt county reindicted the relator for the same murder, and the venue was changed to Gonzales county, where it was again continued by the state on June 25, 1893. It was admitted, and shown to be true, that the offense charged in the indictment found in 1876 was identical with that set forth in the bill preferred in 1891.

We deem it necessary to discuss only one of the legal questions presented for decision, to wit, when a person charged with a cap-

ital offense has once been admitted to bail after indictment found, he shall not be subject to be again placed in custody for the same offense, except on surrender by his sureties, whether the bail be granted on the facts, or on account of ill health. In other words, when bail is once granted after indictment found, it is beyond the power of the state to rearrest for that offense; the right to bail being res adjudicata. This proposition is fully sustained by the authorities, were it necessary to look beyond our own statutes. Wells, Res Adj. § 421; Church, Hab. Corp. 386; Jilz's Case, 64 Mo. 205. Looking to our own legislation, we find that article 187, Code Crim. Proc., provides: "Where a person once discharged or admitted to bail, is afterward indicted for the same offense for which he has been once arrested he may be committed on the indictment, but shall be again entitled to the writ of habeas corpus, and may, notwithstanding the indictment, be admitted to bail, if the facts of the case render it proper; but in cases where after indictment found the cause of the defendant has been investigated on habeas corpus, and an order made either remanding him to custody, or admitting him to bail he shall neither be subject to be again placed in custody, unless when surrendered by his bail, or when the trial of his cause commences before a petit jury, nor shall he be again entitled to the writ of habeas corpus, except in special cases mentioned in articles 155 and 189." Article 155 has reference to cases where the health of the accused is of such a nature as to endanger his life by further confinement. Article 189 applies to cases where, subsequent to the first application, important testimony has been obtained, which was not within the power of the applicant to produce at the former hearing. These provisions are enacted for the benefit of the accused, and can only be invoked in his behalf. The state is not entitled to a new trial, and is debarred the right of appeal by the constitution of this state; and there is no way by which the state can vacate a judgment, and retry the accused, of its own right. A judgment granting bail is final, as to the state, and even to the accused, unless he should seek to reduce the amount of bail granted, by appeal or otherwise. Whether the investigation after indictment found, mentioned in article 187, relates to the facts, or when bail is granted on account of ill health, we think is not material, because in neither event can the state cause the rearrest and second incarceration of the accused for the same offense. We deem it unnecessary to discuss this question at length. The judgment is reversed, and the relator granted bail in the sum of \$10,000. The sheriff of Gonzales county is directed to take his bond for that amount, in the terms of the law governing such cases.

HENDRICKSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

REVIEW ON APPEAL—ABSENCE OF STATEMENT OF FACTS FROM RECORD—CRIMINAL TRIAL—AFFIDAVITS OF JURORS.

1. A statement of facts will not be considered on appeal, when filed after adjournment of court, without the necessary order therefor being incorporated in the record.

2. Two of the jurors in a trial of defendant for burglary stated, on oath, that before they reached a verdict of guilty it was agreed to recommend defendant for pardon, and that such agreement influenced them in making their verdict. Affidavits of six other jurors stated that the agreement in reference to the matter of pardon occurred subsequent to their agreement on the verdict. Held not to authorize a reversal of the judgment.

Appeal from district court, Wise county; J. W. Patterson, Judge.

John Hendrickson was convicted of robbery, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This is a conviction of robbery. The penalty assessed is confinement in the penitentiary for a term of five years. The statement of facts cannot be considered, because filed after court adjourned, without necessary order therefor being incorporated in the record.

While considering their verdict the jury agreed to recommend defendant to the governor as a proper person for executive clemency. Two jurors state, under oath, that this agreement was had before the verdict was agreed upon, and that it influenced them in arriving at their verdict. They further said: "We cannot say that we would ever have agreed to said verdict except for said agreement." How jurors could be induced or influenced to convict a party of an infamous offense in order to have an opportunity of signing a petition for pardon is very remarkable, to say the least of it; and how they could be willing to render infamous a fellow citizen, by convicting him of a heinous crime, in order to have the opportunity afforded them of asking the governor to efface that infamy, passes comprehension. They are contradicted fully by the affidavits of six other jurors, in which affidavits it is stated the agreement in reference to the matter of pardon occurred subsequent to their agreement upon the verdict. The facts set up do not authorize a reversal of the judgment, and it is affirmed.

MATTHEUS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

CRIMINAL LAW—THEFT—REMARKS OF COUNSEL.

1. The refusal of a continuance will not be reviewed, in the absence of a bill of exceptions

2. Where defendant contends that he bought the cattle he is accused of stealing, a charge that if the jury believes that he bought said cattle, or has a reasonable doubt that he stole them, the jury will acquit him, sufficiently states the issue.

3. Where an objection to improper remarks of the county attorney has been promptly sustained,—the attorney being admonished to keep within the record,—and the defense has failed to request an instruction to the jury to disregard such remarks, and defendant has received the lowest term of punishment for his offense, the court's failure to give such instruction is no ground for reversal.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

John Mattheus, convicted of cattle theft, appeals. Affirmed.

A. M. Green and G. H. Culp, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This appeal is prosecuted from a conviction of cattle theft.

1. Without a bill of exceptions reserved, the action of the court, refusing a continuance, will not be revised on appeal. Willson, Crim. St. § 2187.

2. Error is assigned because of the supposed failure of the court to instruct the jury in regard to defendant's explanation of his possession of the alleged stolen cattle. Upon this phase of the case, the court charged the jury as follows: "If you find that defendant bought the two head of cattle he is charged with stealing, or if you have a reasonable doubt as to his having stolen said cattle, you will acquit him." The defendant accounted for his possession of the cattle through purchase from a German. The charge pertinently and correctly submits this explanation to the jury. He gave no other explanation of his possession. The charge, as given, is the law applicable to that phase of the case. Williams v. State, 29 Tex. App. 167, 15 S. W. Rep. 285; Conners v. State, 31 Tex. Cr. App. 453, 20 S. W. Rep. 981.

3. Defendant's objection to the alleged improper remarks of the county attorney were promptly sustained by the court, and the attorney admonished to keep within the record. The defendant did not request instructions to the jury, directing them to disregard said remarks. Young v. State, 19 Tex. App. 536; Kennedy v. State, Id. 618; Willson, Crim. St. § 2321. No injury is shown. Defendant received the lowest term of punishment. We find no error in the record requiring a reversal, and the judgment is affirmed.

ADAMS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

CRIMINAL LAW—CHANGE OF VENUE.

1. Where the court believes that a fair and impartial trial cannot be had in the county where defendant is indicted, it may change the venue to another county, of its own motion.

2. The order changing the venue need not recite the arraignment of defendant.

Appeal from district court, Kerr county; Eugene Archer, Judge.

Tom Adams was convicted of murder in the first degree, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appeal from Kerr county. The conviction in this case was for murder in the first degree, the punishment being a life term in the penitentiary. A statement of the facts is not incorporated in the record.

1. The indictment is in the usual form, and sufficiently charges the offense of murder. The motion to quash was not well taken.

2. The judge, of his own motion, changed the venue from Sutton county to Mason county, because a trial alike fair and impartial to the state and the accused could not be had in Sutton county, and because there existed so great a prejudice in Sutton county against the defendant that he could not obtain a fair trial in said county. Defendant's objections that the order was without authority of law, and disclosed no sufficient legal ground for the change of venue, were properly overruled. Willson, Crim. St. §§ 2189, 2200.

3. A plea to the jurisdiction was filed in Mason county, based upon the failure of the order changing the venue from Sutton county to recite the arraignment of the defendant. There was no error committed by the court in overruling the plea. Ex parte Cox, 12 Tex. App. 665; Willson, Crim. St. § 2212. Upon a second change of venue, the case was carried to Kerr county, and there finally tried. The record discloses no errors, and the judgment is affirmed.

HORTON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

RECOGNIZANCE—SUFFICIENCY.

Under a statute requiring a recognizance to bind appellant to abide the judgment of the "court of criminal appeals" it is not sufficient when binding him to abide the judgment of the "court of appeals."

Appeal from Lamar county court; John W. Rountree, Judge.

William Horton appeals from a judgment of conviction. Appeal dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The statute requires the recognizance to bind the appellant to "abide the judgment of the court of criminal appeals," etc. The recognizance in the record binds him to "abide the judgment of the

court of appeals." This is not sufficient. Acts 1892, p. 38, §§ 32, 33. The motion of the assistant attorney general is sustained, and the appeal is dismissed.

BURGE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

FORGERY—EVIDENCE—RECORD ON APPEAL.

1. The bill of exceptions must set out the grounds of objection to the introduction of another instrument purporting to be signed with the name which defendant is accused of forging.

2. Where a substantial defense is in issue, evidence that defendant had admitted that he was in fear of persons against whom he had agreed to turn state's evidence in certain criminal cases involving both him and them is prejudicial. *Letz v. State*, (Tex. Cr. App.) 21 S. W. Rep. 371, distinguished.

Appeal from district court, Fayette county; H. Teichmueller, Judge.

Tom Burge, convicted of forgery, appeals. Reversed.

Brown, Lane & Jackson, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was charged with and convicted of forgery.

1. Another instrument was admitted in evidence, purporting to be signed by and the act of J. W. Cottrell, whose name had also been signed to the instrument set out in the indictment. The bill of exceptions reserved does not set forth the ground or grounds of the objection, and hence is not entitled to consideration. *Jacobs v. State*, 28 Tex. App. 79, 12 S. W. Rep. 408; *Livar v. State*, 26 Tex. App. 115, 9 S. W. Rep. 552; *Bryant v. State*, 18 Tex. App. 107; *Davis v. State*, 14 Tex. App. 645. We are of opinion, however, that the testimony was admissible under the facts of this case.

2. The bill of exceptions reserved to the introduction in evidence of the instrument signed "J. L. Slagner" fails, also, to state any ground of objection to its admission. It was shown, however, not to be a forgery, and we are of opinion that no injury accrued by reason of its going to the jury.

3. The sheriff of the county testified, in behalf of defendant, that at the instance of "J. W. Cottrell" and others he appointed defendant deputy sheriff during the summer of 1892, and shortly prior to the election that fall revoked the appointment. On cross-examination, and over the objection of defendant that the testimony was "highly prejudicial," and "in no way relevant to the issue involved in the trial," the witness was permitted to testify: "At the time I appointed him he told me his life was in danger from persons against whom he had agreed to testify for the state in the cases in which he and other persons had been engaged in stealing stock,

and to the effect that several horses which had been stolen in Fayette county had been brought back from Bastrop county by one of his deputies, viz. Ike Kennedy, who told me that Burge had shown him the horses, and that defendant had also told him the same thing." We are cited by the state to the *Letz Case*, (Tex. Cr. App.) 21 S. W. Rep. 371, in support of the ruling of the court admitting this evidence. That case holds that, inasmuch as there was no question of the facts that Letz exhibited the gaming table and was given the lowest punishment for that offense, the admission of improper testimony did not require a reversal of the judgment. In this case, however, authority on part of defendant to sign the instrument alleged to be forged was asserted, and constituted the main issue of contention on the trial. It is therefore not within the rule laid down in the Letz case. The testimony was inadmissible and prejudicial to the defendant. The judgment is reversed, and the cause remanded.

HENDERSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

RECOGNIZANCE—SUFFICIENCY.

A recognizance, on appeal from a conviction for selling goods on Sunday, merely reciting that defendant stands charged with the offense of selling goods on Sunday, is insufficient, as failing to recite an offense, since the sale, to constitute an offense, must be made by a person belonging to one of the classes enumerated in Pen. Code, art. 186, declaring the offense.

Appeal from Morris county court; J. W. Bolin, Judge.

J. W. Henderson was convicted of selling goods in violation of the Sunday law, and appeals. Appeal dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant, having been convicted of selling goods on Sunday, prosecutes this appeal. The assistant attorney general moves a dismissal of the appeal because the recognizance fails to recite an offense against the law. That obligation recites that "the defendant stands charged with the offense of selling goods on Sunday." In order to constitute this offense, the sale must be made by one of the persons designated in the statute, and, this offense not being one eo nomine, its constituent elements must be recited in the recognizance. This has not been done in this case. Pen. Code, art. 186; *O'Brien v. State*, 8 Tex. App. 671; *Edwards v. State*, 29 Tex. App. 452, 16 S. W. Rep. 98; *Koritz v. State*, 27 Tex. App. 53, 10 S. W. Rep. 757; *Wilson*, Crim. St. § 2650. The motion is granted, and the appeal is dismissed.

MONTGOMERY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

THEFT—PRINCIPAL AND ACCESSORY—WEIGHING CONFLICTING EVIDENCE.

1. Where the testimony for the prosecution, on a charge of theft, if true, makes a strong case against defendant, his conviction will not be disturbed on appeal, though the testimony for defendant, if true, establishes an alibi.

2. Where defendant made preparations for killing and dressing hogs while his confederates were stealing them, he is guilty as principal in the theft. *Watson v. State*, 1 S. W. Rep. 451, 17 S. W. Rep. 550, 21 Tex. App. 598, followed.

Appeal from district court, Llano county; W. M. Allison, Judge.

Frank Montgomery was convicted of the theft of hogs, and appeals. Affirmed.

Leigh Burleson, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. But one reason is urged for reversing the judgment. Counsel for appellant contends that the evidence fails to support the verdict of the jury, and that in fact the verdict is against the weight of the testimony. If the evidence in support of the verdict establishes the guilt of appellant with a reasonable degree of certainty, we cannot, on this ground, reverse. The testimony relied upon by the state, and that by the appellant, is in conflict. The state's witnesses swear to facts, which, if true, make a strong case against the appellant. On the other hand, if the testimony supporting the alibi is reliable,—not manufactured, or the witnesses mistaken as to time,—then appellant is not guilty. Appellant could not have been at the cleaning of the hogs at the time and place stated by the witnesses for the prosecution, and on the road to San Saba. Hence, the conflict. Now, the jury, and not this court, being the judges of the credibility of the witnesses, may not, and did not, believe the witnesses who swore to the alibi. They could not have believed the alibi witnesses and those for the prosecution.

It is contended that the evidence most clearly shows that appellant was not a principal, but, if he had guilty connection with the hogs, it was as a receiver. The writer is of this opinion, but his views on the subject have not prevailed. See *Watson v. State*, 21 Tex. App. 590, 607, 1 S. W. Rep. 451, and 17 S. W. Rep. 550. If, while others were capturing the hogs, appellant was engaged in preparing to slaughter and dress them, then he would be a principal. And when we consider the time the hogs were taken from the range, the distance from the place of taking to the place of slaughter, and the time the parties engaged in cleaning the hogs were surprised and fled, we are forced to the conclusion that some of the parties were engaged in making preparations for the slaughter and dressing of the hogs while McCullen or John Montgomery were stealing

them from the range. If present at the place where the hogs were dressed, appellant was certainly guilty as taker or receiver, for, when disturbed, he, with the other thieves, fled. Now, whether he took, or aided in taking, the hogs, if he was—knowing that others were stealing the hogs—making preparations for killing and dressing them, under the rule stated in the *Watson Case*, he was a principal. Judgment affirmed.

BAUMBACH v. GULF, C. & S. F. RY. CO.
(Court of Civil Appeals of Texas. Nov. 9, 1893.)

CARRIERS—DELAY IN DELIVERY—DEMURRAGE.

1. Mere delay of a carrier in delivering goods is not a conversion thereof, and the consignee cannot refuse to accept them, and recover their total value, though at the time of delivery he had no use for the goods.

2. A consignee who refuses to accept the goods on the ground of delay in delivery by the carrier cannot be held liable for demurrage and storage fixed by the rules of the carrier, of which he had no notice, unless the rates of demurrage and storage are shown to be reasonable.

Appeal from Harris county court; W. C. Anders, Judge.

Action by A. Baumbach against the Gulf, Colorado & Santa Fe Railway Company. From the judgment entered, both parties appeal. Affirmed.

W. B. Munson, for plaintiff. J. W. Terry and Chas. K. Lee, for defendant.

WILLIAMS, J. Both parties have appealed from the judgment below, and both have assigned errors. The action was brought by Baumbach to recover of the railroad company damages for delay in delivering a car load of lumber. The damages claimed were the value of the lumber and freight and trackage charges paid upon it. The defendant pleaded in reconvention for storage or demurrage upon the lumber. Plaintiff had a load of lumber upon one of defendant's cars at its freight depot at Galveston, where it had arrived from Lake Charles, La. Plaintiff paid the freight charges upon it from Lake Charles to Galveston, and arranged with defendant to carry the car to a point upon its track opposite the place where he was engaged in building, about a mile distant from the freight depot. This was on the 22d of September, 1890. The car with the lumber was not carried to the designated point until the 10th of November, the delay being caused by a confusion of the number of the car with that of another. In the meantime, plaintiff, needing this lumber for a particular part of the work he was doing, and having inquired of defendant about the car in question, and getting no satisfaction, bought and used other lumber. When the car load in question arrived and was tendered to him he declined to

receive it, on the ground that he then had no use for it, having supplied its place and completed the part of the building upon which it was intended to be used. Defendant left the car with the lumber on its track at the point to which it had been taken until January 9, 1891. It was then taken to defendant's yard, and remained loaded with the lumber until March 17, 1891, when the lumber was put in defendant's warehouse, and in September following it was put in charge of a warehouseman at plaintiff's charge. Plaintiff was several times notified that unless he received the lumber it would be stored for his account. One of the notices was dated April 4th, the dates of others not being given. Plaintiff replied to the notices that the lumber was at the disposal of defendant. The rules of defendant provided that demurrage or storage would be charged for cars if not unloaded within 24 hours after notice of arrival, for first day, \$1; second day, \$2.50; for third and succeeding days, \$5 per day. There was no evidence as to whether the rate charged was reasonable or not, nor was it shown that plaintiff had notice of the regulation. The only damage claimed by plaintiff (and there was evidence of no other) was the total value of the lumber. It is well settled that the mere delay, however unreasonable, on the part of the carrier in delivering goods, does not amount to a conversion. The title of the property remains in the consignee, and he must receive it when tendered, so long as it retains its identity, and is not rendered wholly valueless. That the value of the lumber here was wholly destroyed cannot be admitted. Plaintiff had no use for it, but it still had a market value. He should have accepted it, and held defendant liable for the actual damages which he had sustained. What the measure would have been we are not called upon to say. Nothing was claimed but the value of the lumber, and the assignments of error only complain of the refusal of the court to allow that. *Hutch. Carr.* 775.

The court is also of opinion that there was no error in the refusal of the trial court, under the facts of this case, to allow judgment for defendant for the amount claimed for storage or demurrage. There was no evidence that the charges made were reasonable, and, in view of the fact that the sum charged for storage due to defendant alone, leaving out of view that which may have accrued to the other warehousemen, amounted to \$200,—very considerably more than the value of the lumber,—the court could well conclude that it was unreasonable, and there was nothing to show what sum would have been proper compensation. It is true that some authorities hold that a railway company which delivers to the consignee a car loaded with freight to be unloaded by the consignee may charge reasonable demurrage, fixed by regulation, and brought to the no-

tice of the freighter. *Miller v. Banking Co.* (Ga.) 15 S. E. Rep. 316; *Miller v. Mansfield*, 112 Mass. 260. In the latter case it is said that the parties contract with reference to the rule, and that the rate fixed by such rule is adopted by their contract. These decisions relate to ordinary cases where the carrier discharges its duty and delivers the car within the proper time, and the consignee, by delay in unloading it, deprives the owner of the car of its use. Here the lumber was not delivered according to the contract, and for that reason the plaintiff refused to receive it when tendered. While he had no right to do so, we do not think it can be said he adopted by agreement a rate of demurrage fixed by a rule, of which he is not shown to have had notice, and which seems to apply to a different state of facts. The judgment is affirmed.

CITY OF GOLIAD v. WEISIGER et al.
(Court of Civil Appeals of Texas. Nov. 9, 1893.)

OPENING JUDGMENT—LAPSE OF TIME.

A consent judgment will not be declared void on the ground of fraud in an action brought by the party against whom it was rendered nearly 20 years afterwards, where the facts constituting the alleged fraud were open to the observation of such party during the whole time.

Appeal from district court, Goliad county; J. C. Wilson, Judge.

Action by the city of Goliad against R. N. and S. P. Weisiger to recover land. There was a judgment in favor of defendants, and plaintiff appeals. Affirmed.

J. L. Brown and S. Chenoult, for appellant. Gloss, Callender & Coosner, for appellees.

GARRETT, C. J. The city of Goliad, formerly the town of Goliad, brought this suit against R. N. Weisiger and S. P. Weisiger to recover of them certain lands, a part of the four leagues of land conceded to the town of Goliad. The petition alleged title in the town of Goliad, and pleaded the original charter of said town, and the various amendments thereto, showing the trusts for which said land was held, and alleged that the claim of the defendants rested solely upon a judgment of the district court of Goliad county in their favor, in a suit wherein the town of Goliad and others were plaintiffs against the same defendants. When this case was called for trial, the defendants presented a demurrer to the petition that the matter in controversy was *res adjudicata*, and that plaintiff's cause of action was a stale demand. The demurrers were sustained, and judgment was rendered for the defendants.

The facts presented by the petition and exhibits thereto attached may be briefly stated

as follows: The town of Goliad received from the republic of Texas a grant of four leagues of land, which constitute the town tract; and the town of Goliad and the towns of Victoria and Gonzales were chartered by the same act, passed February 5, 1840, (Laws 4th Cong. pp. 276-279.) By the ninth section of that charter the town council was authorized "to sell and alienate any portion of the lands owned by said corporation, and appropriate the proceeds thereof to the erection of a jail, courthouse, and clerk's office, and the remainder of such proceeds of said sales shall be appropriated for the purposes of education within said town, and for no other purpose;" and in 1848 a separate charter was granted to the town, and the corporate limits were made the same as the boundaries of the four leagues that had been granted; and by section 12 the town council, in conjunction with the county court, was empowered to sell any lots within the corporation to which there was no legal claimant or title, and to collect debts and forfeitures due the town, to be appropriated to the erection or repair of a courthouse or jail, etc., and to the establishment of a public school for the town. In 1852 the charter of Goliad was again amended by the legislature, and by the ninth section thereof it was provided that "the common council may acquire and hold any property for public uses, and may improve, sell or otherwise dispose thereof at pleasure; it may collect the prices of any land of said town sold by the corporate authorities since the autumn of 1846, or may acquire the title and control of any part thereof from any purchaser by compromise or other legal means, or may refund the price with interest on failure of title, and so act under future sales; and may sell at public auction, on sixty days' notice in some newspaper published in this state, any portion that may at the time be unsold of the land heretofore conceded to said town by the late republic of Texas, except such parts as may hereafter be necessary for a public square, a public cemetery, a courthouse, a jail, public market, and public highways." And then, after providing for the erection of a jail, courthouse, etc., out of the proceeds of the former sales and future sales of lands, it is further provided that "the remainder of the proceeds of such sales, if any, with the unsold parts of said trust land shall be held, sold, exchanged, or otherwise used by the common council for the purposes of education within said town, and for no other purpose, and said corporation as a trustee for the proper disposal of said land and its proceeds, to accomplish the purposes aforesaid, shall be answerable in the district court of Goliad county, at the suit of any party interested." Acts 1852, p. 87. By act of the legislature of August 13, 1870, this ninth section of the charter was further amended, and after making, in substance, the same provisions in regard to the erection of a jail

and courthouse as is made in the above copied act, this amended section provided that "the remainder of said lands, or the proceeds of sales of said lands, shall be held, sold, exchanged or otherwise used and disposed of by the common council for the purpose of repairing the streets, building bridges, and inclosing the courthouse square and cemetery, and for such other purposes within the corporate limits of said town as may be deemed necessary and proper by said town council." In the year 1874 there were pending in the district court of Goliad county 10 suits against sundry persons to recover certain lands "theretofore claimed and disposed of by Paine Female Institute and Avanaama College," among which suits was one numbered 1,058, and entitled "Town of Goliad vs. Joseph Weisiger et al." This suit was brought to recover a number of farm lots upon the town tract, and among said lots were the lots now in controversy in this suit. The parties to the suit No. 1,058 were the town of Goliad, plaintiff, and Joseph Weisiger, R. N. Weisiger, and S. P. Weisiger, defendants. Messrs. Phillips, Lackey & Stayton were counsel for the plaintiff, and Messrs. Lane & Payne were counsel for the defendants. On the 8th day of September, 1874, the town council made an order authorizing its attorneys to compromise said suits, which is set out in a written agreement made for such settlement, as follows: "Ordered, that whereas, Phillips, Lackey & Stayton, attorneys of the town of Goliad, be and are hereby authorized to compromise with all parties holding adverse title to realty situated on the town tract of Goliad, including all suits now pending in the district court of Goliad county prosecuted by said attorneys for said town, and for all other persons claiming adversely to said town, and on the payment to the said Phillips, Lackey & Stayton, by said claimants of said land or defendants in said suits, of one thousand dollars or one thousand acres of land, which is the said attorneys' fee for their services in said suits, and, further, that said attorneys are hereby authorized to go into the district court of Goliad county and make a binding agreement on the said town of Goliad, whereby the title of said claimants or defendants, and each of them, to their particular lands, respectively, shall be forever vested in them and their title quieted, and the claim, title, or interest of the town of Goliad forever annulled, abrogated, and held for naught." Pursuant to and embodying this order of the town council, an agreement was made and signed by Phillips, Lackey & Stayton, for themselves, and as attorneys for the town of Goliad, and by Lane & Payne, attorneys for the defendants and interveners in all the causes mentioned in the agreement, (including said cause No. 1,058,) whereby it was agreed, among other things, that all the title of the town of Goliad in certain farm lots, which are men-

tioned in detail, (and including the lots sued for in this suit,) should be divested out of the town of Goliad, and vested in the defendants R. N. Weisiger and Samuel P. Weisiger; and that the town of Goliad should have judgment against said Weisigers for all the land sued for in that suit, except the farm lots so agreed to be vested in said defendants; and, further, that the title of certain of the lots agreed to be vested in said Weisigers should be divested out of them, and vested in said Phillips, Lackey & Stayton, as said defendants' proportion of the fee of \$1,000 to be paid to said attorneys under the terms of said agreement. And this agreement having been filed in said suit No. 1,058, and said suit having been dismissed as to Joseph Weisiger, and said Phillips, Lackey & Stayton having been made parties to the suit, the court rendered judgment that the town of Goliad recover of defendants Reed N. and Samuel P. Weisiger a certain large tract of land described by metes and bounds, including all the farm lots, etc., sued for in said suit, less certain farm lots particularly described, among which were the farm lots now in controversy in this suit; and as to all said described farm lots it was "ordered, adjudged, and decreed by the court that all title therein held by the town of Goliad be divested, and that title thereto be and hereby is vested in Reed N. Weisiger and Samuel P. Weisiger;" and by the same decree the title to certain of said farm lots was divested out of said Weisigers, and vested in said Phillips, Lackey & Stayton, pursuant to the agreement above recited,—which judgment was first rendered October 24, 1874, and was afterwards amended in some matter of description, and was again rendered by the court at February term, 1875.

Plaintiff averred that it had executed the trust for which it held said land by selling a portion thereof for a courthouse and jail, and held the remainder for the purposes of public education; that E. R. Lane, who represented the defendants in said suit, was the mayor of the town of Goliad, and that the mayor and board of aldermen, and the attorneys for the parties to said suit, acting together, fraudulently combined and entered into said agreement of writing, by which the said attorneys went into said district court, and entered of record a decree by consent of parties, by which the title to said land was divested out of plaintiff, and vested in said defendants, all of which was without authority and contrary to law; that no question of fact or issue of law was actually litigated or judicially tried and determined by the court, nor was the merit of said suit put in issue or determined; that the town was in no way benefited by said decree; that the land adjudged to plaintiff was not claimed by the defendants, and said judgment was in no wise a compromise. Said agreement was made without authority, etc.,

and was a mere attempt to donate said land to parties not entitled thereto, and was a fraud upon the rights of the town, which defendants well knew, etc.

The allegations in the petition, if the proper parties were before the court, and the suit had been brought within the proper time, would be sufficient to make it a direct attack upon the judgment in the suit No. 1,058, *Town of Goliad v. Joseph Weisiger et al. Phillips, Lackey & Stayton* would be necessary parties to such a suit, and it should be brought within such a time that laches would not be imputed to the plaintiff. Nearly 20 years elapsed from the rendition of the judgment before it was attacked in this suit, and there is no pretense that the facts of fraud charged were not always open to the constituted authorities of the town of Goliad and its citizens. The question is not the application of the doctrine of laches or limitation to a suit for the recovery of lands which the town had no right to convey, but an action to set aside an erroneous judgment of a court which had jurisdiction to render it on a charge of fraud. Plaintiff is clearly cut off by the lapse of time from reopening the case and setting aside the judgment. As a collateral attack upon the judgment, the suit cannot be maintained. The plea of *res adjudicata* applies. There is nothing in the record to show that the judgment was void. We do not deem it necessary to refer to cases in our supreme court which recognize the validity of a judgment rendered by consent or by the agreement of parties. In the case of *Gunter v. Fox*, 51 Tex. 383, a judgment rendered on the agreement of an administrator that the defendant had title to the land was binding on the heirs. See also, *Hollis v. Dashiell*, 52 Tex. 187; *Ivey v. Harrell*, 1 Tex. Civ. App. 226. 20 S. W. Rep. 775. We do not deem it necessary to enter into a discussion of the authorities. In this state, such a judgment as was the subject of attack in this case would be at most erroneous, and not void. The judgment of the court below will be affirmed.

O'FIEL v. KING et al.

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

DISSOLUTION OF PARTNERSHIP—ACTION ON AGREEMENT TO PAY FIRM DEBTS—EVIDENCE.

On the dissolution of the partnership composed of plaintiff and defendant, the latter assumed payment of the firm debts. Plaintiff alleged that a debtor had obtained a judgment against the firm, which he (plaintiff) was obliged to pay, and sought to recover the amount thereof from defendant. The evidence showed that, if plaintiff paid the judgment at all, he did so by satisfying a claim which he held against the debtor, but the amount of such claim was not shown. *Held*, that plaintiff could not recover.

Appeal from district court, Camp county. S. P. Pounders, Special Judge.

Action by John J. O'Fiel against E. A. King and another. Defendants had judgment, and plaintiff appeals. Affirmed.

Morris & Crow and W. P. McLean, for appellant. E. A. King, for appellees.

FINLEY, J. The appellant and appellee were partners in the practice of law in the town of Pittsburgh, Camp county. On dissolution and settlement of their partnership business, O'Fiel conveyed to King, in the name of his wife, his interest in the firm property, consisting of notes, accounts for professional services, some town property, including a house and lot in the town of Pittsburgh. The consideration paid by King was \$1,000, and the assumption of all the firm debts or outstanding obligations. In the payment of the \$1,000, O'Fiel took the library of the firm at \$500,—upon which there was a balance due, afterwards paid by King,—received \$800 in cash, and a note for \$133, which is signed by Mrs. King. In carrying out this settlement of their partnership affairs, O'Fiel executed a deed to the house and lot to King, in his wife's name, which recited that: "For and in consideration of the sum of eight hundred and sixty-seven dollars to me in hand paid by Mrs. Laura King, and the further consideration of the execution and delivery to me of one certain promissory note of even date herewith for the sum of \$133, due thirty days from date hereof, bearing interest at the rate of 10 per cent. per annum until paid, and the further consideration that the said Laura King shall assume all of the obligations of the said John J. O'Fiel as said partner in said business, and all other obligations growing out of the transactions between the said King and O'Fiel and all other persons, and shall pay off and discharge all the obligations of the said O'Fiel on cost bonds, and all other notes, bonds, and obligations for which said O'Fiel is now responsible, or may hereafter be made responsible for by judgment of any court. To secure the payment of which, promptly, a vendor's lien upon the property hereinafter described is specially reserved, as well as for the payment of said notes heretofore mentioned," etc. This suit is brought by J. J. O'Fiel, appellant, alleging that the partnership of King & O'Fiel had been sued upon their partnership obligations due to one J. P. O'Fiel, judgment obtained thereon, and that he has been forced to pay the said judgment, amounting to some \$554.65, and court costs; and he asks judgment against King and his wife, appellees, for the amount of said judgment, and costs so paid by him, and for a foreclosure of the vendor's lien upon the said house and lot in the town of Pittsburgh, retained in the deed executed by him to Mrs. King. Appellees defended by pleading general demurrer and general denial, and they further pleaded specially, in substance, as follows: "(1) That in the suit against the firm of

King & O'Fiel, in which J. P. O'Fiel was plaintiff, that appellee E. A. King defended that suit for himself, and desired and proposed to defend it for appellant also, but that appellant declined and refused to allow him to defend the suit for appellant, and declined and refused to interpose any defense thereto for himself; that in said suit judgment went against appellant, as a matter of course, for the full amount sued for, namely, \$554.65, he making no defense in the suit; that appellee, among other defenses to said suit, plead partial failure of consideration for the obligation sued on, which defense was equally available to appellant, had he desired to permit the same to be interposed in his behalf; and that the suit resulted in a judgment against appellee for only the sum of \$182.50, while, as above stated, the full amount, \$554.65, was rendered against appellant. (2) That, while said suit of J. P. O'Fiel against King & O'Fiel was pending, Goggin & Bro. obtained against J. P. O'Fiel, plaintiff in said suit, a judgment in the county court of Galveston county for the sum of \$333, and caused a writ of garnishment to be issued out of the county court of Galveston county, and served upon both the appellant and appellee, commanding them to answer whether or not they were indebted, how much, etc., etc., to J. P. O'Fiel; that on the 31st day of May, 1889, the day upon which J. P. O'Fiel obtained judgment against appellant and appellee, as above stated, for \$554.65 and \$182.50, respectively, appellee answered in the garnishment suit pending in Galveston that he owed J. P. O'Fiel the sum of \$182.50; and that thereafter, in December, 1889, judgment was rendered against appellee in the garnishment suit for the sum of \$182.50, with interest, and that he paid off and discharged the same in April, 1890." To this latter portion of the answer of appellee, appellant, in the court below, interposed a special exception upon the ground that it constituted no defense, which was overruled by the court, and that action of the court is assigned as error. The only other assignment of error in the case is, in substance, that the facts established on the trial did not warrant the judgment.

The case was tried in the court below without the intervention of a jury, and judgment rendered for defendants, and there are no findings of fact by the court below in the case. Should we conclude that the action of the court in overruling appellant's exception to that portion of appellees' answer which set up the garnishment proceedings was erroneous, would it be such an error as could avail or benefit the appellant in this court? The case being presented to us without any findings of fact by the court, under well-established rules, it is our duty to examine the statement of facts, and, if there is any phase of legally competent facts upon which the court may have based the judgment, the judgment should be affirmed.

That is to say, it is not apparent from the record, in the absence of the findings of fact, what, if any, weight the court gave the particular defense which was excepted to; and, if there is another legally sufficient phase of facts which would justify the judgment, it would be our duty to affirm, even though we were of the opinion that the action of the court in not sustaining the exception was erroneous. Under the terms of the partnership dissolution and settlement between J. J. O'Fiel and E. A. King, the latter, as has been before stated, assumed all of the firm outstanding obligations, and it was his duty to discharge them; and if appellant, by reason of failure on the part of King to discharge any of those obligations, has been compelled to pay any of them, he would have the right to recover back the amount or amounts he was so compelled to pay. The judgment which was rendered in favor of J. P. O'Fiel against E. A. King and J. J. O'Fiel, it is alleged, was paid off and satisfied by J. J. O'Fiel, and he seeks in this suit to recover of appellees the amount of said judgment. His right to recover the amount of the judgment depends upon the fact whether or not he paid the full amount of the judgment. His rights in the premises were not fixed by the transfer of the judgment, but were measured by the amount he had to pay in satisfaction of the judgment. He did not become the owner of the judgment by paying it, and receiving a transfer to it; but, if he paid the judgment, the payment extinguished the judgment, and he had his right of action against appellees on their obligation to pay off and satisfy the firm debts of King & O'Fiel. What amount, if any, did J. J. O'Fiel pay on the judgment rendered against him and his former partner, King? Appellant testified that plaintiff in said judgment, J. P. O'Fiel, who was appellant's father, was indebted to him in an amount exceeding the amount of the judgment so satisfied by him, and that the same was satisfied by his releasing his father from such indebtedness to him; that his father owed him for professional services and for borrowed money. What he owed for professional services, and what he owed as borrowed money, is not stated. The father, J. P. O'Fiel, testified, also, that the judgment was satisfied by his indebtedness to his son, which he stated amounted to as much or more than the judgment, released by the son. He, too, stated that he was indebted to the son for borrowed money and professional services. The only borrowed money that he identified was \$80, which he had at one time received from his son as a loan. He testified that the bulk of the professional services rendered by his son to him, and for which he was indebted, were rendered while his son was in partnership with E. A. King. How much, if any, of such services were rendered when he was a partner with King, is not

stated. All such indebtedness, under the dissolution settlement, would be due King, and not appellant. That he did not know how much he owed for professional services, did not know how much his son claimed, and that he did not know how much his son owed him; in other words, that the state of the accounts between the father and the son was unknown to the father. Neither of these witnesses pretended that there was a dollar in cash paid upon the judgment; and neither of them testified that there was any settlement between them of their accounts, or a formal extinguishment of any particular item or amount of the indebtedness of the father by the satisfaction and extinguishment of said judgment. Under this state of evidence, had the court founded its judgment upon the theory that appellant did not pay anything in satisfaction of the judgment rendered against him and King, we could not have said that the evidence did not justify the conclusion or finding of the court. It may be that upon this phase of facts the court rendered the judgment. If this be true, then the action of the court on the special exception to the answer would be a harmless error, which would not justify a reversal of the cause. We are of opinion that the facts of the case warrant the judgment of the court below, and the judgment ought to be affirmed, and it is so ordered.

TEXAS & P. RY. CO. v. CLARK.

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

CARRIERS—INTERSTATE SHIPMENTS.

A shipment of freight over connecting lines from Missouri to a point in Texas by a bill of lading which provides that the receiving carrier shall only be liable for damage occurring on its own line, and which guarantees a through rate of freight to such point, is an interstate shipment, within the interstate commerce act; and, though the entire haul of the last connecting line is within the state of Texas, an overcharge by it on such shipment is a matter to be adjusted under the interstate commerce act, and not under the laws of Texas.

Appeal from Van Zandt county court; John S. Spinks, Judge.

Action by D. F. Clark against the Texas & Pacific Railway Company. There was judgment for plaintiff, and defendant appeals. Reversed.

Woods & Gossett, for appellant. Liveley & Reese, for appellee.

RAINEY, J. Appellee, Clark, brought this suit against appellant to recover the penalty prescribed in article 4258, Rev. St., alleging that there was an overcharge on freight, and that there was a discrimination against him in charging him a greater rate than other persons. Defendant pleaded generally that, if there was an overcharge, it was

not the act of defendant, and that the shipment came under the interstate commerce act of congress, and it was not, therefore, liable in this suit. A trial was had, resulting in a verdict for plaintiff, from which an appeal was taken.

If the third assignment of error is well taken, it is decisive of this case, and appellee cannot recover. It is: "The court erred in refusing to sustain defendant's special demurrer, setting up that the freight shipment herein complained about, and the overcharge thereon, was clearly a subject-matter that is to be adjusted under the interstate commerce act of congress, and therefore not subject to the jurisdiction of a state court." The plaintiff's petition distinctly alleged, and the proof so shows, that the penalty claimed for the overcharge and discrimination was based on a through bill of lading executed by the Missouri, Kansas & Texas Railway Company to transport the freight therein mentioned from St. Louis, Mo., to Will's Point, in Van Zandt county, Tex. By the provisions of said bill of lading the Missouri, Kansas & Texas Railway Company was to deliver to connecting lines, and only be liable for damage on loss occurring on its own line. A through rate of freight was guaranteed to the point of destination. Said road connects with the Texas & Pacific Railway at Mineola, Tex., and the entire haul of the appellant's road was within the state of Texas. Article 4257, Rev. St., provides that railroads shall not charge a greater rate than "fifty cents per hundred pounds per hundred miles for the transportation of freight over their roads; that the rates shall be uniform and no unjust discrimination in the rates for transportation shall be made against any person or place," etc. Article 4258, *Id.*, prescribes a penalty of \$500 for the violation of the provisions of said article 4257. Does the transaction under investigation come within the purview of the foregoing statute, or is it such a transaction that it comes within such regulation of commerce between the states as the congress of the United States has the power only to make? In the leading case of *Wabash, etc., Ry. Co. v. People of Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4, the facts show that two shipments were made in Illinois over the same road to New York city. The railroad charged for one shipment 15 cents per 100 pounds, and for the other 25 cents, the freight in both instances being of the same class. In an action brought by one of the consignors against the road for unjust discrimination, under the statute of Illinois, which is similar to the statute of this state on the same subject, the court held that such were interstate shipments, and did not fall within the regulations prescribed by the laws of Illinois. In *Railway Co. v. Sherwood*, 84 Tex. 125, 18 S. W. Rep. 455, the railway company received a lot of cotton

at Greenville, Tex., to be by it carried on its lines in Texas, and forwarded to Liverpool, England, executing therefor a through bill of lading, though restricting liability to its own line. Said cotton was delivered by said railway company to the West India Pacific Steamship Company at Galveston, Tex. Suit was instituted against said company for loss. The only question raised in that case that is material in this was, was the shipment interstate or not? Justice Tarlton, in a very elaborate and well-considered opinion, held that it was an interstate shipment. In that case stress was laid upon the provision in the bill of lading that the railway company's liability should cease upon delivery to a connecting carrier, and that such delivery was made at Galveston, within this state; the shippers contending that these facts constituted a domestic shipment; that, as the cotton was not transported out of the state, and the railway's liability ceased upon delivery to a connecting carrier, it was in no sense a foreign shipment, but came exclusively within the laws of Texas. The court said: "The track of a railway company may extend beyond the limits of a state, yet if goods be carried by it from one point to another within this state, such carriage constitutes transportation within this state, and such railway is a carrier within this state. But if the railway, whether by itself or by its connecting lines, its agents, transports goods from a point within this state to a point within another state, it is a carrier, not within the state, but within and out of this state into another. In the latter event it is engaged in interstate commerce." There is no conflict on this point between the decision above mentioned and the case at bar, except in those cases the freight was to be transported out of the state, while in this case the freight was coming from without to within the state. This, in principle, can make no possible difference. In the case of *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. Rep. 554, the St. Louis, Arkansas & Texas Railway Company received a lot of flour at St. Louis, Mo., to be transported to Texas by said line via the Gulf, Colorado & Santa Fe Railway Company to Brenham, at a certain rate. When the flour reached Corsicana, it was delivered to the Houston & Texas Central Railway, which transported it to Brenham. After reaching Brenham the consignee tendered the amount of freight specified in the bill of lading, and demanded the flour. The road refused to deliver unless a greater rate than that charged in the bill of lading was paid, which the consignee would not pay. After waiting awhile he sued the company for the penalty prescribed by the statute for detention of freight. The court said: "These facts show that the flour was interstate commerce, and that the defendant company and its connecting line, the said

St. Louis, Arkansas & Texas Railway Company, were common carriers, engaged in carrying interstate freight, and were answerable to the laws of congress regulating interstate traffic." There can be no question, then, but that the transaction under consideration constitutes an interstate shipment. Is there anything, then, that will bring this case within the provisions of the statute under which this action was brought? We think not. The constitution of the United States vests in congress the power to regulate commerce between the states. This precludes the rights of the states to make any regulations in reference to the same whatever. We do not wish to be understood as holding that the states cannot make police regulations relative to interstate commerce within proper limitations. Justice Gaines, in *Railway Co. v. Dwyer*, 75 Tex. 572, 12 S. W. Rep. 1001, having under consideration the construction of the state statute prescribing a penalty for the detention of freight by the railroad, as to whether the same infringed the rights of congress to regulate commerce between the states, decided that such statute was a police regulation, and came within the scope of the state's authority. But he further said: "A state can make no law regulating the rate of freight for the carriage of goods between that and another state, although the regulation be construed as applying only to so much of the line of transit as lies within its own borders." The law under which the plaintiff in this case seeks to recover is for the purpose of regulating freight rates. It fixes the maximum rate that can be charged in this state by a railroad company. It prescribes a penalty for overcharge, and for unjust discrimination. This statute applies only to shipments between points within the state. To enforce it in this transaction would be an infringement upon the powers expressly delegated to congress in the regulation of commerce between the states. The congress of the United States, it seems, thought it had jurisdiction of such commerce. Its act entitled "An act to regulate commerce," approved in 1887, and its amendments, provide that, after rates have been agreed to and fixed by carriers, they shall publish same, and furnish the interstate railway commission with such rates; and, after such rates have been thus established, and continuing in force, a higher or lower rate cannot be charged than that agreed upon and established, and for the violation of which fine and imprisonment are prescribed. It will thus be seen that if the statute of this state is enforced in such transactions as this it will be exercising jurisdiction in a matter over which congress has exclusive jurisdiction. For the reasons above set forth we are of the opinion that the appellee has no right to recover, and therefore this cause is reversed and remanded.

PARKER v. FOGARTY et al.¹

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

WIFE'S SEPARATE ESTATE—LAND BOUGHT ON CREDIT.

1. Where the price of land is paid partly in cash from the wife's separate estate, and partly by notes, wherein the husband joins pro forma, with the intention that they shall be paid from the wife's estate,—the deed being made to the wife, but not disclosing that the land is her separate estate,—such land is not subject to levy by a creditor of the husband, who has notice of this fact.

2. A wife had at different times from 1867 to 1883 inherited sums amounting to \$2,650, and had loaned them to her husband, who agreed to pay them, with interest. In 1885 the couple sold their homestead for \$4,500 cash, which the husband paid to his wife on account of said loans, and which was deposited in bank to her credit. The wife drew \$1,000 as cash payment for land bought, and the balance was drawn in her name, and was invested by the husband in a mercantile business. It was understood that the land was bought for the wife's separate estate. The husband managed said business, and, as the interest became due on the land, he took out of the business money to pay it. The business was not very profitable. In 1889 he paid the interest from the products of the land. *Held*, that the interest being paid either out of the wife's separate estate, or by the husband in discharge of his debts to her, the land was the wife's, and was not subject to her husband's debts.

Appeal from district court, Limestone county; Rufus Hardy, Judge.

Action by W. J. Fogarty against John T. Parker and another to remove cloud from title to land. Judgment for plaintiff. Parker appeals. Affirmed.

Scarborough & Rogers, for appellant. Robertson & Davis, for appellee.

LIGHTFOOT, C. J. This suit was brought in the district court of Limestone county by W. J. Fogarty against John T. Parker and John Fogarty to remove cloud from the title of 500 acres of land. Plaintiff claims that the land was bought by Amanda J. Fogarty, the wife of John Fogarty, from T. W. House. That \$1,000 of her separate money was paid in cash, and that it was understood and intended by herself and husband that the balance of the purchase money therefor should be paid out of her separate estate, and that notes were given for the deferred payments, in which the husband joined pro forma. The deed was to Amanda J. Fogarty, without disclosing that it was her separate estate. That the land was afterwards levied upon under attachment by a creditor of John Fogarty, and in the mean time was sold by Amanda J. Fogarty and husband to plaintiff. The homestead of 200 acres was set apart by the sheriff, and the balance, 300 acres, bought at the foreclosure sale by defendant John Parker for \$50. That, before

¹ Rehearing pending.

the purchase, Parker was notified that the property was bought as the separate estate of Amanda J. Fogarty, and was her separate property at the time of the levy. The defendant Parker denied that the land was ever the separate estate of Amanda J. Fogarty, but claims that the whole—and, in any event, a part—of the purchase money was paid with community funds, and that the sale by Amanda and John Fogarty to W. J. Fogarty was fraudulent. He sets up a tender to T. W. House, the vendor of Fogarty, of the unpaid purchase money, and in a cross bill makes him and Amanda Fogarty and John Fogarty parties, and asks for an adjudication of all the matters growing out of said transaction. The court sustained the demurrer of T. W. House, and, upon the verdict of a jury, rendered judgment against appellant John T. Parker, from which he has appealed.

The first assignment of error is as follows: "The court erred in sustaining the demurrer of T. W. House to the cross bill of defendant Parker." T. W. House was brought in on the cross bill of defendant Parker, and, in the event of a recovery by him, he sought to extinguish the lien on the land held by House. Under the views we take of the case, it will not be necessary to consider this assignment, as the question presented by it can only be material in the event of a recovery of the land by Parker.

The second and seventh assignments of error can be disposed of together, and are as follows: "(2) The court erred in refusing the special charges Nos. 1 and 2, requested by defendant Parker." "(7) The court erred in admitting the evidence complained of in bills of exceptions Nos. 1 and 2." These two assignments, under the statutes, rules, and decisions of our supreme court, do not point out specifically the errors complained of, and cannot be considered. Each assignment should definitely point out some specific error. *Rev. St. art. 1037; Mitchell v. Mitchell, 84 Tex. 306, 19 S. W. Rep. 477; Blackwell v. Hummcutt, 69 Tex. 277, 9 S. W. Rep. 317; Hughes v. Railway Co., 67 Tex. 595, 4 S. W. Rep. 219; Blake v. Insurance Co., 67 Tex. 160, 2 S. W. Rep. 368; Cannon v. Cannon, 66 Tex. 686, 3 S. W. Rep. 36; Railway Co. v. Gilbert, 64 Tex. 536.*

The remaining assignments of error may be considered together, and are as follows: "(3) The court erred in holding, as a conclusion of law, that property bought on a credit by John and Amanda Fogarty, for which they gave their joint notes, thereby became the property of the wife. (4) The verdict of the jury, finding that \$900 paid subsequent to purchase of the land, as interest money, was the separate property of Amanda Fogarty, is not supported by the evidence, and the court erred in so holding, and so rendering judgment. (5) The finding of the

jury that the \$1,000 paid on the land at the time of purchase was the separate means of the wife is not supported by the evidence, and the court erred in so holding. (6) The court erred in not rendering judgment for defendant Parker notwithstanding the finding of the jury, because it was error to hold that the intention with which the property was purchased on a credit, for which notes of the husband and wife were given, affected the status of the property."

It will only be necessary to examine the testimony far enough to see whether the verdict and judgment are supported by the evidence upon the points complained of in the above assignments. The deed from House to Amanda J. Fogarty expresses a consideration of \$1,000 paid by Amanda J. Fogarty, and \$2,500 secured by two promissory notes of \$1,250 each; one due on November 1, 1857, and the other November 1, 1866; each bearing 12 per cent. interest from date, and signed by Amanda J. and John Fogarty, and being a vendor's lien on the land. It was shown by the testimony that Amanda J. Fogarty inherited from her father \$900 in 1867 or 1868, and from her mother \$850 in 1880, and from her brother \$1,000 in 1883, and that each of these sums, aggregating \$2,650, were loaned to her husband, John Fogarty, who agreed to repay them, with interest; that in 1885 they sold their homestead, 200 acres, in Limestone county, for \$4,500 in cash, and that John Fogarty paid the money to his wife, Amanda, in payment for the said separate money used by him, and the money was deposited to her credit in bank; that when the purchase of the land in controversy was made from House the \$1,000 cash payment was made by a check of said Amanda upon the \$4,500 deposited by her in bank, and the balance of the money, \$3,500, was drawn out on her check, and was taken by the husband, and invested in a mercantile business in New Mexico, in the wife's name; that at the time of the purchase from House it was fully understood between the parties that the land was bought by Amanda J. Fogarty as her separate estate, to be paid for with her separate means. John Fogarty testified that he lived in the territory of New Mexico some two or three years, and during that time, as the interest on the deferred payments to House became due, he took from the mercantile business he was managing money to pay said interest; that there was but little profit made from said mercantile business; that he simply took the money out of the business to pay interest; that in the year 1889 he paid the interest from the proceeds of cotton raised on the farm in question after the sale to W. J. Fogarty, having prior thereto given House a mortgage on it, in order to secure its proceeds to House against creditors who might attach it; that during the year 1890 he ran

the farm for W. J. Fogarty, as his agent, and paid the interest from the products of the farm for that year for W. J. Fogarty, who owned it. The parties to the sale from Amanda J. Fogarty to W. J. Fogarty testified as to the good faith of the transaction, and the deeds were all in evidence, with much oral testimony. The special verdict of the jury found all the issues in favor of plaintiff, and judgment was rendered accordingly. The appellant, in his able and extensive brief, thus tersely states the issues: (1) Was the \$1,000 cash paid separate property of Amanda Fogarty? (2) Were the interest payments made with her separate funds? (3) Could the wife purchase property on credit, and make it her separate property?

Upon the first question, we think the testimony leaves no doubt. It was certainly legitimate for the husband to pay his wife the proceeds of their homestead for her separate money, which he had used, and agreed to repay, with interest. The \$1,000 was invested by her as the first payment on the land in controversy, which was purchased as her separate estate, all parties understanding that the husband joined in the notes pro forma, and that the purchase was for her separate estate, and the deferred payments to be made out of her separate means. The interest payments to House, for several years, were made by John Fogarty from money taken out of the business in New Mexico. The capital invested in this business was the separate property of the wife. There was but little profit made in the business. That "he simply took the money out of the business to pay interest." If he took the money out of the business, it must have been money that he put into the business, which was the separate property of the wife. For the year 1889 the interest was paid out of the proceeds of cotton raised on the farm, and after that it was paid under the direction of W. J. Fogarty, who owned the place. Appellant lays much stress upon the fact that the payment of interest to House upon the purchase-money notes was made in 1889, before appellant's purchase, out of the proceeds of cotton raised on the farm, which he contended was community property. Suppose that this was true. If John Fogarty honestly owed his wife \$3,500, or any other amount, for her separate money in his hands, was it improper or illegal for him to pay on her separate debt a part of the community funds in his hands, from whatever source such community funds may have been derived? Such payments, when honestly and fairly made, even if other creditors should thereby lose their debts, have been recognized and upheld by our courts. It has been further held that the wife may purchase property, paying a part of the purchase money in cash out of her separate means, and giving notes for the deferred payments, the husband joining in said notes,

where it is understood that such purchase is for her separate estate, and the deferred payments to be made out of her separate means, and the title becomes as fully vested in her as if she obtained it by inheritance. In this case the deed was taken to her, but it did not show upon its face that it was intended as her separate property; and hence the apparent onerous title was in the community. But the appellant, before his purchase, had written notice that it was bought with her separate means, as her separate estate.

For many years the cases of *Blankenship v. Douglas*, 28 Tex. 225; *Cooke v. Bremond*, 27 Tex. 457; and *Grace v. Wade*, 45 Tex. 522,—gave much trouble in this line of cases, and caused much confusion as to the rights of the wife in regard to her separate estate, until these decisions were more thoroughly understood by the profession. In the light of more recent cases, the tenure of the wife is made perfectly clear, and her title rests upon the same solid basis as that of other holders of realty. In the case of *Mitchell v. Mitchell*, reported in 80 Tex. 101, 15 S. W. Rep. 705, and again in 84 Tex. 303, 19 S. W. Rep. 477, the husband had invested the separate means of his wife in a mercantile venture, and afterwards used the proceeds, or a part thereof, to buy the land in controversy, taking the deed in his own name, though the land was intended for his wife. The court says: "If the land in controversy was either paid for by the separate means of Mrs. Mitchell, or was purchased for her by her husband for the purpose of discharging a debt which he owed her, it became her separate property." 84 Tex. 307, 19 S. W. Rep. 477. In this case, if the land in controversy was bought with the separate means of Mrs. Fogarty, or was purchased for her by her husband for the purpose of discharging a debt which he owed her, in either event it became her separate estate. What difference would it make if all the interest upon the House notes had been paid by John Fogarty, if he was honestly indebted to Mrs. Fogarty, and in making such payments intended to discharge that much of his obligation to his wife? We fully concede the proposition contended for by appellant, that where the wife's separate means are used in a mercantile business, whether such business is conducted in the name of the husband or wife, the profits of such business belong to the community, and would be liable for the payment of the husband's debts, and if the profits be mixed with the wife's separate estate, in a contract between the wife and the husband's creditors, the burden is on the wife to show how much of it retained the character of separate estate. *Clafin v. Pfeiffer*, 76 Tex. 469, 13 S. W. Rep. 483. But that question is not involved in this case, for the reason that the land in controversy was clearly bought for Mrs. Fogarty, and the first payment of

\$1,000 was made out of her separate money and the notes, intended to be paid out of her separate estate. The interest payments were made, either out of her separate money, or by the husband in discharge of his debts to her, either of which vested the property in her. In the case of *McKamey v. Thorp*, 61 Tex. 648, a conveyance was made to the wife by a third party, the deed not showing on its face the separate interest, the land being paid for by the husband, in pursuance of an agreement between them, under which the husband had used the separate funds of the wife, to repay which the deed was made. It was held that the title was vested in the separate estate of the wife, against a purchaser at execution sale against the husband, who credited the amount of his bid on his debt, and who had no notice of the wife's separate interest. In the case of *Ullmann v. Jasper*, 70 Tex. 447, 7 S. W. Rep. 763, it was held that where land is purchased for the separate estate of his wife, partly on time, even though the note of the husband was given for the deferred payment, if it was understood that payment was to be made out of the separate means of the wife, and the transaction was in good faith, the land became her separate estate. We might multiply authorities upon this point, but we deem it unnecessary. The right of a married woman to buy property for part cash and part notes, where the payments are to be made out of her separate estate, is now too firmly established to be called in question. *McBride v. Bangus*, 65 Tex. 174; *Matlock v. Glover*, 63 Tex. 239; *Schuster v. Jewelry Co.*, 79 Tex. 179, 15 S. W. Rep. 259; *Ullmann v. Jasper*, 70 Tex. 446, 7 S. W. Rep. 763; *Evans v. Welborne*, (Tex. Sup.) 12 S. W. Rep. 230. In this case the good faith of the transaction was fully established by the testimony, and by the verdict of the jury and findings of the court. We believe that justice was done to all parties by the judgment, and it is affirmed.

CLARK v. GOINS.

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

HOMESTEAD—DESCENT—CONSTITUENTS OF FAMILY.

1. D. lived with her grandmother, who had been deserted by her husband, on premises which were the grandmother's separate property, and held by her as a homestead. Her grandmother had cared for her as her own child from infancy, while her own mother, the grandmother's daughter, being also deserted, had been unable to provide her a home, but had worked around from house to house. *Held*, that D. was a constituent member of her grandmother's family, and could, on the latter's decease, continue to use the homestead.

2. The property vested in D.'s mother as legal heir, free from deceased's debts, and subject only to D.'s right of occupation, and D.'s

mother had a right to object to the approval of a sale of the premises by deceased's administrator.

Appeal from district court, Kaufman county; Anson Rainey, Judge.

Petition of Green J. Clark, administrator of the estate of Betsey Hill, deceased, for confirmation of sale of real estate. Petition granted, and decree entered. Deceased's daughter, Babe Goins, appealed to the district court, where the decree was reversed. The administrator appeals. Affirmed.

Clark & Morrow, for appellant. Manion & Huffmaster, for appellee.

Conclusions of Fact.

FINLEY, J. (1) That the south half of block No. 33 in the town of Kaufman is the separate estate of Betsey Hill, and that it was used and occupied by her as a homestead at the time of her death. (2) That said Betsey Hill departed this life intestate, in Kaufman county, about August, 1889, and that she owned no other property than said homestead, and that her estate is insolvent. (3) That the deceased left surviving her a constituent member of her family at the time of her death, to wit, Daisy Goins, her granddaughter, about 12 years old, who had lived with her as a member of her family from infancy, receiving from her support in the way of food, clothing, schooling, medical attention, and in all respects was treated as her own child. The mother of the child was a married woman, but her husband had deserted her a number of years before the death of Betsey Hill, and she had to work about from place to place for a living for herself, and was not able to properly provide for the child. (4) That Jerry Hill was not a constituent member of the family at the time of the death of Betsey Hill, because he had previously, willfully and without just cause, deserted her and the home without intention of returning, and was not living with her at the time of her death. (5) Babe Goins was a married daughter, not living with her mother at the time of her death, and was not a constituent member of the family at that time.

Conclusions of Law.

1. The surviving constituent member of the family, to wit, the granddaughter, Daisy Goins, was entitled to continue the use of the property as a homestead, and it was not subject to administration.

2. There being a surviving constituent of the family at the death of Betsey Hill, the legal title to the homestead vested in appellee, the only child, free from the debts of the mother, and subject only to the rights of the grandchild to use and occupy it as a home, and she had the right to interpose objection to the approval of the sale. *Brau v. Von Rosenberg*, 76 Tex. 522, 13 S. W. Rep. 485; *Childers v. Henderson*, 76 Tex. 667, 13 S. W. Rep. 481; *Roco v. Green*, 50 Tex. 488;

Hall v. Fields, 81 Tex. 555, 17 S. W. Rep. 82; Duke v. Reed, 64 Tex. 705. The judgment should be affirmed, and it is so ordered.

RAINEY, J., not sitting.

BROWN et al. v. RECORD et al.

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

DEATH BY WRONGFUL ACT—ACTION AGAINST RECEIVER.

A receiver is not a "proprietor, owner, charterer or hirer," within Rev. St. art. 2899, giving a right of action for injuries resulting in death, caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, or by the negligence of their servants or agents. Turner v. Cross, 18 S. W. Rep. 578, 83 Tex. 218, followed.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action by Susan Record and others against John C. Brown and another, receivers. There was judgment for plaintiffs, and defendants appeal. Reversed.

F. H. Prendergast, for appellants.

RAINEY, J. The appellees, surviving wife and children, bring this suit to recover damages alleged to have accrued to them by the negligent killing of J. S. Record, husband and father. He was killed by a train on appellant's road, while being operated by J. C. Brown and — Sheldon as receivers of the Texas & Pacific Railway Company. In the court below a judgment was rendered upon a verdict of the jury against appellants, from which an appeal was taken. Appellees made no appearance here, and the cause has been submitted by appellants on a suggestion of "fundamental error." The evidence shows that the death of J. S. Record was caused by being run over by a train of cars on said railroad while being operated by Brown and Sheldon, receivers. The receivers were discharged, and a recovery is sought against the railroad company, on the ground that the earnings, while in the hands of the receivers, were applied to the betterment of the railroad. In the case of Turner v. Cross, 83 Tex. 218, 18 S. W. Rep. 578, in an able and lengthy opinion by Stayton, C. J., it is distinctly held that receivers cannot be held liable for injuries resulting in death, under article 2899, Rev. St.,¹ nor can the property of the company be subjected to the payment of such a claim, after the discharge of the receivers, because the earnings, while the road was in the hands of the receivers, had been applied to the betterment of said road. Yoakum v. Selph, 83 Tex. 607, 19

¹ Rev. St. art. 2899, gives a right of action for injuries resulting in death, caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, or by the negligence of their servants or agents.

S. W. Rep. 145; Railway Co. v. Collins, 84 Tex. 121, 19 S. W. Rep. 365. The error suggested fully appears, and is fundamental. The cause is reversed and remanded.

HEINZE et al. v. MARX et al.¹

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

SALE—RESCISSION FOR PURCHASER'S FRAUD—RES JUDICATA.

1. An election to rescind a sale of goods for the purchaser's fraudulent representation as to financial standing is clearly manifested by the seller when he institutes the statutory proceeding of claim and delivery, by filing the claimant's oath and bond, and retaking the goods, as provided by Sayles' Civil St. arts. 4822-4847; and the fact that the nature of the seller's claim or title is not disclosed until the issues are tendered is immaterial.

2. Where a seller of goods has disaffirmed the sale for the purchaser's fraud, by instituting proceedings for the recovery of the goods, the fact that he afterwards obtains a judgment against the purchaser for the value of the balance of the goods, which the purchaser had wrongfully disposed of, and which could not be found, does not estop him from asserting title to the goods retaken, as against other creditors of the purchaser, not parties to the action in which such judgment for value was obtained.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action by M. Marx and others against Otto Heinze & Co. to recover certain goods which defendants had taken into their possession in claim and delivery proceedings against Munzeshelmer & Klein, who were indebted to both parties in the action. From a judgment in plaintiffs' favor, defendants appeal. Reversed.

Henry & Henry and Crawford & Crawford, for appellants. Scott, Levi & Smith and Todd & Hudgins, for appellees.

FINLEY, J. This is an action for the trial of the right to property. The original affidavit and claim bond were destroyed by the burning of the courthouse of Bowie county, and have been substituted by an order of the court. On August 29, 1887, Leon & H. Bhum instituted suit by attachment in the district court of Galveston county against Munzeshelmer & Klein for \$19,774.00, and on the same day M. Marx instituted his suit in the district court of Galveston county against the same defendants by attachment for \$20,000, and on the same day Marx instituted another suit in the district court of Galveston county against Munzeshelmer & Klein and one J. Marx for \$11,000. In each of these suits, writs of attachment were issued to Bowie county, and were by the sheriff of said county, on August 30, 1887, levied on the goods in controversy as the property of Munzeshelmer & Klein. September 7, 1887, the appellants, Otto

¹ Rehearing pending.

Heinze & Co., filed their affidavit and claim bond in the sum of \$3,019.86, being double the value of the property claimed as assessed by the sheriff, which bond and affidavit were duly returned into court, filed, and docketed. In due course, each of said suits in the district court of Galveston county was reduced to judgment, and attachment liens foreclosed. In the suit for \$20,000 the judgment was satisfied by the proceeds of other property attached, and the suit of Marx for \$11,000 was reduced, by the proceeds of property attached, to the sum of \$6,188.60. The judgment in favor of Leon & H. Blum against Munzesheimer & Klein for \$20,042.39 is wholly unpaid.

Plaintiffs tendered issues. Otto Heinze & Co., appellants, joined issue, and claimed title to the goods levied upon because Munzesheimer & Klein purchased the goods from appellants with no intention of paying for the same, and for the purpose of defrauding appellants, and upon the false and fraudulent representation that they were perfectly solvent, when in fact they well knew that they were insolvent and on the eve of failing in business; that said goods and other large quantities of merchandise were obtained on credit from appellants and others with no intention of paying for the same, but with the intent and purpose of placing them within the reach of fictitious creditors of Munzesheimer & Klein, living in Galveston and Texarkana; that upon the eve of their failure, and with the view of having the goods attached, Munzesheimer & Klein purchased on credit, from appellants and other merchants, a great many thousand dollars worth of goods, with the intention of defrauding appellants and other merchants, and delivering the goods to other persons. Appellants say that as soon as they heard of the failure of Munzesheimer & Klein they filed affidavit and bond, and received from the sheriff so many of the goods sold by them to Munzesheimer & Klein as could be identified and found; that said goods were obtained by fraud and swindling, and the title thereto never passed to Munzesheimer & Klein, and were not subject to the attachments. March 23, 1891, appellees filed a replication, denying all of appellants' allegations, and pleading that appellants on, to wit, September 15, 1887, sued Munzesheimer & Klein in the district court of Lamar county on the contract for the sale of the goods which they seek in this claim suit to avoid; that in said suit an attachment was issued and levied upon property sufficient to satisfy the judgment which was rendered in the case; and that the judgment is now in full force and effect, —wherefore appellees say that the appellants are estopped from relying upon matters set up to avoid the original sale of the goods. April 2, 1891, the cause was tried by the court, and judgment rendered against the claimants and the sureties upon their claim-

ant's bond for \$1,509.93, the assessed value of the goods, with interest from September 7, 1887, the date of the claim bond, and \$150.90 damages. The judgment sets out a list of the goods taken under the claim bond. The appellants in open court excepted, and gave notice of appeal, 10 days being allowed in which to file a statement of facts.

The court filed its conclusions of facts, as follows: "(1) That Munzesheimer & Klein induced the defendants in the above styled and numbered cause to sell them (M. & K.) the goods involved in the trial of the right of property in this cause by making false and fraudulent representations to them as to their pecuniary circumstances and financial status. (2) That Munzesheimer & Klein were wholly insolvent at the time they purchased said goods from defendants herein, and they made false and fraudulent representations to the defendants, with the view and intent to induce these defendants to sell these goods to them, (M. & K.) and these defendants sold these goods to them, relying on and believing said representations so made to them to be true at the time they were made and the goods were sold. (3) That they made statements to these defendants to the effect that they (M. & K.) were perfectly solvent, and had assets in excess of their liabilities amounting in value to more than \$100,000; that these statements were made with the view and for the purpose of purchasing these goods from these defendants on credit, and that the same were in fact false and untrue; and that the said Munzesheimer & Klein never intended to pay these defendants for these said goods at the time they purchased them on credit. (4) That Leon & H. Blum knew and were cognizant, at the time these goods were purchased by Munzesheimer & Klein, of all the facts in the three foregoing findings, and knew that Munzesheimer & Klein were wholly insolvent at that time, and that Munzesheimer & Klein were defrauding and swindling these defendants out of these said goods, and bringing said goods to Texarkana in order for Leon & H. Blum and other creditors to run attachments upon, and that Leon & H. Blum were lying in wait to seize these goods, but that Leon & H. Blum never intentionally induced these said sales to be made to Munzesheimer & Klein for the purpose of defrauding these defendants. (5) That after these defendants filed their affidavit and claim bond in this court, claiming title to these goods, and attempting to avoid and rescind said contract of sale on the ground of fraud perpetrated by Munzesheimer & Klein, they instituted suit in the district court of Lamar county, Texas, against said Munzesheimer & Klein, to enforce the collection of their debt against them (Munzesheimer & Klein) on their said contract of sale, and sued out an attachment, and caused the same to be levied on some of the identical

same goods they sold Munzesheimer & Klein, and prosecuted said suit to judgment, which judgment is now in full force and effect."

The court's conclusion of law was as follows: "The defendants are estopped from rescinding said contract of sale on the ground of fraud, because they have elected to sue on the contract of sale, and have prosecuted said suit to final judgment in the district court of Lamar county, Texas."

Appellants' assignments of error, which raise the vital questions necessary to be decided, challenge the correctness of the fifth conclusion of fact, and the conclusion of law upon the findings of fact, filed by the lower court. The fifth finding of fact is not the fair and legitimate deduction from the evidence. The evidence clearly and unequivocally established that after appellants filed their affidavit and claim bond, and obtained possession of the goods in controversy, they instituted suit in Lamar county for the value of the balance of the goods not retaken under claimants' oath and bond. The suit in Lamar county was based upon the account for the entire bill of goods, amounting, in the aggregate, to \$2,869.50; but there was a credit upon the account of \$1,204.74, stated to be "the value of certain goods taken back," and the items appearing in the account of the goods which had been taken in the claim proceedings were clearly identified by exhibit and the affidavit proving the account. The goods in controversy in this suit were not sought to be recovered for in the Lamar county suit; no recovery was sought or had beyond the value of the goods which appellants were unable to find and retake in the claim proceeding. The judgment rendered in Lamar county for the value of that portion of the goods purchased of appellants by Munzesheimer & Klein which had not been retaken, it is admitted, was fully satisfied by proceeds from sale of goods attached in that suit. The parties to the Lamar county suit were Otto Heinze & Co., plaintiffs, and Munzesheimer & Klein, defendants; and the issue involved and determined by the judgment was the value of the goods not recovered by appellants in the claim proceeding, in the form of a suit upon account for such balance. With these additional conclusions of fact, the findings of the lower court of fact are approved and adopted by this court, except the fourth finding, relating to the fraudulent conduct of Leon & H. Blum, which we think immaterial to the decision of the case.

The other and main point for determination is the correctness of the legal conclusion pronounced upon the facts by the trial judge, that "the defendants are estopped from rescinding said contract of sale on the ground of fraud, because they have elected to sue on the contract of sale, and have prosecuted said suit to final judgment in the district court of Lamar county, Texas." The

findings of fact by the judge which are unsaluted by assignments of error show that, at the date of the seizure of the goods by appellees under writ of attachment, the goods had been sold to Munzesheimer & Klein by appellants, but under circumstances which entitled appellants to rescind the sale if they chose to do so. They had, under the law, the option of rescinding the contract of sale and proceeding by appropriate remedy to recover their property, or of affirming the sale and pursuing Munzesheimer & Klein upon the contract debt. If they elected to rescind the contract of sale and pursue the property to recovery, the effective and appropriate legal remedy open to them was the statutory proceeding of the trial of the right of property under claimant's oath and bond; the goods having been seized by appellees under attachment. Sayles' Civil St. tit. 97, arts. 4822-4847, inclusive. It is contended by appellees that the filing of the claimants' oath and bond, and the retaking of the goods, were not alone sufficient to show an election to rescind the contract of sale, for the reason that the nature of appellants' claim or title to the property was not disclosed in the affidavit or bond, and therefore that there was no election to rescind until the issues were tendered, in which appellants stated the grounds upon which they sought to recover back the property. This proposition, we think, is wholly untenable. There was no other contract between appellants and Munzesheimer & Klein in relation to these goods except a contract of sale. By the filing of the affidavit and bond, appellants asserted title in themselves, and thereby repudiated the sale, which would have conveyed title to Munzesheimer & Klein had it been legal and binding upon appellants. The statute under which appellants proceeded does not require that the nature of the claim or title to the property should be stated, and it is not perceived that any good reason exists why appellants should have given more specific notice of their repudiation of the sale than was necessarily contained in the statutory proceedings adopted. In *Morris v. Rexford*, 18 N. Y. 556, it is said: "If, then, plaintiff had a right to disaffirm the delivery, that right was effectually asserted by the issuing of writs of replevin, and causing the property to be taken and delivered on those writs." The levy of appellees' writ of attachment upon the goods in no way affected appellants' right to disaffirm the sale and take back the goods, and no additional or more specific acts were required of appellants in rescinding the sale by reason of such levy.

The court below, in its conclusions of fact, correctly found that the filing of the claimants' oath and bond was an election by appellants to rescind the sale; and this finding is not attacked by any assignment of error. What effect, then, upon this case of the trial of the right of property, could the sub-

sequent suit and judgment rendered in Lamar county have? The appellees were not parties to that suit; they had no interest in the subject-matter involved therein; they did not rely and act on the conduct of appellants in that suit, or the recitals contained in the judgment therein. The judgment was *inter partes*, and binding only upon the parties and their privies. 1 Herm. Estop. §§ 129, 135, 136, 138, 154, 169, 170. In *Medlin v. Wilkins*, 60 Tex. 414, it is said: "The general rule that judgments are not binding on strangers is so far mutual that strangers cannot take advantage of the same to affect the parties to them. . . . Where strangers have acted upon the faith of recitals in a judgment or decree to their injury, then, ordinarily, they can assert it as an estoppel against the parties." Had the property involved in this suit, upon which appellees had an attachment lien, also been involved in the Lamar county suit, or had they acted upon the recitals in the Lamar county judgment in causing their levy to be made and lien fixed on the property, a different question would be presented for decision. The Lamar county suit could in no possible way affect injuriously the rights or interests of appellees. Their attachment was levied before the institution of that suit; the property levied upon was in no sense affected by it, and it was certainly a matter of no concern to them if appellants followed up the common debtor, and recovered compensation for the balance of their goods which they could not discover and take in the claim suit. We fail to perceive any sound reason why appellees should be benefited by the Lamar county suit, to appellants' injury. The right to rescind the contract of sale existed at the time the statutory claim was made. The election to rescind was made, and the right to maintain this suit was fixed by the filing of the claimant's oath and bond. Can it be said that this right was extinguished by appellants' effort, under a different form of action, to recover the value of the balance of the goods which the debtors had wrongfully disposed of, and which could not be found and recovered? When appellants elected to rescind the contract of sale, and, in consummation of that election, instituted the claim proceeding to recover the goods, the contract of sale was as if it had never existed, and no act of appellants alone could restore its existence. The same acts originally necessary to create the contract relation would be necessary to restore the contract of sale rescinded. *Moller v. Tuska*, 87 N. Y. 166; *Powers v. Benedict*, 88 N. Y. 605.

It is not, then, a question of remedy in this suit, but a question whether the appellants are estopped from asserting title in this suit by reason of the Lamar county judgment rendered upon the contract of sale for the value of other and different items of goods. We have been cited to no authority, and have been unable to find any, which holds

that a suit of a creditor to recover goods fraudulently obtained cannot be maintained for the reason that he subsequently brought suit and obtained judgment upon account for the value of a balance of goods sold at the same time, which he could not find and retake, and is thereby estopped from pursuing the property. We do not think the general principles of estoppel sanction the proposition, and the cases to which we have been cited by appellants negative the doctrine. *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. Rep. 201; *Powers v. Benedict*, 88 N. Y. 605; *Kinney v. Kiernan*, 49 N. Y. 165.

In this state, technical forms of action have been abolished. It is only required that the facts constituting the cause of action shall be stated in the pleading in order to obtain the appropriate relief either in law or equity; and it would seem to be out of harmony with the spirit of our system to hold one estopped in a suit by the form of action adopted in another suit, when he would not have been estopped by a truthful recital of the facts constituting his cause of action. Such is this case. Had the appellants in the Lamar county suit alleged that the goods were obtained by the established fraudulent acts of the debtors, and that they were worth the price agreed to be paid for them, a recovery would have been had for their value, and the suit would have been entirely consistent with the claim proceeding. The contract of sale in question specified each item of goods sold, and the price to be paid for each item; and while they were all sold at the same time, and constituted one bill or order, it may well be questioned if it was not such a contract as could be rescinded in part and affirmed in part. *Manufacturing Co. v. Wakefield*, 121 Mass. 91. But in our opinion it does not become necessary to so hold in this case, and we leave the question open for future determination. We are of opinion that the conclusion of law upon the facts found by the trial court was erroneous, and that the judgment should be reversed, and here rendered for appellants; and it is accordingly so ordered.

MANHATTAN CLOAK & SUIT CO. v.
MARX et al.¹

(Court of Civil Appeals of Texas. Sept. 5,
1893.)

Appeal from district court, Bowle county; John L. Sheppard, Judge.

Action by M. Marx and others against the Manhattan Cloak & Suit Company to recover certain goods which defendant had taken into its possession in claim and delivery proceedings against Munzeshelmer & Klein, who were indebted to both parties in the action. From a judgment in plaintiffs' favor, defendant appeals. Reversed.

¹ Rehearing pending.

Henry & Henry and Crawford & Crawford, for appellant. Scott, Levi & Smith and Todd & Hudgins, for appellees.

FINLEY, J. This is a companion case to that of *Heinze v. Marx*, 23 S. W. Rep. 704, (this day decided.) In this case the particular items of goods received back in the claim suit, amounting in value to \$1,035, did not appear at all on the account sued on in Lamar county. The original amount of the account was reduced, by taking out these items, from \$2,457.50 to \$1,422.50, the amount sued for and recovered. We do not think this difference in the facts of material importance, and are of the opinion that the principles announced and applied in the *Heinze Case* are applicable to this case. The judgment of the lower court is therefore reversed, and here rendered for appellants.

KRAUSE et al. v. MARX et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

RES JUDICATA—JUDGMENT FOR PRICE OF GOODS—DISAFFIRMANCE OF SALE.

Though a seller of goods has shown his intention to disaffirm the sale for the purchaser's fraud, by instituting proceedings for the recovery of the goods, a subsequent judgment obtained by him against the purchaser for the value of all the goods sold estops him from asserting title to the goods retaken, as against other creditors of the purchaser.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action by M. Marx and others against O. K. Krause & Co. to recover certain goods which defendants had taken into their possession in claim and delivery proceedings against Munzeshelmer & Klein, who were indebted to both parties in the action. From a judgment in plaintiffs' favor, defendants appeal. Affirmed.

Henry & Henry and Crawford & Crawford, for appellants. Scott, Levi & Smith and Todd & Hudgins, for appellees.

FINLEY, J. This is a companion case with *Heinze v. Marx*, 23 S. W. Rep. 704, and *Manhattan Cloak & Suit Co. v. Marx*, Id. 707, (this day decided.) There is but one material difference in the facts of this case from the others named, but that difference is of such gravity as demands a different disposition of the case. In this case, appellants brought suit in Lamar county on their entire account against Munzeshelmer & Klein, except \$180 worth of goods, which were stopped in transit, without either giving credit or deducting the items of goods taken back in the claim suit, and recovered judgment for the full amount sued for. This judgment had been fully satisfied at the time of the trial of this cause, and thereby appellants' right to the property in question had been released

and extinguished. The judgment of the lower court should be affirmed, and it is so ordered.

POST v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

RAILROAD COMPANIES—DANGEROUS DEPOT PREMISES—SCOPE OF SERVANT'S EMPLOYMENT.

1. A railroad company is under no obligation to keep the platform about its depot in safe condition as against a boarding-house keeper, who goes to the depot to meet an incoming train for the purpose of securing a boarder.

2. The fact that the boarding-house keeper was present at the depot by invitation of the telegraph operator employed by the railroad company does not render the latter liable, in the absence of any showing that the operator was acting within the scope of his employment in extending such invitation.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action by Samuel Post against the Texas & Pacific Railway Company for personal injuries. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Vaughan & Leary, for appellant. F. H. Prendergast, for appellee.

Conclusions of Fact.

RAINEY, J. On the 13th day of January, 1890, at night, appellant went to the depot of appellee to meet a gentleman expected to arrive on the train. B. Temple, an employee of appellee, had informed him that a new operator was to arrive, and wanted appellant to secure him as a boarder, and appellant was there for that purpose, and while there received the injuries complained of. He went to the depot before dark, and remained until after dark. He lived about 75 yards from the depot, and was familiar with the premises. Around the depot is a platform about four feet high, around which there is no railing or banisters. There was also a low platform between the high one and the track, on which passengers alighted from the train. When the train arrived, appellant was on the low platform, and after its departure he went into the depot. On leaving the depot he went out on the platform, from which he fell, and injured himself very severely. The way he was going at the time of falling was not in the direction of his home. At the time it was dark, and there were no lights by which he could see. He was 77 years old, and could not see well. He was at the depot on business pertaining solely to himself, in which the railway company was in no way connected. Knowing the condition of the platform, he being 77 years of age, and there being no light, it was negligence on his part which contributed to his injuries.

It is not shown to be within the scope of B. Temple's agency to invite boarding-house

keepers to the depot to solicit customers for their houses, so as to bind the railway company in any way.

Conclusions of Law.

The appellant was at the depot solely on his own business, with which the railway company was in no way concerned, and was under no duty to appellant to keep its depot in a safe condition. If it can be said that appellant was at the depot by the invitation of said Temple, there is nothing to show that such was within the scope of his authority, so as to bind the railway company. The appellant was well acquainted with the premises, and contributed to his own injury. There is no conflict in the testimony, and the case made by appellant does not enable him to recover. The instruction of the court to the jury to find for the appellee was proper in this case, and the judgment of the district court is affirmed.

MONTROSE et al. v. FANNIN COUNTY BANK.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

PRINCIPAL AND SURETY—JUDGMENT—PROTECTION OF SURETY—COSTS OF APPEAL.

1. A judgment against the principal and sureties on a note should protect the sureties by directing that the execution be first levied on the principal's property, as required by Rev. St. art. 3653.

2. An appellant who, on proper motion, could have had the judgment corrected below, and thus rendered the appeal unnecessary, will be taxed with the costs of the appeal, in addition to those rendered against him below.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Action by the Fannin County Bank against T. D. Montrose and others on a promissory note. From a judgment in plaintiff's favor, defendants appeal. Modified.

B. F. Looney, for appellants.

LIGHTFOOT, C. J. This was a suit by appellee against appellants upon a promissory note for \$1,100, with interest at the rate of 12 per cent. per annum, and 10 per cent. attorney's fees on the amount of the principal and interest. Judgment was rendered below in favor of appellee for the debt and interest and attorney's fees against all of the defendants, and in favor of defendants Boyd, Harrison, and Popper, as sureties, against the defendant Montrose, principal, for any sum of money that they may pay on such judgment. All of such defendants have appealed. There is no statement of facts in the record, and there was no motion for new trial or in arrest of judgment. The only assignment of error that we deem it necessary to notice is as follows: "(3) Because the court erred in its judgment in not making an order directing the sheriff to levy

execution first upon the property of the principal, T. D. Montrose, subject to execution, and situated in Hunt county, before a levy shall be made upon the property of the sureties, as required by the statutes of Texas." The court below having in its judgment found that Boyd, Harrison, and Popper were sureties, the judgment should have been rendered so that execution should have first been levied upon the property of the principal. Rev. St. art. 3663. This order would no doubt have been made by the court below if the appellants had there called the attention of the court to the question by motion or otherwise. As was said by our supreme court in the case of Helm v. Weaver, 69 Tex. 145, 6 S. W. Rep. 420: "As the appellant, upon proper motion, could have had the judgment corrected below, and rendered an appeal here unnecessary for that purpose, he should be taxed with the costs of this court, in addition to those rendered against him below." The judgment is reversed, and here reformed so that plaintiff below (appellee) shall recover judgment against appellants and their sureties for the amount of his note and interest and attorney's fees, and all costs of this court and the court below; and that the sheriff of Hunt county be directed to levy the execution first upon the property of appellant T. D. Montrose, in Hunt county, and protecting the sureties, as required by Rev. St. art. 3663.

GARDNER v. BURKHART et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

PUBLIC LANDS—TITLE FROM STATES—HOMESTEAD ENTRIES.

1. A single man, with his brother, resided upon a 160-acre tract of land for more than three years, under the pre-emption laws, the land having been surveyed, and the survey returned to the general land office. He then divided with his brother, continuing to reside on the 80-acre tract, and, a year afterwards, married. *Held*, that the division did not affect his right to the 80 acres as his separate property, and his wife acquired no community interest therein.

2. Defendant, after he had acquired the right to 80 acres of land by virtue of a homestead entry and residence thereon, married, and afterwards filed an application for 135 acres, including the original 80-acre tract, and received a patent therefor. *Held*, that this application did not constitute an abandonment of the original claim to the 80 acres, so as to destroy his separate right thereto, and vest the whole in the community estate.

Appeal from district court, Hopkins county; E. W. Terhune, Judge.

Action by Mollie Burkhardt and others against Edward Gardner. From a judgment for plaintiffs, defendant appeals. Reversed.

The other facts fully appear in the following statement by **LIGHTFOOT, C. J.**:

This suit was brought by appellees, Mollie Burkhardt and husband, to recover an interest in 160 acres of land which she claims

by inheritance from her deceased mother, and to cancel certain patents. There was a judgment for plaintiff below for three-eighths of 80 acres, subject to the homestead claim of appellant, Edward Gardner, from which he has appealed. There is no brief or appearance filed by appellees, and under rule 40 (20 S. W. Rep. ix.) we are inclined to regard the brief of appellant as a proper presentation of the case. The following assignments of errors will be sufficient to present the views we take of the case: "(2) The court erred in his second conclusion of law, in holding that the application for a homestead survey by defendant on March 3, 1868, and the survey made thereunder April 13, 1869, were void, and that the same were abandoned by him in 1870, as said finding is not warranted by the facts as found by the court. (3) The court erred in his third conclusion of law, in finding that on the 15th day of March, 1871, defendant had made no effort to appropriate the land in controversy, and that the first effort made by him to appropriate it was on July 12, 1871, as the same is contradicted by the facts as found by the court." "(6) The court further erred in his conclusion of law, in holding that the east 80 acres of land in controversy was community property between defendant and his first wife." The facts were substantially as follows: Ed Gardner, (appellant,) who was an adult, single, white man, entered upon the 160 acres of land in controversy, and made application therefor under the homestead laws of the state on March 3, 1868. At the time of such application, Ed Gardner and his brother John, who was also a single man, were in actual possession, built a dwelling house in the center of the tract, and inclosed and put into cultivation land on each side of the house, and in 1869 the land was surveyed by Ed Gardner, and the field notes returned to the general land office. The two brothers lived upon and cultivated the land in 1868, 1869, and 1870, and in the last-named year divided it into two 80-acre tracts by running a line through the house, John taking the west 80 acres, and Ed the east, each continuing to live in the house, and to cultivate and claim his respective tract. On March 15, 1871, Ed Gardner married a widow, who had, at the time of such marriage, an infant daughter, Mollie, (appellee,) who lived on the place with her mother and stepfather until her mother died, December 31, 1872, and then continued to live in the place with her stepfather, Ed Gardner, until her marriage with Mr. Burkhart, November 2, 1887. On July 12, 1871, Ed Gardner, as the head of a family, made another application for the survey of the eastern 80-acre tract, together with 55 acres more adjoining it on the east. This 135 acres was surveyed for him October 25, 1872. He was married again in August, 1873. He made the requisite proof of occupancy, etc., and patent was issued for the 135 acres May 10, 1876,

and he has ever since used and occupied it as a home. The west 80 acres of the original 160-acre tract was patented to John Gardner, August 23, 1876. After Ed Gardner made his proof under the survey of the 135-acre tract, there was some mistake in the land office under which the patent was issued on November 18, 1874, for the original 160 acres; but this was canceled, and the patents correctly issued, in 1876.

J. A. B. Putman, for appellant.

LIGHTFOOT, C. J., (after stating the facts.) Under the facts, the first question presented for our consideration is this: Did the mother of appellee, the first wife of Ed Gardner, have a community interest in the east 80 acres of the land in controversy? At the time of her marriage with appellant, March 15, 1871, he had resided upon the land for more than three years, cultivating, using, and claiming it as his own under the homestead laws of the state, having filed his application therefor March 3, 1868, and it having been surveyed, and the field notes returned to the general land office, in 1869. It is true that in 1870, the year before his marriage, he had divided the land with his brother John, and from that time on only claimed the east 80 acres. But was his claim to that affected in any manner by this division? We think not; so that his right to this 80-acre tract at the time of his marriage cannot be questioned. He had up to this time done everything that the law required to secure him the land. After his marriage, desiring to secure, also, 55 acres more adjoining him, he filed application on July 12, 1871, as the head of a family, for the tract of 55 acres, with his original 80 acres, making 135 acres, upon which patent was afterwards issued. Did the filing of this application constitute an abandonment of his original claim to the 80 acres so as to destroy his separate right thereto, and vest the whole 135 acres in the community estate? He had continued to reside upon and claim said land, and there is no evidence of such an intention, unless the filing of the application so as to include the additional land can be construed into an abandonment of his original claim. We do not think that it can have that effect. *Miller v. Moss*, 65 Tex. 179; *Cravens v. Brooke*, 17 Tex. 274; *Turner v. Ferguson*, 58 Tex. 10; *Jennings v. De Cordova*, 20 Tex. 508; *Railway Co. v. Thompson*, 65 Tex. 186; *Thornton v. Murray*, 50 Tex. 161; *O'Neal v. Manning*, 18 Tex. 403. By the act of November 12, 1866, it was enacted "that all white persons being heads of families or twenty-one years of age * * * who may hereafter settle upon and improve a portion of the vacant public domain * * * shall have the privilege of locating and appropriating a tract of such vacant land, not to exceed 160 acres," etc. *Sayles' Early Laws Tex.* art. 3376. The appellant, being 21 years of age, entered upon

the original 160-acre tract under this law, and made the improvements and settlement required by the statute, and under such entry and settlement was entitled to appropriate the whole tract of land. Under the constitution of 1869 (article 10, § 8) all heads of families were given 160 acres of land, and single persons, 21 years of age, 80 acres; but appellant's settlement and entry having been made March 8, 1868, and his land surveyed and the field notes returned to the general land office, neither did this constitution, nor any subsequent legislation, propose to take away his rights. On the contrary, such rights are expressly recognized and preserved, and by the act of March 24, 1871, it is provided that "any person who has occupied any portion of the public domain not exceeding 160 acres, in good faith, under any of the pre-emption laws of this state for three years or longer, shall be entitled to the same as a homestead," etc. So that it is clear that if the appellant had not voluntarily divided the land with his brother John in 1870, he pre-empting the west 80 acres, and appellant the east 80, there would have been nothing to prevent appellant from obtaining his patent to the whole tract. The act of division could not deprive him of the portion retained. The 80 acres originally located and improved by Ed Gardner, being the only tract in controversy in this suit, we hold that it was his separate estate, and that the mother of appellee Mollie Burkhart had no community interest in it, and no interest passed to appellee. The judgment below is reversed, and here rendered in favor of appellant.

CULLUM v. PRICE et ux.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

HOMESTEAD—EXTENT—DEED—NONJOINER OF WIFE.

1. Where the owner of a block, on one end of which he has built a home, divides the rest into lots, and sells one of them, dividing the residence lot from the others, the latter are not part of the homestead.

2. A deed by a married man of land not his homestead will convey title without his wife's joining therein.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action of trespass to try title by John C. Price and wife against B. W. Cullum. From a judgment for plaintiffs, defendant appeals. Reversed.

Henry & Henry, for appellant.

RAINEY, J. John C. Price and wife, appellees, brought this suit in 1888, to recover of B. W. Cullum, appellant, the land in controversy, the action being trespass to try title, and for damages for use and occupation. On October 16, 1890, appellant filed his first amended original answer, contain-

ing a plea of not guilty and alleging that he was in peaceable and lawful possession of the land sued for when appellees instituted their suit, and that he owned the same in fee simple; and that, after the institution of this suit by appellees, he was unlawfully ejected from said land and premises. Appellant prayed judgment for the recovery of said land, and for rent for use of same at \$10 per month from September 1, 1889. He also alleged that appellees had executed and delivered a valid deed of conveyance to A. C. Milwee (appellant's grantor) before appellant purchased said land, and that said deed had been lost or destroyed, and he asked the court to grant a decree re-establishing said deed. On October 16, 1890, appellees filed their first supplemental petition, with a general demurrer and a plea of not guilty. Appellees, on October 16, 1890, recovered judgment for said land and premises, and \$36 for use and occupation. On October 17, 1890, appellant filed a motion for a new trial, which was overruled by the court. Appellant excepted, and gave notice of appeal to the supreme court. Appellees claimed that the land was part of their homestead, and that the wife had not executed or signed the deed thereto. The court found this claim to be good, and rendered judgment for appellees. Appellant complains of this action of the court.

Price bought block J in the town of Texarkana. He improved one end of it, building a home thereon, and living in it with his wife. The balance of said property, which included the lot in controversy, was never improved by him, nor in any manner used in connection with the homestead. But this lot and other lots had been by Price marked off and carved out of block J, and put on the market as urban property. In February, 1882, appellees by deed conveyed to one Valle a lot of ground 50 feet by 140 feet, which completely segregated the land in controversy from the part on which appellees had their residence. In 1883 the vendor of appellant purchased the lot in controversy from Price, improved it, and built thereon. Appellant bought in 1885, took possession, and lived thereon until about 14 months before the trial, when he temporarily moved, leaving a tenant in charge, which tenant was ejected by appellees after suit brought. For nine years prior to moving onto the premises in suit appellees had occupied the part of said land first improved by them, and up to the bringing of this suit had never claimed the premises in suit, nor in any manner interfered with appellant's possession. These facts show that the lot in controversy was not a part of appellees' homestead, and the court erred in so holding. *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. Rep. 110; *Blum v. Rogers*, 78 Tex. 531, 15 S. W. Rep. 115; *Langston v. Maxey*, 74 Tex. 155, 12 S. W. Rep. 27.

There are other errors assigned, but it is

not necessary for them to be noticed, as the foregoing disposes of this case.

There was controversy as to whether or not the wife signed the deed to appellant's vendor. This becomes immaterial under the findings of this court that the lot was not the homestead, for the deed, if made by Price alone, was sufficient to convey title. The judgment of the court below is reversed, and the same here rendered for appellant. This case is decided on the statements made in appellant's brief, there being no brief filed by appellee.

ALLEN v. BRIGHT.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

COMMUNITY PROPERTY—RIGHTS OF SURVIVOR.

A husband, as surviving member of the community subsisting between himself and his deceased wife, has the right to compromise an outstanding claim to the community real estate, and such compromise is conclusive as against the children, especially where the legal title to the land is in the husband, and the claimant is ignorant of the children's equities.

Error from district court, Navarro county; Rufus Hardy, Judge.

Action by H. B. Allen, as administrator, etc., against W. R. Bright, to quiet title to land. There was a judgment in defendant's favor, and plaintiff brings error. Affirmed.

Baker & Prendergast, for plaintiff in error. Bennett Hill, W. R. Bright, and F. N. Read, for defendant in error.

Conclusions of Fact.

RAINEY, J. In June, 1882, in consideration of \$2,250 cash, defendant Bright and one Johnson, by warranty deed, conveyed to John Onstott one-third of a league of land in Navarro county. Onstott took possession of the land; and made valuable improvements thereon. At the time of the purchase he was a married man. His wife's name was Lou. She died in August, 1886. John Onstott died in January or February, 1888. They left surviving them four children. Allen qualified as the administrator of the estate of both John and Lou Onstott. In November, 1886, Eugene Lecompte, claiming to be the heir of the patentee, brought suit against John Onstott for the land, and for use and occupation. The children of Lou Onstott were not made parties to the suit. Bright, recognizing his liability on his warranty, employed counsel to defend the suit, on condition that Onstott would pay one-half the fee. Counsel filed an answer pleading the general issue. Onstott failed to do anything in the premises. Bright then, as president of the Texas Loan Agency, a private corporation, contracted with A. B. Lee, agent of the Lecompte heirs, to purchase said land for said corporation for \$7,084. After this

contract was agreed upon, the answer filed in said suit was withdrawn. In December, 1886, the Lecompte heirs recovered a judgment against Onstott for the land, and for use and occupation the sum of \$1,400. After said judgment was rendered said land was deeded to said loan agency as per the contract theretofore made between Bright and Lee, agent. On the 31st day of January, 1887, a settlement was made between Bright and Onstott of the matters in controversy, as follows: The deed theretofore executed from Lecompte to the loan agency, was destroyed. Lecompte, at the request of the loan agency, executed a deed to said Onstott for 500 acres, being one-third of said land; the consideration expressed in the deed, \$1,100; real consideration, the compromise. Lecompte executed a deed to the loan agency for balance—two-thirds—of said land; consideration expressed, \$12,000; real consideration, \$7,084, theretofore paid. Onstott executed a deed of special warranty to the loan agency for two-thirds of said land; consideration expressed, \$1; real consideration, the compromise. Onstott then leased from the loan agency the said two-thirds of said land for three years at a specified rate. The money judgment against Onstott was also released and discharged by the transactions. On February 12, 1887, said loan agency deeded the said two-thirds of said land by warranty deed to said W. R. Bright, who claimed same at the institution of this suit. At the time Bright and Johnson conveyed said land to Onstott they held same under a tax title. In September, 1888, Allen, in his representative capacity as administrator of the estate of Mrs. Lou Onstott, deceased, brought this suit for an undivided half interest in the one-third league, but on the trial claimed only an undivided half of what remained of said survey after taking 500 acres off the north end thereof, being the 500 acres deeded by the loan agency to John Onstott. Bright knew nothing of Onstott's marital relations. He supposed him to be married, but did not know, and had never heard of his wife's death.

Conclusions of Law.

As between John Onstott and wife, the land was their community property. There being an outstanding claim to the land, and a judgment against John Onstott for the land, and for \$1,400, which was a claim, in part at least, against the community estate of John and Lou Onstott, John Onstott was authorized, as surviving partner of the community, to compromise and settle the matters in dispute; and such compromise is conclusive as against the children, especially so as the legal title to the land was in John Onstott, and said Bright was ignorant of any outstanding equity in the children. The judgment of the lower court is affirmed.

HARVEY et al. v. CARROLL et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

LAND CERTIFICATE—PAROL TRANSFER—PRESUMPTION—DIVORCE—LIMITATIONS—SUSPENSION.

1. A mere declaration by a minor, since deceased, that he wanted his stepmother to have all his father's land, is not sufficient to show a gift by the minor to her of an unlocated land certificate owned by the father at his death.

2. After the lapse of over 40 years, a divorce will be presumed from the fact that a husband separated from his wife, going to another state, and that, several years later, each married again.

3. The effect of the provision in the constitution of 1869 suspending the operation of the statute of limitations from January 28, 1861, until the acceptance of the new constitution by congress, was merely to prevent the suspended period from being taken into account in the computation of the time required by statute to bar an action, and not to restore the disability of coverture, which had been removed by statute. *Ragsdale v. Barnes*, 5 S. W. Rep. 68, 68 Tex. 504, followed.

Appeal from district court, Navarro county; Rufus Hardy, Judge

Trespass to try title by J. Harvey and others against B. F. Carroll and others. From a judgment in defendants' favor, plaintiffs appeal. Modified.

The other facts fully appear in the following statement by LIGHTFOOT, C. J.:

About 1828, Edward Patterson was married to Nancy Jennings, a widow, who lived in Lawrence county, Ala., and who had a son by her former marriage,—A. J. Jennings. They had born to them a son, William F. Patterson, about 1829. About 1835 or 1836, Edward Patterson came to Texas, and there is testimony tending to show that they were divorced in Alabama in the spring of 1838. Edward Patterson was married in Texas to Alethea Brooks in November, 1840, and died in October, 1841, leaving Alethea Patterson as his widow, and his son, William F. Patterson. Nancy Patterson was married to John J. McClosky about 1840 or 1841, and died in 1853, leaving, as her heirs, (plaintiffs,) Sallie J., who afterwards married Harvey, and a son, A. J. Jennings. There was a certificate for one league and labor of land issued February 1, 1838, to Edward Patterson, by reason of his immigration in 1835, under which the 1,285 acres of land in controversy were located in 1853, and patent issued to Edward Patterson in 1855. William F. Patterson died in 1847. Plaintiffs S. J. Harvey and A. J. Jennings claimed that their mother, Nancy McClosky, owned a community one-half interest in the land certificate, and that Edward Patterson owned the other half, and upon his death descent was cast upon his son, William F. Patterson, who died in 1847, leaving his mother, the said Nancy, as his only heir, and that at her death, in 1853, the whole descended to plaintiffs. Defendants claim different tracts, as follows: B. F. Carroll, 42 and 27 acre tracts; H. O. Melton, 86 acres; Emily C. and Henry

Ivey, 221½ acres,—and that each have made valuable improvements, and their specific tracts are set out by metes and bounds; all claiming under titles emanating from Alethea Patterson, the second wife, who had, after the death of Edward Patterson, married A. M. Brooks, and who claimed the certificate as the surviving widow of Edward Patterson, and that William F. Patterson had relinquished all his interest to her. Said defendants also claim under the statute of limitations of 3, 5, and 10 years, and disclaim as to any other part of the land sued for. Defendant John Barnett, on October 14, 1890, filed a disclaimer. The cause was tried October 15, 1890, and the verdict of the jury was as follows: "We, the jury, find for the plaintiffs, land sued for, except as follows: We find for B. F. Carroll, 69 acres; for Mrs. Emily C. Ivey, 291½ acres, [meaning 221½ acres;] and for H. C. Melton, 86 acres,—out of said Patterson survey, and as respectively described in the special answer of said defendants." Upon which the court rendered a judgment that the plaintiffs "do have and recover said land, [without describing it,] but that they take nothing by this suit as to defendants" Carroll, Melton, and Ivey, who each recovers his lands, specifically, by metes and bounds; and all the defendants recover their costs against plaintiffs. Their motion for new trial was overruled, to which plaintiffs excepted, and have appealed.

Jas. B. Goff, for appellants. Simpkins & Neblett, for appellees.

LIGHTFOOT, C. J., (after stating the facts.) The first, second, and fifth assignments of error are as follows: First. "The court erred in admitting, over plaintiffs' objections, the testimony of Alethea Brooks, as recited in the bill of exceptions, viz.: 'That son relinquished to me all his right to the Edward Patterson certificate, saying he wanted me to have all his father had in Texas,'—because the same was irrelevant and incompetent, and did not tend to show a transfer of the Edward Patterson certificate, and because the evidence then before the jury showed that William F. Patterson, the person referred to, was a minor." Second. "The court erred in charging the jury as to William F. Patterson having parted with his interest in the Edward Patterson certificate, there being no legal evidence tending to show that he had parted with the same." Fifth. "The court erred in refusing to give plaintiffs' sixth special charge, that the language used by William F. Patterson, as quoted in the testimony of Alethea Brooks, did not amount to a transfer of his interest in the certificate." All of the three above assignments relate to the claimed relinquishment of William F. Patterson to his stepmother, Alethea Patterson, (afterwards Brooks,) of his interest in the head-right certificate of his father, Edward Patterson, de-

ceased. This testimony was objected to, as shown by the bill of exceptions, because it was irrelevant,—did not show a transfer of William F. Patterson's interest in the certificate,—and because the other evidence showed that he was a minor. An unlocated land certificate is personal property, and may be, under certain circumstances, the subject of a parol sale or gift. The testimony upon this subject is vague and indefinite, and does not give the date or consideration, or any other circumstances of a relinquishment. It was shown that William F. Patterson was 19 or 20 years old when he died, in 1847. The fact that a party who makes a relinquishment, in proper form, is a minor, does not necessarily render it void; but it is only voidable, and subject to be set aside by him after he becomes of age. In view of the fact that the effect of this testimony has been once passed upon by the supreme court in the case of *Harvey v. Carroll*, 72 Tex. 63, 10 S. W. Rep. 334, upon a former appeal, unless there was other testimony supporting it on this trial, it might have been properly excluded. It was weak, indefinite, and not sufficient, either on the theory of a sale or parol gift. If there was a relinquishment in writing, it should have been introduced in evidence, or its absence accounted for. If a parol sale or gift was relied upon, the facts should have been definitely shown, bringing it within the rule in such cases. The mere empty declaration that he wanted his stepmother to have all his father had in Texas was not sufficient. The court, in its charge to the jury, so limited the effect of this statement as to render it harmless, and we cannot see that appellants were in any manner prejudiced thereby.

2. The seventh and ninth assignments will be considered together, and are as follows: Seventh. "The court erred in submitting to the jury the question whether Edward and Nancy Patterson were divorced, and whether said Edward and one Alethea were lawfully married, and in charging in reference thereto; there being no evidence to support said charge, or warrant any charge on these matters." Ninth. "The court erred in refusing to give plaintiffs' special charge No. 5, that, if Edward and Nancy Patterson were husband and wife previous to the date of the alleged marriage of said Edward and Alethea, said marriage was unlawful, and said Alethea acquired no right thereby to the Edward Patterson certificate." After the great lapse of time, and under the circumstances of this case, there was certainly enough testimony to authorize the submission of the question to the jury as to whether there was a divorce of Edward Patterson from his wife Nancy. The parties had separated about 1835 or 1836, and Edward Patterson came to Texas; and they lived separately until about 1840, when Edward married Alethea Brooks in Texas, and near the same time Nancy married John J. McClosky in Alabama. These facts,

alone, have been considered sufficient to raise the presumption of a divorce. See *Harvey v. Carroll*, 72 Tex. 63, 10 S. W. Rep. 334. But in this trial there was additional testimony. An act of the general assembly of Alabama was in evidence, which recited that a decree of divorce had been granted by the circuit court of Lawrence county, Ala., exercising chancery jurisdiction, at the spring term, 1838; and this act dissolved and annulled the marriage, in accordance with the constitution and laws of the state.

3. The eighth assignment of error is as follows: Eighth. "The court erred in charging the jury to find for defendants, under their plea of limitation, unless Mrs. Harvey was a married woman at the time defendants took possession of the land, and that her marriage after the taking possession would not prevent the running of the statute of limitations,—there being no statute of limitations in force either at the date of the taking possession by defendants, or of the marriage of Mrs. Harvey, according to the evidence,—and in refusing to give plaintiffs' special charge No. 1, to the converse of said proposition, and that, on proof of the marriage of Mrs. Harvey in 1867, she is presumed to be still a married woman." It appears from the evidence that in 1857 B. F. Carroll, Sr., bought 160 acres of the land in controversy, placed his deed on record, and improved and occupied the land, and that it has ever since been occupied by him, and his heirs and vendees. Mrs. Harvey was married to her complaint H. T. Harvey, November 26, 1867. In 1864 the 225-acre tract was bought, under deeds duly recorded, and it has been improved, and ever since held, by a portion of the defendants and their vendees. As to the holders of the 160 acres first improved and occupied by B. F. Carroll, Sr., in 1857, the period of occupancy was continuous from that time until 1882, when the suit was brought, and the limitation is admitted. The parties claiming the 225-acre tract bought in 1864, and those under whom they claim, went into immediate possession, and began their improvements, and have ever since claimed, used, and occupied it. This evidence is not disputed by appellants, but they claim that at the time of such purchase and occupancy, and also at the time of the marriage of Mrs. Harvey, on November 26, 1867, the statute of limitation was suspended in Texas, and hence the statute never began to run against her. This position is not tenable. The testimony of Mrs. Harvey shows that she was a minor up to the time of her marriage, in 1867. At the time of such marriage the statute of limitations was not suspended, and it was not until the adoption of the constitution of 1869 that the statute of limitation was suspended from the 28th day of January, 1861, to the 30th day of March, 1870; and while the courts have been liberal in extending this suspension, for all causes of action, over that period, they have never

extended it so far as to allow one disability to be tacked to another. At the time of the possession and improvement of this 225 acres of land, in 1864, Mrs. Harvey was a minor, and no limitation could run against her until her marriage in 1867, but it then began. In the case of *Ragsdale v. Barnes*, 68 Tex. 504, 5 S. W. Rep. 68, the minor feme sole had married in 1868. The lot was sold, and the vendee went into possession, in 1863. The court said: "It is clear that, if there had been no suspension of the statute of limitation, it would have commenced to run against her upon her marriage, in 1868, and she would have been barred long before the institution of this suit. But it is contended that because the constitution of 1869 provided that the statute should be suspended from the 28th day of January, 1861, until the acceptance of that constitution by congress, therefore there was no law of limitation in force at the time of appellant's marriage, and hence that, when the suspension ceased, the disability of coverture also attached, and protected her against the bar of the statute. But in this view we do not concur. In the first place, it is to be borne in mind that during the year 1868 the laws of limitation were in full force, (section 6 of Ordinance 11 of 1866; *Sayles' Const.* 343,) and that upon appellant's marriage the statute began to run against her, (*White v. Latimer*, 12 Tex. 62.) The object of the provision of the constitution of 1869 was merely to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action, and was not to restore a disability that had already been removed." Pages 505 and 506, 68 Tex., and page 69, 5 S. W. Rep. The above opinion of Judge Gaines so clearly presents our views that further elaboration seems unnecessary. Section 6 of Ordinance 11, passed by the constitutional convention of 1866, was as follows: "That in all civil actions, the time between the 2nd day of March, 1861, and the 2nd day of September, 1866, shall not be computed in the application of any statute of limitation." *Sayles' Const.* 343. This does not embrace November 26, 1867,—the date of Mrs. Harvey's marriage,—and at that date the statute of limitation began to run against her. The subsequent constitution, giving relief in the computation of time, was not intended to allow the tacking of disabilities, so as to furnish protection for an indefinite time to a party against whom the statute had once begun to run. The 42-acre tract claimed by B. F. Carroll was timbered land, and has not been in his actual possession, and there was no limitation in his favor upon that tract. Said appellee has since the trial filed in court a remittitur or relinquishment of that tract.

4. The remaining assignments of error attack the judgment rendered by the court on the finding of the jury, and in overruling their motion for a new trial, in substance, as

follows: (1) Because appellants claim that they fully proved title in themselves; (2) because there was no limitation proved as to the 42 acres, or of the 225-acre tract, or to any of the land, except the 150-acre tract; (3) because the judgment fails to adjudge to appellants all the land except the special tracts found against them by the jury; (4) because all costs are adjudged against plaintiffs below,—even against defendant John Barnett, who disclaimed after litigating a number of years. It will not be necessary to go into the details of these assignments. A part of the judgment, as rendered by the court upon the verdict of the jury, is erroneous. The defendants below having each severally set out the lands claimed by them, and held and claimed separately, we must treat the matter as though these causes were being tried upon separate titles. (1) The plaintiffs below are entitled to judgment, under the verdict of the jury, and the remittitur filed, for all the lands sued for by them, except the 27 acres claimed by B. F. Carroll in his answer, not remitted, the 221½ acres claimed by Emily C. Ivey in her answer, and the 86 acres claimed by H. C. Melton in his answer, together with all of his costs expended herein against B. F. Carroll up to the filing of the remittitur or relinquishment of said 42-acre tract; and the judgment below should be affirmed, in favor of B. F. Carroll, for said 27-acre tract, with his costs from the time of filing such remittitur or relinquishment, and rendered in favor of appellants against John Barnett for all costs incurred, as against him, up to the time of filing his disclaimer, and judgment is here rendered accordingly. (2) The appellees Emily C. Ivey and her husband, Henry Ivey, and H. C. Melton, are justly entitled to the lands decreed to them by the court below, and as to them we find no material error, and the judgment is affirmed.

GARRETT *et al.* *v.* LYLE *et al.*

(Court of Civil Appeals of Texas. Sept. 5, 1903.)

TRESPASS TO TRY TITLE—WHEN LIES.

Trespass to try title may be maintained as well on an equitable as a legal title.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Trespass to try title by John J. Garrett and others against M. J. Lyle and others. From a judgment in defendants' favor, plaintiffs appeal. Affirmed.

Montrose & Clark, for appellants. J. S. Sherrill and J. P. Atteberry, for appellees.

FINLEY, J. There are but three assignments of error presented in appellants' brief. The first and fourth challenge the correctness of the findings of fact by the judge of the trial court. We think the findings of fact clearly warranted by the evidence, and

that, therefore, the assignments are not well taken. The sixth assignment raises the point that, appellees' title being an equitable one, namely, a secret trust under an absolute deed in the name of another, they are not entitled to recover upon pleadings in the ordinary form of trespass to try title. It is well settled in this state that an action of trespass to try title is maintainable in our courts as well upon an equitable as a legal title. *Martin v. Parker*, 26 Tex. 253; *Easterling v. Blythe*, 7 Tex. 210; *Miller v. Alexander*, 8 Tex. 36.

Conclusions of Fact and Law.

The conclusions of fact and law filed by the trial judge are approved and adopted by this court. We see no error in the judgment of the court below, and it is affirmed.

GILLUM et al. v. ST. LOUIS, A. & T. RY. CO. et al. (No. 61.)

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

RES JUDICATA — JUDGMENT FOR TENANT IN COMMON—RELEASE.

1. A judgment in favor of a tenant in common for a trespass on land does not prevent his cotenant from recovering from the trespasser the damages he has sustained by the trespass.

2. In Texas, a release and settlement of damages for trespass on land executed by one of the tenants in common does not bind his cotenant, and is not a bar to a suit for the damages they have sustained.

3. The fact that persons have been improperly joined as parties defendant does not warrant the entry of a judgment in their favor, but the action should be dismissed as to them.

Appeal from district court, Hopkins county; E. W. Terhune, Judge.

Action by Henry Gillum and others against the St. Louis, Arkansas & Texas Railway Company and others for the destruction of plaintiffs' grass by a fire set by one of defendants' engines. From a judgment in plaintiffs' favor for \$100, they appeal. Reversed.

J. A. B. Putman and Whittle & Son, for appellants. Perkins, Gilbert & Perkins and Sam H. West, for appellees.

RAINEY, J. The appellants and C. M. and Nancy Houston were owners in common of the Dike's league and labor of land in Hopkins county. Part of this land was inclosed and used as a pasture by the Houstons. In August, October, and November, 1887, the grass in said pasture was burned. Appellants bring this suit to recover damages of appellee railway company, alleging that the grass was burned by the negligence of said railway company, and that the land was damaged by said burning. During the pendency of the suit, receivers were appointed for said railway company, who were made parties to the suit. The railway company answered

by general denial, and that C. M. and Nancy Houston, appellants' cotenants, had recovered judgment against it for said burning, which judgment was res adjudicata. The receivers answered that leave had never been granted appellants to sue them, and asked that they be dismissed. A trial was had, which resulted in a judgment for appellants and C. M. and Nancy Houston against the railway company for \$100, and in favor of the receivers as against appellants, from which appellants appeal.

The appellants complain of the action of the court in excluding from the consideration of the jury evidence as to the damages done to the premises by the burning of August 12, 1887; the ground upon which said evidence was excluded, as given by the court, being that the Houstons were in possession of the premises at the time, and had since then recovered of the railway company for such damages. On April 11, 1887, a judgment by a court of competent jurisdiction was rendered, establishing the fact that appellants and C. M. and Nancy Houston were owners in common of the land in question. The appellees contend that, at the time of the burning, the Houstons had the land inclosed, were using and enjoying the same and exercising ownership over it, and that a recovery by them precludes appellants from a further recovery. "That tenants in common must join in the action of trespass *quare clausum fregit* is well settled" in this state. In this respect this action differs from the action of trespass to try title, in which case a tenant in common can maintain, alone, an action against a naked trespasser. In *May v. Slade*, 24 Tex. 205, Slade brought an action against May for cutting and carrying away timber, alleging that he was "absolute legal owner of an undivided interest" in and to said land, (specifying the interest;) "that he holds said land as tenant in common with —; and that he was in the peaceable possession of said land" at the time of the cutting, etc. Subsequently, the cotenant was made a party. On the trial the court charged the jury that the mere fact "that the parties stand before the court as joint suitors will not bar Slade's recovery for the injury to his own land;" and judgment was rendered for Slade alone. In that case the court, after discussing the right of one tenant in common to maintain an action of trespass to try title, said: "But it is well settled that they must join in actions of trespass relating to the possession, because in actions of this nature, though the estates are several, yet the damages survive to all, and it is deemed that it would be unreasonable, when the damage is thus entire, to bring several actions for a single trespass. Thus it is laid down that tenants in common shall join in actions personal, as trespass in breaking into their houses, breaking their inclosures or fences, feeding, wasting, or defouling their grass, etc., and shall recover jointly their

damages, because in those actions, though their estates are several, yet damages survive to all, and it would be unreasonable to bring several actions for one single trespass. There is nothing in our practice to require a departure from this rule of common law; but there is a great reason to adhere to it, to prevent multiplicity of suits, and the inconvenience that would arise from the bringing of several suits and allowing several recoveries for the same trespass. The objection of the nonjoinder of the cotenant, it is true, can, in general, only be taken by plea in abatement, or by way of apportionment of the damages on the trial." This doctrine has been repeatedly announced and reaffirmed by our supreme court. *Railroad Co. v. Knapp*, 51 Tex. 592; *Lee v. Turner*, 71 Tex. 266, 9 S. W. Rep. 149; *Rowland v. Murphy*, 66 Tex. 538, 1 S. W. Rep. 658; *Railway Co. v. Ragadale*, 67 Tex. 28, 2 S. W. Rep. 515; *Hill v. Newman*, 67 Tex. 266, 3 S. W. Rep. 271.

The judgment in favor of the Houstons against the railway company does not prevent appellants from prosecuting their action for the injury they sustained. The Houstons' possession of the land was not exclusive, but inured to the benefit of all the cotenants. There is nothing in the record to show that they had an exclusive right to the land, or that appellants had waived any right by the Houstons' possession. The judgment partitioning the land does not show that this land was set apart to the Houstons, or that the amount they received from the railway company was in any way considered in making the partition. If the Houstons sued for the entire damage, and the railway company failed to interpose such defenses as it was entitled to do under the law to prevent a recovery, then such judgment is not a bar to appellants' action, to the extent of their damage, if any. In the case of *Rowland v. Murphy*, supra, the court, in discussing this principle, says: "The question, then, is whether one tenant in common can maintain an action of this character, and recover the entire damages done to the common estate. The negative of this proposition is established in the case of *May v. Slade*, 24 Tex. 205, which is in harmony with the rulings of the English courts, and with the rulings of the courts of the other states of this Union. The rule prevents the multiplicity of suits, and denies a recovery to one cotenant for the entire damage done to the common estate, because a judgment in favor of one cotenant alone, rendered in an action to which he was sole plaintiff, would not bar the right of another cotenant to recover on the same cause of action, in his own right, to the extent of the damage to which he would be entitled for injuries done to his interest in the common property. One cotenant, in such case, is not the representative of another."

The appellee also contends that, where

"tenants in common have a joint action for a trespass, a release and settlement of damages for such trespass by one of the tenants in common binds his cotenants, and is a bar to an action by them, because such settlement and release necessarily operate as a transfer of the property to the trespasser." It is true, Mr. Freeman, in his work on *Cotenancy and Partition*, (section 179,) lays this down as the general rule; but it does not pertain in this jurisdiction, as a reference to our supreme court decisions above quoted will readily show. The ruling of the court below in excluding testimony of the burning of August 12, 1887, as complained of by appellants, was error, as such evidence was material to support appellants' cause of action. We also think that judgment in favor of the receivers was error, as it precludes any further action as to them. If they were not properly made parties, the judgment should have been one of dismissal. The judgment of the court below is reversed, and the cause remanded for a new trial.

GILLUM et al. v. ST. LOUIS, A. & T. RY. CO. (No. 62.)

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

TENANCY IN COMMON—SALE OF TIMBER BY COTENANT.

A tenant in common has the right to sell marketable timber growing on the land, so long as he does not commit waste; and the purchaser takes a good title as against the other cotenants, their remedy being to compel the seller to account for the proceeds.

Appeal from district court, Hopkins county; E. W. Terhune, Judge.

Action by Henry Gillum and others against the St. Louis, Arkansas & Texas Railway Company to recover certain timber from defendant. From a judgment in defendant's favor, plaintiffs appeal. Affirmed.

Whittle & Son and J. A. B. Putman, for appellants. Head & Dillord, Perkins, Gilbert & Perkins, and Sam H. West, for appellee.

RAINEY, J. Appellants and O. M. and N. Houston were tenants in common owning the Dike's league and labor of land in Hopkins county. O. M. and N. Houston sold growing timber thereon to Hargrove & Miller for cross-ties, piling, etc. They sold to Britton & Lyon, who used same on the railway company's roadbed. Appellants sue to recover for the timber thus used, alleging that the same was taken without authority. The defendant answers, alleging, among other things, that the timber was sold to the parties from whom it purchased by the Houstons, who were tenants in common with appellants. A trial was had before a jury, and verdict and judgment rendered for appellee, from which an appeal was taken.

Quite a number of errors were assigned to

the rulings of the court. Under our view of the case there is one proposition involved, which, if answered in the affirmative, settles the case, and renders it unnecessary to discuss the other issues raised; that is, has one tenant in common a right to sell marketable timber growing on the common estate, and pass a clear title thereto to the purchaser? Many authorities are cited by the able counsel in their briefs, but none from this state that is in point, nor has the court been able to find any. All those cited from other jurisdictions that bear directly on this proposition hold the affirmative of this proposition to be true. All tenants in common have a right to possession of the property, and a right to use and enjoy it. Each has a right to cultivate it, and reap the proceeds of such venture. Each has a right to cut the grass thereon and market it, and each has a right to sell the marketable timber growing thereon. One cotenant has no right to despoil the land of its timber,—that is, to cut, waste, and destroy all the timber, marketable or unmarketable, growing thereon; and, if such was attempted, the cotenants could invoke the aid of the courts, and enjoin him from such destruction. But such state of facts does not exist in this case. Here the Houstons sold and gave permission to the parties from whom Britton & Lyon bought to cut the timber. There is no claim that all the timber growing thereon was cut from the land; nor is it shown but that there is plenty left for appellants to secure their pro rata share; nor is it shown that they have not received from the estate other emoluments equal to the amount received by the Houstons from the sale of the timber. If they have not, then they would have a right to an accounting from the Houstons for the amount they have received on that score. Mr. Freeman, in his excellent work on Cotenancy and Partition, (section 251), lays down the rule to be that, "if timber standing on the land is of proper size and condition for advantageous sale, either of the cotenants may lawfully proceed to cut and sell it, for in so doing he makes no unusual use of the real estate of which he is a tenant in fee." In *Hihn v. Peck*, 18 Cal. 641, an action was brought by one tenant against another, alleging the cutting and wasting of timber, and asking for partition, and for an injunction to prevent such cutting and waste during the pendency of the suit. The lower court perpetuated the injunction, but on appeal the supreme court reversed the case, and said: "The defendants, being tenants in common, had a right to the enjoyment of the common estate, and to cut timber, and use or dispose of it, at least to an extent corresponding to their share of the estate. No insolvency is averred, nor that they are exceeding this share, nor any other facts which entitle them to this injunction." In *Baker v. Wheeler*, 8 Wend. 505, it was held that "one tenant in common may cut trees

proper to be cut on the land held in tenancy in common, and the remedy of the cotenant is an action against the cotenant cutting the timber, for his share of the value. If one tenant in common may cut, himself, he may give license to another." This doctrine is also laid down in *McCord v. Mining Co.*, 64 Cal. 134, 27 Pac. Rep. 863, and *Alford v. Bradeen*, 1 Nev. 230. The authorities cited by appellants, in our opinion, do not contravene this doctrine. There is nothing in the record to show that appellants were excluded from possession, or deprived of any other use or benefit of the premises, by the Houstons. To say that one tenant in common must have the consent of all his cotenants to use the common estate would in many instances be practically a denial of any benefit to him from such estate, and before he could receive any benefit therefrom, or exercise any individual control over his interest, a partition of said estate would have to be had. We take it that one tenant in common has a right to the use and enjoyment of the common estate within due bounds, which we think were not exceeded in this case. This case differs from the case of *Gillum v. Railway Co.*, 23 S. W. Rep. 716, (heretofore decided at this term.) In that case a trespass was committed, and the damage done affected the interest of all jointly, and all the tenants in common were entitled to recover jointly, and one could not sue and recover to the exclusion of another. In this case the sale of the timber by the Houstons was the exercise of a right and privilege that was personal to them, and no right of action accrued to appellants against the Houstons' vendees, as they had committed no trespass, but merely exercised a license that properly belonged to them under the law. The judgment of the district court is affirmed.

STEINER v. JESTER.¹

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

EVIDENCE—PROOF OF HANDWRITING—QUALIFICATION OF WITNESS—TRESPASS TO TRY TITLE—INSTRUCTIONS—BURDEN OF PROOF.

1. In proof of handwriting by comparison, a paper proposed to be used as a standard cannot be proved to be an original and genuine signature by the opinion of a witness, derived solely from his general knowledge of the handwriting of the person whose signature it purports to be.

2. Where, in trespass to try title, an affidavit is made, attacking the deed under which plaintiff claims as a forgery, after plaintiff proves his deed, and there is some evidence raising the question of the grantor's identity, the court may properly make a general charge that the burden of proof is on plaintiff, but cannot confine it to the single issue of identity.

Error from district court, Navarro county; Rufus Hardy, Judge.

¹ Rehearing pending.

Trespass to try title by George W. Steiner against George T. Jester. There was judgment for defendant, and plaintiff brings error. Reversed.

McKie & Autry, for plaintiff in error. J. M. Blanding and Frost & Etheridge, for defendant in error.

RAINEY, J. This is an action of trespass to try title brought by George W. Steiner, plaintiff in error, against George T. Jester, defendant in error, to recover certain land situated in Navarro county. Jester pleaded not guilty, and filed affidavit attacking the deed under which plaintiff claimed as a forgery. A trial was had before a jury, and verdict and judgment rendered for Jester, from which this appeal is prosecuted. Steiner claims under a deed signed "Mathias Eder." The pivotal question raised is the genuineness of this deed.

The first error assigned is: "The court erred in admitting in evidence the letter appended to the deposition of W. P. Voorhees, purporting to have been written by Phillip Eder." In the body of this letter was written the name of "Mathias Eder," and it was used as a basis for comparing the signature to plaintiff's deed with the writing in the letter, for the purpose of showing that the signature to said deed was not in fact that of Mathias Eder, but that of some other person. Various witnesses were examined on the trial, as experts, as to the genuineness of the signature to said deed, and said letter was used by them as a basis upon which they rested their opinion that the signature to said deed was not genuine. We know of no authority that goes as far as the trial court did in this case. The letter was not written by Mathias Eder, nor did any witness testify to its having been written by Phillip Eder, that ever saw him write. Even if it was shown beyond controversy to have been written by Phillip Eder, it could not form a basis for proving that Mathias Eder did not execute the deed to plaintiff. In *Com. v. Eastman*, 1 Cush. 217, the court says: "Nor can a paper proposed to be used as a standard be proved to be an original and genuine signature merely by the opinion of a witness that it is so, such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purports to be. The evidence resulting from a comparison of the disputed signature with another, proved signature is not regarded as evidence of the most satisfactory character, and by some most respectable tribunals is entirely rejected. In this commonwealth it is competent evidence; but the handwriting used as a standard must first be established by clear and undisputed proof, either by direct evidence of the signature, or by some equivalent evidence." Mr. Greenleaf, in his admirable work on Evidence, (volume 1, § 581,) says

"that such papers can be offered in evidence only when no collateral issue can be raised concerning them, which is only when the papers are conceded to be genuine, or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself personally acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his testimony." Authority for the doctrine here announced is not wanting in this state. Justice Gould lays down the rule broadly in *Eborn v. Zimpelman*, 47 Tex. 503, that, before such writing can be used in evidence, it must be "established by the most satisfactory evidence" that such is that of the party whose signature is attacked. Such evidence, at best, is very unsatisfactory, and to make the rule broader than here announced would be, indeed, extending it into the domain of absolute uncertainty.

The defendant in error, in order to parry the force of plaintiff in error's objection, contends that the admission of said letter in evidence, if error, was harmless, for that, on the trial of this cause, plaintiff offered in evidence "the registry return receipt for a registered letter written by J. F. Knox at Corsicana, Tex., and sent by registered mail to the address of Mathias Eder at Benardville, N. J., which receipt purports to be signed as claimed by plaintiff,—'Mathias Eder;'" that the signature to said receipt was used by the plaintiff in comparing it with the signature to the deed, and he thereby vouched for its genuineness; and that, taking the signature to the receipt as a basis, the evidence was sufficient to support the judgment of the court below. The letter was used as a basis of comparison in establishing the main fact relied on by defendant to defeat a recovery by plaintiff. It was of such a nature as was calculated to exert undue influence upon the minds of the jury. What influence it had, of course, we cannot tell, but we are not warranted in saying it that had none. An established rule of evidence was violated by its admission, and we are constrained to hold that the case must be reversed.

Plaintiff in error also complains "that the court erred in its charge to the jury, in its instructions to them that the burden of proof was upon the plaintiff as to the identity of the party who signed the deed under which plaintiff claims." "Similarity of name, alone, is ordinarily sufficient evidence of identity of a purchaser in a chain of title." *Chamblee v. Tarbox*, 27 Tex. 144; *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. Rep. 300. When the affidavit was filed, in this case, attacking plaintiff's deed as a forgery, the burden was then cast upon plaintiff to prove its genuineness. When he did this, the burden then shifted to defendant to sustain his impeaching affidavit by any lawful testimony he might produce. *Cox v. Cock*, 59 Tex. 524. The only office the affidavit could perform

was to put the plaintiff on proof that Mathias Eder executed the deed. It did not raise the question of identity. *Robertson v. Du Bose*, supra, was a case like this, where an affidavit was made, attacking plaintiff's deed as a forgery. After the plaintiff proved his deed, defendant offered no evidence in support of his impeaching affidavit. The court, in charging the jury, not only placed the burden on plaintiff of proving his deed, but also that of showing the deed to be the act and deed of the identical grantor named in the deed. The court held that this constituted error. There being evidence in this case raising the question of identity of Mathias Eder, the court could very properly instruct the jury on the question of identity. But, under the facts before us, we think it erred in placing the burden upon plaintiff. A general charge as to the burden of proof being on plaintiff would not be erroneous, but confining it to a single proposition—that of identity—was not warranted. The cause is reversed and remanded.

**TRINITY COUNTY LUMBER CO. v.
PINCKARD et al.¹**

(Court of Civil Appeals of Texas. Oct. 12, 1893.)

APPEAL — SUFFICIENCY OF EVIDENCE — FORGED DEED — BURDEN OF PROOF — DEED — DELIVERY OF TESTIMONIO — EXECUTION BY VENDEE — EXECUTION UNDER POWER OF ATTORNEY — ACTION TO RECOVER LAND — EQUITABLE TITLE — ADVERSE POSSESSION — LIMITATIONS — PAYMENT OF TAXES.

1. The finding of a trial court, from circumstantial evidence, that a deed was forged, will not be reversed on appeal where the appellate court is not able to say that the finding was not warranted by such evidence.

2. Where the proper affidavit is filed, charging that a deed offered in evidence is forged, the party offering the deed must establish by prima facie evidence the execution of the deed by the person whose act it purports to be, and then the burden of proof shifts to the person assailing the genuineness of the deed.

3. A protocol remaining in the office of the notary is competent proof that the testimonio was delivered to the grantee when the protocol was executed; and such protocol may be proved without producing the testimonio, or accounting for its nonproduction.

4. The law requiring the vendees of a colonist to contract with the colonist to perform the conditions on which the land was granted does not render inadmissible in evidence a deed by a colonist which the vendees did not sign.

5. Under a power of attorney in Texas, a conveyance may be made in the name of the attorney, and without reference to the principal.

6. The right of the holder of the equitable title to land cannot be defeated by lapse of time, unaccompanied by adverse possession.

7. On an issue of adverse possession, an alleged written acknowledgment of J. that he was in possession as tenant of the vendor is not sufficiently proved, to be admissible for the vendee, by testimony of the vendee that he received it with other title papers of the vendor, and was told that J. executed it.

8. Where the statute of limitations is pleaded in an action to recover land, declarations of

one in possession of the land are admissible in explanation of his possession.

9. The payment of taxes by the claimant of land under the statute of limitations cannot be assumed from the fact that the taxes were assessed to claimant, and no default in payment was proved, since claimant in such case must show affirmatively that he paid the taxes, and that the payments were concurrent with possession.

Appeal from district court, Trinity county; Norman G. Kittrell, Judge.

Action by the heirs of William Monroe Pinckard and of Claiborne Steele against the Trinity County Lumber Company and another to recover a league of land. Judgment for plaintiffs. Defendant company appeals. Affirmed.

J. P. Stephenson and J. R. Burnett, for appellant. Nunn & Nunn, for appellees.

PLEASANTS, J. The appellees, the heirs of William M. Pinckard and Claiborne Steele, brought this suit on the 1st day of June, 1891, in the district court of Trinity county, against the appellant, a private corporation organized under the laws of Iowa, and L. T. Sloan, for the recovery of a league of land granted by the government of Coahuila and Texas on the 6th of October, A. D. 1833, to John Johnson.

Defendants, for answer, pleaded the general denial, and the statute of limitations of three, five, and ten years, and, to the statute of limitations, plaintiff, by replication, pleaded the disabilities of minority and of coverture. Both plaintiffs and defendant deraign title under the conveyances purporting to be made by the grantee. The instrument under which the defendant claimed title, bearing date the 16th of September, 1857, and proved for record by one of the subscribing witnesses, before the Texas commission for the parish of Natchitoches, La., and duly recorded in Trinity county, October 19, 1859, and purporting to be a conveyance for the land in question from the grantee, John Johnson, to one Stubblefield, was charged by plaintiff to be a forgery, the charge being supported by the necessary affidavit. The case was tried by the court without a jury, and judgment was rendered for plaintiffs on the 3d of September, 1892. The judge, in his conclusions of fact, found against the defendants upon the statute of limitations. He found the averment of payment of the taxes by defendant, and those under whom it claimed, to be true, but found that the averment of actual possession of the premises was not sustained by the evidence. Upon the question of forgery the finding was for the plaintiffs. Defendant's counsel, in their learned brief, present and ably discuss many assignments of error. If the finding of the court upon the question of forgery be correct, then the plea of the statute of three years' limitation and that of an innocent purchaser are necessarily

¹ For opinion on rehearing, see 23 S. W. Rep. 1015.

eliminated from the case, and need not be noticed by us. If the deed from Johnson to Stubblefield be in fact a forgery, then the failure of the plaintiffs' ancestors to place their title upon record can avail the defendant nothing.

The statute which declares a deed void as to subsequent purchasers, if not registered, can only be invoked in aid of a former title when the prior and subsequent purchaser are both vendees of the same person or of his personal representatives. We have carefully considered the evidence bearing upon the issue of forgery; and while it is, as it is generally in such cases, entirely circumstantial, we are not able to say that the finding of the court that the deed was spurious is not warranted by the facts. Had its finding been otherwise, the judgment of the court would necessarily have been for the defendant, as it is evident that the defendant, as well as each of the other purchasers under Stubblefield, paid a valuable consideration for the land, and there is no evidence whatever that any one of them knew of the previous conveyance from the grantee, under which the plaintiffs assert their title. The appellees' title was not registered in the county in which the land is situated until the 14th of July, A. D. 1890; nor had the plaintiffs, nor those under whom they claim, ever exercised any of the rights of ownership over any portion of the land prior to this date; nor had the land ever been assessed in the name of any one claiming under the plaintiffs' title. Under such circumstances, if the deed from John Johnson to Stubblefield were genuine, the defendant would be protected under the statutes of registration. It has long been the rule in the appellate courts of this state not to reverse a finding upon an issue of fact, whether the finding be that of a jury or of the judge of the court, unless it is unsupported by the evidence.

But the appellant insists that the finding of the court upon the issue of forgery shows upon its face that the judge misapprehended the rule of law for determining upon whom rested the burden of proof upon this issue, and for that reason the finding is necessarily erroneous, and should be reversed. The rule of law, as we understand it to be, is, when the proper affidavit is filed, charging a deed offered in evidence to be forged, that the party offering the instrument must offer evidence sufficient to establish, at least prima facie, the execution of the paper by the party whose act it purports to be, and, when this is done, the burden of proof shifts to the party assailing the genuineness of the instrument. In this case the antiquity of the instrument, its due registration shortly after its execution, the long and continuous and notorious assertion of property in the land by those claiming under the instrument, and their long and continuous custody of it, were

sufficient, unless overcome by the rebutting evidence of the plaintiffs, to establish its authenticity. While we will not say, from the language of the learned judge who tried the case, that he was in error as to the law, it may be conceded that he was, and yet we should sustain his finding, because the evidence pro and con was before him, and was, doubtless, deliberately and thoughtfully considered and weighed, and in our judgment is sufficient to sustain the charge of forgery.

We now proceed to consider the objections presented in appellant's brief, under the first assignment, to the evidence offered by appellees in support of their claim of title, and admitted by the court over appellant's objections. The first paper offered by appellees purports to be a power of attorney from the grantee of the land to William Richardson, bearing date the 7th of October, 1835, and which, omitting the caption, is in the words following: "Know all men by these presents that I, citizen John Johnson, for divers good causes and considerations, as well as for and in consideration of the sum of five hundred dollars to me in hand paid by William Richardson, the receipt of which is hereby acknowledged, I have this day nominated, constituted, and appointed the said William Richardson my true and lawful attorney, for me, and in my name, to receive, take possession of, hold, enjoy, sell, alien, convey, and transfer over in full & free sale one sitio of land, which I am entitled to as a colonist in Jose Vehlne's colony; hereby granting to my said attorney as full, free, and ample power as in the premises I myself possess, and fully authorizing my said attorney to do all and everything relating to the taking possession, holding, enjoying, selling, and disposing, and making in my name good and bona fide deeds of sale for the aforesaid sitio of land; hereby ratifying and confirming and declaring good and valid, to all interests and purposes, all the acts which my said attorney may do in the premises; hereby obligating myself and family, binding all my properties, present and future, to protect, as far as I can do so, the title to said sitio of land in my said attorney, or those to whom he may transfer the same; hereby renouncing all laws which may favor me in any attempt to avoid or annul this instrument, either in the whole or in a part, and submitting myself to the honorable judges and judiciary of this state, and particularly of this municipality, to enforce the same according to its true intent and literal meaning. In witness whereof I have hereto subscribed my name with my witnessses, the date above given. John X John^{his} mark.

son. G. Pollitt. S. R. Peck. James Grant. Chs. Helskell. Tho. J. Rusk." The plaintiffs proved that the witnesses to this deed were dead, and then further proved that their signatures to the paper were genuine.

The plaintiffs next offered in evidence the following instrument of writing: "Sale. Wm. Richardson to W. M. Pinckard, Joseph Walker, and Claiborne Steele. 30th March. State of Louisiana, city of New Orleans. Be it known that this day, before me, William Boswell, a notary public, in and for the city and parish of New Orleans, state of Louisiana, aforesaid, duly commissioned and sworn, personally came and appeared Mr. William Richardson, a citizen of the department of Natchitoches, who declared that for the consideration of one thousand dollars, to him in ready money paid, the receipt whereof he hereby acknowledges, he does by these presents grant, bargain, sell, convey, transfer, assign, and set over, with a full guaranty against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever, unto Messieurs William Monroe Pinckard, Joseph Walker, and Claiborne Steele, of Vicksburg, in the state of Mississippi, joint and equal purchasers, present and accepting, their heirs and assigns, and acknowledging possession thereof, a league of land situate in Texas, republic of Mexico, between Little and Big Neches, on Duncan's path, commencing the survey at a red oak, which forms the first corner, from which a red oak eight inches diameter, bearing north, 18 degrees east, distance eight and 5-10th varas, and another red oak fourteen inches diameter, bearing N., 71 degrees W., distance 11 6-10th; thence north, sixty degrees west, 5,000 varas, raised a mound for second corner, from which a black jack bearing north, eighty-five degrees east, distance four and 4-10th varas, and a post oak five inches diameter, bearing north, eight degrees east, distance four and 2-10th varas; thence north, thirty degrees east, distance 5,000 varas, to a black jack seven inches in diameter, which forms the third corner, from which a red oak fifteen inches in diameter, bearing north, thirty-three degrees west, distance four and 2-10 varas; thence south, seventy degrees east, 5,000 varas, raised a mound for fourth corner, from which a pine ten inches in diameter, bearing north, 83 degrees west, distance ten varas, and a pine fourteen inches in diameter, bearing south, seventy degrees west, distance thirteen varas; thence south, thirty degrees west, 5,000 varas, place of beginning,—containing one league, or 4,428 acres, of land, of which six labors are arable, and nineteen labors pasture lands, together with the improvements thereon and appurtenances thereof, and all rights, servitudes, privileges, and advantages thereunto belonging or in any wise appertaining, acquired by the present seller from John Johnson by act under private signature, dated the 7th of October, 1835, and was granted to said Johnson by the government of Mexico on the sixth of October, 1835, as will appear by the documents hereto annexed; to have and to hold the said tract of land and appurte-

nañces, unto the said purchasers, their heirs and assigns, to their proper use and behoof, forever. And the said seller, for himself and his heirs, the said tract of land, etc., to the said purchasers, their heirs and assigns, shall and will warrant and forever defend against the lawful claims of all persons whomsoever by these presents. And the vendor does moreover subrogate said purchasers to all the rights and actions of warranty which he has or may have against his own vendor, or against the vendors of his vendor, fully authorizing said purchasers to exercise the said rights and actions in the same manner as he himself might or could have done. And therefore the said purchasers declare that they hereby bind themselves to comply with the twenty-fourth article of the colonization law of the twenty-fourth of March, 1825, to cultivate the said land agreeably to the prescriptions thereof, and to pay the government of Mexico all sums due thereon, and also that they will never sell, hire, make donation, mortgage, or any way dispose of said land, or any part or parts thereof, to any church, nunnery, corporate body, bodies, or societies, whereby the same will not be cultivated. Thus done and passed in my office at the city of New Orleans, aforesaid, in the presence of Edward Barnett and Francois M. Mioton, witnesses of lawful age and domiciliated in this city, who hereunto sign their names, together with the said parties, and me, the said notary, on this thirteenth day of March, in the year one thousand eight hundred and thirty-six.

[Original signed] "Wm. Richardson.

" " "Edward Barnett.

" " "F. M. Mioton.

" " "William Boswell,

"Not. Pub."

This instrument was duly authenticated under the laws of congress by proper certificate from Martin Voorhies, notary public for the parish of Orleans, in the state of Louisiana, and by certificate of the secretary of state of Louisiana, under the seal of the state, stating that Voorhies was notary public for the parish of Orleans, and the custodian of notarial records for that parish; and that his signature to the certificate attached to the copy from the archives of his office is genuine, and of his proper handwriting, and that his attestation thereon is in due form and by the proper officer, and that full faith and credit are and ought to be given to all his official acts as such. The objections to the admission of the notarial act are: First, there was no evidence of the execution of the original; second, because the testimonio was not accounted for, and there was no evidence that such was ever delivered; third, because there was no evidence of custody, on part of grantees, of said power of attorney, or of a copy of said act of sale, or other title papers; fourth, because said certified copy was not duly record-

ed, and because said purported act was not signed by the vendees, and was not in the name of Johnson.

The instrument was admissible in evidence under the act of congress of March 27, 1804. There is no objection to the form of the certificate of the notary or that of the secretary of state of Louisiana, and the copy was itself, without further evidence, proof of the genuineness and authenticity of the act. The courts of this state take judicial notice of the laws of Louisiana, and also of the Spanish law in force here at the date of the execution of this instrument. *Vide Watrous v. McGrew*, 16 Tex. 508.

We do not think the second objection is well taken. The testimonio is a copy, or "first original," as it is sometimes called, of the protocol, and is itself proof of the original; but we do not understand that it is any higher or better evidence of the protocol than is an exemplified or certified copy. The testimonio is given to the grantee at the time of the execution of the protocol for his use, while the protocol remains an evidence in the office of the notary before whom the act was passed. It is true that in the opinion delivered by Judge Lipscomb in *Titus v. Kimbro*, 8 Tex. 210, there are dicta to the effect that, before the protocol is admissible in evidence, the testimonio must be accounted for, but this view does not seem to have been acquiesced in by Judge Hemphill, who also delivered an opinion in that case; and in *Watrous v. McGrew* this precise objection was made to the admission of the protocol, and yet the certified copy of the notarial act from the custodian of the notarial records for the city of New Orleans was admitted in that case, and held by the court to be a valid conveyance of the land which the act purported to sell, provided the power of attorney, to which the act referred as authority for the sale, had been duly executed. If the testimonio is proof of the existence of the protocol, the protocol itself should be proof that the testimonio was delivered, as the law required, to the vendee. This being so, we cannot see the necessity for requiring the production of the testimonio, or its non-production accounted for, before proof can be made of the protocol. What we have said in discussing the second ground of objection renders it unnecessary to notice the third ground of objection.

To the admission of this instrument under the fourth ground of their objections, counsel for appellant insist that the act should have been excluded because it was not signed by the vendees, and was not in the name of Johnson. As to the first of these two objections, we have to say that we are not aware of any law obtaining now, or at the date of this instrument, which requires the signature of the vendee in a sale of land to make valid the conveyance, whether the conveyance be by a deed of bargain and sale, or by notarial act. We feel quite sure

that it has not been the practice to have the vendee sign his name to acts purporting to convey to him real estate. In ordinary contracts, evidenced by notarial act, it doubtless is and has been customary and necessary to require the signature of both parties to the contract. It will not be denied that Johnson, after the issue to him of the final title to his land, was authorized to sell and convey the same before he performed the conditions upon which the title issued, and that his vendee or vendees would take a complete title, subject, however, to be forfeited by the government making the grant if its conditions were not performed. *Vide Hancock v. McKinney*, 7 Tex. 384. There was a law requiring that the vendees of a colonist should contract with him for the performance of the conditions upon which the land was granted to him when the sale was made, after the issuance of final title to grantee. The law imposed that obligation upon the purchaser. This being the law, where was the necessity for the recitals in the act of conveyance that the purchasers would perform the conditions of the grant to Johnson, take possession of the land, use and cultivate it for the period prescribed by the colonization law, and pay the price stipulated for within the time allowed for payment? If the conveyance would be good without the recital of such stipulation on part of the purchasers, then their signatures need not be affixed to the act to make it valid and binding upon the vendor and his privies.

It is further objected, under this fourth head, that the act of sale by Richardson does not purport to be in the name of his principal, and that therefore it was not an execution of the power, and did not convey the title from Johnson. When this act was passed, it must be remembered that neither in Texas nor in Louisiana was the common law of England in force; nor were the distinctions between law and equity which obtain in the courts of England and most of the states of the Union known in either Louisiana or Texas when this act was passed. The execution of a power by the attorney in his own name is, at common law, invalid; but that rule does not now nor did it obtain in this state when the act in question was passed. Under the law of this state a power may be executed by the attorney without reference to his authority. Our law, in this particular at least, dispenses with the technical requirements of the common law, and, if the attorney has the power to convey, the conveyance is binding upon the principal, and conveys his title, though the conveyance be made without reference to him. *Vide Hough v. Hill*, 47 Tex. 148; *Rogers v. Bracken*, 15 Tex. 564; *Link v. Page*, 72 Tex. 592, 10 S. W. Rep. 690.

Under the appellant's third assignment, counsel insist that the court erred in not rendering judgment for the defendant because the plaintiffs' title is, at best, but an

equitable one, and their claim to the land is a stale demand. Under the law of this state, an equitable title is as potent as a legal one, and suits for trespass may be prosecuted or defended as effectually under an equitable title as under a legal title; and the plea of stale demand cannot avail in such suits against an equitable one, any more than against a legal title. When one who has only a contract for the execution of title sleeps upon his rights until after the period in which a court of equity would have given relief by decreeing him title, a plea of stale demand is a complete defense to his suit; but when one has already acquired a title, whether it be a legal or an equitable one, no lapse of time, unaccompanied by adverse possession, will defeat his right of recovery. *Vide Martin v. Parker*, 26 Tex. 233.

It is not necessary, under our view of the legal effect of the notarial act, coupled with the deed from Johnson to Richardson, to determine whether that deed be simply a power of attorney, or a conveyance of the land to Richardson, investing him with full and complete title.

Under the sixth assignment of error, counsel submit that the court erred in excluding the alleged written acknowledgment from John Johnson that he was holding possession of the premises for Daniel Dailey, the vendee of Stubblefield, and the vendor of Pierson, from whom the defendant purchased. Pierson testified that this paper was received by him from George Dailey; that it bore date in 1873; that George Dailey was dead, and that the instrument was turned over to him along with the title papers of Daniel Dailey; that it was in the handwriting of a Mr. Cundiff, with whose hand the witness seemed to be familiar, and it was signed by John Johnson; and the witness further testified that he thought he turned the paper over with the title papers to the defendant Sloan when the land was sold to him, and, if Sloan did not have it, the paper was lost. Sloan had no recollection of receiving such a paper, and had none such in his possession. Upon cross-examination the witness Pierson testified that he did not know that Johnson signed the paper, further than that he was told so by George Dailey. The witness also testified that John Johnson, in conversation with him after the sale of the land by Dailey to witness, told witness that he was holding the land for Daniel Dailey, and that after Dailey left the neighborhood and removed to northern Texas he became uneasy for fear he would lose his home, and that he went to see George Dailey about the matter, and that George Dailey satisfied him, and he continued on the land. This evidence certainly would not be sufficient to authorize the admission of the paper as an acknowledgment by Johnson that he was Dailey's tenant, as against him, if he were asserting title to the land against Dailey or his vendee; and we are of

the opinion that it was not admissible between the parties to this suit, and that the court did not err in excluding it upon objection being made to it by the plaintiff.

The admission of testimony by the court over objection of defendant, that John Johnson, while on the land, declared that he had, at one time during his occupancy, purchased from Dailey 160 acres of the land, and that they rescinded the sale because Johnson could not make title, was not error. Declarations of one in possession of land are admissible in explanation of his possession. And equally untenable, we think, was the objection to the admission of declarations by Johnson, while on the land, that he claimed 160 acres of it by right of pre-emption. The contention by appellant that the court, under the circumstances, should have presumed a conveyance from the grantee, John Johnson, in favor of those claiming under Daniel Dailey, might doubtless be correct if the deed from Johnson to Stubblefield had not been offered in evidence by defendants as a link in their chain of title, and the deed from Stubblefield to Dailey had recited a conveyance from Johnson to Stubblefield. There would have then been such a similarity between this and the case of *Dailey v. Starr*, reported in 26 Tex. 562, as to have justified the court in presuming a grant; but the facts, as presented in the record, repel any such presumption. The defendant's title is either genuine, or it is false and spurious.

We have carefully considered all the facts of this case, and while we think the evidence is amply sufficient to have authorized the court to find for the defendant upon the question of possession for five years by Dailey through tenancy of John Johnson, and while we have no doubt that both the son and daughter of John Johnson attorned to Pierson after his purchase, and that they continued upon the land, as his tenants, from 1884 until the institution of this suit, we still think the court properly decided against the defendant upon the statute of limitations of five years, because the evidence failed to show a compliance of the statute in the payment of the taxes. We are aware that the court finds from the absence of proof of default in the payment of the taxes, and from the fact that the land was assessed to Dailey, that he paid the taxes. The law, we think, requires one claiming under the statute of limitations to show affirmatively the payment of the taxes; and not only must this be shown, but the payments must be concurrent with the possession. The testimony as to whether the taxes upon the land accruing subsequent to the sale by Dailey had been paid at the time of trial is conflicting; but, if they were paid, there was no payment until after the sale by Pierson to Sloan in January, 1887, and to make the bar the payment must antedate the year 1887, otherwise there could not be five years of concurrent possession and

payment of taxes prior to the institution of the suit. As to the defendant's defense of 10 years' limitation, we cannot say the court erred in holding that this defense was not established. The statute commenced running for the first time after John Johnson's entry upon the land, in December, 1869, and some time in 1877 Dailey sold the land to Brown, who in 1879, (not having met the notes given in payment of the purchase,) at the request of Dailey, made sale of the premises to Pierson, the consideration being a debt due from Dailey to Mrs. Pierson. Then, if it be conceded that Johnson was a tenant of Dailey, the 10-years bar is not established, unless by mere operation of law. Without attornment by Johnson to Brown, nor even notice to Johnson of the sale, the latter became, as soon as the sale was made to the former, his tenant. And to such proposition we are not prepared to give our assent, without further investigation. So that, from whatever aspect we consider the case, we are unable to reverse the judgment, even though we should do what we have already declined to do,—reverse the findings of the judge upon the facts, notwithstanding the conflict in the evidence. There is very decided conflict in the evidence, upon both the question of tenancy and the question of payment of taxes subsequent to the purchase of the land by Pierson. The judgment of the lower court is affirmed.

WILLIAMS, J., did not sit in this case.

MAES v. TEXAS & N. O. RY. CO. et al.
(Court of Civil Appeals of Texas. Oct. 12, 1893.)

INSTRUCTIONS—REPETITION—CONTRIBUTORY NEGLIGENCE.

1. In an action for personal injuries, where the charge correctly stated the law governing the case, a judgment will not be reversed because in the charge the judge twice stated that, in order to entitle plaintiff to a verdict, he must show negligence on the part of defendant, and twice stated that plaintiff must show that he exercised ordinary care to avoid the accident; for, though the charge was redundant in this respect, it did not require the jury to find any fact not essential to plaintiff's recovery.

2. It is not error to refuse to submit to a jury a special charge which has been covered by the general charge.

3. While a court may not submit to the jury questions not raised by the evidence, it is not, in defining the issues, restricted to the direct statements of witnesses, but may instruct the jury as to inferences which may be drawn from circumstances surrounding the case.

4. While a servant may hold his master liable for the results of defective and dangerous appliances, still, if the immediate duty of keeping such appliances in order rests on such servant, and he is injured through his neglect to keep them in proper order, or through the neglect in relation thereto of servants immediately under him, and whose acts in regard to the appliances he is bound to oversee, he cannot recover. *Railway Co. v. Hohn*, 21 S. W. Rep. 922, 1 Tex. Civ. App. 35, distinguished.

Error from district court, Harris county; James Masterson, Judge.

Action by Robert Maes, plaintiff, against the Texas & New Orleans Railway Company and another, defendants, to recover damages for personal injuries. Judgment was rendered for defendants, and plaintiff brings error. Affirmed.

Goldthwaite, Ewing & H. F. Ring, for plaintiff in error. W. N. Shaw, for defendants in error.

WILLIAMS, J. The case is thus stated by counsel for plaintiff in error: "Action in damages by plaintiff, an employe, for personal injuries. The petition was filed August 29, 1891, and alleged, in effect, that plaintiff, while in the discharge of his duties as shipping clerk, was permanently injured, to wit, April 5, 1891, by striking his head, without fault on his part, against an obstructing appendage, negligently permitted by defendants' agents to remain on one of the cars; and damages were laid at twenty thousand dollars. Defendants answered by general denial, special traverse of negligence on their part, and plea of contributory negligence. Jury trial, and verdict for 'defendant,' and judgment for both defendants, January 29, 1892." The assignments of error relate mainly to the charge given by the court and to the refusal of special instructions requested by plaintiff in error.

The portion of the court's charge complained of in the first assignment of errors was as follows: "If from the evidence you find that defendant's car, upon which plaintiff's injuries occurred, was not in a reasonably safe condition, and if defendant company, or its servants whose duty it was to attend to such things, (other than plaintiff himself, or laborers working under his immediate control,) did not use ordinary care in furnishing and placing the car in question, and if the passageway of such car furnished was obstructed by a scantling, as alleged in plaintiff's petition, and if said car, on account of the obstruction, was not in a reasonably safe condition, and if thereby plaintiff was exposed to an extraordinary danger that was not known to him, which, by the use of ordinary care on his part, he could not have known of, then, if the jury further believe from the evidence that defendants' agents, (other than the plaintiff, or those working under his orders,) whose duty it was to inspect and repair the car, negligently failed to remove such scantling, and if, in direct consequence thereof, plaintiff, without fault or negligence on his part, was injured, as alleged, while discharging his duties as defendants' transfer or shipping clerk, the jury will find for plaintiff, unless the evidence shows that an ordinarily prudent person in the circumstances of plaintiff's situation at the time would have discovered the obstruction, and have avoided the injury. In that

case last supposed your verdict should be for defendant." A special charge asked by plaintiff, the refusal of which is assigned as error, in connection with the above passage from the general charge, is as follows: "If from the evidence the jury believe that the passageway of the car was obstructed by a scantling, as alleged, and that the car was, on account of the obstruction, not in a reasonably safe condition, and that thereby plaintiff was exposed to an extraordinary danger that was unknown to him, then, if the jury believe from the evidence that the defendants' agents, whose duty it was to inspect and repair the cars, negligently failed to remove such obstruction, and that, in direct consequence thereof, plaintiff was injured, as alleged, while discharging his duties as defendants' employe, the jury will find for plaintiff, unless the evidence shows that an ordinarily prudent person, in the circumstances of plaintiff's situation at the time, would have discovered the obstruction and avoided the injury."

The character of the issues raised by the evidence to which these charges applied is thus stated in the brief for plaintiff in error: "On the part of the plaintiff it was shown that at the time of the injury he was in the employ, as shipping clerk, of defendants, and had been about six months, and had been otherwise in defendants' employ about ten years. That in the discharge of his duties it became necessary for him to run hurriedly from his desk, where he was checking, across the platform, through the warehouse, and through the car in question, in order to give directions to a crew of a switch engine, which was needed on the 'transfer track.' The car was on the 'house track,' to be loaded with freight, where it had been about ten minutes, with open door. It was raining very hard, and, as plaintiff reached the car, he looked up, and saw a heavy sheet of water falling from the roof, ducked his head, 'as a man naturally would going through water,' attempted to run through the car, and violently struck his head against an unobserved appendage in the form of a wooden scantling nailed across the door entrance, of sufficient height to strike the head of one going through in his position. The scantling was nailed across to facilitate loading and unloading lumber, by employees engaged in that service. According to plaintiff's testimony, such employees are required to knock the scantling off in the first instance, but, if they do not do it, it is the duty of the car repairer or inspector to remove it before marking the car 'O. K.' on the 'house track.' This car had been actually inspected, and stood on the 'house track,' marked 'O. K.,' but the scantling was left on it by the inspector, who was charged with the duty of seeing that the cars were in a proper condition. H. Stewart, a witness for plaintiff, had been car repairer for 15 or 20 years, and testified that the car is supposed to be in good condi-

tion in ordinary railroad uses when on the 'house track;' that the car would not be sent to repair shops to remove the scantling, but that it would be the duty of the inspectors to remove it, and that the scantling would render the car dangerous because liable to do injury. Plaintiff, in his experience, had never seen a car door obstructed in that way when it was to be loaded. On the part of defendant the evidence tended to show that the appendage is of usual occurrence; that cars frequently come from the mill with one on, but this was specially contradicted; that they are generally left on the car by the men placing them there. Witnesses testified for defendants, in effect, that if the car went to the repair shop the repairers might or might not knock off the appendage, but that it would not be deemed a defect; that the officials had nothing to do with seeing that the scantlings were taken off, but that was a matter of detail left with the men who loaded the car; that it was not made the duty of the car inspectors to remove the appendage. But it was not controverted that the car repairers and inspectors are the agents charged with the duty of seeing that cars are in proper condition, nor that this car had been actually inspected. Plaintiff testified that the car was No. 3,854, and much testimony was adduced by defendants tending strongly to show that such was not the car, because not then in Houston." In regard to the evidence we may say that, in our judgment, there was a decided preponderance to the effect that the timber across the door of the car was such as might at any time have been looked for, and that its presence there was not in the nature of a dangerous defect, but that such risks as resulted from it belonged to that class which were incident to the service.

The complaint made of the charge is that it was confused and misleading "in twice submitting to the jury the necessity of negligence on the part of the defendants, and twice the use of ordinary care on the part of plaintiff to discover the obstruction, thereby giving undue prominence to those parts." There is unnecessary repetition in the charge. This, of itself, is not sufficient, however, in our opinion, to reverse the case. We do not think that it was naturally calculated to impress upon the jury any particular view of the case, nor to indicate any opinion of the court. Aside from the fact that it is redundant, the charge is a fair statement of the law. If the jury correctly applied the rules given, they were not required to find any fact not essential to a recovery by plaintiff. In this the case differs from that of *Railroad Co. v. Conroy*, (Tex. Sup.) 18 S. W. Rep. 609, in which, by coupling distinct defenses by the copulative conjunction, the charge required proof of both, where one was sufficient. The repetitions here required proof of the same facts and those essential ones. We have examined the authorities referred

to, and in none of them was the case reversed because of mere repetition. We do not mean to say that particular views of the cause might not be so impressed on the jury by the court, by the manner in which rules of law governing it were stated and repeated, as to furnish grounds for reversal. We do not think this charge of that nature, and see nothing in the case to indicate that the jury were misled. The refusal of the special charge was not error, because it was sufficiently given in the general charge.

The following portion of the charge is assigned as error: "On the other hand, if you find from the evidence it was a part of the duty of plaintiff, or of the laborers under him, to have removed any slats or pieces of timber across the doorway of cars placed to be loaded or unloaded, and if he or they failed or neglected to do so, and if by reason of such obstruction being there plaintiff was injured, he cannot recover for injuries so by him received, although you may believe that it was also the duty of some other of defendants' servants to have knocked off such piece of timber." It is claimed that there is no evidence in the record to warrant the submission of this question to the jury. Plaintiff's testimony shows that it was his duty as check clerk, when he unloaded or superintended the unloading of a car, to remove, or cause to be removed, such timbers as that in question; but he stated that he did not unload the car by which he was hurt, and that the omission to remove the timber was not that of himself, nor of those under him, but of other servants; and no witness stated that he did superintend the unloading of the car. Upon a careful examination of his own testimony, however, we have concluded that circumstances appear which warranted the court in submitting to the jury whether or not he did, notwithstanding his direct testimony to the contrary, have charge of the unloading of the car in question. Those circumstances we will state, premising that there is no other evidence which tended to show the fact. In his cross-examination, on page 12 of the transcript, he says: "I was check clerk, but did not unload that particular car. I had a gang of hands under me to unload the cars, and transfer lumber from one car to another, and to do all kinds of work," etc. On page 14 he says: "This car was three or four days before the accident on the transfer track. The number of the car was S. A. 3,854." He further states that he had taken the number of the car at the time he saw it on the transfer track, explaining that it was a part of his business to do so. He further states that a hole was cut in the end of the car by the order of Mr. Scott, in order that the large lumber might be gotten out, and that "Scott asked me to send for Bridespecker to do it." On page 17 he says, "He [Bridespecker] either cut the hole or knocked it so we could get the lumber out." On page 18, returning

to this point, he says: "The way I know there was a hole in the end of the car, Scott asked me to send for Bridespecker to have it done; but Scott sent. I did not do it quick enough for him. I was doing other work with my men, and did not have the hands to spare. I saw the car that morning. Did not see it unloaded; was busy with my gang. I knew the car he meant, because he said the car Kleiber was unloading. I am sure Kleiber was unloading it." Kleiber, one of the check clerks, denied that he unloaded car No. 3,854, or any car in the end of which a hole was cut. On almost every material fact which he testified to plaintiff was contradicted by other evidence. And from the manner in which he testified about the car, and was contradicted by Kleiber as to the unloading of it, the court, in view of the attack made upon his credibility, was warranted in leaving the jury to say whether or not he superintended the unloading of the car, it being admitted by him that if he had done so it would have been his duty to have the timber removed. While a court may not submit questions not raised by evidence, it is not, in defining the issues, restricted to the direct statements, but may pay regard to inferences which the jury may draw from circumstances. There is no evidence tending to show that any one else but either Kleiber or plaintiff unloaded the car. Plaintiff says Kleiber unloaded, but drops some expressions that seem to suggest that the might have done it himself. Kleiber denies that he did it. It would seem that this plainly raises the question if plaintiff did not himself see to the unloading of the car. This may not be the view best supported by the evidence, and we do not say that it is; but it is sufficient to warrant the charge if there any evidence tending to prove the fact, the effect of which was stated to the jury. That the charge contains a true rule of law we think there is no doubt. While a servant may hold his master liable for the results of defective and dangerous appliances growing out of a master's negligence, it is nevertheless true that, if the immediate duty of making such appliances in order rests upon the servant, and he omits to perform it, he cannot recover. To permit him to do so would allow him to take advantage of his own negligence. And the same result would follow if the omission was that of the servants immediately under him, whose acts in keeping the appliances in proper condition he was bound to oversee. In this respect the case is clearly distinguishable from that of *Railway Co. v. Hohn*, 1 Tex. Civ. App. 35, 21 S. W. Rep. 942, and other authorities cited. It follows that the second special charge requested by plaintiff, "to the effect that, if the scantling was not removed through the negligence of the car inspector or repairer, then the fact that the laborers creating the obstruction were required in the first place to remove it would furnish

no defense," was correctly refused, because it partially conflicted with the rule given in the general charge. The verdict for "defendant," we think, under the issues in this case, authorized judgment for both defendants. The judgment is affirmed.

WESTERN BRASS MANUF'G CO. v. MAVERICK.¹

(Court of Civil Appeals of Texas. Oct. 18, 1898.)

BANKS—COLLECTIONS—PAYMENT BY CHECK.

1. In an action to recover money collected by a banker, it appeared that plaintiff drew on one K., to defendant's order, and sent the draft to defendant for collection. Defendant's collector went to K. to collect the draft, and, receiving from K. a check on defendant for the amount of the draft, stamped the same "Paid," and delivered it to K. There were no funds in defendant's hands belonging to K., and the check was not paid, but K. refused to surrender plaintiff's draft. Defendant's collector was not authorized by defendant to receive in payment of drafts anything but money, though it was shown that he had before received from defendant his checks for drafts. *Held*, that the receipt by defendant's collector of the check did not have the effect of a payment of the amount of the draft to defendant.

2. Even if defendant had himself presented plaintiff's draft for payment, and had taken therefor a check on a third person, the receipt of such check would not have had the effect of a payment to defendant, unless he received the check as a payment.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by the Western Brass Manufacturing Company against Sam Maverick to recover money collected by defendant, as a banker, in the regular course of business. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Geo. C. Altgelt, for appellant. Perry J. Lewis, for appellee.

FLY, J. Appellant sued for \$522.66 which it alleges was collected by appellee, as a banker, in due course of business, from one David Kirkwood, on a check drawn by appellant on Kirkwood, and placed in the hands of the Maverick Bank for collection. Defendant answered by general denial. There was no controversy about the facts, which showed that the appellant sent the check drawn by itself on Kirkwood in favor of the Maverick Bank to the said bank for collection; that an agent or employe of the bank took the draft to Kirkwood, and the latter gave the employe a draft on the Maverick Bank for the amount; the employe stamping "Paid" on the back of appellant's draft, and turning it over to Kirkwood. When the employe arrived at the bank, Kirkwood not having any funds in the bank, payment was not made, and the employe was instructed by

Sam Maverick to return to Kirkwood's place of business, and get the draft. When Kirkwood was seen, he refused to surrender the draft. Appellee immediately informed appellant of the facts, as above set out. The employe was the regular collector of the Maverick Bank. There was no agreement between the collector and Kirkwood that the draft given by him was taken in payment of appellant's draft, except as might be implied from the circumstances. Appellee did not honor the draft of Kirkwood, and did not pay the draft of appellant. The collector swore that he had no authority to accept anything but money in payment of drafts or like paper, but that he had often before taken checks for drafts, or other paper, and had received checks from Kirkwood before. We conclude that an agent, in collecting, must act within the scope of his powers, in order to bind the principal, and that, if he is sent out to make collections, he would in the absence of instructions, have no authority to receive anything but money. *Robson v. Watts*, 11 Tex. 764. Whatever is received by a creditor in satisfaction of his debt will be effective as a payment between the creditor and his debtor. But a trustee or agent, with power simply to collect, cannot, in general, receive payment in anything but money. Nor will a payment to him in anything else be binding upon his principal, or operate to discharge the debt, unless made or received by authority of his principal, express or implied. Thus, an agent cannot bind his principal by taking a bill of exchange in payment, unless authorized so to do, or unless it was customary to settle by bill. *Story*, Ag. §§ 98, 181, 413, 430. While it was shown that the collector had often taken drafts for debts, yet it was not often enough to establish a custom, and it was done in direct violation of orders.

Even if Maverick had presented the check himself, and had taken a draft on a third party, it would not have been a payment, unless he had received the draft as a payment. *McNeil v. McCamley*, 6 Tex. 164; *McGuire v. Bidwell*, 64 Tex. 43; 2 Para. Cont. 624; 2 Ohit. Cont. 1135. If the draft was not accepted in payment of the debt due by Kirkwood to appellant, is he not in the same position that he would have been, had the check not have been taken? He had the same recourse against Kirkwood after the presentation of the draft as before, and we are unable to see upon what ground, legal or moral, he expects to hold Maverick responsible. If there had been an acceptance of the draft of Kirkwood in payment of the debt, appellant would then have been deprived of his right of action against Kirkwood, and could hold appellee liable for the resulting damages. But, under the facts in this case, appellant had lost no right by the acts of appellee, and we can see no error in the judgment of the lower court. The judgment is affirmed.

¹ Rehearing denied.

BURLESON v. LINDSEY.¹

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

CHANGE OF VENUE—BREACH OF CONTRACT—DAMAGES.

1. Where an action based on a written contract, which specifies the place of its performance, is commenced in the county specified in the contract, the venue will not, on the application of defendant, be changed to the county of defendant's residence, under Rev. St. art. 1198, subd. 5, which provides that where a person has contracted, in writing, to perform an obligation in any particular county, suit may be brought either in such county, or where defendant has his domicile.

2. In an action to recover damages for breach of contract, it appeared that plaintiff, a lawyer, contracted with defendant, another lawyer, to assist in the defense of an action, and, as compensation, was to share with defendant in the proceeds of a note from one D. to the latter, secured by a deed of trust of real and personal property, defendant agreeing to realize on the property at once. Plaintiff assisted in the trial of the action, but not in the appeal. Defendant sold the personal property, and appropriated the proceeds; and, in an action by a third person to partition the land, one-eighth thereof was adjudged to belong to such third person, and seven-eighths to D. The land was sold under the judgment in the action, and bought by defendant. In his petition, plaintiff alleged fraud on defendant's part in the sale of the personal property, but, in regard to the land, complained only of defendant's failure to foreclose his lien. *Held* that, inasmuch as the question of fraud was raised only as to defendant's dealings with the personal property, it was error to submit to the jury the question of whether defendant had fraudulently depreciated the value of the land for the purpose of buying it in.

3. In fixing the damages in such an action, the question is, not what the value of plaintiff's services were, but what proportion of services he rendered, as he is entitled to recover out of the proceeds of the property only such an amount as will be proportionate to the services rendered by him.

Appeal from Maverick county court; James M. Goggin, Judge.

Action by Leigh Burleson against B. D. Lindsey to recover damages for breach of contract. Judgment was rendered for plaintiff, and defendant appeals. *Reversed*.

Ward & Faulk and W. L. Evans, for appellant. Dan W. Nicholson and James A. Ware, for appellee.

FLY, J. The petition in this case is quite voluminous and prolix, but we gain from the allegations that appellee is suing for \$600 due him by appellant; that appellant is an attorney, and he, with other counsel, had been employed to defend one Dick Duncan, charged with murder; that, the other counsel having failed to put in an appearance at the term when Duncan was to be tried, the brothers of Duncan and one Berry Ketchum, with the consent of appellant, employed one R. H. Lombard to assist in the defense, and

agreed to pay said Lombard \$100 cash, and also the amount agreed to be paid the absent attorneys, Ward & Fisher, being a one-half interest in a certain note for \$1,600, which was secured by a deed of trust upon 147½ acres of land in San Saba county, and a certain stock of horses; that said note and deed of trust had been executed to Ward & Fisher and defendant jointly; that defendant represented to Lombard that Ward & Fisher had failed to put in an appearance, and had violated their contract, and were entitled to no part of the \$1,600, and that defendant would pay over to Lombard one-half of what was realized from the note, above expenses, and \$100 due Ketchum, and would, by foreclosure or otherwise, as soon as possible, collect the money, and would remit to Lombard his part of the money, in New York exchange, to Eagle Pass; that Lombard did assist in the trial of Duncan in the district court of Maverick county, and assisted in preparing the case for appeal; that the services rendered were worth \$600, and no part of the same had been paid; that an obligation was signed by defendant, setting up the failure of Ward & Fisher to be present, and the employment of Lombard to assist in the defense of Duncan in the district and superior courts, and the agreement of defendant to use said property, and to foreclose or sell the same at the earliest practicable time, and to pay over first to Berry Ketchum \$100, and the balance, deducting necessary expenses, to divide equally between defendant and the said R. H. Lombard, and to send his part to him in New York exchange at his expense at Eagle Pass; that this obligation had, with the knowledge and in the presence of defendant, been transferred, for value, to appellee; that the property was in the hands of defendant at time of filing of suit; that the land was worth \$8 per acre; that the horses, 30 head, were worth \$20 each; that the note had matured, and the deed of trust had in it a power of sale; that defendant had fraudulently caused the horses to be sold under a deed of trust, and had bought them at a grossly inadequate price, to wit, \$150, when they were worth \$600, and had not given any of the proceeds to plaintiff; that Lombard was dead; that defendant had not foreclosed the lien on the land. There was prayer for judgment for \$600. On December 15, 1890, defendant filed a plea of privilege to be sued in San Saba county, where he resided. On January 17, 1891, defendant filed his answer, denying any verbal contract, and setting up the written agreement mentioned in the petition made by him with Lombard, and denying that Lombard had performed any service for Duncan, except in the district court, and that even there he did not assist in preparing the case for appeal. Defendant also alleged that he had realized from the horses only \$120, after paying expenses. The trial took place January 19,

¹ Rehearing denied.

1801, and there was a verdict and judgment for plaintiff for the sum of \$450. The unchallenged facts in this case show that Lombard was employed as alleged, and defendant was present; that defendant signed the written contract; that Lombard assisted in the defense of Duncan in the district court of Maverick county, but not in the supreme court; that the horses were sold, and defendant bought them in for \$150, and appropriated the net proceeds; that a suit was brought in San Saba county for partition of the Williamson pre-emption tract, of which tract the land mortgaged by Duncan was a part, and one-eighth of it was set apart to the plaintiff in that suit, and seven-eighths to Duncan, and the land, being incapable of partition under the order of the court, was sold, and was bought by appellant for \$625.

The first and second assignments of error are that the court erred in overruling the plea of privilege. The contract sued on was in writing, the place of performance of the obligation being Maverick county, and there was no error in overruling the plea. Rev. St. art. 1198, subd. 5, provides that where a person has contracted in writing to perform an obligation in any particular county, suit may be brought either in such county, or where defendant has his domicile. *Durst v. Swift*, 11 Tex. 274.

The sixth assignment of error brings in review a section of the charge on the subject of the fraud of defendant in using means to depreciate the value of the property, and then buying it in. Counsel for appellant object to this charge because it is not supported by the proof. It was alleged in the petition that the horses were sold for a grossly inadequate price, and that this was brought about by defendant, and the only fact introduced to show that the horses were worth more is a declaration of defendant as to the value of the horses made six months before the sale. No fraud is alleged in the sale of land, but complaint is made in the petition that the foreclosure of the lien had been neglected. We are of the opinion that the charge was not warranted by the facts, and, under the allegations, should have been confined to the sale of the horses. The jury were doubtless misled by the charge, because it is only on the assumption of fraud having been proved that the amount of the verdict can be justified. Under proper allegations and proof, fraud in using means, direct or indirect, to depreciate the value of the property with which defendant was intrusted, would render defendant liable, in accounting to plaintiff for his share of the property, for the true market value of the same. Defendant occupied a position of trust to plaintiff, and the law would not tolerate bad faith on his part in dealing with the property. He had been intrusted with plaintiff's interests, and he will be compelled to act in good faith towards the man who put his trust in him. But fraud was not proved in

this case, and the charge was unwarranted and misleading.

In view of another trial, we will say that, in ascertaining the portion of the proceeds of the property to which plaintiff is entitled, the question is not as to what Lombard's services were worth, that he rendered, because there was a positive agreement as to the amount of the fee for all the courts. The question is, what proportion of the services did he render? And, when that is ascertained, it is easy to obtain his proportionate share of the fee. If the defendant did the larger part of the work, justice, it seems, would demand that he have a larger part of the fee. For the error indicated, the judgment of the lower court is reversed, and the cause remanded.

OGDEN et al. v. BOSSE.

(Court of Civil Appeals of Texas. Sept. 20, 1893.)

GRANTING NEW TRIAL ON APPEAL—EFFECT.

Where, on appeal, the judgment is reversed, and the cause merely remanded for a new trial, without directions, trial should be had as if the cause had never been tried at all.

On rehearing. Denied.

For report on appeal, see 23 S. W. Rep. 260. For report on former appeal to supreme court, see 11 S. W. Rep. 860.

NEILL, J. In his motion for a rehearing in this case the appellee insists that this court, in arriving at its opinion, considered his first supplemental petition after it was substituted by his second supplemental petition, and was therefore not properly a part of the record, and argues therefrom that the statement in the opinion of the court that appellee, in his supplemental petition, admitted the legal title to the land in controversy was in Sam M. Johnson, but averred that such legal title rested on fraudulent conveyances made by Clark to Moore, and by Moore to Johnson at the instance of Clark, was not founded on appellee's pleading, and that therefore there was nothing upon which to predicate the principle of law that in action of trespass to try title, where the plaintiff admits the legal title to the property in controversy to be in defendant, but alleges that such legal title is invalid, he cannot rest his case upon proof of title in himself, but must establish the invalidity of defendant's title. In its statement of the pleadings in the case, the court set out fully the allegations in appellee's first supplemental petition, and then stated that "on November 30, 1889, plaintiff [appellee] filed his second supplemental petition, excepting generally and specially to defendant's said amended answer, and pleading, in effect, the facts alleged in his first supplemental petition, and sought to avoid the deed from Moore to Johnson as fraudulent." In his second supplemental petition the appellee alleged that

"on or about the — day of November, 1882, A. G. Clark made and contrived said agreement in the said plea set forth in defraud of the creditors of the said Clark, who was then indebted to insolvency, and was being pressed by his creditors; and the said firm of Ogden and Johnson, being said Clark's attorneys, and with the intention to place all of Clark's property beyond the reach of his creditors, and with a view to cheat and defraud both existing and subsequent creditors, did contrive the conveyance to R. W. Moore to defeat his (thesaid A. G. Clark's) creditors in the collection of their debts then existing, or those that he might thereafter contract," etc.; and that "Moore, * * * at the instance of Ogden & Johnson, on or about the 5th day of February, 1885, conveyed said four lots to Sam M. Johnson, which said conveyance was made to hinder, delay, and defraud Clark's creditors," etc. From this it is seen that appellee, as stated in the opinion of the court, admitted that the legal title to the land was in Johnson; and, having done so, it was incumbent on him to prove the matters alleged in his said supplemental petition in avoidance of it, before he could recover the property sued for. This legal title was not only alleged by appellee, but shown by his proof, to be superior the one under which he claimed. If the appellee had been in the possession of the property, and suit brought against him by appellants to recover it, they would have been successful in such suit if the proof in such case had been the same as in this. Though it may have been a bare legal title, it was good against Bosse until he showed an equity superior to it. He alleged facts to show such an equity, but introduced no evidence tending to establish it. No case can be found in which it has been held that after the plaintiff has alleged and proven, as in this case, that the legal title of the property sued for was in the defendant, without proof showing the invalidity of such title, it will be incumbent on the defendant to affirmatively prove such title, or any trust estate that may be involved therein, in order to defeat plaintiff's action. Counsel for appellee say, in their argument on this motion, that, if the plea of Ogden & Johnson had been simply not guilty, appellee would have been compelled to prove, not only that the parties claimed through Clark as a common source of title, but also that his claim under such source was superior to appellants', but contend that their special plea relieved them of the necessity of proving the superior title from the common source. In our opinion, this contention cannot be maintained. In the case of *Sayers v. Mortgage Co.*, 78 Tex. 245, 14 S. W. Rep. 578, the defendant pleaded not guilty, and also specially that a certain firm and corporation had executed a deed in trust upon the land sued for to secure defendant in a larger sum of money, and that, in satisfaction of the mortgage, the

land conveyed by the deed had been sold, but that a balance of the debt secured remained unpaid, and that a part of the lands had not been sold. The answer was then followed by a prayer "that, in the event the plaintiff should recover any part of the land in controversy, the court should make such orders as might be necessary and proper to reserve to defendant its rights under said mortgage to that part of the land not sold," etc. Such being the state of the pleadings, the defendant offered evidence for the purpose of showing title to the land in controversy through chains of conveyances, of which the deeds in trust above mentioned were not parts. To this evidence the plaintiff objected, upon the ground that the defendant had pleaded specially its title, and its evidence was confined to the title so pleaded. The evidence was admitted, and its admission assigned as error. To this the court said: "The rule of law invoked by plaintiff is well established in this court, but it is apparent from an inspection of the special answer that it does not apply in this case. It was not the purpose of the pleader to set forth in the answer the title upon which the defendant relied to defeat a recovery. It was not a special plea of title. There was a plea of not guilty, and under that plea it was the right of defendant to introduce evidence of any chain of title under which it claimed." The answer of Ogden & Johnson in this case is similar to the one in the case just referred to. They also pleaded a general denial, not guilty, and answered specially that if, as charged by plaintiff in his supplemental petition, their title to the property was not absolute and indefeasible, the same was held by Johnson under a conveyance to Moore to secure Charles W. Ogden in the payment of \$1,500 due by Clark, etc., and prayed that, if plaintiff recovered the land, Ogden have judgment, with a decree against all parties, foreclosing his alleged lien, etc. So it is evident that "it was not the purpose of appellants to set forth in their answer the title upon which they relied to defeat a recovery. It was not a special plea of title; it was a plea of not guilty." And, it being such plea, according to appellee's own argument, he "was compelled to prove, not only that he claimed under Clark as the common source of title, but also that his claim under such common source was superior to appellants';" and, as their answer was not "such a special plea as relieved appellee of the necessity of proving that his title from the common source was superior to theirs," he could not recover without showing superior title in himself. If, as was held in *Sayers v. Mortgage Co.*, the appellants under their pleadings could show title independent of the deed from Clark, there was no necessity in their doing so until the plaintiff proved title in himself superior to theirs. But it is needless to speculate upon what they might have

proved, as the plaintiff's proof relieved them from proving anything.

The cases of *Custard v. Musgrove*, 47 Tex. 218, and *Stegall v. Huff*, 54 Tex. 193, have no application to the case under consideration. In both those cases the respective defendants, after having pleaded not guilty, specially pleaded title derived from the respective plaintiffs; and the court, applying the rule that "when a defendant in trespass to try title files a special plea setting up title in himself, and setting out his title, he is confined in his defense to the title set up by him, and in such cases the plea of not guilty is waived," held that the defendants, having alleged in their special plea that they claimed under plaintiffs, assumed the burden of proving their allegations that such title had been divested from plaintiffs and vested in them, and in failing to make such proof the plaintiffs were held entitled to recover on the title admitted by defendants' pleadings to be in them. Those cases, and others quoted by appellee, reiterating the rule of pleading and proof quoted, are essentially different from the case of *Sayers v. Mortgage Co.*, supra, and the one under consideration. The pleas in the former were special pleas; in the latter, the pleas were not invoked until the plaintiff showed a superior title entitling him to recover the premises, in which event the pleas sought to enforce an alleged lien.

We remarked in our original opinion "that this case was before on appeal before our supreme court, but that the questions presented and determined on that appeal do not arise in this case as it is now presented to us." Appellee now contends that "the judgment of the supreme court reversing the case settled the law of this case so far as it went, and that the facts found by said judgment to exist are to be taken as true, and are not subject again to be investigated, no new evidence having been introduced tending in the least degree to establish a different state of facts." Such we do not understand to be the effect of a reversal of a judgment. It is to restore the parties litigant to the same condition in which they were prior to its rendition; and the parties to it are allowed to proceed in the court below, to obtain a final determination of their rights, in the same manner, and to the same extent, as if their cause had never been heard or decided by any court. *Freem. Judgm.* § 481. If, when the case, after it is reversed, is retried, the same facts should be proven that were on a former trial, and the decision of the appellate court announced the law arising from such facts, it would be the duty of the trial court to be governed by it, and apply it in trying the case, or, if any question of law should in any way arise in the trial that was settled by the decision on appeal, it should likewise be regarded by the trial court; but when, on the reversal,

the appellate court simply remands the case for trial without directions to the court to proceed in accordance with the opinion, the rule quoted from *Freeman on Judgments* obtains; and it was so understood by appellee on the trial from which this appeal was taken. He introduced different evidence from what the decision in 73 Tex. 608, and 11 S. W. Rep. 860, indicates he did, and omitted to introduce evidence introduced by him on that trial. The facts developed on the subsequent trial being different from those upon which the supreme court rendered its decision in 73 Tex. 608, and 11 S. W. Rep. 860, it would be impossible for us to apply the principles of law announced in that case to the case as it is now before us. "If the facts change on a second trial of the whole case in the court below, after remanding, these may so change the nature of the case as to require a new decision applicable thereto; and, if so, the former decision ceases, under the new development, to be the law of the case." *Wells, Res. Adj.* § 618. The decision of the court in *Tuttle v. Garrett*, 74 Ill. 444, cited by appellee, is in perfect harmony with our views. It simply holds that when, on error, certain facts are found from the evidence, and the case reversed and remanded merely to supply proof of particular facts, the facts found by the supreme court must be regarded as settled, and not open to be questioned on a second writ of error. The supreme court in this case found no facts, nor did it reverse the cause to supply proof, or give any directions to the district court as to its procedure on a second trial.

We have given appellee's motion for a rehearing as full and careful consideration as our time, in justice to other business before this court, would permit, and have found no reason why we should recede from our original opinion in the case. Appellee's motion for a rehearing is overruled.

GULF, O. & S. F. RY. CO. v. NELSON.
(Court of Civil Appeals of Texas. Oct. 23, 1893.)

CARRIERS—FAILURE TO DELIVER FREIGHT—PENALTY—CONSTITUTIONAL LAW—INTERSTATE COMMERCE—ACTION TO RECOVER PENALTY—INSTRUCTIONS.

1. Gen. Laws Called Sess. 17th Leg. p. 35, imposing a penalty on a carrier for refusing to deliver freight on tender of the charges specified in the bill of lading, is not an attempted regulation of the interstate commerce law, but a valid police regulation, which the state has a right to pass.

2. A shipment of freight over connecting carriers which have no contract for joint through rates is not within the interstate commerce act, § 6, as amended by Act March 2, 1880, authorizing, but not requiring, connecting carriers to agree upon joint rates, and providing a penalty for failure of a carrier to enforce such rates when agreed on.

3. Where, in an action to recover the pen-

alty authorized by Gen. Laws Called Sess. 17th Leg. p. 35, for failure to deliver freight on tender of the amount shown to be due by the bill of lading, it was admitted by both parties that the bill contained the words, "Weight subject to correction," and it was claimed by defendant that more was due than tendered, the court erred in charging that the jury could only consider evidence as to the true weight if they believed that such words were in the bill, as the burden of proof was on plaintiff to show that he tendered the full amount.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Action by C. O. Nelson against the Gulf, Colorado & Santa Fe Railway Company. There was judgment for plaintiff, and defendant appeals. Reversed.

J. W. Terry, for appellant. J. A. Gillette and S. H. Lumpkin, for appellee.

HEAD, J. Appellee, as plaintiff in the court below, sued appellant for \$158.96, statutory penalty for each day from the 16th day of June, 1889, to the time of trial, on the 30th day of January, 1890, alleging that it had shipped 21,000 pounds of wire and staples from Joliet, Ill., to Clifton, Tex., at an agreed rate of 75 cents per hundred, as evidenced by the bill of lading, and appellant refused to deliver the goods after tender of the amount thus shown to be due. The bill of lading was charged to have been issued by the agent of the Chicago, Rock Island & Pacific Railway Company, which was alleged to be a connecting line with appellant, and, by an arrangement with it, had authority to issue through bills of lading over their joint lines; and the agent who issued this bill was, in its issuance, also alleged to be the agent of appellant. There was no averment by either party that these two lines had established a joint tariff of rates, in compliance with the interstate commerce law, nor was there any denial under oath by appellant of the allegation by appellee that this bill of lading was executed by its agent, or by its authority. Appellant pleaded a general denial, and, specially, that the true weight was greater than that given in the bill of lading, and it only retained the goods until the correct amount of freight was paid, as it claimed the right to do by the terms of the contract, and, as it contended, it was required to do by the interstate commerce law. A part of the freight having been delivered, the penalty was calculated upon the basis of the amount of freight that would have been due on that not delivered, and a trial before a jury resulted in a verdict and judgment in favor of appellee for \$3,109.50, from which this appeal is prosecuted.

Appellant contends, in an able brief, citing numerous authorities, that the statute of this state imposing a penalty upon a common carrier who refuses to deliver freight upon tender of the charges specified in the bill of lading has been absolutely and entirely superseded by the act of congress

known as the "Interstate Commerce Law," in so far as it could have application to a shipment originating in another state and extending into this; in other words, that our statute, in so far as it applies to such shipments, would be a regulation of commerce between the states, the power to do which is confided by the federal constitution exclusively to the congress of the United States, and since the exercise of this power by that body, in the passage of the act above referred to, the state statute can have nothing to do with such shipments, even though the carrier had not subjected himself to the requirements of that act. That our statute is not a regulation of interstate commerce, within the meaning of the prohibition contained in the federal constitution, but is more properly classed as a police regulation, which the state has the power to make, was decided upon mature consideration, in the case of *Railway Co. v. Dwyer*, 75 Tex. 572, 12 S. W. Rep. 1001. It is true that case grew out of facts which occurred prior to the passage of the act of congress, but the opinion was not placed upon that ground; and in the case of *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. Rep. 554, it was followed, as applying to a case originating since that time. In this last case, however, it was held, in case of a conflict between the statute and the act of congress, the latter would prevail. The supreme court of Arkansas, in the case of *Railway Co. v. Hanniford*, 49 Ark. 201, 5 S. W. Rep. 294, construed a statute almost identical with ours, and arrived at the same conclusion as our supreme court in the *Dwyer* Case. We have no disposition to enter upon an extended discussion of the question. The line of demarcation between the regulations the state can and cannot make is so shadowy and variable, and so entirely dependent upon the impression the particular facts of each case may make upon the different members of the supreme court of the United States, that but little importance would be attached to our views, beyond the effect they may have upon the disposition to be made of the case before us, and we shall content ourselves with saying that we agree, both upon principle and authority, with the conclusions announced in the cases above cited. It does not seem to us that the statute in question can fairly be construed as an attempted regulation of interstate commerce. It does not attempt to prescribe the charges that shall be made for the carriage of goods, nor in any manner to interfere with the freedom of the carrier in making his contracts in reference thereto, but only prescribes a speedy and effectual remedy for the enforcement of the contract after it is made, and the goods carried to their destination within this state. It makes no discrimination against interstate shipments, but only says that common carriers, whether state or interstate, occupy such a position of vantage in refer-

ence to goods in their possession that the interests of consignees generally must be protected by imposing heavy penalties upon a carrier who insists upon retaining possession of property intrusted to him, after he has been tendered the full amount of his charges, as shown by his written contract. In other words, carriers should not be allowed to use their possession of the shipper's property to force him into new terms, not agreed on as a part of the original arrangement. We think this clearly a police regulation, not denied to the state, in the same sense that numerous other regulations for the conduct of this business, about which no question is raised, are police regulations. It has already been repeatedly held that this statute only applies to contracts which the defendant carrier has itself executed, or has voluntarily made its own by authorization or adoption. *Railway Co. v. Dwyer*, supra; same case, on third appeal, 84 Tex. 194, 19 S. W. Rep. 470; *Miller v. Railway Co.*, 83 Tex. 518, 18 S. W. Rep. 954. And it, of course, would not apply to a contract invalid by reason of fraud, accident, or mistake in its procurement. *Baird v. Railway Co.*, 41 Fed. Rep. 592. When so restricted, we can see no injustice or harshness in its provisions. If the carrier thinks he has made a mistake in issuing the bill of lading, against which he is entitled to be relieved, but is not willing to risk incurring the penalty imposed by the statute, there is nothing to prevent him from delivering the goods on tender of the amount due as shown by the bill of lading, and afterwards litigating for the balance; and we see no greater injustice in this than there would be to require the consignee to first yield to the demands of the carrier, and then taken the initiative in the subsequent litigation.

What we have said has no application to a carrier who has entered into a contract with connecting lines for joint through rates, in compliance with the interstate commerce law, and, through the act of one of these lines, has become a party to a contract for a less rate than that thus prescribed. In such case, we agree with the conclusion of the court in the *Fischl Case*, that the rate agreed upon under the act of congress should be collected by the delivering line, regardless of the bill of lading, and for so doing it could not be made liable under our statute. It will be observed, however, that it is not every shipment from one state into another, over connecting lines, that comes within the provisions of the interstate commerce law, and subjects the carriers engaged therein to its penalties. This law only authorizes, but does not require, connecting carriers to agree upon joint rates, and it is only when they voluntarily enter into such an agreement that the rates so agreed upon are enforced under its provisions. See section 6 of that law, as amended by the act of March 2, 1889; also, *Kentucky & I. Bridge*

Co. v. Louisville & N. Ry. Co., 37 Fed. Rep. 629, 630. In this case, there is no evidence whatever that the several lines over which this freight passed had established a joint tariff of rates, so as to subject them to the penalties imposed by the interstate commerce law for its violation; and we must therefore hold that the rights of the parties must be adjusted, untrammelled by its provisions.

In this case, appellee sues to recover a statutory penalty, and it is therefore incumbent upon him to prove a case clearly within the terms of the law. *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. Rep. 1014; *Railway Co. v. Dwyer*, 84 Tex. 194, 19 S. W. Rep. 470; 13 Amer. & Eng. Enc. Law, 270, and authorities there cited. The penalty imposed by the statute is for the refusal to deliver after "payment or tender of payment, of the freight charges due as shown by the bill of lading." 2 Sayles' Civil St. art. 4258a, § 3. The bill of lading, according to appellee's own allegations and evidence, contained the following provisions:

MARKS AND CONSIGNEE.	No. PKGS.	DESCRIPTION OF ARTICLES.	WEIGHT, SUBJECT TO CORRECTION.
C. O. Nelson, Clifton, Tex. Car 3294C. (Duplicate.)	8 198 10 H. & C. Rate	Bds. Wire. Spools Wire. Keys Staples. 75c.	21,902

J. R. Graham, B., Agent.

The appellant, however, alleged "that the bill of lading issued by the Chicago, Rock Island & Pacific Railway Company, under which the goods of the plaintiff were shipped from Joliet, Ill., specified the weight of the shipment as being 20,902 pounds, and the rate of freight thereon as seventy-five cents per hundred pounds, but that immediately above the place in said bill of lading where the weight of the shipment is mentioned, at the time of its issuance, and ever since, there were and now are printed, in legible characters, the words, 'weight, subject to correction,' and that there was also written on said bill of lading, at the time of its issuance, the words 'the approximate weight is 20,902; the correct weight to be ascertained, and charges collected thereon, at the point of delivery,' which point of delivery was Clifton, Tex.," and that the actual weight at Clifton was 21,755 pounds, upon which it demanded freight at the agreed rate. There was thus no conflict, either in the allegations or evidence, upon the point that the bill of lading, as issued, did contain the words, "weight, subject to correction," and the evidence at least sharply raised the issue as to whether the correct weight was not more than the amount upon which appellee made the tender, if it did not strongly preponderate in favor of the amount as alleged by appellant; and upon the issue thus presented the court gave the following charges: "If

you believe from the evidence the bill of lading introduced by the defendant was the original bill of lading as made out by the agent at Joliet, Ill., when the goods were shipped, and shall further believe from the evidence the words, "The approximate weight is 20,902 pounds; the correct weight to be ascertained, and charges collected thereon, at point of delivery," were incorporated in said bill by said agent at Joliet at the time the same was issued by the said agent, then you are instructed that the agent of defendant at Clifton, Tex., had the right to weigh said freight to ascertain the weight of same, and if, upon notice to plaintiff that he would weigh the same, the plaintiff did not give his attention to the weighing of the said freight, the defendant had the right to weigh the same in the absence of the plaintiff; and if you believe he did weigh the said freight, and found it was of greater weight than that named in the bill of lading, and shall further believe from the evidence that said agent only demanded the sum of seventy-five cents per hundred pounds for such amount as the weighing at Clifton showed to be in excess of the amount as shown by the bill of lading, and shall further believe that plaintiff refused to pay such sum as shown by such excess in weight, if any, to be due, then you will find for defendant, and say by your verdict how much is due. * * *

But if you believe that the words quoted in paragraph beginning with the words, "The approximate weight is 20,902 pounds; the correct weight to be ascertained, and charges collected thereon, at the point of delivery," were not incorporated in said bill at the time the same was first made by the agent at Joliet, but that said words were incorporated in said bill of lading since said bill was issued by said agent, then you will find for plaintiff, and you will state what amount you so find under the evidence and the instructions hereinbefore given you." In the case of *Railway Co. v. Looile*, 84 Tex. 262, 19 S. W. Rep. 385, it was held that the stipulation in a bill of lading that "weight was subject to correction" deprived it of its conclusiveness as to the sum to be paid, and it was said that, "suing as he does for a penalty, the plaintiff should have averred in his petition that the freight specified in the bill of lading was upon the actual weight of the wire and staples, and the burden of proof rested upon him to show that it was." Also, see *Railway Co. v. Cruse*, 83 Tex. 460, 18 S. W. Rep. 755, to the same effect. It will thus be seen that the bill of lading, as admitted by both parties, required appellee to show that he made the tender upon the correct weight, and the charge, as given, was erroneous, in that it only authorized an investigation as to the true weight in case the jury found the additional words alleged by appellant were in the original bill when issued. We think the error thus indicated will necessitate a reversal of the judgment,

and it will be unnecessary for us to enter upon a discussion of the other assignments. The judgment of the court below will be reversed, and the cause remanded for a new trial.

TEXAS & P. RY. CO. v. DONOVAN et al.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

CARRIERS—DELAY IN TRANSPORTATION—ACTION FOR DAMAGES—EVIDENCE—REVIEW ON APPEAL.—ASSIGNMENT OF ERROR—SUFFICIENCY.

1. An assignment that there was error in sustaining the special exceptions to defendant's answer is not sufficiently definite to be noticed, there being several exceptions, some of which, at least, were well taken.

2. An assignment of error based on "the refusal of special charges numbered 1 to 4, inclusive," is bad, where each charge relates to distinct and separate questions.

3. The court may properly refuse to give special charges which are covered by one given of its own motion.

4. Where, in an action to recover for a loss sustained through defendant's alleged negligent delay in transporting plaintiff's sheep over its road to Chicago, it appeared that plaintiff had sold sheep in Chicago for nine years, and that during the whole time he had received daily accounts of sales and current prices, and private telegrams, from persons interested with him in Chicago in such business, it was competent for him to testify as to the market value of sheep in Chicago on certain days, months prior to the institution of the suit.

5. The further objection that plaintiff's testimony was inadmissible because the witness could not say that the telegrams and prices current covered the very days mentioned is untenable; the objection being rather to the weight, than to the admissibility, of the evidence.

Appeal from district court, Howard county; William Kennedy, Judge.

Action by P. J. Donovan & Co. against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. G. Bidwell, for appellant. G. W. Walshall and S. H. Cowan, for appellees.

STEPHENS, J. Appellees sued to recover damages for delay and other negligence attending a shipment of sheep from Toyah, Tex., to Chicago, Ill. The shipment was made over appellant's road under a contract with John C. Brown, receiver. Appellant was held liable for the negligence occurring during the receivership, on the ground that current earnings far in excess of appellees' claim had been applied by the receiver in betterment of the road, which was never sold out, but turned back to appellant. The material allegations of appellees' petition, both as to negligence and as to the liability of appellant therefor, were sustained by the evidence. The verdict of the jury imports such a finding, and, as no complaint is made of the insufficiency of the proof, it must be held conclusive of the facts alleged.

The second and third errors are not well assigned, and hence we need not consider the several propositions submitted thereunder. The second complains that there was error in sustaining the special exceptions to defendant's answer, of which there were nine, and some of them at least, if not all, were well taken. *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. Rep. 463; *Boggs v. Brown*, (Tex. Sup.) 17 S. W. Rep. 830. The third complains of the refusal of special charges numbered from 1 to 4, inclusive. These special charges related, some to the measure of damages, some to the delay occasioned by the alleged abandonment of the sheep in transit on the part of appellees, and some to liability of appellant as restricted to injuries occurring on its own line. Besides, in so far as they contained correct propositions of law applicable to the facts of this case, they seem to have been given in the main charge. On the insufficiency of these two assignments, see *Cannon v. Cannon*, 66 Tex. 682, 3 S. W. Rep. 36; *Freiberg v. Johnson*, 71 Tex. 564, etc., loc. cit., 9 S. W. Rep. 455. The sixth assignment—that there was no evidence to warrant the charge therein complained of—is not sustained by the record.

The only remaining assignment found in appellant's brief is the fourth, reading: "The court erred in admitting the evidence of plaintiff Thos. Voliva, over defendant's objections, as is shown by bill of exceptions on file. The said evidence, so admitted by the court over defendant's objections, was wrongfully admitted, as said witness shows he was in Texas on the days spoken of by him; yet he attempts to give the market value of sheep in Chicago at the time, and does not qualify himself to do so." It appears from the bill of exceptions referred to in this assignment that the witness undertook to state the market value of sheep of the quality shipped, at Chicago, on the 23d, 24th, 25th, 26th, and 27th days of April, 1888, based on his knowledge and memory derived from telegrams received about that time from Chicago, and long since destroyed, and from trade journals containing the prices current, though the witness could not state that the telegrams and journals, which were received almost every day, were received on the very days mentioned. The ground of objection contained in this assignment—that the witness was in Texas on the days spoken of, and attempted to give the market value in Chicago without qualifying himself to do so—seems to imply that the evidence was inadmissible because founded on hearsay. It seems that this ground of objection was untenable. It is laid down by the elementary writers that "hearsay is a primary evidence of value;" and that "it is no objection to the evidence of a witness testifying as to market value that such evidence rests on hearsay." 1 Whart. Ev. §§ 255, 449; *Cléquot's Champagne*, 3 Wall. 114; *Fennerstein's Cham-*

pagne, Id. 145; 2 Rice, Ev. p. 1807; *Lush v. Druse*, 4 Wend. 317. It further appears from the bill that the witness had been engaged in the business of buying and selling sheep and cattle in the Chicago market for about nine years; that he had been receiving daily accounts of sales and current prices, as well as private telegrams, from parties interested with him in Chicago in said business; that from these sources he was, at the dates testified about, receiving daily information from Chicago, and was consequently familiar with the market prices of sheep at that place from the 23d to the 27th of April, 1888. We conclude, therefore, that the witness was sufficiently acquainted with the Chicago market to make his testimony competent. The several cases cited by appellant in support of its contention have been examined, but those most in point seem to support the conclusion just announced. Take, for instance, the case of *Railroad Co. v. Perkins*, 17 Mich. 801. In this case the opinion was delivered by the renowned Judge Cooley, who, in disposing of the assignment of error "that the court erred in allowing the witness to testify to a knowledge of the New York market derived from the newspapers," said: "This objection is met by the decision of this court in *Slason v. Railroad Co.*, 14 Mich. 497. That case does not require that the newspapers themselves should be put in evidence, but it recognizes them as a proper source of information, to which persons interested in the market may resort; and there is no reason why they should not testify the result of their examinations, as they might the result of inquiries in the market places." The opinion in the case referred to was also delivered by Judge Cooley, who, in commenting on *Lush v. Druse* and the *Fennerstein Case*, supra, used this language: "The principle which supports these cases will allow the market reports of such newspapers as the commercial world relies upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales, or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." See, also, *Laurent v. Vaughn*, 30 Vt. 90, and *Whitney v. Thatcher*, 117 Mass. 523-527, which seem to be equally against the contention they appear to have been cited to support. For a restriction of the rule, see *Whelan v. Lynch*, 60 N. Y. 474, which, however, has been the subject of adverse criticism.

The further objection, submitted as a proposition under this assignment, that the testimony was inadmissible because the witness could not say that the telegrams and prices

current covered the very days in question, is likewise untenable. It goes rather to the weight, than to the admissibility, of the evidence. *Railway Co. v. Fagan*, 72 Tex. 127, 9 S. W. Rep. 749. This disposes of all the errors assigned, and leads to an affirmance of the judgment.

EUSTIS v. COWHERD et al.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

COVENANT OF WARRANTY—LIMITATION OF ACTION.

When another is in possession of land conveyed, the covenant of warranty is broken immediately, and the statute at once begins to run in favor of the warrantor.

Error from district court, Wichita county; George E. Miller, Special Judge.

Trespass to try title by Walker and Fletcher Cowherd against George Norwood, W. G. Eustis, Palo Pinto county, and others. Judgment for Norwood for the land, and for plaintiffs, against W. G. Eustis, for damages for breach of warranty. Eustis brings error. Reversed.

W. G. Eustis, in pro. per.

HEAD, J. Walker and Fletcher Cowherd sued George Norwood to recover 160 acres, part of one league of Palo Pinto county school land, and alleged that said county had sold the league to W. G. Eustis September 19, 1882, and he sold to J. G. Eustis, by warranty deed, September 20, 1882, and he sold to said plaintiffs, by warranty deed, November 24, 1882. W. G. Eustis and Palo Pinto county were also made defendants, and appropriate judgments asked against them, in case plaintiffs failed to recover the land from Norwood. Judgment was rendered in favor of Norwood for the land, and in favor of Cowherd, against W. G. Eustis, for \$27.20, and interest from September 20, 1882, on his warranty, and adjusting the equities of the different parties with said county, against which Eustis, alone, complains to this court. It seems that, at the time Eustis purchased from Palo Pinto county, Norwood was in possession of the 160 acres as an actual settler, and has remained in possession thereof ever since, and by reason of these facts he was adjudged to have the prior right to purchase it, under the constitution of 1876. Eustis pleaded the four-year statute of limitations in bar of the action against him upon his warranty, but the court refused to charge upon this issue, which we think was error. In the case of *Jones' Heirs v. Paul's Heirs*, 59 Tex. 45, quoting from *Rawle on Covenants for Title*, (pp. 149, 150, note,) it is said: "When, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment or of warranty will be held to be broken, without any other act on the part of either the grantee or the

claimant." That the statute of limitations begins to run against an action upon this covenant from the time of its breach will be conceded. In *Wood, Lim. Act. § 174*, it is said: "But little difficulty will be experienced in determining when the statute begins to run upon, or the presumption attaches to, a covenant, because, in all cases, it begins to run from the time of a breach thereof; and it is only necessary to ascertain at what time an action could first have been maintained thereon, to determine the period from which the running of the statute began." No errors having been assigned against the judgment in favor of Norwood, it must be held to conclusively establish his superior right to the land; and, as he was in actual possession at the time plaintiffs purchased, the statute at once commenced to run against them, and the court erred in refusing to so charge the jury. This will necessitate a reversal of the judgment as to Eustis, and no useful purpose could be subserved by a discussion of the remaining assignments. The judgment of the court below will be reversed, and remanded for a new trial as to the issue between the plaintiffs, Walker and Fletcher Cowherd, and the defendant W. G. Eustis, on his covenant of warranty, and in all other respects affirmed.

FT. WORTH & D. C. RY. CO. v. DAVIS.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

CARRIERS OF PASSENGERS—PLATFORMS.

Plaintiff, a passenger alighting from defendant's train on its regular depot platform, stepped from the last step of the car onto a railroad spike. The head of the spike had a thin, sharp edge, which injured the ball of plaintiff's foot. Held, that defendant was liable for the injury.

Appeal from district court, Montague county; D. E. Barrett, Judge.

Action by J. O. Davis against the Ft. Worth & Denver City Railway Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Stanley, Spoons & Meek, for appellant. Potter, Potter & Giddings, for appellee.

STEPHENS, J. Appellant states the case correctly, as follows: "Plaintiff alleged that on the 23d of October, 1890, he was a passenger on the defendant's railway, and that in attempting to get off defendant's train at Henrietta, Clay county, Texas, he stepped upon a railroad spike lying loose upon defendant's platform at said place; that said spike was the kind commonly used for fastening and holding the rails of the railway to the cross ties; that it was a piece of iron about four inches long and three-fourths of an inch thick; that it was a square in shape, and had a head on one end, and that one side of the head came to a thin, sharp edge;

that the sharp and protruding edge came in contact with the ball of plaintiff's left foot, and broke and bruised the nerves of the same; that defendant had a regular passenger depot at Henrietta, and that the platform upon which plaintiff alighted was the usual and customary place for a passenger to alight from defendant's cars; that it was gross carelessness and negligence for defendant to let said spike lie on said platform, and that it was defendant's duty to keep said platform free from all obstructions; that the plaintiff did not know said spike was lying there when he placed his foot upon it, and could not have so known by the use of ordinary and reasonable diligence; and by reason of stepping upon said spike plaintiff's foot has sustained permanent injury, and plaintiff has been rendered a cripple for life. Defendant answered by general demurrer, general denial, and plea of contributory negligence. The cause was tried on the 14th day of July, 1891, and resulted in a verdict and judgment in favor of the plaintiff for fifteen hundred dollars."

The case was proven substantially as alleged. The verdict of the jury was sustained by the evidence, therefore, in ascribing the injury complained of to the negligence of appellant without fault on the part of appellee. The charge of the court was as favorable to appellant as the law would warrant, if not more so. It submitted only ordinary negligence, and not that high degree of care imposed where the passenger is held to be the bailee of the carrier. The assignments of error only call in question the sufficiency of the evidence to support the verdict, and the action of the court in giving and refusing charges. The judgment will therefore be affirmed.

WAGGONER et al. v. DANIELS.

(Court of Civil Appeals of Texas. Oct. 25, 1893.)

SURVEYS—LOCATION OF BOUNDARIES—EVIDENCE.

1. On an issue as to whether there was a vacancy between the east line of the A. survey and the west line of the C. T. R. R. Co. surveys Nos. 1 and 2, which lay contiguous,—one north of the other,—it appeared that the south line of the A. survey, in terms, ran "east 1,866 varas to the west line of the C. T. R. R. Co. survey No. 2, thence north 3,670 varas to the northwest corner of the C. T. R. R. Co. survey No. 1," and the field notes of the A. survey stated that the east line of that survey and the west line of the C. T. R. R. Co. surveys were coincident. It further appeared that the existence of a vacancy between the two lines would involve a violation of the west call of the A. survey, while the absence of such vacancy would harmonize with the surrounding surveys. *Held*, that a verdict finding such a vacancy to exist was against the weight of the evidence, and should be set aside.

2. An assignment that "the court erred in refusing to give the three special instructions requested by defendants, numbered 1, 4, and 6," is too general, when the instructions bear upon different and distinct issues.

Appeal from district court, Wichita county; J. A. Templeton, Special Judge.

Trespass to try title by T. W. Daniels against W. T. Waggoner and others. From a judgment for plaintiff, defendants appeal. Reversed.

W. W. Flood, for appellants. Robt. Cobb, R. E. Huff, and L. T. Miller, for appellee.

TARLTON, C. J. This appeal is from a judgment wherein the appellee, as plaintiff, recovered from the appellants, as defendants, 308 acres of land lying in Wichita county. The plaintiff's claim rests upon a location made July 20, 1886, by virtue of Confederate certificate No. 655, issued August 27, 1881, to Lewis Coleman, for 1,280 acres. The defendants claim by title derived from the heirs of Samuel C. Anderson, to whom a patent was issued August 4, 1877. The appellee contends that his location was upon a vacant strip situated between the east line of the Samuel Anderson survey and the west lines of the C. T. Railroad surveys Nos. 1 and 2, which lie contiguously, the one north of the other. The sole question for our consideration is whether, in the light of the record, there was such a vacancy at the time of the Coleman location.

The course of the south line of the Samuel Anderson survey is "east 1,866 varas to the west line of the C. T. R. R. Co. survey No. 2, thence north 3,670 varas to the northwest corner of the C. T. R. R. Co. survey No. 1." While the west line of the two C. T. Railroad Company surveys is an unmarked prairie line, its location is nevertheless undisputed, and the inference to be irresistibly drawn from the field notes of the Coleman survey is that the appellee admits it, practically, to be where the appellants claim that it is. When the surveyor of the Anderson tract tells us, as he does in the field notes thereof, that the east line of that survey and the west line of the C. T. Railroad Company surveys are coincident, we must presume that he tells the truth, and that this statement is founded upon an actual survey made by him. The line thus called for, and with its locality, as in this instance, fixed and acknowledged, becomes, though unmarked, an "artificial object," controlling course and distance. *Madrox v. Fenner*, 79 Tex. 279, 15 S. W. Rep. 237; *Groesbeck v. Harris*, 82 Tex. 415, 19 S. W. Rep. 850. The presumption referred to is, of course, disputable; and its effect may be avoided by proof that the challenged call was made by mistake. In this case, however, the testimony, as we interpret it, sustains the theory of an actual surveyor, and excludes that of mistake or conjecture. Without stating other reasons leading us to this conclusion, it suffices to say that, accepting appellee's theory, the Samuel Anderson would violate its call, requiring its west line to course with the east line, thoroughly

fixed and identified, of the older (Rivers) survey, and, in its western course, to conflict with the latter survey to the extent of a strip 390 varas wide and 2,726 varas long. Accepting, on the contrary, the appellants' theory, the calls of the Anderson harmonize quite satisfactorily with those of the surrounding surveys. We think that the verdict of the jury, finding the existence of a vacancy between the Anderson and the two C. R. Railroad Company surveys, is contrary to the manifest weight of the testimony, and that the trial court should have sustained the defendants' motion for a new trial, urging the grounds above set out, and included, substantially, in their fourteenth assignment of error.

We decline to consider appellants' proposition to the effect that appellee failed to establish title, even conceding the existence of the vacancy. This proposition rests upon an assignment that "the court erred in refusing to give the three special instructions requested by defendants, numbered 1, 4, and 6." Such an assignment, the instructions requested bearing upon different and distinct issues, is too general to require notice. For the error pointed out, the judgment is reversed, and the cause is remanded.

NASH et al. v. HERRING.¹

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

HOMESTEAD—ABANDONMENT—EVIDENCE.

A man sold and conveyed land which he and his wife had occupied as a homestead. Two weeks before the sale, he and his family had moved away from the premises, and his wife consented to such removal, but she favored a lease of the land, and not a sale, and hence did not join in the deed. She, however, had no intention to return to the land without her husband, and he had frequently expressed his intention not to return. The husband bought, with part of the proceeds of sale, some lots, which were exempt from liability to creditors as constituting a homestead, though the family lived for a time in a rented house; and subsequently he leased for five years a large farm, on which he died. *Held*, that the homestead was abandoned by both husband and wife before the sale.

Error from district court, Bastrop county; H. Telchmueller, Judge.

Action by Lillie L. Nash and others against John Herring. Judgment for defendant, and plaintiffs bring error. Affirmed.

Geo. F. Pendexter and G. Wallen, for plaintiffs in error. B. D. Organ and J. P. Fauler, for defendant in error.

KEY, J. Mrs. Lillie L. Nash and her three children brought this suit to recover certain real estate conveyed by her deceased husband, H. C. Nash, to one A. C. Harvey, and by Harvey to John Herring, the defendant in error. Plaintiffs alleged in their petition that the property was the homestead of said

H. C. Nash and Lillie L. Nash at the time the former conveyed to Harvey, and that Lillie L. Nash did not join in the conveyance. The trial court gave judgment for the defendant.

There is no statement of facts in the record. The court's conclusions of facts and law are as follows:

"I. Facts.

"(1) The premises in controversy were conveyed by John T. Nash to H. C. Nash by deed dated March 19, 1883. (2) During the month of July, 1883, H. C. Nash married Mrs. Lillie L. Nash, the present plaintiff, and in the same month they took possession of the premises, and have occupied them as their homestead until some time in the month of January, 1884. (3) Considerations and reasons, in which his wife fully concurred, induced a desire in H. C. Nash to remove from said premises, with the fixed intention on his part, repeatedly expressed, never to return; and on the 15th day of February, 1884, he conveyed the premises to one A. C. Harvey, alone, his wife failing to join him in the deed of conveyance. (4) On the 22d of February, 1884, H. C. Nash purchased from K. H. Barbee certain lots in the town of McDade, with a mill, steam engine, and other fixtures, for the sum of two thousand dollars, of which he paid the sum of five hundred dollars at the time of receiving a deed, and for the balance of which he executed his notes. Concerning this purchase, Nash and Barbee had been negotiating for some time, and its consummation was dependent on the success of Nash in selling the premises now in controversy, and the five hundred dollars he paid to Barbee were part of the purchase money he received from Harvey for the farm. (5) For five or six months after his purchase from Barbee, Nash followed the mill business on the premises purchased from Barbee, but during this time he resided with his family on rented premises in the town of McDade. (6) About two or three weeks before the sale of his farm to Harvey, Nash had removed with his family from that place, and the premises were vacated when Harvey received a deed and took possession, the 15th of February, 1884. (7) Nash, becoming dissatisfied with his McDade property, and feeling unable to pay the balance of the purchase money, canceled the contract with Barbee, and returned to him the deed he had received from him. (8) In November, 1884, Nash obtained from Vaughn & Brother a lease to a large farm for the period of five years; and he ultimately moved with his family to — county, where he died, in 1888. (9) The premises in controversy were conveyed by A. C. Harvey to the defendant, John Herring, by deed dated August 12, 1888. (10) Mrs. Nash, though favoring a removal of the family, advised her husband to lease the premises in-

¹ Rehearing pending.

stead of selling them, and she declared to him that she would not join him in a conveyance; but she states that it was then and afterwards not her purpose to return to the place without her husband, and admits that it was his determination never to return to the place.

"II. Law.

"(1) If the premises in controversy were the homestead of H. C. Nash on the 15th of February, 1884, the conveyance by H. C. Nash, without his wife joining him, is void as to her homestead estate in the premises; but, if the place was not the homestead of the family at that time, the conveyance by Nash alone passed title.

"(2) That the place was abandoned as a homestead is inferred from the following facts: (a) The place was actually vacated at the time of sale by Nash to Harvey. (b) The purchase by Nash of property in McDade, which, though not used as a residence of the family, was exempt from liability to creditors as constituting a homestead, evidences the purpose of abandoning the former homestead, and the intent of Nash to provide a new homestead for the family,—an intent partly carried into execution. (c) The designation and selection of a homestead for the family is incumbent upon the husband, and the acquiescence by the wife in this case, and the subordination of her views to those of her husband, indicate her concurrence in her husband's manifest purpose to abandon their first homestead. (d) The subsequent movements of the family until Nash died, in 1888, tend to prove that the original intention of abandonment was adhered to by the parties."

A reversal of the judgment is sought, upon the contention that the findings of fact show that the property was the homestead of Mrs. Nash when it was conveyed by her husband to Harvey. With this contention we cannot agree. It clearly appears from the court's findings that H. C. Nash had abandoned all homestead rights in the property at the time he sold it. This action on his part, if not binding upon his wife, certainly concludes his children. *Portwood v. Newberry*, 79 Tex. 337, 15 S. W. Rep. 270. We do not deem it necessary to decide, in this case, whether or not the husband, when he acts in good faith, and removes his family from the homestead with the intention of abandonment, can bind his wife by such action, without acquiring another homestead. While the findings of the court below are not as specific as they might have been in regard to Mrs. Nash's intention, we think that court intended to hold, as a fact, that she voluntarily and willingly left her homestead with the intention never again to occupy it as a homestead; and we cannot say that this conclusion is overthrown by the facts disclosed by the findings. It is true that she did not want her husband to sell the prop-

erty, and declined to join in the execution of the deed; but these facts, while tending to disprove abandonment on her part, are not conclusive. She may have had other reasons than an intention to reoccupy the property as a home for objecting to the sale. She may have considered it better, as a business proposition, for her husband to keep the property, and rent it, than to sell it. It does not appear that she objected to the sale of it because she intended or desired to return and use it as a home. The court's findings show that she testified that she did not intend to return to the property without her husband, and admitted that it was his determination never to return. The most that can be contended in behalf of Mrs. Nash is that this statement shows, inferentially, a contingent intention on her part to return to the property. But this contingency rests upon an admitted improbability. Such an intention was too remote. We think this testimony shows that Mrs. Nash intended to leave the master of residence and homestead entirely to her husband; and while she thought it better not to sell the property in question, still, whether or not it should ever be occupied any more as a home would be for her husband to determine. We find no error in the judgment, and it is affirmed.

WESTFALL v. PERRY.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

CONTRACTS—STATUTE OF FRAUDS—PERFORMANCE—DAMAGES FOR BREACH.

1. Plaintiff, defendant, and another agreed to erect a windmill at a well on the land of a third person, in consideration of which they were to have the use of the machinery and water for three years for their stock, and were to share equally the expense of the machinery. Plaintiff alleged that, after the mill had been erected and the water used about a year, defendant fenced in the well, and cut off plaintiff's stock from the use of it. *Held*, that plaintiff could recover damages, for the contract was not obnoxious to the statute of frauds because not to be performed within a year; the consideration having been paid, and action having been taken on the contract.

2. The expense sustained by being compelled to hire a man to drive his stock 12 miles to water, and the loss arising from the depreciation in value of the stock of \$1 per head by being driven so far, were proper elements of damages.

3. Plaintiff's allegation that defendant's acts were maliciously, willfully, and wantonly done, and that he ought to be awarded \$500 exemplary damages, was sufficient to admit proof on the subject.

4. The value of certain horses, which it was alleged, being unable to obtain water, and urged on by thirst, attempted to break into another watering place, and injured themselves so that they could not be driven to water, and died, could not be recovered as damages, the cause of death being too remote.

5. It was improper for plaintiff to join with the suit for damages to his stock a demand for his expense in erecting the windmill.

6. The owner of the land on which the windmill was constructed was not a necessary or proper party to the suit; she not having broken any contract, or, by any act of her own, caused damage to the plaintiff.

Appeal from Kinney county court; R. Kratz, Judge.

Action by W. Westfall against one Perry to recover damages for violation of contract. From a judgment in favor of defendant, plaintiff appeals. Reversed.

C. C. Clamp, for appellant. Solon Stewart, for appellee.

FLY, J. Appellant, who was plaintiff in the court below, alleges in his petition that he, the defendant, and one J. M. Henson, on the one part, and E. Reid, on the other, entered into an agreement that plaintiff, defendant, and Henson, in consideration of erecting a windmill and pump at a well owned by Reid on a certain survey in Kinney county, owned by said Reid, should have the use of the machinery and water for three years for the cattle and horses of all of the parties; that the machinery cost the sum of \$120, equally apportioned among plaintiff, defendant, and Henson; that the agreement was reduced to writing, and, although a contract in which the last three were equally interested, yet was only signed by Reid and defendant; that the windmill was erected and the water was used by each of the parties for about a year, but after that time defendant had fenced up the well, and prevented plaintiff from watering his stock at the well; that plaintiff, after the well had been fenced, had bought out Henson's water rights; that Reid had not been made a party because he had not in any manner interfered with plaintiff's rights; that there was ample water in the well for all interested; that the well had been fenced, and his stock cut off from it, in a severe drought, and water very scarce; that the fencing of the well was done with a wicked and malicious desire to cause damage to plaintiff and Henson; that plaintiff had 100 head of cattle and 40 horses, and that, by reason of the well being fenced, plaintiff, to prevent them dying, was compelled to hire a man, at \$2 per day, for 45 days, to drive the stock to the nearest water, a distance of 12 miles, over a rough and dry country; that the horses, being unable to obtain water sufficient,—urged on by thirst,—attempted to break into another watering place, and injured themselves so that they could not be driven to water, and 10 head, of the value of \$10 each, died; that the 100 head of cattle, by reason of being driven so far to water, were damaged \$1 per head. Plaintiff further alleged that defendant, having taken the well and pump, was indebted to him for the same, and, plaintiff having bought out Henson, defendant ought to pay him \$30,—two-thirds of the cost of the windmill; that defendant's acts were conceived and done in

a malicious spirit towards plaintiff; that they were wilfully and wantonly done; and that he ought to be awarded \$500 as exemplary damages. Defendant filed general and special exceptions, stating in the latter that the action ought not to be maintained because the contract was not in writing, and was not to be performed in one year; that there was a misjoinder of actions, in joining an action for debt for the windmill with a suit for damages growing out of the use of that property; that the damages claimed are too remote, imaginary, and not susceptible of proof showing that the stock were injured by the violation of the contract; that the petition shows that plaintiff had violated the contract by buying out Henson; and that plaintiff cannot recover for the value of improvements made on Reid's land. The special exceptions were sustained, and, plaintiff declining to amend, the case was dismissed, and this action of the court is assigned as error.

We are of the opinion that the court erred in sustaining all the special exceptions. If the allegations in plaintiff's petition were true,—and they must be taken as true on demurrer,—then he had a right to recover such damages as naturally flowed out of a breach of the contract. The contract was in writing, and, if it had not been, the consideration having been paid, and action having been taken on the contract, it was not obnoxious to the statute of frauds because not to be performed in one year. If Mrs. Reid, the owner of the land, had endeavored to repudiate the contract after she had permitted the improvements, and had acquiesced in the use of the land, the law would not tolerate such bad faith; and it would be unconscionable to allow defendant, under the circumstances of this case, to get the benefit of all the improvements, and the good to result from their use, under a plea that the contract was invalid because it was not to be performed in one year. *Dugan v. Colville*, 8 Tex. 126; *Whitson v. Smith*, 15 Tex. 31. The rule on this subject has been stated by the supreme court of the United States as follows: "Where one of the two contracting parties has been induced or allowed to alter his position on the faith of such contract to such an extent that it would be fraud on the part of the other party to set up its invalidity, courts of equity hold that the clear proof of the contract, and of the acts of part performance, will take the case out of the operation of the statute, if the acts of part performance were already such as to show that they are properly referable to the parol agreement." *Williams v. Morris*, 95 U. S. 457. The statute of frauds is to prevent frauds, not to encourage or give aid and comfort to them. *Castleman v. Sherry*, 42 Tex. 39; *Ponce v. McWhorter*, 50 Tex. 563. The damages of \$90 alleged to have been sustained by reason of plaintiff being compelled to hire a man to drive his stock to water a

distance of 12 miles, and those arising from the loss in value of \$1 per head, were proper elements of damages, in this case, and were fully and explicitly enough set forth to support the introduction of proof. The acts of defendant in fencing up the well, and excluding plaintiff's cattle from water, were the direct and proximate cause of the expense incurred in hiring a hand to drive the stock of plaintiff to water, and of the deterioration in value of \$1 per head of the 100 head of cattle; and the allegations in the petition are sufficient, if supported by proper proof, to entitle plaintiff to recover the amount of \$190 from defendant. The allegations of the exemplary damages are likewise sufficient to admit proof, and the exception as to them should not have been sustained.

The value of the 10 horses that killed themselves, seeking for water, is too remote to be recovered as damages, their death not being the direct and proximate result of defendant's act in fencing the well.

It was improper for plaintiff to join with this suit for damages a demand for his two-thirds expense in erecting the windmill, and as to that item the exception was properly sustained.

Mrs. E. Reid was neither a necessary nor proper party to the suit. She had not broken any contract, or, by any act of hers, caused damage to plaintiff, and he had no right to join her as defendant in an action against the person who had been guilty of the alleged wrongful acts. The fact that she owned the land can in no manner make her a proper party in this suit. For the errors indicated in this opinion, the judgment of the lower court is reversed, and the cause remanded.

EDWARDS et al. v. GILL et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

ADMINISTRATOR'S SALE — PRESUMPTIONS — WHEN TITLE PASSES—TRESPASS TO TRY TITLE.

1. An administrator, under an order of court, sold a land certificate of his intestate in March, but the sale was not confirmed until the following May. In April a patent was issued by virtue of the certificate. *Held*, that title to the land passed on the sale of the certificate, the presumption being that the certificate had not been located at the time of the sale, and was personal property, and the confirmation, though subsequent to the day of sale, relates back to the date, and carries title from that time.

2. Where the holders of the equitable title to land seek a recovery against trespassers without color of title and with no connection with the legal title and with no evidence of possession, a defense of a stale demand is unavailing.

Appeal from district court, Frio county: D. P. Marr, Judge.

Trespass to try title by T. D. Gill and others against L. J. W. Edwards and others. Judg-

ment was rendered in favor of plaintiffs, and defendants appeal. Affirmed.

W. T. Meriwether, Upson & Bergstrom, and Barnard & Green, for appellants. Mason Maney, for appellees.

NEILL, J. This is an action of trespass to try title, brought on the 11th day of May, 1889, by appellees against L. J. W. Edwards and J. E. Berry, to recover one-third of a league and labor of land in Frio county out of survey No. 1,178, patented to Mathew C. Patton on April 24, 1855. The defendant Edwards answered by a plea of not guilty, and alleged that on the 20th day of August, 1886, he purchased a portion of the land from John C. French for \$638.75, the title to which French warranted by his deed of that date. He alleged the death of his grantor; that Sallie R. French was his independent executrix; prayed that she be made a party defendant, and that, in the event plaintiff recovered, he have judgment against her on the warranty of her testator. She was made a party, and answered by a general denial. The defendant J. E. Berry answered by disclaiming any interest in the premises but as a tenant of the estate of A. Hansford, deceased; whereupon M. A. Hansford, administrator of the estate of A. Hansford, appeared, and answered by a plea of not guilty. The case was tried without a jury, and judgment rendered in favor of appellees for the land in controversy, and in favor of Edwards against Sallie R. French, as independent executrix of John C. French, deceased, for \$638.75, with interest thereon at the rate of 8 per cent. per annum from the 25th day of August, 1886, from which judgment this appeal is prosecuted. The only evidence appearing in the record was introduced by appellees, from which we deduce the following

Conclusions of Fact.

(1) Patent issued by the state of Texas to Mathew C. Patton, his heirs or assigns, on the 24th day of April, 1855, granting the league and labor of land which includes the property in controversy. The patent recites that it was issued by virtue of certificate No. 39, issued by the board of land commissioners of Brazoria county, January 25, 1838. (2) Letters of administration were granted by the county court of Brazoria county on the 23d day of February, 1852, to John P. Gill, on the estate of Mathew C. Patton, deceased. (3) Application of John P. Gill as administrator of the estate of Mathew C. Patton, deceased, to the county court of Brazoria county for an order to sell "the certificate for one league and labor, issued to his intestate," in which the administrator prays that the sale be made on the first Tuesday in February, 1855, on a credit of six months, which application was filed on the 20th of December, 1854. (4) Order of the county court of

Brazoria county, made upon the application above referred to, authorizing the said administrator to sell "a land certificate for one league and labor of land, which was granted to his intestate as a headright claim," at public auction, to the highest bidder, in front of the courthouse door in the town of Brazoria, on a credit of six months, which order was made on the 2d of February, 1855. (5) Report of sale made by said administrator to said court, in which he represented that, in obedience to the order above referred to, he, on the first Tuesday in March, 1855, offered for sale at the courthouse door in the town of Brazoria "a certificate for one league and labor of land, the headright of his intestate," upon a credit of six months, etc., at which sale M. T. C. Patton became the purchaser of said certificate, etc., which report was filed on the 1st of May, 1855. (6) On May 1, 1855, the following order was made by the county court of Brazoria county, viz.: "1st May, 1855. This day John P. Gill, administrator of M. C. Patton, deceased, presented in court an account, verified by affidavit, of the sale of a certificate for one league of land granted by the government of — to said M. C. Patton as a colonist, and the court having examined into the means in which said sale was made, and being satisfied that the same was fairly made, and in every respect in conformity with law, ordered, adjudged, and decreed that said sale be, and the sale is hereby, confirmed and approved, and that said administrator transfer said certificate to M. T. C. Patton, the purchaser." (7) Deed from John P. Gill, as administrator of the estate of M. C. Patton, to M. T. C. Patton, conveying a certificate for one league and labor of land, the headright of his (Gill's) intestate, which deed recites the order of sale, report of sale, and confirmation above referred to, and bears date July 29, 1856. (8) A deed from M. T. C. Patton to John P. Gill, executed on the 1st of February, 1858, conveying all of his right, title, and interest in and to a certain league and labor of land situated in the district of Bexar, which land is described as located by virtue of a certain certificate for said quantity of land, issued as the headright to Mathew C. Patton, and that the certificate was conveyed to the grantor by the administrator of said Patton. (9) The will of John P. Gill, by which he bequeathed his estate to the children of his brother, Robert J. Gill, and the children of Verona C. West, to be equally divided between them. Robert J. Gill and Peter J. West were named in the will as the executors, which will was admitted to probate by the county court of Fort Bend county on the 31st of May, 1860. (10) All the appellees are children of Robert J. Gill and Verona C. West, except Iona McDuffie, who is a granddaughter of Robert J. Gill. (11) The evidence did not show any connection of the appellants with the pat-

ent of the land, nor the time they had been in possession, if at all, of the land.

Conclusions of Law.

It sufficiently appears that the application for the order of sale, the order of sale, the report of sale, and order confirming it, relate to the headright certificate of Mathew C. Patton for a league and a labor of land; and, when all are taken and construed together, they are amply sufficient to identify the certificate; and the recitation in the patent shows that said certificate was located on the land in controversy. *Hurley v. Barnard*, 48 Tex. 88; *Davis v. Touchstone*, 45 Tex. 490; *Robertson v. Johnson*, 57 Tex. 64. The patent to the land having issued on April 24, 1855, and the sale of the certificate, though made (as shown by the administrator's report) on the first Tuesday in March, not having been confirmed by the court until the 6th of May, it becomes important to determine at what time the title passed, if at all, by virtue of the sale of the certificate. After a certificate is located, it ceases to be personalty, but is merged in and becomes a part of the realty. *Hearne v. Gillett*, 62 Tex. 25; *Simpson v. Chapman*, 45 Tex. 566; *Adams v. Railway Co.*, 70 Tex. 275, 7 S. W. Rep. 729. We cannot presume, in the absence of evidence, that when the probate court ordered the sale the certificate had been located, but must presume that it had not, for the court would not have ordered the sale of personalty after it ceased to exist as such. The rule seems to be that a sale made by an administrator or other functionary by order of and under authority of a court is not complete, and confers no rights until confirmed. But when confirmation is made by the court, though subsequent to the day of sale, it relates back to the date of the sale, if the date of sale is made to appear, and carries title from that date. *Rorer, Jud. Sales*, (2d Ed.) § 109; *Taylor v. Cooper*, 10 Leigh, 317; *Evans v. Spurgin*, 52 Amer. Dec. 107; *Cale v. Shaw*, (W. Va.) 10 S. E. Rep. 639. The case of *Taylor v. Cooper*, supra, was brought by Cooper against John Taylor, administrator of the estate of Peter Dyerle, for rents on certain lands belonging to Dyerle, which were ordered sold by the administrator on a credit of 6, 12, and 18 months. On January 10, 1835, the land was sold under the decree to Cooper, who gave his bond for the purchase money. At the time of the sale the land was rented, and the tenant paid the rent, amounting to \$200, to the administrator, notwithstanding Cooper had notified him not to pay it. The sale was afterwards confirmed. Judgment was given in Cooper's favor against the administrator. Judge Tucker, in rendering the opinion of the court, said: "I have not the slightest doubt of the right of Cooper to the rent in question. * * * Where the sale is confirmed,—that is, where both contracting

parties (the purchaser and the court) concur in ratifying the inchoate purchase,—the confirmation relates back to the sale, and the purchaser is entitled to everything he would have been entitled to if the confirmation and conveyance of title had been contemporaneous with the sale." In the case before us the court ordered the certificate to be sold at a certain time, place, and in the manner, and on terms specified in the order. The report of the sale by the administrator shows on its face a strict compliance with the order, and the confirmation by the court relates to and sanctions what was done in obedience to and under its authority, and its effect was as though its confirmation and the act confirmed were contemporaneous. Thereupon the title to the certificate vested in M. T. C. Patton on the first Tuesday in March, 1885, and the right to locate and acquire land by virtue of it. *Cox v. Bray*, 23 Tex. 261. When the patent issued by virtue of the certificate, it inured to the benefit of, and vested title in, the assignee. But appellants say that the title is an equitable one only, (it is,) and that appellees' demand is stale, and therefore they cannot recover on it. When a recovery is sought against strangers to the title, who are trespassers without color of title, and who show no connection with the legal title, as in this case, and the time they had been in possession, if at all, does not appear, the defense of stale demand is unavailing to defeat the right of recovery. *Wright v. Dunn*, 73 Tex. 295, 11 S. W. Rep. 330; *Moss v. Berry*, 53 Tex. 832; *Murphy v. Welder*, 58 Tex. 236. We find no error in the record, and the judgment is affirmed.

TEXAS & P. R. CO. v. WOOD.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

CARRIERS—ILLEGAL FREIGHT CHARGES—RECOVERY OF PENALTY.

1. In an action to recover the statutory penalty for detaining goods after the amount of freight has been tendered, the party seeking recovery must bring himself strictly within its terms; and, since the statute bases the amount of penalty recoverable on the amount of freight designated in the bill of lading, there can be no recovery where there are no figures or data given in the bill, and none referred to, from which the amount of freight can be calculated.

2. An expense account, furnished by the carrier, and showing the amount of freight, constitutes no part of the bill of lading, and cannot be used in aid of it unless referred to therein.

Appeal from El Paso county court; Allen Blacker, Judge.

Action by H. R. Wood against the Texas & Pacific Railroad Company to recover the statutory penalty for detaining goods, the amount of freight having been tendered. Judgment was entered in favor of plaintiff, and defendant appeals. Reversed.

R. S. Lovett, for appellant. J. P. Hague and Waters Davis, for appellee.

FLY, J. This suit was brought by appellee against appellant to recover the statutory penalty for detaining goods, the amount of freight having been tendered, the petition showing that the goods were shipped from New York to the city of Mexico in care of appellee at El Paso. Appellant filed a general demurrer to the petition, and general denial. The bills of lading are attached to the petition, and made a part of it. The evidence shows that plaintiff, desiring to obtain the low rates on a long haul, had a lot of goods shipped from New York to the city of Mexico, in his own cars at El Paso, Tex. He had previous to the shipment made arrangements with the agent of appellant at El Paso to allow him to stop the goods at El Paso by paying a pro rata of the through rate. When the goods came they were held for seven days by appellant, although appellee not only offered to pay what he considered the proper freight, but also offered to pay the amount claimed by the agent, who claimed that he was compelled to hear from his superiors before he could deliver the freight. After the goods had been held for seven days, the agent accepted the amount of freight money first offered by appellee, and delivered the goods. Two bills of lading were placed in evidence, both from the Cromwell Pacific Through Line and the Texas & Pacific Railway, John C. Brown, receiver, signed "S. E. Stehr, General Eastern Agent, at New York, Oct. 20, 1888." Neither of the bills of lading show the weights of the goods, only showing a through rate of \$1.53 per 100 pounds on some of the freight and \$1.96 per 100 pounds on some others, the rate of freight not being shown as to others. An expense account furnished by appellant shows the amount of freight. In the case of *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. Rep. 1014, it is held that the expense account constitutes no part of the bill of lading, and cannot be used in aid of it, unless referred to in the bill of lading. In other words, the bill of lading must give upon its face sufficient data from which the amount of freight can be ascertained, and extraneous evidence cannot be resorted to for this purpose unless it is referred to in the bill of lading. The only reference to the amount of freight in the bills of lading is in one, as follows:

No. Pkgs.	Description of Articles.	Said to Weigh.
Two (2)	Cases Sad Iron	1.53 Owner's risk.
Three (8)	" Hardware	1.96
Five (5)	" Scales	" Marine risk assumed by Cromwell Pacific Through Line
One (1)	Bbl. Bells.	"

In the other is found the following:

No. Pkgs.	Description of Articles.	Said to Weigh.
Seventeen Boxes	Coffee Mills	550
Two Bbls.	Iron Castings	845
Five Boxes	Hardware	1300

The figures under the words "said to weigh" are erased by a line drawn across them. There are no other figures given in the bills of lading in relation to the freight, and no data given, and none referred to, from which the amount of freight can be calculated. The remedy invoked in this case against appellant is statutory, and to the statute we must look for its construction. It does not deprive the shipper or consignee of any right he enjoyed before its enactment, to enforce by suit any claim for damages that he had sustained from the unlawful detention of goods by a common carrier. In an ordinary suit for damages arising out of refusal to deliver goods when freight is tendered, proof of what the true amount of freight was might be introduced outside of and independent of the bill of lading if it was silent on the subject, but suits of this character are not brought for compensatory damages. The amount recovered may be grossly in excess of the actual damage incurred. So far as the railroad is concerned, the statute under which this suit was brought is penal. It enjoins a duty, and prescribes a punishment for a failure to perform it. Article 4253, Sayles' Civil St. It has been held by the supreme court of the United States, and quoted without dissent by our supreme court, that in cases of this character the facts necessary to sustain a verdict against a defendant for penalty must be proved beyond a reasonable doubt. *Chaffee v. U. S.*, 18 Wall. 516; *Railway Co. v. Dwyer*, 84 Tex. 195, 19 S. W. Rep. 470. It has been universally held that, where a party seeks to recover by virtue of a penal statute, he must bring himself within the terms of the statute, and, the statute basing the amount of penalty to be recovered on the amount of freight designated in the bill of lading, we cannot extend the scope of its provisions. *De Witt v. Dunn*, 15 Tex. 108; *De la Garza v. Booth*, 28 Tex. 478; *Scogins v. Perry*, 46 Tex. 111; *Murray v. Railway Co.*, 63 Tex. 413. The judgment of the lower court is reversed, and the cause dismissed.

SOZAYA v. PATTERSON et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

COURTS—JURISDICTIONAL AMOUNT—TORTS.

In actions sounding in damages for tort, the amount claimed in the petition determines the jurisdiction of the court, unless the question of jurisdiction is raised by an allegation that plaintiff fraudulently alleged an excessive amount for the purpose of giving the court jurisdiction.

Appeal from El Paso county court; J. E. Townsend, Judge.

Action by Bonifacia Sozaya against C. B. Patterson and others for damages for an alleged wrongful levy on plaintiff's goods.

Judgment was entered in favor of defendants, and plaintiff appeals. Affirmed.

N. B. Bendy and John Mitchell, for appellant.

JAMES, C. J. This was a suit against a constable, and the sureties on his official bond, for a wrongful levy upon and appropriation of plaintiff's exempt household effects, which act was alleged to be done with knowledge of the exemption, and oppressively and maliciously, praying for \$50 actual and \$850 exemplary damages. Defendants, in connection with other defenses, pleaded that the plaintiff had fraudulently alleged her damages at such a sum as to give the court jurisdiction, when, in truth and in fact, if she had a cause of action against defendant constable for damages, it was one over which this county court had not original jurisdiction. The cause was submitted to the jury, among other matters, on the question of jurisdiction, by charges not complained of, except in so far as they submitted the question of jurisdiction to the jury, for, as stated in the assignment of error, "the plaintiff's petition showed the case to be one of trespass, sounding in damages, claiming the sum of nine hundred dollars, for levying execution upon, and taking from plaintiff's possession, her homestead and other exempt property, and turning her and her children out of possession of same." The jury found that the county court had no jurisdiction in the cause. Plaintiff in error contends that, in actions "sounding in damages for tort, the amount claimed in the petition determines the jurisdiction of the court."

Conclusions of Law.

The rule stated by appellant is correct, unless the question of jurisdiction is raised, that the amount alleged by plaintiff was fraudulently alleged for the purpose of giving the court jurisdiction. Such plea being interposed in this action, it was proper that it should have been determined by the jury, under proper instructions. The authority cited by plaintiff in error (*Dwyer v. Bassett*, 63 Tex. 274) is against her on this question. See, also, *Roper v. Brady*, 80 Tex. 583, 16 S. W. Rep. 434. The correctness of the proceedings not being questioned on any other grounds, the judgment is affirmed.

SAN ANTONIO & A. P. RY. CO. v. VAUGHN.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

RAILROAD COMPANIES—CHILD KILLED ON TRACK—EVIDENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. In an action for damages against a railroad company for the negligent killing of plaintiff's child, evidence of the worldly condition of plaintiff is admissible to show whether plain-

tiff and his wife were guilty of negligence in their care of the child.

2. Where the contributory negligence of plaintiff is pleaded as a defense, he can show that his wife and son, with whom the child was left, were accustomed to exercise the greatest watchfulness over it.

3. A railroad company is bound to exercise reasonable care to discover persons on its track, and, in the case of a child under two years of age, the fact that it was on the track is not contributory negligence on its part; and, the negligence of defendant being conceded, the question is whether plaintiff was guilty of contributory negligence in allowing it to wander alone on the track.

4. Where a child two years old is killed on the track by the lack of ordinary care of those in charge of the train, his father can recover damages unless those in charge of the child failed to exercise ordinary diligence in keeping it off the track.

5. A charge that the company was liable if it failed to use reasonable care to avoid injury to "any person that may come upon its track" was not prejudicial, when applied to the facts in the case, because it failed to draw the distinction between the care necessary towards a person rightfully on the track and a trespasser.

6. A charge which merely defines negligence in reference to the case made by the pleadings and evidence, without commenting on the facts, but leaves them to be found by the jury, and leaves the jury to determine from them whether they constitute negligence as defined, is not on the weight of evidence.

Appeal from district court, Kerr county; Thomas M. Paschal, Judge.

Action by George D. Vaughn against the San Antonio & Aransas Pass Railway Company to recover damages for the negligent killing of his child. Judgment for plaintiff. Defendant appeals. Affirmed.

William Aubrey and John Sehorn, for appellant. Denman & Franklin, W. G. Garrett, and W. W. Burnett, for appellee.

NEILL, J. This appeal is from a judgment of \$2,000, recovered by appellee against appellant for running its train over and killing his little child. It was alleged by appellee that appellant's negligence causing the death consisted of: (1) The failure of appellant's servants operating the train which killed the child to observe the child on its track in time to avoid striking him, and without taking any precaution to prevent the accident. (2) The failure of appellant's servants operating the train to ring the bell or blow the whistle at a road crossing about 600 yards from the place where the child was killed, and in the direction from which the train was running; thus preventing appellee and his wife, and their son, 13 years old, from knowing of the approach of the train in time to have removed the child from its place of danger, which it was alleged they could and would have done if the usual signals had been given at said crossing. The wife of appellee, who was mother of the child, was joined as a party plaintiff to the suit; but exceptions were sustained to the petition upon the ground that she was neither a proper nor necessary party, upon which the suit

was prosecuted by the husband alone. The appellant pleaded a general denial, and not guilty, and specially that the death of the child was the result of the contributory negligence of appellee and his wife in permitting the child, unprotected, to wander alone upon appellant's track at a time and place where he would likely be injured.

Under the first, fourth, and thirteenth assignments of error appellant asserts the proposition that "in an action for actual damages by the parents for the negligent killing of their children, evidence of the worldly condition or of the wealth or poverty of such parents is immaterial and irrelevant, and the admission of it reversible error." None of the authorities cited by appellant under this proposition support it. They all relate to actions for personal injuries when the suit was brought by the injured party. In the case of *Brunswick v. White*, 70 Tex. 504, 8 S. W. Rep. 85, which was an action by the parents to recover damages for the loss of the services of their child, occasioned by its death, which resulted from the negligence of the appellant, the evidence was that the parents "were poor people," and the court held that their circumstances became necessary as evidence, not as a basis for increasing or diminishing the amount of damages, but to illustrate the acts of the child as useful or otherwise. This case was quoted as authority by the United States circuit court in the case of *Ross v. Railway Co.*, 41 Fed. Rep. 46, which was a case similar to the one under consideration. And the supreme court of Kansas, in the case of *Railroad Co. v. Dunden*, 14 Pac. Rep. 501, (the evidence being that deceased's father was a poor man, and not in the best of health,) said: "The jury had presented to them evidence of the parents of the deceased, their position in life, the occupation of the father, the condition of his health, etc., and it was their province from this evidence * * * to form an estimate of the damages," etc. On the strength of these authorities we hold that appellant's proposition under the assignments of error referred to is not well taken. Besides, as the contributory negligence of the parent in permitting the child to go unattended on the railroad track was relied on as a defense, it was proper to show the circumstances surrounding the parent's home, such as their mode of earning a livelihood, and their ability to employ a nurse for the child, in order to enable the jury to determine whether its parents used such care in protecting the child from danger as reasonably prudent people would have done under like circumstances. *Keyser v. Railroad Co.*, (Mich.) 33 N. W. Rep. 867; *Hoppe v. Railway Co.*, (Wis.) 21 N. W. Rep. 227; *Smith v. Railroad Co.*, 4 Amer. & Eng. R. Cas. 557; *McGeary v. Railroad Co.*, 15 Amer. & Eng. R. Cas. 407; *Isabel v. Railroad Co.*, 60 Mo. 483. Under the principle that it was proper to show the circumstances surrounding the

parents' home, such as their mode of earning a living, etc., for the purpose of enabling the jury to determine whether the child's parents were guilty of contributory negligence, we think that the admission of the testimony complained of in appellant's second, third, fifth, and sixth assignments was proper.

Over appellant's objections the mother of the deceased child was permitted to testify "that on all occasions prior to the accident, when she heard the train coming, whistling, or passing, her first thought was to see where the child was, and who had him; and that she always, upon hearing the train, ran to the child, no matter who had him at the time." The objection to the testimony was that what her custom had been on previous occasions was irrelevant and immaterial. The action of the court in admitting the testimony is assigned as error. The same witness was also permitted to testify over appellant's objection that her son Henry, in whose charge she placed the child a short time before the accident, was just as careful as any child could be; that he always idolized the child, and was very careful. The objection was that the testimony was irrelevant and immaterial. The testimony is also assigned as error. We think, in view of the fact that contributory negligence of the appellee was pleaded as a defense, the evidence as to the wife's previous care of the child, and that Henry was very careful with it, was admissible to show that appellee was not guilty of such negligence in leaving the child in the care of its mother or brother. *Hoppe v. Railway Co.*, (Wis.) 21 N. W. Rep. 227. In the third paragraph of the court's charge the jury was instructed: "If you believe from the evidence that plaintiff's child was killed by defendant's cars, as alleged, and that at the time of such killing the child was less than two years old, and if you further believe from the evidence that those in charge of defendant's train of cars, by the exercise of ordinary care, skill, and caution might have observed the child in time to have stopped the train of cars in the usual manner before it reached and ran upon the child, then the plaintiff should recover damages, unless you believe from the evidence that the child's parents or the person in charge of it, or one of them, failed to exercise ordinary prudence and diligence in preventing it from going upon the defendant's track." This part of the charge is assigned as error upon the ground that it is upon the weight of evidence, and withdraws from the jury the consideration of the question whether or not defendant's servants and agents were guilty of negligence in failing to observe the child in time to stop the train and avoid killing it. The fourth paragraph of the charge is: "If you believe from the evidence that those in charge of defendant's cars used reasonable care and skill in the operation of said cars to prevent the killing of said child, or if you believe the parents

of the child or person in charge thereof failed to exercise ordinary prudence and diligence to prevent its going upon defendant's track, then plaintiff would not be entitled to recover." The error assigned to this part of the charge is its failure to limit the time when the defendant's servants and agents should have used reasonable care in the operation of said train to prevent killing the child to the time after the agents of defendant saw it on the track, or could have seen it by the exercise of ordinary care and diligence. The appellant asked the court to instruct the jury that "any person who enters upon the track of a railway at a place where it is the private property of the company, and the railroad company is entitled to the exclusive use and possession of the track,—as where there is no public crossing and persons do not habitually appear,—becomes a trespasser, and the company is not bound to run its trains in reference to the probable presence of persons upon the track, except at public crossings and highways. The fact that a person is a trespasser, however, does not authorize his wanton or negligent injury; but if the employees of the defendant, upon the discovery of such person upon the track, use all the means in their power to prevent the injury, but nevertheless do injure him, then the company will not be liable. So, in this case, if you do find from the evidence that the child was on the track of defendant when first discovered by its employees, and they did all they could after its discovery to prevent its injury, then your verdict must be for the defendant." Under these three assignments the appellant asserts the proposition that "one who enters upon the track of a railroad company other than a public road crossing, or when the public generally use the railroad track in crossing the same, thereby becomes a trespasser; and the degree of care which the law requires should be exercised by the employees of a railroad company towards one trespassing upon the track is, after the discovery of such trespasser, to use reasonable care to prevent injuring the trespasser; and the degree of care thus imposed is not increased when the trespasser is an infant, and suit is brought by the parents of the child to recover damages for its alleged negligent killing." To this appellee interposes as a counter proposition that "it is the duty of the servants of the railroad company, operating its train, to use reasonable care and caution to discover persons on its track, and a failure to use such care and caution is negligence on the part of such company, for which they are liable in damages for an injury resulting from such negligence, unless such liability is defeated by the contributory negligence of the person injured, or of the person who seeks to recover for such injury; and in the case of an infant under two years of age, the fact of being on the track is not contributory negligence on the part of such

infant, and the question is, the negligence of defendant being conceded, whether the person seeking to recover was guilty of contributory negligence in permitting the infant to wander alone on the track." We think this is a correct enunciation of the principle of law applicable to cases like this, when the person injured on the track was not guilty of negligence proximately contributing to the injury. In this case the child killed was 19 months old, and could not be guilty of negligence. The general rule is, when the defendant owes the injured party no duty, and is not aware of his danger, though discovery might have been made by the exercise of ordinary prudence on the part of defendant, no recovery can be had. *Railway Co. v. Ryon*, 70 Tex. 58, 7 S. W. Rep. 687; *Id.*, 80 Tex. 60, 15 S. W. Rep. 588. This rule is founded on the principle that the injured party was guilty of contributory negligence in being on the track. In the case of *Railway Co. v. Sympkins*, 54 Tex. 615, it was held that if, after Sympkins went on the track of defendant, he was stricken down in a fit, and was run over by the train, his negligence in going on the track was only a remote cause of his injury, and that, if a providential occurrence interfering broke the causal connection between the original act of negligence and the injury, the defendant would be liable for the injury, if its servants failed to use ordinary diligence to discover that the plaintiff was lying on the track in a helpless condition. In the case of *Railway Co. v. O'Donnell*, 58 Tex. 43, the defendant was held liable on account of failing to use ordinary diligence to discover the little child on the track to prevent its injury, because negligence could not be imputed to it on account of the want of discretion in the child. These cases demonstrate that appellant's proposition under these assignments is not correct when applied to the facts in this case.

The third paragraph of the charge hereinbefore copied is almost in the exact language of that given in the *O'Donnell Case*, which was affirmed by the court, and is therefore not considered obnoxious to the objection urged against it by appellant. There was no error in the refusal of the court to give special charge No. 5, asked by the appellant, because the jury had been fully instructed as to the duties of parents living near a railroad track to protect their child of tender years from injury, etc. And the jury were told by the court the plaintiff could not recover if the parents or person in charge of the child failed to use ordinary care to prevent the child's going on the track. The first clause of the court's charge is as follows: "It is the duty of a railroad company, in the management and operation of its trains, to exercise all reasonable care and caution to avoid injury to any person that may come upon its track, and a failure to exercise such care and caution on the part of

the railroad company or its servants is negligence." This part of the charge is assigned as error, and one of the objections urged to it is "that the court fails to make any distinction between the liability of defendant to a trespasser on its track, and one who is on the track rightfully; and further, that it instructs the jury that the failure to exercise all reasonable care and caution to avoid injury to any person that may be upon its track is negligence, thus withdrawing from the jury the only question to be determined in the case, viz. the negligence or nonnegligence of defendant in causing the death of Harvey Vaughn." We have seen from the authorities referred to that in this state at least it is the duty of the servants of a railroad operating its trains to use reasonable diligence to discover a child of such tender years as to render it incapable of negligence, and of apprehending danger and protecting itself, on its railroad track in time to prevent its injury, and its failure to do so renders it liable for the damages resulting from its failure to use such diligence. This principle answers the first and second objections interposed by appellant to the charge quoted; for, even if the child should technically be regarded as a trespasser, it is the duty of the road to use reasonable care and caution to avoid injuring it. While the contention of appellant is that the rule announced in the charge is too general, in that it imposes the duty on the railroad company to use such care and caution to avoid injury to any person that may come on its track, it could only apply to the person injured, as shown by the evidence in this case; and, as the duty did devolve on the appellant to use such care and caution to prevent the injury to him, the supposed defect in the charge could not injure the appellant in this case.

The next question is, does the charge withdraw the question of negligence from the jury. Or, in other words, is it upon the weight of evidence? The rule is well established that a charge which states that if the jury believe certain facts to be true, then that such facts constitute negligence, is on the weight of evidence, and that the court invades the province of the jury in instructing it as to the deduction to be drawn from the facts; for it is as much the province of the jury to find its own conclusion from the facts as it is to find the facts. And charges which withdraw from the jury the question as to whether the facts, if found true, constitute negligence, are properly held to be upon the weight of evidence; but a charge that leaves it to the jury to determine from the evidence whether negligence has been established is not on the weight of evidence. A charge that does not instruct the jury as to the legal effect of certain facts in the case, nor give it to understand what weight should be given to certain evidence, nor indicate what impression has been made upon the

mind of the court by certain testimony, cannot be considered on the weight of evidence. Nor do we think that a charge which merely defines negligence in reference to the case made by the pleadings and evidence, without grouping or commenting on the facts, but which leaves them to be found by the jury, and the jury to determine from them whether such facts constitute negligence as defined, is upon the weight of evidence. If it is, we can hardly see how a jury can be so instructed by a court as to enable it to properly discharge the duty incumbent upon it when trying a question of negligence. It is the duty of the court to instruct the jury upon the law of the case. If it is one of negligence, and the court cannot inform the jury what negligence is, it cannot perform this duty. "Negligence constituting a cause of action is such an omission, by a responsible person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter." *Shear. & R. Neg. § 3*. It was the legal duty of the appellant, in the management and operation of its trains, to exercise all reasonable care and caution to avoid injury to persons on its track, and its omission to use that care and caution was negligence, and we do not think the court invaded the province of the jury in so instructing it in this case. The charge simply adapted the legal definition of negligence to the case, but the jury were left free to determine from the evidence whether appellant was guilty of negligence. In the case of *Railroad Co. v. Underwood*, 64 Tex. 469, the court gave the following charge: "It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable." The objection found by the court to it was that it practically made the defendant an insurer of the safety of its passengers, which was a higher degree of care than the law imposed; but no question was raised by the court as to its being upon the weight of evidence, for the court simply defined negligence, but did not direct the attention of the jury to any particular evidence in the case whereby it might be influenced. That charge is similar to the one under consideration, so far as it declared that the want of such care is negligence. The charge complained of in this case does not refer to any evidence introduced, nor did it even refer to the defendant in the case or to the deceased. It simply lays down the duty and care required of railroads generally to persons on their tracks, and declares the failure to discharge such duty negligence. We do not think the charge is upon the weight of evidence. We are of the opinion that there is no error in the record, and therefore affirm the case.

FENLEY v. FLOWERS.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

BOUNDARIES—CONFLICTING SURVEYS.

Where, in a conflict as to the boundaries between two surveys, it appears that the later survey was not made on the ground, but in the surveyor's office, and from his memory of a former survey, and that it called for certain trees as an established corner of an adjoining survey, while in fact the trees were not on such survey, the former survey must control.

Appeal from district court, Uvalde county; Thomas M. Paschal, Judge.

Trespass to try title by B. O. Flowers against Joel O. Fenley. Judgment for plaintiff. Defendant appeals. Affirmed.

Willett & Willett, for appellant. Clark & Old, for appellee.

NEILL, J. This is a suit of trespass to try title—brought by the appellee against appellant—to survey No. 9, in the name of J. V. Massey, situated partly in Uvalde and Kinney counties. The appellant answered by pleading not guilty, and the statute of limitations of 5 and 10 years. There was no question of title, the sole question being one of boundary of surveys No. 9 and 7 of the same block; it being admitted that appellee owned the former and appellant the latter survey; the appellant claiming that the true location of his survey, in the block, was that claimed by appellee as the position of his. The case was tried by the court without a jury, and judgment rendered for the appellee, from which this appeal was taken. The court filed its conclusions of facts in the case, which we have examined very carefully, in connection with the statement of facts contained in the record, and having, from such examination, found them correct, adopt them as our own. They are as follows, viz.: "(1) That plaintiff is the legal owner, and entitled to the possession, of survey No. 9, block No. 19, containing 640 acres, as surveyed for J. V. Massey, as shown by regular chain of transfer from the patent down to himself, and as admitted upon the trial by defendant and his counsel, and that defendant is the legal owner, and entitled to the possession, of survey No. 7 of same block of surveys, as shown by his regular chain of title from the patent to himself, and as admitted upon the trial by plaintiff and his attorneys. (2) I find from the admission of both parties upon the trial that this controversy is as to the true location of survey No. 9, claimed by plaintiff as described in his petition; defendant claiming that to be the location covered by No. 7, as claimed by him. (3) I conclude that the block of surveys known as 'I. & G. N. R. R. Co. Block No. 3,' was located by an actual survey upon the ground by F. M. Maddox, deputy

surveyor for Bexar district, on the 6th day of July, 1875, and the field notes of same duly returned unto the land office; said block consisting in part of surveys 97, 98, 99, 100, 104, 105, 106, 107, and 108, as shown upon the maps in evidence, and that by said maps the said surveys are correctly located as upon the ground, and that survey No. 105 was located by actual survey upon the ground by said surveyor, and that the true position is correctly shown upon said map, and that its true position is and has been known and recognized by all parties since its location, and can be easily identified upon the ground from its calls, made from an actual survey, and as admitted upon the trial by both plaintiff and defendant. (4) I conclude as a fact that on the 14th day of February, 1876, F. M. Maddox, still acting as deputy surveyor of Bexar district, surveyed a base line by beginning at the northwest corner of survey No. 20, block No. 1. That he run thence north 1,900 varas, and designated the point by calling for fixed bearing trees. That he then continued on north 1,900 varas further, and marked that point by calling for fixed bearing trees. That he then run north, 45° west, 2,687 varas, and marked that point, calling for fixed bearing trees and other objects. That he then run west one mile, marking the place by fixed bearing trees. That he then continued west one mile further, and marked that corner, designating same by calling for pile of rocks on north side of neighborhood road, and then, continuing on west, at the end of the next mile he marked this point by calling for pile of stones and bearing trees, and then continued on west another mile, and marked the place by calling for a stone mound 2½ feet base and 2½ feet high; thence west another mile, and marked the place by calling for a stake from which a bearing tree was marked; thence west another mile, and marked the place by calling for a stone mound 2½ feet base, and 2½ feet high, and on west another mile, marking the place by calling for a stone mound 2½ feet high, and 2½ feet base, and that he still continued on west several miles further, marking each mile by calling for different objects. I also find that at the same time he made a connection with the Catlett league by an actual survey, and I further find that said base line can now be easily traced and identified by the calls made in the same. (5) I further find that afterwards, to wit, on the 3d day of March, 1876, that block No. 19, J. V. Massey surveys, Nos. 1 to 10 inclusive, was located by John W. Maddox making out in his office the field notes from data given him by F. M. Maddox, and I further find that he located surveys Nos. 1 to 4 inclusive by calling for bearings at their corners as given at their respective places on said base line run by F. M. Maddox. I find that, in making the field

notes of No. 5 of said block No. 19, he left said base line, and located said survey by calling to begin at the southwest corner of No. 4 in said block, and by calling for No. 106 of block 3, I. & G. N. surveys, placing said survey No. 5 adjoining and west of 106, and southwest of survey No. 4 of block No. 19, and that he made the field notes of No. 6 of block 19 by calling to begin at the northwest corner of 105, block No. 3, also calling for bearing trees at that corner, which trees were not marked at that time, and which were not marked for the purpose of locating said survey No. 6. That said bearing trees were situated at the common corner of 98 and 99 of block 3, I. & G. N. surveys, and the southwest corner of said No. 6, and that said trees were marked at the time of the survey of Nos. 98 and 99, and for the purpose of identifying the corners of the same, and that they were called for from memory in making the field notes of No. 6, and that they were called for by a mistake, and that survey No. 6 was placed adjoining and west of 105 of block 3, and adjoining and north of 99, same block; and I find that survey No. 7 was constructed on No. 6 by course and distance, and joins and lies just west of it, and that No. 8 was constructed on No. 7 by calls for course and distance, and joins and lies north of it, and that No. 9 was constructed upon No. 8 by calls for course and distance, and joins and lies west of it, and that No. 10 was, in the same way, constructed upon No. 9, and lies just south of it, which places No. 9, the tract claimed by plaintiff, in the position claimed for it by plaintiff. I find that surveys Nos. 5, 6, 7, 8, 9, and 10 were not actually surveyed upon the ground, and that none of them have corners established upon the ground, that none of them call for any bearings or other objects called for on said base line; and I find that in said surveys they call at the corners in the field notes for mounds, and that they were not established on the ground. (6) I further find that all the land west of No. 4 of block No. 19, and on said base line as far as the vacant land extended, is rough, poor, and indifferent, and that all the land appropriated by said surveys, according to the field notes, is superior land to that west of No. 4 on said base line. I further find that to have made said surveys, as claimed by defendant, there would have been left vacant land both to the south and north of the block being located; and I further find that to have so made said surveys would have placed survey No. 10 of said block No. 19 in conflict with the Catlett league, which had been previously located, and that the same would be contrary to every call in the field notes. I further find that it was not shown that the surveyor, F. M. Maddox, returned to the land office, with his field notes of block No. 19, or at

any other time, the field notes of said base line, or made by record of same; and I further find from the circumstances, taken with the testimony of F. M. Maddox, that he did not, at the time of testifying in this case, have any clear and distinct recollection or knowledge of how said surveys 5, 6, 7, 8, 9, and 10 were intended to be made."

Conclusions of Law.

From these findings, the judgment for appellee is obviously correct. "The rules upon the question of boundary are only invoked when the calls of the survey lead to different results. Then those calls must be adopted which are most consistent with the intention apparent upon the face of the grant, or the presumed intention of the grantor. Hence, the rule that the most material and certain calls will control those which are less certain and material, because those are supposed to be the most prominent in the mind of the grantor, and hence a call for a natural object, as a river, a known stream, a spring, or marked tree, will control course and distance. But that is where the actual survey can be found and identified as the same called for in the grant? It is not meant that, where the grant calls for certain known and established natural or artificial monuments or boundaries, these may be controlled by parol proof of a survey entirely inconsistent with and repugnant to all the calls of the grant. That would be virtually to destroy the written evidence of title, and substitute parol evidence in its stead." *Anderson v. Stamps*, 19 Tex. 465. In making the surveys in block 19, none of them were actually made on the ground, but all were platted in by the surveyor in his office. Those from 1 to 4, in reference to the base line described in the finding of facts, and those from 5 to 10 inclusive, in reference to the northwest corner of No. 105, block 3, which is called for as the beginning corner of survey No. 6, then No. 7 begins on 6, No. 8 on 7, No. 9 on 8, which places the land in the position claimed by appellee. The trees called for as on the northwest corner of survey 105 are not there, or on said survey at all, but are found one mile west of its southwest corner, at the northwest corner of 99, which is the northeast corner of 98, which was the established corner of said surveys. The surveyor, in locating the surveys in block 19, did not go to these trees, but called for them from memory, and admits that he was mistaken as to their location, and that they were in fact south of where he thought they were when the field notes of the surveys of block 19 were made out in his office. No claim being made that he was mistaken as to the true location of survey No. 105, block 3, and its true location being certain, and admitted by the parties, leaves it the true beginning corner, as intended. To hold differently would be to contradict every call in

the field notes, and place the surveys in conflict with older locations made by the same surveyor, which was certainly not his intention.

Errors are assigned to the exclusion of certain testimony, and to the admission of other evidence. If the testimony excluded had been admitted, and the evidence admitted rejected, as contended for by appellant, the result of the trial could not have been different. There is no error in the record, and the judgment of the district court is affirmed.

HOLT et al. v. MAVERICK.¹

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

ANCIENT INSTRUMENTS—EVIDENCE—DOCKET OF JUSTICE OF THE PEACE.

1. An indorsement on a land certificate made in 1839 by a county surveyor, with whom, there was evidence, the certificate was deposited at that time, is admissible in evidence as an ancient instrument, though the indorsement was canceled, apparently, by the surveyor.

2. In trespass to try title, where defendant relies on a sheriff's deed under an execution issued under a judgment of a justice of the peace, the docket in which the justice must enter the record of the judgment under Pasch. Dig. (Act 1848,) art. 1182, is the proper evidence whether such judgment was rendered or not; and evidence of the justice, 30 years after, as to its rendition, and the issue of execution thereon, is inadmissible.

Appeal from district court, Kinney county; Winchester Kelso, Judge.

Trespass to try title by Helen M. Holt and others against Samuel Maverick. Judgment for defendant. Plaintiffs appeal. Reversed.

James B. Goff and C. C. Clamp, for appellants. Perry J. Lewis, for appellee.

FLY, J. This is an action of trespass to try title to 320 acres of land in Kinney county, granted to John Wilkinson, brought by appellants against appellee. To this action, defendant pleaded not guilty, and pleaded 3, 5, and 10 years' limitation. Plaintiffs showed by their testimony that they were the legal heirs of one John Wilkinson, who was a soldier of the Texas revolution, and as such was the possessor of two bounty warrants or certificates,—one for 640 acres, and the other for 320 acres, of land; that said John Wilkinson, in 1839, placed these certificates in the hands of James H. Selkirk, county surveyor of Matagorda county, for location on a certain league of land, known as "No. 58," on Cone creek, in said county; that afterwards Wilkinson returned, and got the certificates, and placed them in the hands of a real-estate firm, to be located in north or west Texas. D. E. E. Braman swears that he lived in the same house with Wilkinson in 1839, and worked in an office with Selkirk, and saw Wilkinson give the certificates to Selkirk, and afterwards get them again. This John Wilkin-

¹ Rehearing pending.

son died in 1840. The patent was issued to the land in controversy, in 1849, to John Wilkinson. Defendant proved by one Buquor that in 1853 he was a justice of the peace of Bexar county; that he knew John Wilkinson intimately, in the army, in 1836, and on up to 1853; that he was a single man; that he, as justice of the peace, had on May 7, 1853, rendered a judgment against said Wilkinson in favor of John E. Crawford, and issued an execution on the same, and had placed the same in the hands of W. B. Knox, sheriff of Bexar county, who had levied on and sold the land in controversy; that he had, when he went out of office, turned over his docket and papers to the county clerk of Bexar county, and had, since this suit was instituted, in conjunction with the county clerk, made diligent search for the docket and papers, and had failed to find them. P. J. Lewis, counsel for defendant, also swore that he had made diligent search for the papers, but had failed to find them, but found a trial docket marked "Buquor," and found in it an entry of the style of the case. When asked if there was any record of judgment in the docket, objection was made by defendant, and sustained. Plaintiffs offered in evidence an indorsement on the back of the certified copy of the land certificate upon which the patent was issued, which was as follows:

~~adjoining his location
on league No. 58 on
Caney Redd, June 16
1839 James H. Selkirk
Co sur.~~

This was excluded by the court, and this action is assigned as error. It will be seen, by a scrutiny of the testimony, that it became necessary for plaintiffs to identify their ancestor as being the man to whom the bounty warrant was issued, and this testimony might have been a circumstance going to show that the certificate upon which the patent was issued was the same that was placed in the hands of Selkirk, in Matagorda county, in 1839, and by him returned to plaintiffs' ancestor, his (the surveyor's) notes being canceled when he gave the paper back. But was this canceled indorsement by the county surveyor such a paper as would render a certified copy of it from the land office valid evidence? Article 2253 Rev. St., makes a copy of any paper in public offices evidence, the original of which would be valid and legal evidence; its object simply being to place within the reach of litigants the evidence of the original papers in the land office, through certified copies. It was in proof that the certificate for 320 acres of land was placed in the hands of James H. Selkirk, county surveyor of Matagorda county, in 1839, and we find from the copy of the certificate that it was approved on April 24, 1849, and a patent issued on it in the June following. The indorsement on the certificate must have been made before it

was filed in the land office in 1849, more than 40 years before the attempt was made to use it as evidence. Before the bounty warrant was filed in the land office, there could have been no motive for or inducement to have forged the indorsement on the certificate, and it cannot be presumed that it was written thereon since it was filed with the land commissioner. It has all the essentials and qualifications to make it an ancient instrument. It comes from the proper custody, is free from suspicion, and is over 30 years of age, and was therefore admissible, at common law, as an ancient instrument. *Ammons v. Dwyer*, 78 Tex. 650, 15 S. W. Rep. 1049; *Crain v. Huntington*, 81 Tex. 614, 17 S. W. Rep. 243.

In the case of *Stroud v. Springfield*, 28 Tex. 664, it was held that, in addition to the other essentials above enumerated, there must have been some act of ownership, corroborative of the genuineness of the instrument, before it could be considered an ancient instrument. The case of *Holmes v. Coryell*, 58 Tex. 688, is perhaps a little more liberal in its views on this question, and yet there is drawn from the opinion the thought that all proof is not dispensed with; and the case of *Pasture Co. v. Preston*, 65 Tex. 448, rather follows in its wake. But in the case of *Parker v. Chancellor*, 73 Tex. 478, 11 S. W. Rep. 503; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049; and *Crain v. Huntington*, 81 Tex. 614, 17 S. W. Rep. 243,—the broad and liberal doctrine is laid down that where a deed is 30 years old, and is free from suspicion, and comes from the proper custody, it would be admissible in evidence as an ancient instrument. There was no objection made to the admission of the certificate, as there could not have been; and, while the indorsement is no part of it, it has evidently been on the certificate for over 50 years. Every circumstance went to show its age and genuineness, and no attempt was made to impeach it. But it is objected that it is a mere memorandum, and no part of the certificate. Suppose that the indorsement or memorandum of Selkirk had been found among the papers of John Wilkinson, disconnected from the warrant, and had been preserved by his children. Is there any question that it could have been introduced without the necessity of proof of execution? None whatever. In the case of *Ballard v. Carmichael*, 88 Tex. 359, 18 S. W. Rep. 734, a receipt for money was permitted to be read as an ancient instrument; and the authorities seem to hold, generally, that any document or paper that is proper testimony otherwise would, if it has the necessary essentials, be admitted as an ancient instrument. It has been held that a letter purporting to have been written more than 30 years ago is an ancient document, and, being produced from the family papers of the person to whom it was addressed, the writer and person to whom it was addressed being dead,

It is presumed to have been written by the person by whom it purports to have been written; also, a pay roll of a company, in the war of 1812, on which is what purports to be the signature of a soldier to a receipt for pay due him, produced from the archives of the government. The admission of documents as ancient ones applies, not only to deeds, wills, and bonds, but also to receipts, letters, entries, and all other ancient writings. 2 Phil. Ev. 481; *Bell v. Brewster*, (Ohio,) 10 N. E. Rep. 679. In the case we have before us, the plaintiff was, without the order of the district judge for the original to be brought from the land office, compelled to use the copy of the indorsement, and this, under the circumstances, was sufficient. *Brown v. Simpson's Heirs*, 67 Tex. 225, 2 S. W. Rep. 644.

But it may be said that the erasure throws suspicion upon the memorandum or indorsement. This, instead of being a suspicious circumstance, might be considered confirmatory of its genuineness, for it might be supposed to be natural that Selkirk, when he returned the certificate or warrant to Wilkinson, should have attempted to erase the notes he had placed on it? But, if this is a suspicious circumstance, it is to be passed on by the jury, for it is held by our supreme court that when an ancient document is attacked, and there is a conflict of evidence about any of its essentials, it is proper for the court, under proper instructions, to submit the issue to the jury. *Pasture Co. v. Preston*, 65 Tex. 448; *Warren v. Fredericks*, 76 Tex. 652, 13 S. W. Rep. 643; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049. The case of *Gaither v. Hanrick*, 60 Tex. 92, 6 S. W. Rep. 610, cited by appellee, is not in point in this case. In that case an instrument was attacked as a forgery, and it was held that a copy of a memorandum made by some unknown person on the document was hearsay, and was not admissible as testimony to show the genuineness of the document.

Defendant, in this case, claims the land sued for by virtue of a sheriff's deed made to his ancestor in 1853, under and by virtue of an execution issued out of a justice court of Bexar county. The deed is amply sufficient in its recitals, but the question that arises, and upon which the decision on this point must turn, is, were the judgment and execution properly proved up? The very life and vitality of a sheriff's deed is a valid judgment and valid execution. Some few authorities have held that no action can be maintained upon a record that is lost or destroyed; that the existence and tenor of the judgment can be proved in no other way than by an inspection of the record itself. But the great preponderance of authority favors the rule that, in such a case, secondary evidence is admissible to establish the fact of the existence of such a judgment, and its contents. 2 Black, Judgm. § 969. Defendant, upon a proper showing of the loss or de-

struction of the judgment, would have the right to establish the fact of the rendition of the judgment and the execution by secondary proof. It became necessary to clearly establish the loss of the docket and papers of the justice of the peace before secondary evidence would become admissible, and we are of the opinion that there has been a failure to do this in this case. We have been shown by the testimony that vigilant and active search was made in the clerk's office for the papers and docket, and that the latter was found; and, when discovered, we are not informed what its contents were, further than that the case in which the judgment is claimed to have been rendered was entered in its proper place. When plaintiffs inquired as to a judgment being recorded in this docket, defendant excepted, and the court excluded the answer; and again, when plaintiffs offered in evidence a copy of the proceedings in the case taken from this old justice court docket, and certified to by the county clerk of Bexar county, this, too, upon objection of defendant, was excluded. The justice of the peace, who was a witness for defendant, does not deny that the docket was the one he used, and does not swear that he ever entered any judgment in the docket, and does not deny that the docket marked with his name, and containing the entry of the case, was the only docket he had. This docket entry was positive proof that no judgment was ever entered, and was calculated to remove every presumption in favor of the validity of the sheriff's deed. If no record whatever had been found, then the proof introduced might have been sufficient. But the docket is discovered, and the reason for using secondary evidence would be removed. We find many cases sustaining very brief and meager judgments by justices of the peace, but there is in every one of them some words or sentences indicating the intention to render a judgment. *Clay v. Clay*, 7 Tex. 251; *Howerton v. Luckie*, 18 Tex. 237. In this case, a justice of the peace, 36 years after the occurrence, is permitted, not only to prove up a judgment and execution, but to supplement and amend, if not to contradict, his records made at the time, and now in existence. Article 1182, Pasch. Dig., (Act 1848,) provides that every justice of the peace shall keep a docket, in which, among other things, must be entered the judgment rendered by the justice, and time of rendering the same, the time of issuing execution, the name of the officer to whom it was directed, and the return of the execution; and while the entry of the judgment would not be necessary to its validity, being merely a ministerial act, and the omission to enter it does not destroy it, yet the record entry of the judgment is indispensable to furnish the evidence of it, when it is made the basis of a claim or defense in another court. 1 Black, Judgm. § 106. The docket of the justice of the peace was discovered;

there was no entry of the judgment; and if there was or was not a judgment entered on the docket, the same being in existence, the best proof of that fact would be the docket itself.

It is unnecessary to notice other errors assigned. For the errors indicated, the judgment of the lower court is reversed, and the cause remanded.

INTERNATIONAL & G. N. R. CO. v. DIMMITT COUNTY PASTURE CO.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

CARRIERS—LIVE-STOCK SHIPMENTS—LIABILITY FOR INJURY—MEASURE OF DAMAGES—HARMLESS ERROR—HEARSAY EVIDENCE—MARKET REPORTS—INTEREST.

1. Where cattle have been delivered to and accepted by a railroad company for immediate shipment, the railroad company is liable as a common carrier for damages to the cattle from the time of delivery to it, though Rev. St. Tex. art. 283, provides that the shipment shall be considered as having commenced from the time of signing the bill of lading, and that the liability of the common carrier shall attach as at common law from after such signing. *Railway Co. v. Hall*, 64 Tex. 615, followed. *Railway Co. v. Nicholson*, 61 Tex. 495, and *Railway Co. v. McCorquodale*, 9 S. W. Rep. 80, 71 Tex. 46, distinguished.

2. Where cattle accepted by a carrier for immediate shipment were damaged by failure of the carrier to feed and water them during a delay of 24 hours before shipment, the measure of damages was the difference between the market value of the cattle in the damaged condition at the place of delivery and what their fair market value would have been at the same time and place if they had been delivered in a sound condition.

3. An instruction that the carrier was liable for the diminution in the value of the cattle at the place of shipment cannot be claimed by the carrier to be reversible error, where the damages assessed under such instruction were less than they would have been if assessed under the proper rule of damages.

4. Testimony based on daily market reports from a commercial center comes from a public, authentic source, and is not hearsay.

5. A judgment in such case may be rendered for damages, and the interest thereon from the time they accrued to the date of judgment, and may provide that the amount of the judgment should bear legal interest from the date of judgment.

Appeal from district court, La Salle county; D. P. Marr, Judge.

Action by the Dimmitt County Pasture Company against the International & Great Northern Railroad Company for damages to cattle. Judgment for plaintiff. Defendant appeals. Affirmed.

Barnard & Green, for appellant. Lane & Mayfield, for appellee.

FLY, J. Appellee sued the railroad company for \$936.50, damages to 349 head of cattle shipped from Cotulla to Chicago. The damage is alleged to have taken place by 24 hours' detention at the shipping point, and delay on the route. There are two counts,—

one for damages en route, declaring on the written contract; and the other for delay at Cotulla before the contract was signed. Defendant answered by general and special exceptions and general denial, and also pleaded settlement and the stipulations in a written contract. There was a verdict for plaintiff for \$432.50, with 8 per cent. interest from date of sale of the cattle in Chicago, and the interest having been computed from that time to date of trial, judgment was rendered for that amount, with 8 per cent. interest from last said date.

It was in proof that on March 30, 1888, the cattle were brought to Cotulla and placed in the shipping pens of defendant, and were locked up by its agent. The cars in which to ship the cattle had been ordered for the date specified, and the agent of defendant told one witness, from time to time, that the cars would arrive in a short time, but they failed to come, and the cattle did not get off until the next day. Rachal, a witness for plaintiff, swore that he tried to water the cattle while in the pens, but the supply was insufficient. The cattle were badly injured by the delay and want of food and water. The damage at Cotulla was laid at \$436.50, or \$1.25 per head. The witness swore that the cattle were damaged from \$1.25 to \$2.50 per head before they were started. The contract was not signed until at the time the cattle were loaded. There was no proof to sustain a verdict for damages occurring to the cattle while on defendant's line en route to Chicago, and the verdict must be sustained, if at all, upon testimony of damage occurring to the cattle at Cotulla, while in possession of defendant, and before the signing of the contract. The proof is clear that the cattle had been in possession of appellant for 24 hours before they were started on their journey; and this, not because the railroad company had not had sufficient time in which to procure cars, for it had set the day on which it would have the cars in readiness, and, on the date fixed, appellee brought its cattle to the shipping pens of appellant, and the agent of appellant emphasized his possession by immediately locking the gates and taking exclusive possession of the property.

We are of the opinion that the six days' notice allowed in the statute to procure cars by railroad companies is a safeguard given to them to prevent being pressed for time in obtaining cars for the transportation of property, and, being a privilege granted to them, they can waive it at any time. However, there is no evidence that shows that defendant did not have the full six days' notice, and this was a matter of defense to be proved by defendant.

The liability of a railroad company as a common carrier attaches whenever the shipper has done all that is required of him to prepare his property for shipment, and has delivered the same to the railroad company.

and it has been accepted. In other words, whenever all the arrangements for transportation have been made by the would-be shipper, and there is nothing to do but to transport the property to its destination, then the liability of the railroad company attaches as a carrier. So long as anything further is to be done, or orders to be given, by the owner to enable the company to perform its duty, it would be a bailee of a different character than as a carrier, and the question of ordinary care on the part of the company might become a prime factor in the determination of the suit. In the latter case the depositary or warehouseman would only be liable for negligence or want of ordinary care of the property, and the burden would be on the plaintiff as to negligence. In the other case the onus probandi as to due care would be upon the defendant whenever the damage is proved. 2 Ror. R. R. pp. 1279, 1280; *Railway Co. v. McCarty*, 82 Tex. 608, 18 S. W. Rep. 716.

It is unnecessary, under the facts in this case, to discuss the question of delivery and acceptance, as they are uncontroverted facts, the only contention being that defendant is only liable as a warehouseman, if at all. Article 283 of the Revised Statutes of Texas provides that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach, as at common law, from after such signing. At common law the liability as carrier began whenever the goods were delivered to the carrier for immediate transportation, and our supreme court, in passing upon the statute above cited, holds that the statute has not changed the common-law rule. *Railway Co. v. Hall*, 64 Tex. 615; *Railway Co. v. Trawick*, 80 Tex. 274, 15 S. W. Rep. 568, and 18 S. W. Rep. 948. The cattle in this case were turned over to and accepted by defendant for immediate shipment, and it was liable for damages to them, as a carrier, from the time of delivery. There is an apparent conflict between the authorities above quoted and the cases of *Railway Co. v. Nicholson*, 61 Tex. 495, and *Railway Co. v. McCorquodale*, 71 Tex. 46, 9 S. W. Rep. 80; but in those two cases the railroad had contracted to receive and ship the cattle at certain dates, but refused to receive them when presented for shipment, and it was held that the railroads were responsible as mere individuals for breach of their contract. In the case we are considering there was an actual delivery to and acceptance by the railroad company, and we are of the opinion that its liability as a common carrier, as under the common law, began at that time. The trial court did not err in refusing the instructions asked on this subject by appellant.

Where goods are injured on their way to point of destination, the measure of damages is, as a general rule, the difference be-

tween the marketable value of the goods in their damaged condition at point of delivery, and what the fair market value thereof would have been at the same time and place if they had been delivered in a sound condition. Appellant contends in his brief that the above rule was disregarded by the trial court. The charge objected to is as follows: "If defendant failed to do this, [that is, properly feed and water the cattle,] after it had received and accepted the cattle for transportation, if it did so, then, in the absence of a special contract relieving it from such duty, if the cattle were damaged and injured while under the control of the defendant at Cotulla, on account of the failure of defendant to properly feed and water them while in the pens of defendant at Cotulla, then the defendant would be liable to the plaintiff for the amount of such damage,—that is, for the diminution, if any, in the value of said cattle at Cotulla,—with 8 per cent. interest from date of injury." We are of the opinion that the measure of damages as fixed by the court is in contravention of the rule hereinbefore enunciated, and, unless there is sufficient uncontradicted proof to show that defendant has not been injured by the erroneous charge, it would be reversible error.

In this connection, it may be said, we are of the opinion that the testimony of the witness E. R. Rachal, based upon daily market reports sent out from Chicago, was properly admitted, such being received in the course of his business. It was not what could be denominated "hearsay evidence," because it is an opinion based on market reports that are public, and upon which, in a commercial country like ours, men are acting every day in affairs of business of the greatest moment. The vast crops of cotton produced in the south are bought and sold upon quotations daily telegraphed from money centers, and they are facts as clearly definite and determined as though the witness were in New York and Liverpool. Even if he were in these commercial centers, the possibilities are that he could only obtain a knowledge of the state of the market by consulting newspaper reports, or bulletin boards in exchanges. A knowledge gained through market reports is different from information received from persons. In one case it comes from a public, authentic source; in the other it is hearsay and unreliable. *Railway Co. v. Maddox*, 75 Tex. 301, 12 S. W. Rep. 815; *Banking Co. v. Skellie*, (Ga.) 12 S. E. Rep. 1017; *Lawson*, Exp. Ev. 439; 1 Whart. Ev. §§ 255, 449.

Rachal swears that if the cattle had been delivered in Chicago in good condition the cows should have brought \$2.75, instead of \$2.10, per hundred pounds, that they sold for; steers, \$3.25, instead of \$2.85, the price they brought; bulls, \$2.50, instead of \$2.25, that they brought; and calves would have been worth \$7.50, instead of \$4.50, for which they sold. There were 189 cows, 44 steers, and 89 calves. Now, unless this testimony is con-

tradicted, a simple calculation will show that the damages to the cattle were largely in excess of the verdict of the jury. The only other testimony on the subject of the value of the cattle is an excerpt taken from the Drovers' Journal, showing the number and value of Texas cattle sold in Chicago on the 7th day of April, 1888, the day on which appellant's cattle were sold. This report shows all the cattle sold on that day except 25 head must have been, as contended by appellant in its brief, appellee's cattle, and of course the value of these damaged cannot contradict the market reports sent out on that date. Appellant introduced testimony as to value of cattle sold on the 4th, 5th, and 7th of April, but does not introduce testimony as to value on April 6th. If the cattle had been shipped when delivered to appellant, it is clear they would have been put on the market in Chicago on the 6th, instead of the 7th. As it would be inequitable and unjust to plaintiff to take the value of his damaged cattle as a criterion by which to fix the market value of cattle in Chicago, suppose we take the quotations of the 5th, as offered in evidence by appellant, and ascertain, if we can, what the loss to appellee, if any, would have been. We find from the return of sales that the cows weighed 138,450 pounds, or about 732 pounds each, and that they sold at \$2.10 per hundred pounds. On the 5th of April, 140 cows, weighing less than plaintiff's cows, sold at \$2.20 per hundred, as the true value of the cows, on the 6th, we have a loss sustained by plaintiff of \$138.45; the amount of 25 cents per hundred pounds damage on the bulls is uncontradicted, making an aggregate sum of \$55.60; and there is nothing in any of the testimony to contradict the testimony as to the calves being damaged \$3 per head, or, in the aggregate, \$267.05. The sums, added together, give the sum of \$461.10, nearly \$30 more than plaintiff recovered. It will be seen that the damage to the 44 steers is not included in this calculation. If the damage to them is included, the amount of the damages will be \$598.93, three-fourths of which sum, the damages sustained on defendant's road, gives the sum of \$449.19, being more than the verdict. We therefore conclude that the charge of the court as to the measure of damages worked no injury or damage to appellant, and it has no cause to complain. Applying the measure given by the lower court, or the proper one, and appellee has not received greater damages than it proved upon uncontradicted testimony.

It was proper to allow interest on the damages from the time they accrued to date of judgment, and there was no error in rendering judgment for principal and interest to date of judgment, and then in providing that this combined sum of principal and interest should bear legal interest from date of judgment. *Railway Co. v. Jackson*, 62 Tex. 212; *Railway Co. v. Greathouse*, 82 Tex.

111, 17 S. W. Rep. 834; *Heidenheimer v. Johnson*, 76 Tex. 203, 13 S. W. Rep. 46. None of the assignments of error are well taken, and the judgment is affirmed.

HOLLAND v. CITY OF SAN ANTONIO.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

TRESPASS TO TRY TITLE — TITLE TO MAINTAIN — RIGHTS OF LESSEE — UNAUTHORIZED ENTRY — DAMAGES.

1. A tenant in possession under a lease may maintain trespass to try title against one who makes an unauthorized entry on the leased land.

2. The right of the tenant to maintain such action cannot be defeated by a deed given by the lessor to the trespasser after the tenant has brought action.

3. In such case the tenant may recover the actual damages sustained by him on account of the unauthorized entry.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Trespass to try title by William Holland against the city of San Antonio. Judgment for defendant. Plaintiff appeals. Reversed.

B. L. Aycock, for appellant. Upson & Bergstrom, for appellee.

FLY, J. Appellant instituted an action of trespass to try title, setting up special damages arising from the unauthorized entry of appellee upon premises held by appellant under a certain lease for a term of years, and the destruction of certain outhouses and fences, and opening a street, which cuts him off from the river, and exposes the rear of the premises to view. There was prayer for restitution of the land, and for the special damages set up. Defendant answered by plea of not guilty. The facts in this case show that appellant was in peaceful possession of the premises in controversy; that the appellee, through its agents, entered upon the same, and opened a street, tore down houses, cut down trees, and ousted appellant from his possession of the land. All this was done in the face of his written protest. He brought this suit to test the right of the city to thus invade his property, and the reply to his proof is that the city, after suit had been filed, had obtained a deed to the land seized by it from some persons who, so far as the proof shows, had nothing whatever to do with the land. Appellant having proved possession, this was sufficient evidence of title in him to maintain his action of trespass to try title against a mere wrongdoer. *Parker v. Railway Co.*, 71 Tex. 133, 8 S. W. Rep. 541; *Alexander v. Gilliam*, 30 Tex. 223; *Kolb v. Bankhead*, 18 Tex. 229. It was held in *Reynolds v. Williams*, 1 Tex. 311, that "the tenant being in possession, the right of action was in him for any trespass committed on the premises." Appellant undoubtedly had authority under the law to

bring his suit, and we are of the opinion that, even if the Blencourts are owners of the land, they could not deprive appellant of his rights by entering into a combination with trespassers upon the leased land, and, after the tenant has brought his action, defeat the same by giving a deed to the trespasser. Would the owners themselves have had the right while the lease continued to enter into a part of the leased premises, and dedicate it and set it apart for a street? Common sense and reason answer, "No," and if they could not do it they could not by their deed empower some one else to do it. If the city needed the land for a street, it should have proceeded to condemn it as prescribed in the statute, and not have proceeded in the summary manner in which it did, regardless of the rights of the lessee. He had a constitutional right to his day in court before he could be deprived of his property, privileges, or immunities, and his lease of the land in question could not be set aside by the owner and the trespasser. While he could not recover for any permanent injury to the land, he can recover for the actual damages sustained by him on account of the unauthorized entry upon the land. We are of the opinion that the leases should have been admitted as evidence. For the errors indicated the judgment of the lower court is reversed, and the cause remanded.

JAMES, C. J., did not sit in this case.

McLANE v. ELDER et al.¹

(Court of Civil Appeals of Texas. Nov. 1, 1886.)

CONTRACTS—TIME OF THE ESSENCE—ESTOPPEL—INSANITY—GENERAL REPUTATION—APPEAL—OBJECTION WAIVED.

1. A party to a contract, who causes a delay in the time of its performance, cannot claim that time was of the essence of the contract, and that he is no longer bound by the contract because of the delay.

2. Rumors that a person had become insane are not competent to prove insanity.

3. A party who put a question in issue, but failed to ask to have it called to the attention of the jury by charge, cannot claim on appeal that the evidence was conflicting, and object to the omission of the court to charge on the question.

Appeal from district court, Wilson county; George McCormick, Judge.

Action by H. H. McLane against J. M. Elder for the possession of land. Defendant having died, his heirs were substituted as defendants. Judgment for defendants. Plaintiff appeals. Affirmed.

W. E. Goodrich and J. B. Polley, for appellant. John A. & N. O. Green, for appellees.

JAMES, C. J. This cause was once before the supreme court. 60 Tex. 383. Upon

¹ Rehearing denied.

its being remanded, both parties filed amended pleadings. Plaintiff, McLane, alleged, in substance, that he and defendant owned adjoining surveys, and that the dividing line between them was at a certain place, while defendant's contention was that the line was at a different place, where there was an old marked line. Defendant was sued for the strip between the lines so disputed, he having it inclosed in his pasture. It seems that, prior to the legal proceedings, the plaintiff and J. M. Elder agreed in writing, by which Joseph A. Tivy, as referee, was empowered to settle the disputed question between them,—they agreeing that if, after inspection and investigation, the said Tivy should decide that the line marked through the timber was the true northwest boundary line of the Soto league, then such line should be adopted as the division line between the parties; but should said Tivy, after inspection and investigation, decide that the marked line was not the true northwest line of the Soto league, then he was authorized and empowered to establish such northwest boundary line by actual survey, and the line so established should be adopted by the parties as the division line; and provided, also, that his report should be attached to the agreement, and recorded as evidence for both parties as to the location of the boundary. It also provided that, if Tivy could not act, then John W. Kinney was authorized to the same end. Tivy did not act on account of illness. Thereupon Kinney acted, and found the line to be as claimed by plaintiff, instead of the marked line.

Plaintiff alleged that Elder disregarded the result of the reference, and sued for the narrow strip. Defendant, Elder, having died, his heirs appeared, and by amended answer alleged, in substance, as follows: First. A general denial. Second. That the award of Kinney was of no validity, because, as they aver, Kinney did not make any investigation concerning the lines and courses of the Soto survey, and did not run or actually measure the lines, and that his report was based on assumptions instead of work on the ground, and, in general, that he did not arrive at the line in the manner he was by the agreement directed to do. Third. That, pending the former appeal, the said McLane and said Elder—the latter being aged and infirm, and not expecting to outlive the appeal, and desirous of having this line settled in his lifetime—entered into another written agreement (the sons of Elder duly authorized thereto executing the same in behalf of their father) for the purpose of a speedy settlement of said controversy as to the boundary, and to put an end to the litigation, in substance as follows: That this boundary question should be submitted to William Sutherland, and, if he should decide that said marked line was the original line of the

Soto tract, then such marked line should be adopted by the parties as their line, and, if he should determine otherwise, then he (Sutherland) should establish the said upper line of the Soto tract, and, in case he established it below where Elder claimed, then Elder should pay to McLane five dollars per acre for all the land lying between it and where Elder claimed it to be, and McLane was to make a deed to Elder for the same; that Sutherland acted, and determined the marked line to be the correct line, and made his report accordingly, and for these reasons defendants claimed that plaintiff was precluded from further contention as to said line.

On the former appeal it was held that the matter set up in part second of the answer, as above stated, would constitute a defense against the effect of the award of Kinney, and the cause was reversed for that reason. The matter set forth in clause third of the answer, as above stated, was of course presented as a new defense on the trial last had, and it appears from the judgment that all defenses were withdrawn except those relating to their last agreement. In a replication, plaintiff denied that Elder had authorized his sons to make the agreement, or afterwards ratified their act, and alleged he was of unsound mind when the agreement was made, and so continued until his death; and that the agreement was entered into that the survey should be speedily made, to avoid further costs of courts, but the survey was not made until after the death of Elder, and after the supreme court had reversed the cause, and the mandate filed below.

Conclusions of Fact.

(1) This court concludes from the evidence that the uncontradicted testimony showed that the agreement of 1882 was executed by H. H. McLane and by two sons of J. M. Elder, whose act it purported to be; also, that Sutherland, the surveyor mentioned in said agreement, was deterred from doing the work in due time by being forbidden to do so by McLane; also, that J. L. Elder both authorized his sons to make the agreement and subsequently ratified it; also, that Sutherland afterwards, in 1885, in accordance with the agreement, fixed and determined the position of the line. (2) That the evidence in the subject of Elder's mental condition at the time of the agreement, and subsequently when he ratified it, consisted of testimony given by L. S. Lawhon, Mrs. Ammons, and A. G. Thomas, as the same is set forth in the conclusions of law. (3) That no charges were asked by either party, and the cause was allowed to be submitted to the jury on the question of whether or not the plaintiff and defendant agreed that Sutherland should determine the line between them, and that he did so in accordance with the agreement. There was no conflict of ev-

idence on these issues. No charge was given nor asked submitting the issues of Elder's sanity at the time of the agreement or its ratification.

Conclusions of Law.

The following proposition is made under the fourth assignment of error: "If the agreement for Sutherland to run the line was a contract, time was of its essence, and, not having been run until the reasons on which it had been entered into had ceased to exist, it ceased to be binding on plaintiff." It appears that, several days after the agreement had been executed, McLane came to Surveyor Sutherland at the latter's sheep camp, and called on him to make the survey in accordance with the agreement; that Sutherland told him he could not do so just at that time, because he had no herder, and could not leave his sheep, and that he could not make the survey until he could get rid of his sheep; that, about a month or so afterwards, McLane wrote him several letters, in effect that there was no agreement as to running the line, that he did not intend to be bound by the agreement, and forbidding Sutherland from making the survey, or running the line, or going on his land. It appears that Sutherland could have done the work as early as February, 1883, but refrained from doing so because McLane had forbidden it. McLane, as a witness, states that he "did notify Mr. Sutherland by letter not to make the survey or run the line, as none of us were bound by the agreement." We believe the evidence of Sutherland, accounting for the absence of the original of the letters, was sufficient to raise the presumption that they were mislaid and not obtainable; but, in view of McLane's admission that he wrote Sutherland not to run the line, the evidence given by Sutherland of the contents of the letters may be disregarded without affecting our conclusions. It appears that the Elders were persistent in urging Sutherland to do the work. From the uncontradicted testimony it appears that the delay was contributed to, if not occasioned by, the acts of McLane, without any fault of the Elders, and it is not necessary for us to determine whether or not time was of the essence of this agreement under these circumstances, for McLane was not in a situation to ask such construction to be given it.

Apart from the feature of time, the contract was a plain one, and requires no construction. It was a submission of a pending dispute concerning a line, and, besides, it was an agreement, in a certain event, for a sale of land, and it was not a "power of attorney" in any sense of the words. Nor is there any merit in the claim by plaintiff that the agreement of 1882 was barred by limitation. There was no conflicting evidence as to the signing of the agreement by McLane and by the two sons of Elder, nor as to the

father having authorized and ratified this act of his sons. This authorization was not necessary to be in writing.

The only issue raised by the pleadings, in respect to which it could be claimed there existed a conflict of testimony, was the sanity of Elder at the time the agreement was made. That he became of unsound mind afterwards is evident; but on the question of his condition at the time the agreement was made the record presents the following testimony: That of L. S. Lawhon, who states (referring, presumably, to the time of the agreement) that he had heard rumors through the country that J. M. Elder had become deranged and crazy, but knew nothing of his mind being affected or in any way impaired. That of A. G. Thomas, who said he saw Elder when they were taking him to the insane asylum, shortly before his death, and that he appeared crazy, (this was some time after the agreement.) The testimony of Mrs. Ammons, a relative, (and speaking from personal observation and association with Elder,) that after the agreement she saw him, and he spoke approvingly of the agreement his boys had made settling the line, and that he stated he had sent them to McLane for that purpose; and that his mind was then sound, and not in the least weakened or affected, and it was afterwards that he became deranged. There was evidence that Elder was aged and infirm at the time, but none that either then or before he was mentally deficient. That part of Judge Lawhon's testimony above stated did not constitute general reputation, and general reputation is not competent to prove insanity. Subsequent insanity may be used as evidence towards proving insanity at a particular time, but only under special circumstances; and the rule on this subject is clearly stated as follows in the case of *Com. v. Pomeroy*, 117 Mass. 148: "When admissible at all it is upon the ground either that they [the acts indicative of insanity] are so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the offense [act] as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates, and thus establish its existence at that time; or else that they are of such a character as of themselves to indicate unsoundness to a degree, or of so permanent a nature, as to have required a longer period than the interval for its production or development." There is an absence of all such evidence. The testimony introduced for the purpose of showing Elder to have been insane at the time the agreement was made or was ratified was altogether incompetent and insufficient to establish that fact, and, if the jury had so found, their verdict must necessarily have been set aside. The only competent evidence on the subject was that of Mrs. Ammons, and this was direct and positive. We do not see how, upon the testimony, the jury

could legally have found a different verdict, and hence the remark of the court complained of does not require a reversal of the case.

It matters not, however, what the evidence had been on the issue of insanity. The plaintiff who raised the question did not ask to have it (the only question with reference to which a conflict of testimony could possibly be claimed) called to the attention of the jury by a charge, and he cannot profit by the omission. There was no question of disputed fact before the jury for the remark of the judge to have affected, and the judgment should be affirmed.

STATE v. DAVIS.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

DRUGGISTS—PRODUCING PRESCRIPTIONS BEFORE GRAND JURY.

1. Rev. St. 1889, § 4622, providing that druggists shall produce in court, or before any grand jury, all prescriptions compounded by them, "whenever thereto lawfully required, and on failing, neglecting or refusing so to do shall be deemed guilty of a misdemeanor," is constitutional. 18 S. W. Rep. 894, 108 Mo. 666, approved.

2. A subpoena duces tecum, which requires a druggist to produce all prescriptions filed in his store since a certain day, is too indefinite, since the grand jury is not authorized to inspect all the prescriptions, but only such as relate to the matter under investigation.

Appeal from circuit court, Daviess county; Charles H. S. Goodman, Judge.

D. Harfield Davis was convicted under an indictment for refusing to produce before the grand jury, in obedience to a subpoena duces tecum, all the prescriptions compounded by him since June 10, 1889, and from the judgment of conviction he appeals. Reversed.

W. D. Hamilton and J. F. Harwood, for appellant. R. F. Walker, Atty. Gen., and J. A. Selby, for the State.

GOODMAN, J. At the June term, 1890, of the circuit court of Daviess county, the defendant, who is a druggist, was indicted under section 4622, Rev. St. 1889, for refusing to produce before the grand jury of said county, after having been subpoenaed to do so, his prescriptions compounded and filed in his drug store subsequent to the 10th day of June, 1889. Said section is as follows: "Every druggist, proprietor of any drug store or pharmacist shall carefully preserve all prescriptions compounded by him or those in his employ; numbering, dating and filing them in the order in which they are compounded, and shall produce the same in court or before any grand jury whenever thereto lawfully required and on failing, neglecting, or refusing so to do shall be deemed to be guilty of a misdemeanor and on conviction shall be punished by a fine of

not less than fifty nor more than one hundred dollars." He was subsequently tried and convicted, and the case is now here on his appeal.

Defendant's first contention is that the statute is unconstitutional, and is therefore void and of no effect; but this identical question was passed on by this court in this case, when here on a former occasion, (108 Mo. 666, 18 S. W. Rep. 894,) when it was held otherwise, and we are satisfied with that ruling.

It is also contended that the subpoena duces tecum which was served on defendant, requiring him to produce before the grand jury all prescriptions filed in his drug store between certain dates specified, was too indefinite, insufficient, and that disobedience thereto was no violation of the law. Its command is as follows: "And you are further commanded to bring with you, and produce in evidence, all prescriptions filed in your store since June 10, 1889." This subpoena was read in evidence to the jury, over the objections of defendant, in which we think the court committed error. In the case of *State v. Bragg*, 51 Mo. App. 334, it was held by the St. Louis court of appeals that a subpoena duces tecum, requiring a druggist to produce before a grand jury prescriptions compounded by him, or by those in his employ, must specify with some particularity the prescriptions to be produced; that a requirement for the production of all prescriptions compounded by him between specified dates in that case, during a month, was insufficient, and the disobedience of it by the druggist would not warrant a criminal prosecution under section 4622, *supra*. So it was held by this court in *ex parte Brown*, 72 Mo. 83, that a subpoena duces tecum, to compel the production of telegraphic dispatches, should give a reasonably accurate description of the papers wanted, either by date, title, substance, or the subject to which they relate. The subpoena in the case at bar is entirely too indefinite and uncertain for any purpose, even in an ordinary civil case, and certainly not sufficiently definite upon which to predicate a criminal prosecution for its violation. To require the defendant to produce all of the prescriptions compounded by him or filed by him during any specified length of time, however short, to be inspected and inquired into by the grand jury, no matter what ailments they may have been prescribed for, or for whom, would be an intrusion upon his private affairs and business, and without warrant of law. The subpoena should have described with some kind of particularity the prescriptions, if any, for the sale of intoxicating liquor, and to whom sold; and, inasmuch as it failed to do so, the court committed error in permitting it to be read in evidence to the jury. The cause is reversed, and defendant discharged. All of this division concur.

STATE v. CHAPEL.

(Supreme Court of Missouri, Division No. 2
Nov. 9, 1893.)

FALSE PRETENSES—INDICTMENT.

An indictment charged that defendant did "unlawfully and feloniously, with intent to cheat and defraud, obtain from one F. \$14.60, lawful money of the United States, of the value of \$14.60, the money of F., by means and by use of a cheat, a fraud, a trick, a deception, a false and fraudulent representation and statement and false pretense, a bogus written instrument." *Held*, that the indictment was defective, as not informing defendant of the nature of the charge against him.

Appeal from circuit court, Newton county; J. C. Lampson, Judge.

Marius Chapel was convicted of obtaining money under false pretenses, and appeals. Reversed.

Jas. H. Pratt, for appellant. R. F. Walker, Atty. Gen., for the State.

SHERWOOD, J. The charging portion of the indictment under which the defendant was tried and convicted is as follows: "That on or about the 28th day of September, 1892, at the county of Newton, and state of Missouri, one Marius Chapel did then and there unlawfully and feloniously, with intent to cheat and defraud, obtain from Frank Featherstun fourteen dollars and sixty cents, lawful money of the United States, of the value of fourteen dollars and sixty cents, the money of Frank Featherstun, by means and by use of a cheat, a fraud, a trick, a deception, a false and fraudulent representation and statement and false pretense, a bogus written instrument, contrary to the form of the statutes and against the peace and dignity of the state." Under the ruling of this court in *State v. Terry*, 109 Mo. 601, 19 S. W. Rep. 206; *State v. Benson*, 110 Mo. 18, 19 S. W. Rep. 213; *State v. Cameron*, (Mo. Sup.) 22 S. W. Rep. 1024; *State v. Flemming*, *Id.*,—the indictment in this cause is wholly insufficient in the particulars in those cases specified, and therefore judgment reversed, and defendant discharged. All concur.

SLAUGHTER v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 2
May 30, 1893.)

ACTION FOR PERSONAL INJURIES—EVIDENCE—INSTRUCTIONS—DAMAGES.

1. In an action for personal injuries, an averment that "the injury is permanent, and will render plaintiff a cripple for life," without any allegation as to damage from loss of time occasioned thereby, does not justify the introduction of evidence as to loss of time and earnings.

2. Where the petition in an action for personal injuries does not allege a loss of time as the basis of special damages, and there is no evidence from which the jury can estimate the

damage resulting from such loss, it is error to permit them to consider such loss in fixing the amount of plaintiff's damages.

3. Defendant pleaded that by the laws of the state in which the injury was received by plaintiff the latter was guilty of contributory negligence, and read a statute of such foreign state, adopting the common law, and also several decisions of the supreme court of that state. *Held* that, since the common law prevailed in that state as in Missouri, it was for the court to declare the law of the case, and it was error to permit such decisions to be read without instructing the jury as to the purpose for which they were introduced, and that it was the duty of the jury to look to the court for the law applicable to the case.

4. In an action for injuries caused by the sudden increase in speed of a car from which plaintiff was about to alight, it was proper to refuse an instruction that "the instincts of self-preservation are not proper to be considered in determining whether or not plaintiff was guilty of contributory negligence."

Appeal from circuit court, Jackson county; James H. Slover, Judge.

Action by E. T. Slaughter against the Metropolitan Street-Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Pratt, Ferry & Hagerman, for appellant. George & Lowe and Wash Adams, for respondent.

GANTT, P. J. This is an action for personal injuries, sustained by the plaintiff on the 4th of October, 1880, by being thrown from an electric street car operated by defendant. Plaintiff recovered a verdict for \$5,000, and defendant appeals. The following averment sufficiently states the case made in the petition: "That plaintiff was standing at the crossing where Eighth street runs into Kansas avenue, aforesaid, and stepped onto the front platform of a car in charge of the defendant's employee, the same being a motorman and a conductor. When plaintiff had stepped upon the platform and started to go inside of the car, as other passengers do, the motorman told him to get off, and to get on the rear platform. Plaintiff turned, and, following the orders of defendant's employee, started to step off the car; and just as he did so the motorman increased the speed of the car suddenly, and by reason of the sudden and careless starting of the car, and by virtue of the wrongful ordering of plaintiff by the servant of defendant to get off the car, the plaintiff was thrown violently to the ground, and his right arm, wrist, and hand were broken, bruised, and fractured. These bruises and fractures constitute permanent injury, and will render plaintiff a cripple for life. Plaintiff was compelled to employ a physician, buy medicine and drugs, and also suffered great bodily and mental pain. Wherefore plaintiff prays judgment against the defendant for fifteen thousand dollars, (\$15,000,) the amount of his damages together with costs." The answer consisted, in a general denial, contributory negligence and the following spe-

cial plea: "(3) Defendant for further answer avers that the matters and things complained of all occurred in the state of Kansas, and under the laws of said state the acts done by the defendant, its agents, servants, and employees, at the time complained of, did not constitute negligence; and each of the acts done by plaintiff at such time did constitute negligence upon his part, under the laws of such state, and such acts of negligence contributed directly to the injuries complained of." There was evidence tending to prove that plaintiff suffered the injury of which he complains, through a want of care by the motorman in charge of the car, in starting it too rapidly, as plaintiff was about to get off of the front platform, in obedience to the directions of the motorman to get on at the rear of the car, and evidence tending to show it was caused by plaintiff's own negligence. It was a question of fact for the jury, and they found for plaintiff. The grounds urged here for reversal will be considered in the order pursued in the briefs.

1. Plaintiff testified that he was in the furnace and tin business in Kansas City; that on the day of the accident he went to Armourdale, Kan.; that he had stepped on the front of the car to return to Kansas City, and was ordered to get off, and get on at the other end, and just as he started the car shot forward, and threw him, and broke his right wrist. He testified it was two months before he put in any time at the store, and five months before he assumed any responsibility in his business. He testified to the pain he suffered, and the apparently permanent nature of the injury. His physician's bills were \$50, including medicines and everything. Had a partner, and drew no salary. He was then asked by his counsel, "Are you able to estimate what your personal services were worth during that five months?" This was objected to by defendant, and the objection sustained, on the ground that it was incompetent, immaterial, and irrelevant. The court, among others, gave this instruction for plaintiff: "(3) If the jury find for the plaintiff, they will award him such a sum of money as damages as shall fully compensate him for the mental and bodily pain and suffering endured by him consequent upon the injury, the loss of time occasioned thereby, the expense of medicine and medical attention attributable thereto, and the loss to plaintiff of strength and efficiency already suffered, and whatsoever may reasonably be expected to ensue in the future therefrom, if the injury was proved to be a permanent one: provided, however, that the verdict shall not exceed fifteen thousand dollars." The defendant complains because the court permitted the jury to consider loss of time occasioned by the injury as an element of damages, because it was not alleged in the petition as the basis of special damages, and, the court

having excluded the evidence by which plaintiff sought to show the value of his services during the time lost, there was no evidence from which the jury could make an estimate of the damage resulting from such loss. On the other hand, counsel for plaintiff contend that the petition authorizes a recovery for loss of time; that it is a natural result from the injury, and such damage can be recovered in the absence of proof of the value of the time to plaintiff. There is no allegation in the petition counting upon loss of time specially as an element of damage, so that the discussion here is narrowed to this proposition: Is the general allegation of damages sufficient to authorize a recovery for loss of time, and without proof of the value of such time? In *Mellor v. Railway Co.*, 105 Mo. 455, 16 S. W. Rep. 849, an averment that "plaintiff was permanently crippled, disfigured, and disabled" was held insufficient to support evidence of "loss of earnings." It was held in that case that "loss of earnings" was not a necessary consequence of the injuries alleged, and was not embraced in the general allegation of damages. In *Coontz v. Railroad Co.*, 22 S. W. Rep. 572, (decided by this division at this term,) under the allegation that he "had been permanently disabled from labor," it was held reversible error to permit plaintiff to prove the value of his monthly earnings; citing *Pinney v. Berry*, 61 Mo. 306. The allegation in this case is that "the injury is permanent, and will render plaintiff a cripple for life." Upon the authority of the two cases last cited the evidence as to "the loss of time and earnings" was not admissible, and the trial court correctly so ruled. Having excluded the evidence, we think it is manifest the instruction is erroneous in that it authorized damages of which there was no allegation and no evidence. *Duke v. Railway Co.*, 99 Mo. 347, 12 S. W. Rep. 636; *Smith v. Railroad Co.*, 108 Mo. 243, 18 S. W. Rep. 971; *Norton v. Railroad Co.*, 40 Mo. App. 642; *Rhodes v. City of Nevada*, 47 Mo. App. 499; *Winter v. Railway Co.*, 74 Iowa, 448, 38 N. W. Rep. 154; *Railroad Co. v. Simcock*, (Tex. Sup.) 17 S. W. Rep. 47; *Britton v. Railway Co.*, (Mich.) 51 N. W. Rep. 276; *Leeds v. Gaslight Co.*, 90 N. W. 26; *Staal v. Railroad Co.*, 107 N. Y. 625, 13 N. E. Rep. 624. The distinction sought to be made between "loss of time" and "loss of earnings for that time" does not exist in law. The damages to be awarded in either case is the pecuniary value of the time lost, and either expression sufficiently indicates the measure. In common acceptance they are one and the same thing. We think, on principle, this instruction, upon the facts of this case, is even less defensible than that which was disapproved in *Duke v. Railway Co.*, supra. It is much more reasonable to assume that a jury would be familiar with the value of a physician's bill, from their own knowledge and experience, than they would be with the

value of the time of a merchant of whose business they knew absolutely nothing save that it was a "furnace and tin business." Not a word of evidence is to be found as to the amount of capital invested; nor whether it was a profitable business, and, if so, to what extent; nor to what extent, if any, the business suffered by the injury to plaintiff's wrist. As said by *Brace, J.*, in *Duke v. Railway Co.*: "When such damages are susceptible of proof with approximate accuracy, and may be measured with some degree of certainty, they should not be left to guess of the jury, even in actions *ex delicto*." If reversible error in that case, a fortiori it is reversible error in this.

2. The defendant having pleaded in its answer that by the laws of Kansas the acts done by defendant and its employees were not negligence under the laws of that state, and that by said laws plaintiff was guilty of contributory negligence, plaintiff read in evidence the statute of Kansas adopting the common law in that state "as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people." Plaintiff then, over the objections and exceptions of defendant, was permitted by the court to read to the jury four decisions of the supreme court of Kansas, to wit: *Railway Co. v. Higgs*, 38 Kan. 378, 16 Pac. Rep. 667, a case discussing the liability of a street-car company in a case where a passenger on the platform was pushed off by a passing car, the negligence consisting in permitting one of the cars to approach too near the intersection of a switch with the main track. The case of *Railway Co. v. Rollins*, 5 Kan. 172, deciding the liability of a railroad company for killing cattle running at large upon inclosed grounds. Another was the case of *Railway Co. v. Pointer*, 14 Kan. 37, where a person at a crossing was injured by a train backing against him; and another, the case of *Osage City v. Brown*, 27 Kan. 74, in which the liability of cities for injuries caused by defective streets was discussed. We have read the opinions in each of these cases carefully. There is nothing in them that tends in the slightest degree to show that the common law in a case like the one at bar has ever been applied differently by the supreme court of Kansas from the construction placed upon it by this court. When it was shown that the common law obtained in Kansas, it sufficiently appeared that the law of the case was the same as if the transaction had occurred in Missouri. It then became the right of the trial court to declare the law of the case for the guidance of the jury, upon proper requests. The decisions read had no relevancy to the issue on trial. The fact that it was necessary to prove a foreign law did not justify the admission of all the laws of that foreign state, whether relevant or not to the case on trial. When foreign laws are in evidence, it is no less the duty of the court to determine the

law of the case from them than it is its duty in declaring our own laws. *Cobb v. Griffith*, 87 Mo. 90; *Charlotte v. Chouteau*, 33 Mo. 194. In this case the trial court permitted these four decisions to be read at length to the jury without instructing them in any manner as to the purpose for which they were introduced, and without informing them that it was their duty to look to the court for the law so far as it was applicable to this case. Outside of the statute, the laws of Kansas read in evidence were wholly irrelevant and misleading.

3. It becomes unnecessary to pass upon the question of continuance. Any supposed hardship existing from the action of the court can be remedied before another trial.

4. We see no error in refusing to give the eleventh instruction asked by defendant, which was as follows: "The instincts of self-preservation are not proper to be considered in determining whether or not plaintiff was guilty of contributory negligence." We do not think it would have been proper to have given this for defendant, or the converse of it for plaintiff. The issue was very plain and simple. It was for the jury to find from all the facts and circumstances in evidence whether this injury was brought about by the negligence of defendant's employes or was the result of plaintiff's own contributory negligence. In so doing we know no rule of law requiring them, in measuring his conduct at the time, to exclude from their consideration any of the natural instincts which usually affect the conduct of men. For the error noted the judgment is reversed, and the cause remanded for a new trial. All concur.

STATE v. KAIN.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

CONSTITUTIONAL LAW—FALSE PRETENSES—SUFFICIENCY OF INDICTMENT.

An indictment which charged that defendant obtained \$400 from complainant "by means, and use of a cheat, a fraud, trick, deception, false and fraudulent representations and statements, and false promises," is insufficient, though in the form prescribed by Rev. St. 1889, § 3826, as such section violates Const. art. 2, § 22, which declares that "in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation." *State v. Cameron*, (Mo. Sup.) 22 S. W. Rep. 1024, followed.

Appeal from circuit court, St. Francois county; James D. Fox, Judge.

F. A. Kain was indicted for obtaining money under false pretenses, and demurred. Demurrer sustained. The state appeals. Affirmed.

R. F. Walker, Atty. Gen., for the State.
Geo. M. Wilson, for respondent.

BURGESS, J. At the November term, 1890, of the St. Francois circuit court there

was returned by the grand jury of said county an indictment against defendant, which, omitting the formal parts, is as follows: "The grand jury for the state of Missouri, now here in court impaneled, sworn, and charged to inquire within and for the body of the county of St. Francois and state of Missouri, upon their oaths do present and charge that one F. A. Kain, late of said county, at and in said county of St. Francois, and state aforesaid, on the — day of April, A. D. 1888, did unlawfully and feloniously obtain from Mollie Guyton \$400.00, lawful money of the United States, of the value of \$400.00, the money and property of said Mollie Guyton, by means and use of a cheat, a fraud, trick, deception, and false and fraudulent representations and statements, and false promises, contrary to the form of the statute, and against the peace and dignity of the state." The defendant filed a demurrer to the indictment, assigning the following reasons: (1) "Because said indictment and facts contained therein and stated are not sufficient in law, and do not constitute any offense under the law of this state;" (2) "because said indictment fails to charge that defendant obtained from Mollie Guyton the money mentioned therein with intent to cheat and defraud." The demurrer was sustained, and defendant discharged, to which action the state at the time excepted, and in due time perfected its appeal. The indictment is drawn under section 3826, Rev. St. 1889, which section has by this court been held unconstitutional, in that it fails to notify the defendant of the charge which he is required to defend. *State v. Cameron*, (Mo. Sup.) 22 S. W. Rep. 1024, and authorities therein cited. Judgment affirmed. All of this division concur.

ZEITINGER v. HACKWORTH et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

TRESPASS—TITLE TO MAINTAIN—ADVERSE POSSESSION.

When plaintiff, holding under color of title, fails to prove adverse possession for the statutory period either before or after an interval during which the land was entirely unoccupied, though his possession was adverse both before and after said interval, his title to maintain trespass fails.

Appeal from circuit court, Wayne county; John L. Thomas, Judge.

Trespass by Anthony F. Zeitinger against John J. Hackworth and David J. Allen. Judgment for plaintiff. Defendants appeal. Reversed.

C. D. Yancey, for appellants. Raney & Carty, for respondent.

BLACK, C. J. This was an action of trespass for entering upon the W. ½ of the S. W. ¼ of section 5, township 29, range 4,

in Wayne county, and carrying away timber trees alleged to be of the value of \$600. The jury found for plaintiff in the sum of \$10, and the defendants appealed. The case turned upon the question of title. The plaintiff put in evidence a tax deed from the register of lands to Joel D. Lewis, dated in December, 1863. The court held this deed to be void as a conveyance, but good as color of title, so the plaintiff's title depends upon the question whether he and those under whom he claims have acquired title by 10 years' adverse possession. The real question in the case is whether the demurrer to the plaintiff's evidence should have been sustained. As the demurrer was interposed and overruled at the close of plaintiff's evidence, and the defendants thereafter introduced their evidence, we must consider the demurrer in the light of all the evidence in the case. Besides the deed before mentioned, the plaintiff put in evidence the following deeds, which are in due form, and properly described the land: Joel Lewis to John Kerr, dated August 2, 1869; John Kerr to John Long, dated October 5, 1869; John Long to Joseph Raney, dated January 12, 1877; Joseph Raney to James McAllister, dated February 10, 1879; James McAllister to Joseph Raney, dated February 6, 1880; Joseph Raney to Frank Raney, dated 23d March, 1882; Frank Raney to Anthony Zeitinger, dated January 16, 1883; and Anthony Zeitinger to Anthony F. Zeitinger, the plaintiff, dated 12th December, 1887. Joseph Long, who received the deed from Kerr, dated 5th October, 1869, testified that he moved upon the land in that year, cleared seven or eight acres, built a cabin, and lived there six or seven years, and then sold to Joseph Raney. This deed, it will be seen, bears date January 12, 1877. Joseph Raney conveyed to James McAllister in February, 1879. McAllister says he was in possession of the land; that he found his title was not good, and he conveyed the land back to Joseph Raney. This deed, it will be seen, bears date in February, 1880. Frank Raney testified that he worked an iron mine on the land about 1882 or 1883, while his brother Joseph owned it; that his brother then had a tenant on the land by the name of Mrs. Goodbread, and that seven or eight acres were cleared. A small cabin, a small barn, and bearing peach trees then stood on the cleared part. Other evidence shows that this tenant was on the land under Joseph Raney in 1880. It does not appear that the land, or any part of it, has ever been inclosed by a fence of any kind. The plaintiff, to make out 10 years of continuous adverse possession, must begin with the possession of Long in 1839, for there is no claim of 10 years' adverse possession since 1880. There is no evidence of actual possession from the time Long conveyed to Joseph Raney, in January, 1877, to the time the latter conveyed to McAllister, in February, 1879. It is shown that Joseph

Raney never lived upon the land, and there is no evidence showing or tending to show that he made any use of it during that period of two years; indeed, we find no evidence of possession by any one during that time. This break of two years in the possession is not aided by the testimony produced by the defendants, for their witnesses are positive that there was a period of two or three years during which the land was in the possession of no one. On the evidence preserved by this record the demurrer thereto should have been sustained. The judgment is reversed, and the cause remanded. All concur.

STATE v. LORD.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

INDICTMENT—PRESENTING—RECORD.

Rev. St. 1889, § 4062, provides that indictments by a grand jury "shall be presented by their foreman, in their presence, to the court, and shall be there filed and remain as records of such court." Section 4099 provides that, unless defendant is in custody or on bail, the indictment shall not be open to inspection, "nor shall it be docketed or entered upon the minutes or records of the court until the defendant therein shall have been arrested." *Held*, that where an indictment is signed by the prosecuting attorney, and is indorsed "a true bill," and "filed" (with date of filing) by the foreman of the grand jury and the clerk of the court, respectively, but no record entry is made that defendant was in custody or on bail, there is a sufficient record that the indictment was duly returned and presented in open court, though the clerk made no separate minutes of the filing.

Appeal from circuit court, Douglas county; W. N. Evans, Judge.

Jake Lord was convicted of grand larceny, and appeals. *Affirmed*.

A. H. Livingston and W. A. Love, for appellant. R. F. Walker, Atty. Gen., for the State.

GANTT, P. J. At the October term, 1891, of the Ozark circuit court an indictment was filed against the defendant and one Whitaker for grand larceny, duly signed by the prosecuting attorney, and indorsed by the foreman of the grand jury which had theretofore been duly impaneled, charged, and sworn. During the same term the record shows that defendant came into court, and entered into a recognizance, reciting the finding of this indictment, and his undertaking to appear and answer to the same. Upon his application a severance was granted him from Samuel Whitaker, who was jointly indicted in the same indictment. On his application, a change of venue was awarded him to Douglas county. In the circuit court of Douglas county he was arraigned on the duly-certified copy of this indictment, entered his plea of "not guilty," was tried, convicted of grand larceny, and sentenced to the penitentiary for two years. He filed a motion

in arrest, which being overruled, he appealed to this court.

The only assignment of error in this court is the overruling of his motion in arrest. The only point made by his counsel is that there is no record showing that the grand jury of Ozark county ever returned the indictment into open court and presented the bill. Section 4092, Rev. St. 1889, provides that "indictments found and presentments made by a grand jury shall be presented by their foreman, in their presence, to the court and shall be there filed and remain as records of such court." Section 4099 provides that "when any indictment shall be found against any person, not being in actual confinement, or held by recognizance to answer thereto, such indictment shall not be open to the inspection of any person except the judge and clerk of the court and the prosecuting attorney; nor shall it be docketed or entered upon the minutes or records of the court until the defendant therein shall be arrested." It is true that the transcript from the Ozark circuit court contains no separate minute of the filing of the indictment in open court on the minute book, nor does the record anywhere disclose whether the defendant or his codefendant, Whitaker, were either in custody or on bail at the time. If they were not, it would have been a violation of the law for the clerk to have made an entry on his record on the day it was returned. *State v. Corson*, 12 Mo. 405. It was the clerk's duty to file it, and when so filed it became ipso facto a part of the record of the court. *State v. Grate*, 68 Mo. 22; *State v. Clark*, 18 Mo. 432; *Stewart v. State*, 24 Ind. 142; *Mose v. State*, 35 Ala. 421. This indictment in its caption shows it was "in the Ozark circuit court at its October term, 1891." It is signed by the prosecuting attorney of that county, and indorsed by James A. Harley, the foreman of the grand jury appointed at that term of court, as "a true bill." On the back of the indictment are these indorsements: "State of Missouri. Jake Lord and Samuel Whitaker. Indictment. Charged with Grand Larceny. Filed October 13, 1891. Guy T. Harrison, Clerk. By Robert Q. Gilliland, D. C." The names of the witnesses were then indorsed. Under these circumstances, we think it sufficiently appears that the indictment was returned by the grand jury into the circuit court of Ozark county. *State v. Meinhart*, 73 Mo. 562; *State v. Grate*, 68 Mo. 22; *State v. Pitts*, 58 Mo. 556; *State v. Weaver*, (N. C.) 10 S. E. Rep. 486; *Stewart v. State*, 24 Ind. 142; *State v. Bordeaux*, 93 N. C. 560; *State v. Galnus*, 86 N. C. 632; *Mose v. State*, 35 Ala. 421. The indictment itself being a part of the record proper, and always on file, certainly, when it is authenticated, as in this case, by the genuine signatures and indorsements of the prosecuting attorney, foreman of the grand jury, and the circuit clerk, there can be no question, in our opinion, but that the prima facie

presumption is that it was lodged in that court in the manner and by the means prescribed by law. Whatever view has been taken of this question in other jurisdictions, we think it is fair to presume in the first instance that a public officer of the responsibility of a circuit clerk would not file in his office and indorse a paper as an indictment for felony against any citizen unless the grand jury had so returned it; in other words, would not be guilty of a fraud so easily detected. This presumption in favor of the correctness of official conduct is well established. The indictment being on file, with the date of its indorsement, the attestation of the prosecuting attorney and foreman of the grand jury constituted it a part of the record by the terms of the statute, from which the clerk could have certified the filing as well as if he had made the minute thereof on the record, as is invariably done from the filing of a petition in a civil case. It would have been perfectly competent for the circuit court of Douglas county to have granted a certiorari or rule on the circuit clerk of Ozark county to examine his record, and supply the record, if in fact such a record existed, but had, by oversight, been omitted in certifying the cause on change of venue. But, as there was sufficient in the record to show the return of the indictment, and no other error being suggested or appearing, the judgment is affirmed. All concur.

STATE v. YOCUM.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

RAPE—ASSAULT—EVIDENCE—INSTRUCTIONS.

1. The defense cannot show what prosecutrix said to a doctor, examining her a week afterwards, as to how the assault occurred.

2. When the court has postulated that the offense must have been done forcibly, and against the will of prosecutrix, it is no error to refuse charges requiring it to have been done by force and against her will, notwithstanding her resistance, and to gratify defendant's passions, at all events, notwithstanding said resistance.

3. A verdict finding defendant guilty of an "assault to commit rape" is sufficient.

Appeal from circuit court, Jasper county; W. M. Robinson, Judge.

Chris. Yocum, convicted of an assault with intent to commit rape, appeals. Affirmed.

J. W. McAntire, for appellant. R. F. Walker, Atty. Gen., for the State.

GANTT, P. J. At the September term, 1892, of the Jasper circuit court, an indictment containing two counts was returned by the grand jury,—the first, charging the defendant with rape upon Nancy Roten; the second, with an assault with an intent to rape her,—on the night of the 4th of August, 1892. Defendant was duly arraigned and entered his plea of not guilty. The cause was tried at Joplin, at the December term,

1892, and the following verdict rendered by the jury: "We, the jury, find the defendant, Chris. Yocum, guilty of an assault to commit rape, and assess the penalty at three years in the penitentiary. Henry J. Blackwell, Foreman." A motion for a new trial, assigning various grounds, was filed in due time, and overruled. The errors assigned in this court relate to the exclusion of evidence, and the giving and refusing of instructions, all of which will appear in the order of the defendant's brief.

1. The defendant complains that the circuit court refused to permit Dr. Swartz to state what the prosecutrix said to her about a week after the rape was attempted. The question was, "State if the girl told you anything about her condition, and what declaration she made to you?" Upon the objection of the prosecuting attorney, the court said, "You may examine her as to what she said about her organs at the time,—what complaint she made,—but nothing as to how it occurred." To which counsel for defendant excepted, and said: "We propose to prove by this witness that, at the time she made the examination of the prosecuting witness, [about one week after the alleged attempt,] she made a statement as to how this occurred, at the time she claims to have been raped." The court thereupon ruled that anything the girl may have said, at that time, as to how it happened, was incompetent, and defendant excepted. It will be observed that this question in no way referred to the statement made by the prosecutrix, constituting a part of the *res gestae*, nor was it asked by way of impeachment, a proper foundation having been laid. As the prosecutrix was not a party to the record, her statements, except as a part of the *res gestae*, or by way of impeachment, were wholly inadmissible against the state. *State v. Noeninger*, 108 Mo. 166, 18 S. W. Rep. 990; *McMillen v. State*, 13 Mo. 30.

2. The court, of its own motion, gave these instructions: "If you do not believe from the evidence that defendant carnally knew Nancy Roten, and committed rape, as set forth and defined in instruction numbered one, and you do believe from the evidence that the defendant, at the time and place mentioned in said instruction, attempted, forcibly, and against the will of said Nancy Roten, to commit a rape upon her, by carnally knowing her, and in such attempt took hold of her, and did any act towards the commission of such offense, but failed in the perpetration thereof, you should find defendant guilty of attempt to rape, and assess his punishment at imprisonment in the penitentiary for any term not less than two years, and not exceeding fifteen years." "Although you may believe from the evidence that defendant took hold of the prosecuting witness, and that they had a wrestle or a scuffle, unless it was done with intent to have carnal knowledge of her by force and against

her will, you will find him not guilty of an assault to commit rape." The defendant complains of these as erroneous and misleading. He asked the court to give, substantially, the same instructions, except that in one he added to the words, "by force and against her will," the additional clause, "notwithstanding the resistance of the prosecuting witness," and, in the other, the expression, "and to gratify his passion, at all events, notwithstanding the resistance of prosecuting witness." The court's instructions were clear and ample. The omitted clauses were mere tautology, and were included in the instructions of the court; hence, no error was committed in refusing them. The court gave full and fair instructions on the presumption of innocence, and reasonable doubt.

The verdict is criticised as indefinite and uncertain because it fails to use the words, assault "with intent" to commit rape, and merely states that they find him guilty of an "assault to commit rape." The verdict is sufficient.

There was ample and convincing evidence to satisfy the jury that an assault with intent to commit rape was made by defendant at the time charged; that he was only prevented by the extreme resistance of the girl, and her screams, which were heard by witnesses. Upon her arrival at home, she immediately informed her mother of the assault, and her story was also corroborated by the condition of her clothing, which was soiled, torn loose, and unfastened, and by a bruise over her eye. Defendant also confessed to the officer that he failed only because "she kicked around so, over the ground," and that "he stopped her screams by putting his hand over her mouth." The judgment is affirmed. All concur.

STATE v. LIVINGSTON et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

RECOGNIZANCE—LIABILITY OF SURETIES.

The sureties on a recognizance for the appearance of defendant in a criminal case are not relieved from liability either by the insufficiency of the indictment, or because of a variance, as to the description of the offense, between the indictment and the *scire facias* issued on the failure of defendant to appear.

Appeal from circuit court, Texas county; J. F. Hale, Judge.

Scire facias on a forfeited recognizance by the state of Missouri against A. H. Livingston and J. M. Livesay, as sureties of one Perry Coffey, who was indicted for obtaining goods under false pretenses. A demurrer was sustained, and the state appeals. Reversed.

R. F. Walker, Atty. Gen., for the State. Livingston, Green & Galloway, for respondents.

SHERWOOD, J. One Perry Coffey was indicted under the patent form for obtaining from J. H. Williams and J. P. Williams goods, merchandise, and personal property of the value of \$300.15, of the personal goods and chattels of said J. H. Williams and J. P. Williams, by use and by means of false and fraudulent representations and statements, etc. Coffey entered into recognizance with defendants as sureties, conditioned that Coffey should appear before the Howell circuit court, etc., and not depart the court without leave, etc., and should said cause be not then determined, "to appear from time to time, and from term to term, until said cause be disposed of." At the October term, 1889, Coffey having failed to appear, a forfeiture was taken, and *sci. fa.* issued. The judge of the Howell circuit court having been of counsel, the cause was transferred to the Texas circuit court. The defendant sureties demurred to the record on the ground that the indictment was fatally defective and charged no offense, etc.; that there was a variance and repugnance between the *sci. fa.* and the recognizance, the former charging the obtaining goods under false pretenses, and the latter charging that money was obtained under false pretenses. The court held the demurrer well taken, and the defendant sureties were adjudged to go without day, etc.

This action of the trial court was erroneous. The indictment was undoubtedly bad, both in form and substance, since it did not inform, and had no tendency to inform, the accused of the nature and cause of the accusation against him, and thus violated section 22 of our bill of rights, to say nothing of common fairness. *State v. Fleming*, (Mo. Sup.) 22 S. W. Rep. 1024. But, notwithstanding the insufficiency of the indictment, such insufficiency constitutes no ground whatever for failure to comply with the conditions of the recognizance. *State v. Poston*, 63 Mo. 521; *State v. Millsaps*, 69 Mo. 359. The same may be said of any variance between the *sci. fa.* and indictment. The very object of the recognizance being taken as it was, was to insure the continued attendance of the accused, notwithstanding the indictment might be adjudged insufficient. Authorities last cited. Therefore, judgment reversed, and cause remanded. All concur.

STATE v. CAMERON.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

FALSE PRETENSES — SUFFICIENCY OF INDICTMENT.

An indictment for false pretenses charged that defendant and his codefendants represented themselves as agents for a lightning-rod company, and desired to contract with one R. to rod his house, agreeing to give him 100 feet of rod, and to charge him only for their labor and the excess over 100 feet, and assur-

ing him that it would not amount to more than \$5; and that he was induced to sign a contract by which he was obligated to pay \$195 for rodding his house, instead of \$5. *Held*, that the indictment was insufficient to support a conviction, especially where it appeared that R. paid defendant the \$195 without protest.

Appeal from circuit court, Montgomery county; E. M. Hughes, Judge.

A. Q. Cameron was convicted of obtaining money by false pretenses, and he appeals. Reversed.

W. S. Pope and Creech & Martin, for appellant. R. F. Walker, Atty. Gen., for the State.

GANTT, P. J. The count in the indictment on which defendant was convicted is as follows: "The grand jurors for the state of Missouri, duly impaneled, charged and sworn to inquire within and for the body of the county of Lincoln, and state of Missouri, upon their oath do charge and present that on or about the 24th day of April, A. D. 1891, at the county of Lincoln, and state of Missouri, A. Q. Cameron, C. A. Meeks, and F. J. Web, being then and there in an unlawful conspiracy, combination, confederation, and agreement among themselves, with the intent to cheat and defraud Hansford Richards of his money and property, did then and there, in the prosecution and furtherance of said unlawful conspiracy, confederation, combination, and agreement, feloniously and designedly, with the intent to cheat and defraud said Hansford Richards, falsely pretended to the said Hansford Richards that they, the said A. Q. Cameron, C. A. Meeks, and F. J. Web, were in the neighborhood of the said Hansford Richards representing a certain lightning-rod company to these grand jurors unknown, and that, for the purpose of advertising in his, the said Hansford Richards', neighborhood, they, the said A. Q. Cameron, C. A. Meeks, and F. J. Web, could and would give the said Hansford Richards a great bargain, if he, the said Hansford Richards, would allow them, the said A. Q. Cameron, C. A. Meeks, and F. J. Web, to put lightning rods on his, the said Hansford Richards', dwelling house, saying that they would give the said Hansford Richards one hundred feet of rod, free and without charge, as a special inducement for him, the said Hansford Richards, to allow them, the said A. Q. Cameron, C. A. Meeks, and F. J. Web, the privilege of rodding his, the said Hansford Richards', dwelling house; that the said A. Q. Cameron, C. A. Meeks, and F. J. Web then and there cautioned the said Hansford Richards to say nothing to his neighbors about the special and exceptional bargain they, the said A. Q. Cameron, C. A. Meeks, and F. J. Web, had given him; that they could only afford to do this with him, the said Hansford Richards, on account of its being such a good and successful means of advertisement to the people of the said

Hansford Richards' neighborhood; and for the further consideration the said Hansford Richards was to allow them, the said A. Q. Cameron, C. A. Meeks, and F. J. Web, to bring the said Hansford Richards' neighbors, and such other persons as they pleased, to his house, so that his neighbors and other persons could examine the lightning rods and their work, and satisfy themselves as to the kind of material and class of work the said A. Q. Cameron, C. A. Meeks, and F. J. Web did, telling the said Hansford Richards that they were only going to charge him for the actual cost of the labor required in putting the lightning rod on his said dwelling house, and for the few feet extra of rod that it might take over and above the said one hundred feet of lightning rod they had given him without cost as aforesaid, and that the entire expense, including all charges for lightning rods and labor, should not cost the said Hansford Richards more than five dollars in any event; and that the said Hansford Richards, believing the said false pretenses and fraudulent representations so made as aforesaid to be true, and being deceived thereby, was induced, by reason thereof, to sign a contract which the said A. Q. Cameron, C. A. Meeks, and F. J. Web, then and there feloniously and designedly, with the intent to cheat and defraud him, the said Hansford Richards, did falsely pretend and represent to said Hansford Richards that his putting his signature to the said written contract was to obligate the said Hansford Richards for the payment of the said sum of five dollars, and only the said sum of five dollars, whereas, in truth and in fact, the said A. Q. Cameron, C. A. Meeks, and F. J. Web were not representing any lightning-rod company, and as a matter of fact and truth they did not rod the said Hansford Richards' dwelling house as a means of advertisement in said Hansford Richards' neighborhood or community, as aforesaid, and the said Hansford Richards' putting his said signature to said written contract did not obligate him to pay the sum of five dollars and no more, but, to the contrary, the putting of this, the said Hansford Richards', signature to the said written contract as aforesaid, then and there obligated and bound him, the said Hansford Richards, for the payment of one hundred and ninety-five dollars of the United States, and of the value of one hundred and ninety-five dollars, and of the goods and chattels of the said Hansford Richards; and that the said A. Q. Cameron, C. A. Meeks, and F. J. Web, by means of the false pretense and fraudulent representations so made to the said Hansford Richards, as aforesaid, unlawfully, feloniously, and designedly did then and there obtain of and from the said Hansford Richards the said sum of one hundred and ninety-five dollars, lawful money of the United States, of the value of one hundred and ninety-five dollars, of the goods and chattels of the

said Hansford Richards, and that the said A. Q. Cameron, C. A. Meeks, and F. J. Web then and there well knew that the said false pretenses and fraudulent representations so made as aforesaid were false and untrue, against the peace and dignity of the state." The indictment was filed September 24, 1891, and a change of venue granted to Montgomery county. The defendants Cameron and Meeks filed a motion to quash, for the reasons, among others, that the said count of said indictment does not charge the said defendants with any offense against the laws of the state of Missouri, because said count in said indictment does not charge that the money obtained was obtained by false and fraudulent representations, because there is no connection with the payment of the money by Hansford Richards and the false and fraudulent representations made by defendants charged in said count. The motion to quash was overruled and defendant duly excepted.

Stripped of all immaterial averments, the charge in this indictment is simply that the defendant and his codefendants represented themselves as agents for a lightning-rod company, and desired to contract with the prosecuting witness, Richards, to rod his house, agreeing to give him 100 feet of rod, and to charge him only for their labor and the excess over the 100 feet, and assuring him that it would not amount to more than \$3. It is then averred that he was induced to sign a contract by which he was obligated to pay \$195 for rodding his house, instead of \$5 only. The contract is nowhere set out, but it is alleged it was in writing. There is no averment that Richards could not, or did not, read the contract, nor is there any averment of any fraudulent trick or device by which he was prevented from reading the contract before he signed it. It is not pretended that defendant failed to do the work. On the contrary, Richards says, when it was finished, defendant produced the contract, estimated the work, and found it came to \$195, and he paid him the cash therefor without protest. It is charged that the promise of defendant was that the extra work over the 100 feet should not exceed \$5, and yet when the written contract was presented to Richards to sign, by which he was obligated to pay \$195 for the work, no reason is given for his signing it. It is not averred that he was so ignorant he could not read the writing, or that he was blind, or that he was shown one paper, and by a trick induced to sign another. The slightest attention on his part to the ordinary methods of transacting business, especially between strangers, would have enabled him at once to discover the contract called for more than he had agreed to pay, and he could have declined to sign it, but, more than this, when called on to pay, if the contract had been fraudulently procured, he could have retained his money in his pocket; but with a full knowledge that the defendant claimed the contract called for

the \$195, and with no concealment on defendant's part of this claim, he paid that amount. It is not the policy of the law to punish as a crime the making of every foolish or ill-considered agreement. If it is, the jails and prisons must be greatly enlarged. "Where the pretense is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act." *Com. v. Hutchinson*, 2 *Para. Sel. Cas.* 309; *Buckalew v. State*, 11 *Tex. App.* 352; *Com. v. Grady*, 13 *Bush*, 285. The very essence of this crime is that the injured party must have relied upon some false or deceitful pretense or device, and parted with his property. *Fay's Case*, 28 *Grat.* 912; *Trogon v. Com.*, 31 *Grat.* 862; *Reg. v. Mills*, 7 *Cox, Crim. Cas.* 263; 7 *Amer. & Eng. Enc. Law*, p. 708, par. 3. How can it be said that Richards relied upon the truth of the statement that he had agreed to pay defendant \$195 when he, of all men, knew he had only agreed to pay \$5? It was not necessary for him to inquire of any one; he knew the statement was false, and he could not have relied upon it. Knowing it was false, he was not deceived by the contract into paying his money. The indictment is wholly insufficient to sustain this conviction, and the motion to quash should have been sustained. It becomes unnecessary to examine the other assignments. The judgment is reversed, and the prisoner discharged. All concur.

STATE v. RICHARDSON.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

CRIMINAL LAW—TAKING AWAY FEMALE FOR CONCUBINAGE—TRIAL—INSTRUCTIONS—SECONDARY EVIDENCE—REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

1. On a trial of defendant for taking away a female under 18 years old for the purpose of concubinage, the state need not prove defendant's purpose in taking her away by positive testimony, if it be shown that he took her away; it being sufficient that such purpose be shown by facts and surrounding circumstances in evidence.

2. If defendant took her away for the purpose of concubinage, he was guilty whether or not he actually had sexual intercourse with her.

3. An instruction that while defendant's declarations are competent evidence, and that the law presumes to be true what a defendant may say against himself, the jury need not believe as true what he may have said in his own behalf, because proven or drawn out by the state, is not objectionable.

4. The father of prosecutrix was asked if he did not know there was an order of court giving the care of his daughter to her grandmother, to show that at the time of the commission of the offense she was not in the legal care of her father. *Held*, that an objection to the question was properly sustained; verbal testimony being inadmissible to show the contents of a record of court.

5. After the jury had returned their verdict, defendant offered a judgment in a suit for divorce against prosecutrix's father by his former wife, in which the custody of prosecutrix

was given to her grandmother, and the evidence was excluded. *Held* that, it not appearing on what ground the evidence was excluded, it will be presumed that it was offered out of time.

6. The supreme court will not undertake to determine the weight of the evidence, and whether a conviction is sustained thereby or not.

Appeal from criminal court, Greene county; M. Oliver, Judge.

J. W. Richardson was convicted of a crime, and appeals. Affirmed.

The following instructions were given over defendant's objection, and duly excepted to: "(1) If the jury believe from the evidence that the defendant, John W. Richardson, at the county of Webster and state of Missouri, within three years next before the finding of the indictment, did then and there unlawfully, wilfully, and feloniously take one Nellie Moote, a female under the age of eighteen years, from the custody and care of her father, Ephraim Moote, for the unlawful and felonious purpose of prostitution and concubinage, by intending to have, and having, illicit sexual intercourse with her, the said Nellie Moote, then you will find the defendant guilty as charged in the indictment, and assess his punishment at not less than two, and not more than five, years' imprisonment in the state penitentiary. (2) In passing upon the question of the guilt or innocence of the defendant it is not incumbent upon the state to prove the purpose for which defendant took said Nellie Moote away, if you find he did take her away, by positive testimony, but this may be shown by facts and surrounding circumstances; and if, from all the facts and surrounding circumstances in evidence in the case, you find and believe that he did take her for the purpose charged in the indictment, and that she was under the age of eighteen, and under the care of her father, as charged in said indictment, you will find the defendant guilty." "(4) If you believe from the evidence that the defendant did unlawfully, wilfully, and feloniously, at the time and place mentioned in the indictment, take away the said Nellie Moote, she being a female under the age of eighteen years, if you so find, and she being then and there under the custody and care of her father, Ephraim Moote, if you so find, for the unlawful and felonious purpose of concubinage or prostitution, you will find the defendant guilty, although you may find and believe from the evidence that the defendant did not accomplish his purpose,—that is, did not in fact have sexual intercourse with her, the said Nellie Moote." "(6) The court declares the law to be that while the declarations of the defendant are competent evidence, and should be by you considered, you are instructed that the law presumes to be true what a defendant may say against himself; but you are not bound to believe as true what he may have said in his own

behalf, because proven or drawn out by state, but you are at liberty to believe or disbelieve, as you find from the evidence you should do, if it be true or false."

Thos. W. Kersey and Geo. T. Edmisson, for appellant. R. F. Walker, Atty. Gen., and Morton Jourdan, Asst. Atty. Gen., for the State.

BURGESS, J. Defendant was convicted in the criminal court of Greene county for taking away one Nellie Moote, a female under the age of 18 years, from the custody of her father Ephraim Moote, without his consent and against his will, for the purpose of concubinage by having illicit sexual intercourse with her. The offense was committed in Webster county, where the defendant was found, the venue having been subsequently changed to Greene county, where the trial was had. The facts, as disclosed by the testimony, are as follows: For several months prior to the 22d day of January, 1892, the defendant had taught the district school near the residence of the father of the prosecutrix in Webster county. That he, being a preacher of the gospel, had also held religious meetings in that portion of the county, and among his other pupils at school, and auditors at church, was Nellie, the 13 year old daughter of Ephraim Moote. Defendant was a man of family, but pretended to fall in love with Nellie, and arranged and executed an elopement with her on the night of January 22, 1892. Upon this night, and according to his prearranged plans, she left the home of her father, and met defendant about one-half mile down the road, where he was in waiting with a buggy and team already secured at a livery stable. They drove to Marshfield, and there took the train for St. Louis. From St. Louis they went to Nashville, Tenn., at which place they remained overnight, occupying the same bed at the hotel, at which defendant had registered as J. M. Ford and wife. Prosecutrix testified that during the night they had sexual intercourse. During the next forenoon they left for Tullahoma, Tenn., and there again occupied the same bed and had sexual intercourse. The following afternoon the defendant was arrested, and he and the prosecutrix were brought back to this state. It also appears that the father and mother of the prosecutrix had been divorced, and that the mother, Mrs. A. Oswald, lived at Hutchinson, Kan. The father had the care and custody of the daughter. The case is here by appeal.

The first contention on the part of the defendant is that the court committed error in giving instructions to the jury on the part of the state, and in refusing instructions prayed for by defendant. We have examined with much care the instructions, and have arrived at the conclusion that they are not obnoxious to the objections urged against

them. They presented the law of the case to the jury fairly and very favorably to the defendant, and those which were asked by him and refused were mere abstractions, and properly refused. Those given covered the entire case, and were fully justified by the evidence.

On the cross-examination of Ephraim Moote, the father of the prosecuting witness, he was asked if he did not know that there was an order of court decreeing the care and custody of Nellie to her grandmother, Mrs. Sarah F. George. This question was asked, of course, for the purpose of showing that Nellie was not, at the time of the commission of the offense, in the legal care and custody of her father, Ephraim. An objection to this question was made because not the best evidence, which was by the court sustained, and we think rightly so. Verbal testimony was not admissible for the purpose of showing the contents of a record of a court, when the record itself is in existence.

The record also discloses the fact that after the case had been closed, and after the jury had returned into court with their verdict, fixing the punishment of defendant at three years in the penitentiary, his counsel offered in evidence a certified copy of a judgment rendered in the district court of Sumner county, Kan., in a suit for divorce, wherein Mollie L. Moote was plaintiff and Ephraim Moote defendant, in which the care and custody of Nellie Moote was given to her grandmother, Sarah F. George. This was objected to by the state, and the objection sustained, and exception duly saved. It does not appear upon what ground this evidence was excluded, but it must be taken for granted that it was offered out of time, as every reasonable presumption must be indulged in favor of the action of the court. *State v. Smith*, 80 Mo. 520; *Roach v. Colbern*, 76 Mo. 653. In other words, he who asserts that error has been committed must make it so appear.

It is also argued by counsel for defendant that the criminal intent on the part of the defendant was wanting, and that the verdict of the jury was not warranted by the evidence. This court has so often decided that it will not undertake to determine the weight of the evidence, and whether convictions are sustained thereby or not, that it is not deemed necessary to cite authorities upon that question. The defendant in this case, clothed, as he was, in the garb of a minister of the gospel, the head of a family, and the tutor of a mere child, a girl not yet 14 years of age, was guilty of a most heinous crime, if the girl witness is to be believed, for which the punishment he received at the hands of the court and jury was, in our opinion, by no means commensurate with the gravity of the offense. Judgment affirmed. All concur.

STATE v. BRITT.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

CRIMINAL LAW—BILL OF EXCEPTIONS—TIME OF FILING.

Where defendant in a criminal case does not file his bill of exceptions within the time allowed by the court, nor during such time obtain from the court an order, or from the parties a written stipulation, extending the time, the judgment becomes final, and a bill thereafter filed by consent of the court and parties is unavailing.

Appeal from circuit court, Montgomery county; El. M. Hughes, Judge.

Anderson Britt was convicted of defiling his ward, and he appeals. Affirmed.

Appling & Cole, for appellant. R. F. Walker, Atty. Gen., and Morton Jourdan, Asst. Atty. Gen., for the State.

GANTT, C. J. At the October term, 1890, in the circuit court of Montgomery county, the defendant was indicted and convicted of defiling his ward, one Mary Dow, a female under the age of 18 years. His motions for a new trial and in arrest were overruled, and he filed his affidavit for appeal, and it was granted. On November 1, 1890, the court made the following order: Ordered, "that the said defendant be allowed an appeal, with leave to defendant to file a bill of exceptions within forty days from this date." The defendant did not avail himself of this extension, and file his bill of exceptions in the 40 days; nor did he obtain from the circuit judge, during the 40 days, an extension of the time; nor did the attorneys on both sides enter into a written stipulation extending the time, and file it with the clerk, in the cause. But on the 26th of April, 1892, some 15 months after the leave given by the court had expired, this entry appears in the record: "Now, at this day, comes defendant herein, by his attorney, and files his bill of exceptions herein, all exceptions as to time of filing the same being waived by the parties plaintiff and defendant." When the 40 days given by the court had expired, the judgment of the circuit became final. Neither the court nor the parties had any power, in the absence of an order or stipulation extending the time, to take any other steps in the cause. *State v. Seaton*, 106 Mo. 198, 17 S. W. Rep. 169; *State v. Mosley*, (Mo. Sup.) 22 S. W. Rep. 804; *State v. Apperson*, (Mo. Sup.) 22 S. W. Rep. 375. Hence, the bill of exceptions filed at the April term, 1892, constituted no part of the record of this cause, and we must look to the record proper, alone, for reversible errors. This we have done, and find none, and the judgment is affirmed.

The laches of the clerk, whose duty it was to certify this cause in this court, is so glaring that we cannot pass it in silence. Although this defendant was convicted in No-

vember, 1890, this transcript was not filed in this court till September 8, 1893. Delays like this bring reproach upon the administration of the law. The prosecuting attorney should have seen that this appeal was certified after the defendant had refused to file his bill of exceptions. Affirmed. All concur.

STATE v. MADDOX.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

CRIMINAL LAW—CONTINUANCE.

It is error to refuse an application by defendant for a continuance of a trial for robbery in order to procure the attendance of a witness by whom defendant expects to prove an alibi, where the witness is too ill to attend court or to have her deposition taken, and the principal question in the case is the identification of defendant as the robber.

Appeal from circuit court, Shelby county; Thomas H. Bacon, Judge.

Morgan Maddox was convicted of robbery, and appeals. Reversed.

R. P. Giles, for appellant. R. F. Walker, Atty. Gen., Morton Jourdan, Asst. Atty. Gen., and Ben. T. Hardin, for the State.

GANTT, P. J. The defendant was indicted by the grand jury of Ralls county on the 24th of March, 1891, together with Frank Whitecotten, for robbery in the first degree of John L. McElroy, on the night of the 21st day of December, 1890. The defendants were arraigned at the same term, and by consent the cause was continued to the August term, which commenced August 24, 1891. At that term a change of venue was awarded to Shelby county. At the November term, 1891, of the Shelby circuit court a severance was granted, and the case as to the appellant, Morgan Maddox, was continued by order of the court of its own motion to the next term of court. At the April term, 1892, owing to the impassable condition of the roads, the entire docket was continued to June of that year. At the June session this cause was by mutual consent continued to Monday, September 5, 1892, at the adjourned term. At that time defendant Maddox filed the following application for a continuance:

"In the circuit court of Shelby county, Missouri, April term, 1892. The defendant Morgan Maddox comes and moves the court to grant him a continuance in this cause to the next term of this court, and as grounds for this motion, states the following:

"First. That Champ Clark, an attorney at law, is one of the counsel for this defendant in this cause, and has been such counsel ever since the indictment in this cause was found, and that said Champ Clark, as such counsel, is in charge of portions of the work in making the defense in this cause which were peculiarly in the charge and knowledge of said

Clark. That said Clark is a resident of the city of Bowling Green, in Pike county, Missouri, and is a member of the bar at that place, and has a large practice as such attorney in the circuit court of said Pike county. That the regular September term, 1892, of said Pike circuit court, is begun on this day, to wit, the 5th day of September, 1892. That the docket of said circuit court of Pike county is set so that there are a great many of the cases in which said Clark is of counsel set for trial on every day, beginning with this day, and ending on the 15th day of September, 1892. That said cases in which said Clark is engaged as counsel are important cases, and by reason of said employment of said Clark in said cases in said Pike circuit court he, the said Clark, cannot be present at the trial of this cause at the present term of this court; and that, if the defendant is compelled to go to trial without the presence and aid of said Clark as such counsel, a great and material harm would be done this defendant, and this defendant would be deprived of the means of making a full and fair defense in this cause.

"Second. The defendant states that Malinda Maddox, the wife of the defendant Morgan Maddox, is a material witness on behalf of the defendant, Morgan Maddox, in this cause. That her residence is at the town of Huntington, in Ralls county, Missouri, where she now is. That on the night of the 25th day of August, 1892, the said Malinda Maddox, had an abortion or miscarriage, about twelve o'clock on said night. She then had a severe chill, and her temperature arose to 105 degrees, her pulse was 150, she showing and having all the symptoms of septicæmia, resulting from the absorption of a putrid foetus and its membranes. She is now confined to her room, and nearly all the time in her bed, under the order of her physician, and it is the opinion of her physician, S. Mattox, a regular registered and practicing physician, who is now attending her, and who has been attending her since the time of the said abortion, that it would not be safe for her, under the most favorable circumstances, to leave her home under six weeks from the time said abortion took place. And this affiant says her condition is such that it would not be safe under the most favorable circumstances for her to leave her home and be present at the trial of this cause under six weeks from the time said abortion took place. This affiant further says that said Malinda Maddox has been so ill ever since said abortion that she could not give her deposition in this cause without endangering her life. That this cause was set for trial in this court in November, 1891, at the October term, 1891, of this court, on the 23d day of November, 1891. That this defendant caused a subpoena to be issued from the office of the clerk of this court on the 13th day of November, 1891, for said Malinda Maddox,

and placed said subpoena in the hands of the sheriff of Ralls county, Missouri, for service on said witness. That said subpoena was duly served on said Malinda Maddox, during said trial, by the said sheriff, on the 25th day of November, 1891, in Ralls county, Missouri, and that said Malinda Maddox obeyed said subpoena, and appeared in this court at said time in this cause, and, after a severance as to the defendants, Maddox and Whitecotten, testified on behalf of the codefendant, Frank Whitecotten, on his trial at said term of this court, and that the trial of this cause had been by this court regularly continued from the said last-mentioned term until this time, and it was the duty of said witness, under the statute, to attend as a witness on behalf of this defendant on the trial of this cause at the time without further subpoena. That said Malinda Maddox will testify on the trial of this cause, if present, as follows: 'I am the wife of the defendant Morgan Maddox, and was his wife on the 21st day of December, 1890, at the time of the alleged robbery of Leland McElroy, and was living with said Maddox as his wife at his home in the town of Huntington, Mo., about one and a half miles from the place of said alleged robbery.' That she was at home all of the afternoon and evening and night of said December 21, 1890. That this defendant, at the hour of six o'clock in the evening of said December 21, 1890, was present at his and her home in said town of Huntington, and took supper there shortly after said hour, and that said Morgan Maddox remained at their said home from said hour of six o'clock on said evening until the hour of eight o'clock on the night of said December 21, 1890, at which last-mentioned time Maie Maddox announced to the witness and said Morgan Maddox at their said home that Leland McElroy had been robbed on said night, except for a space of time not exceeding twenty minutes, and that during said twenty minutes said Morgan Maddox went to the barn at their home, saying that he, said Morgan Maddox, was going to attend to their horses. That said Morgan Maddox was not absent from said house longer than said space of twenty minutes from said hour of six o'clock until after said Morgan Maddox was notified at his home of said robbery. That the testimony of Leland McElroy and Mary McElroy, who are in attendance on this court as witnesses for the prosecution in this cause, will be that said robbery of said Leland McElroy, with which said defendant stands charged, occurred between the hour of six o'clock and eight o'clock on said December 21, 1890, in the evening of said day, about one and a half miles from the said home of the said defendant. That the testimony of said Malinda Maddox, as above set forth, tends to prove and does prove a complete alibi for this defendant as to said robbery. That the testimony of said Le-

land McElroy, as the prosecuting witness in this cause, will be that said Morgan Maddox was present at the time and place of said robbery, participating therein. That the testimony of Malinda Maddox, as above set forth, is material to the issue of this cause on behalf of the defendant, Morgan Maddox. That this defendant has used due diligence to obtain the testimony of said witness Malinda Maddox on this trial of this cause. That the testimony of said witness can be procured on the trial of this cause by and at the next term of this court, and that said Malinda Maddox will prove facts as above set forth; and this defendant believes said facts, as above set forth as said witness' testimony, are true, and that this defendant is unable to prove said facts by any other witness whose testimony can be as readily procured; and that said witness, Malinda Maddox, is not absent by the connivance, procurement, or consent of this defendant, and that said Malinda Maddox, is absent from this trial solely because said witness, Malinda Maddox, is sick, and unable to attend at the trial of this cause, and that this application for continuance is not made for vexation or delay merely, but to obtain substantial justice on the trial of this cause. [Signed] Morgan Maddox."

"State of Missouri, County of Shelby—ss.: Morgan Maddox, the above-named defendant, being duly sworn on his oath that the facts stated in the foregoing application for a continuance are true. [Signed] Morgan Maddox."

"Subscribed and sworn to before me this September 5th, 1892. [Signed] Frank Dimmitt, Clerk."

The circuit court overruled the application, and defendant was put upon his trial, and was convicted and sentenced to the penitentiary for nine years.

The evidence tended to prove that John L. McElroy, who was robbed, was then about 76 years of age, and lived on his farm in Ralls county, Missouri, about one and a half miles from Huntington, a small railroad town on the line of the Missouri, Kansas & Texas Railway. His family consisted of his wife, who was very old and feeble, and two unmarried daughters of middle age. The defendant Morgan Maddox lived in Huntington, where he was engaged in livery business; the other defendant, Frank Whitecotten, lived on a farm with his father, near the village of Sidney, which is three or four miles distant from Huntington. From the testimony of John L. McElroy and his daughter, Miss Mary McElroy, the only one of his family besides himself who testified, it appears that the robbers came to the house of John L. McElroy shortly after 6 P. M., December 21, 1890. Miss Mary testified that two men came to the front door, one of whom she saw through the window, and that she recognized him to be Frank Whitecotten by his

voice, and that she believed the other man to be Morgan Maddox, though she neither saw him nor heard him speak; that she heard them go into her father's room, after which she, her mother, and her sister made their escape to a neighbor's house. John L. McElroy testified that both of the men wore masks, and that he recognized Frank Whitecotten from seeing his face when his mask dropped down, and from hearing him talk, and that he recognized Morgan Maddox from his height, appearance, and movements, and that he also heard him speak while in the room, but did not see his face; that the men remained in the room less than an hour, but he could not state the exact time; that after they left he caught his horse, and went to the house of John Maddox, the father of Morgan Maddox, which was distant a little over one-fourth of a mile; that his purpose in going there was to look for his family, and while there he requested that MaJe Maddox, a brother of defendant, Morgan Maddox, might be sent to Huntington to tell them to watch to see who got on the train. He then returned home, where he found many of his neighbors assembled, but he did not tell them that he knew who robbed him, though questioned by them with a view to aid in their capture. Sam Burrell, a witness for the state, testified that on that night he saw four men fifty yards off, in a thicket, not far from McElroy's house, and heard one of them say, "Ain't those bright yellow fellows," and heard one of them address the other as "Morg." Then he recognized the voice of one of them as that of Frank Whitecotten. Then he afterwards saw two men climb a fence some distance away from him. That he did not see their faces, but recognized them to be the defendants by their movements. That on the next day he found a sack, which Mr. McElroy identified as having contained part of the money, near the spot where he saw the four men. That he notified Mr. McElroy about finding the sack the same day, and that he said nothing to him, or the prosecuting attorney about having seen the four men until six weeks thereafter. Three witnesses for the state testified that Morgan Maddox had proposed to them, separately, some time before December 21, 1890, to rob John L. McElroy, and other witnesses testified that the defendant Morgan Maddox had stated to them that John L. McElroy had or kept money about the house.

For the defense, evidence was introduced that the defendants, Morgan Maddox and Frank Whitecotten, were both at the house of the former, in Huntington, one and a half miles distant from the scene of the robbery, at the time it was alleged to have been committed. It was shown by the testimony of several witnesses that about 5:30 P. M., or later, Morgan Maddox went to Dick Smith's, who lived about one-fourth of

a mile north of Huntington, and one and three-quarters miles from John L. McElroy's. That, after getting a bucket of water, he walked down to his livery stable in Huntington, where he conversed with other persons, and offered to accompany a lady, who was seeking a conveyance, on a trip several miles in the country. That he then went to his house, which was about 60 or 70 yards from his livery stable, and remained there until after supper; eating supper at home between 6 and 7 o'clock, in the presence of his wife and other persons. That after supper he remained in the house until a short time before 7 o'clock, when he went to his livery stable in Huntington, where he was seen about 7 o'clock by Walter Boardman as he passed through the town to his home in the neighborhood. That after remaining at the livery stable about 15 minutes he returned to his house, and there remained in the company of others until he was notified a short time after 8 o'clock that the robbery had been committed. It was also shown that Frank Whitecotten ate supper at Morgan Maddox's between 6 and 7 o'clock, and that he was there at his house, and never out of it, from 5 o'clock until after notice was received that the robbery had been committed. It was also shown that when John L. McElroy went to John Maddox's, immediately after the robbery, after telling them that he had been robbed, he requested Maje Maddox, a brother of the defendant Morgan Maddox, to go to Huntington, and tell them to watch the trains, to see if any strangers got on the trains. That after he returned to his home that night he stated to the constable and the justice of the peace and a number of other persons among the neighbors, that he did not know who the robbers were, and that he could give no further description than that he heard the voice of one of them, and that it sounded familiar. He stated to Thomas Spalding, the constable, and Mr. Ragor, then deputy assessor of the county, and others, that he did not know who the men were, and had no idea, except the voice of one of them sounded like that of a man he had seen at Sydney, in Squire Engle's store, the Saturday before,—a man who had his coat off, who Engle said was a tie chopper. That he authorized Mr. Engle, the justice of the peace, in presence of four or five others, to send a telegram to Hannibal and other points, giving a description of the men,—one as five feet seven or eight inches high, and the other as five feet ten or eleven inches high, and offering a reward of \$500 for their arrest, and for the recovery of the money. That at the time this telegram was authorized to be sent the defendant Morgan Maddox was there in his house, and in his presence, and in the presence of the officers and 20 or 25 of his neighbors. It appeared from the cross-examination of John L. McElroy, that he did not notify the prosecuting attorney that he rec-

ognized the defendants as the persons who robbed him until six weeks after the robbery. That he knew that Mr. Allison went into the office of the prosecuting attorney January 1, 1891, and that he did not disclose the fact to him until about the middle of February. That he assigned various reasons for concealing his knowledge of the identity of the defendants. At one time he said it was because he feared that they might take his life, at another time he said it was because he feared that the defendant might be mobbed, then again his answer was that he thought if he kept quiet he might recover some of his money, and then he answered that he thought time and its concomitants might develop something. The house in which McElroy lived consisted of two rooms, separated by a hallway, and fronts west. The house is entered at the front door of the hall, with a door leading north to one room from the hall, and one south to the other room. On the night of the robbery McElroy occupied the north room, while his wife and two grown daughters occupied the south room. At about 7 o'clock (for the time is variously estimated by the witnesses) on the evening of December 21, 1890, two men, whom McElroy and his daughter claim to have recognized as Morgan Maddox and Frank Whitecotten, began pounding upon the front door, saying: "There's money in this house. There's money in this house. Money, money, is what we want, and we are going to have it." Then they broke into the house through the outer door; then kicked the door of the south room, which was occupied by the women, but did not enter; they then turned and broke into the north room, occupied by McElroy, breaking the panels of the door,—one being armed with a huge club, the other with a revolver, which was placed to the old man's head, and kept there until they had secured \$2,000 in gold coin and \$2,500 in greenback bills, each of the denomination of \$100, which they found in an old trunk under the bed. It is also established by the testimony that Whitecotten's right hand was sore before the robbery, and that the man who held the pistol to McElroy's head during the robbery had his right hand wrapped and held the pistol in his left. Both the robbers were masked, but when the robbery was being perpetrated Mr. McElroy says the mask slipped down so that he could and did recognize one as Frank Whitecotten. How far down the mask came is not clearly shown. The night was a clear moonlight night.

1. The first and principal assignment of error is the action of the trial court in refusing a continuance on the affidavit of defendant. In connection with this affidavit was presented to the court the certificate of the attending physician, Dr. S. Mattox. It was admitted and conceded by the prosecuting attorney that the certificate was in the genuine and proper handwriting of Dr. Mattox, and

that at the date it was given Dr. Mattox was a regularly practicing physician in good standing, near Ely, Marion county, Mo. The certificate is as follows: "Ely, Mo., September 5th, 1892. This is to certify that I waited upon the wife of Morgan Maddox the night of August 25th, 1892, and that abortion took place about 12 o'clock of said night. She had a severe chill, and temperature rose to 105 degrees, pulse 150, with delirium, showing all the symptoms of septicaemia, resulting from the absorption of putrid foetus and its membranes; and I should not think it would be safe for her, under the most favorable circumstances, to leave her room under six weeks from the time the abortion took place. [Signed] S. Mattox, M. D." The defendant and his wife lived at Huntington, in Ralls county. The trial took place at Shelbyville, the county seat of Shelby county. Shelbyville is not reached by any railroad. To have reached it it was necessary for her to ride by the cars on the Missouri, Kansas & Texas to Monroe City, thence to Shelbyna, Hunnewell, or some other station, on the Hannibal & St. Joseph Railroad, and thence across the country for at least 12 miles. An application for continuance is addressed to the sound discretion of the trial court, and the propriety of granting or refusing it depends much on the peculiar facts of each case; but it has been held from the foundation of this state to this time that this discretion of the trial court was reviewable in this court, and this court reserves the right to inquire into the facts of each case, and reverse if the continuance was improperly refused. *McLane v. Harris*, 1 Mo. 501; *Riggs v. Fenton*, 3 Mo. 28; *Tunstall v. Hamilton*, 8 Mo. 500; *State v. Wood*, 68 Mo. 444; *State v. Maguire*, 69 Mo. 197; *State v. Walker*, Id. 274; *State v. Farrow*, 74 Mo. 531; *State v. Lewis*, Id. 222; *State v. Berkeley*, 92 Mo. 41, 4 S. W. Rep. 24; *State v. Anderson*, 96 Mo. 241, 9 S. W. Rep. 636. Was the continuance improperly refused in this case? It will be observed that the defendant's affidavit meets every requirement of section 4181, Rev. St. 1889. It shows first the materiality of his wife's evidence; that by her he expected to establish a complete alibi by showing that at the time Mr. McElroy was being robbed the defendant was at his home in Huntington, a mile and one-half from the scene of robbing. When it is considered that the guilt of this defendant depends largely upon his identification as one of the robbers by Mr. McElroy and his daughter, Miss Mary; that Mr. McElroy was an old gentleman of 76 years, suddenly attacked in his quiet country home by two masked men; that one of them placed a revolver at his head, and kept it there nearly all the time the robbery was being perpetrated, and that he must have been laboring under more or less mental excitement; that he did not see the defendant's face; that the light of the room was an ordinary

candle and the fire light in the fireplace; did not identify him by his clothing in any way, and only claimed afterwards that he recognized him by his walk, shape, and voice, but that he only heard him speak a few words in a low tone; that he never made known to the prosecuting attorney or his neighbors that he suspected defendant until the middle of the next February, but that many of his neighbors testified that, when asked on the night of the robbery, when surrounded by his neighbors and lifelong friends, if he recognized the robbers, said he did not; and that his daughter, Miss Mary, admits that she neither saw the defendant nor heard him speak on the occasion of the robbery. —It was of the highest importance to defendant to have the benefit of any and all evidence that tended to show he was at Huntington, and not at Mr. McElroy's, at the time of the commission of the crime. His wife's evidence was most material to him. He shows that she had been duly subpoenaed in the cause, and where she was at the time of the trial, and a strong probability that she could be procured for another time. He avers his belief in the truth of her testimony, and "that he was unable to prove said facts by any other witness whose testimony could be as readily procured;" that she was not absent by his consent, connivance, or procurement; that his application was not made for vexation or delay merely, but to obtain substantial justice. He shows that within 10 days before he made this affidavit his wife had suffered an abortion; that she had all the symptoms of septicaemia; that delirium and excessive temperature accompanied her sickness; that she was confined to her room, and nearly all the time to her bed, under the orders of her physician; that it would endanger her life to bring her to court, or take her deposition in time for trial. Her condition was fully corroborated by her physician's certificate, and he is admitted to be a physician of good standing in that community. The only possible suggestion that can be made against the sufficiency of this affidavit is that the physician's certificate does not say she was too ill to have her deposition taken, but the affidavit does, and the physician's certificate discloses a condition in which the court as well as an expert could see the defendant's wife ordinarily, under such circumstances, would be in no condition to stand the excitement of the examination and cross-examination in a trial involving the liberty of her husband. We think the court, under these conditions, erred in refusing a continuance. The defendant had never been accorded a continuance on his own application. In the very nature of things, he could not anticipate the misfortune that befell his wife so close to the trial; and, even if her deposition might have been taken, why should he have been deprived of having her deliver her evidence *ore tenus* before the jury at the time and place of trial? As the

law had been repealed which allowed his statement of her evidence in his affidavit to be read to the jury, he was deprived even of that poor makeshift. But it is argued by the attorney general that, inasmuch as the state filed in the court, the next day after this motion had been overruled, the affidavits of three witnesses to the effect that they saw Mrs. Maddox in her yard at Huntington as they passed on their way to the trial, and could not discern that she was sick, we must take it the court was justified in refusing to continue the cause. We cannot see how these subsequent affidavits affect the question. They most clearly did not affect the judgment of the learned judge who decided the point, because they were not in existence then, and, for aught that this record discloses, he had never seen or heard them read. It would be improper for us to review them, inasmuch as the record nowhere shows that he ever passed on their sufficiency. His ruling was made upon the motion and affidavit of defendant alone, with the physician's certificate. It is that ruling we are called upon as a court of error to review, and not the subsequent *ex parte* affidavits that were filed in the cause, and upon which he took no action whatever.

As to the criticism of the counsel on the eleventh instruction, as this case must be tried again, we think with counsel, if it is necessary to instruct a jury to sign their verdict in ink, it is just as essential that the verdict of acquittal should be so signed as one of conviction.

The fourth instruction correctly placed the defense of alibi before the jury, and no other was needed.

We also think the tenth instruction should have been modified, if given at all. In the shape it now stands its probable effect would be to excuse Mr. McElroy from giving in his greenbacks, because they were nontaxable, but the gold that was in his possession, and under his control, and over which he exercised ownership in paying it out and adding to it, was taxable, and, if any such comment was made, the law of taxation as to all of the money should have been given; but it was not, in our opinion, a question of law arising in this case. As to whether Mr. McElroy's evidence should be affected by his failure to give in that gold to the assessor, the jury were entirely competent to determine for themselves, without any instruction whatever.

We find no reversible error in the record save the refusal of the continuance, and under all the circumstances we think the court committed error in that regard. While it is essential to the welfare of the state and well-being of society that crime should be punished, it is equally important that the securities of individual rights should also be vigilantly guarded. The judgment is reversed, and the cause remanded for a new trial.

BURGESS and SHERWOOD, JJ., concur.

WARDER v. HENRY.

(Supreme Court of Missouri, Division No. 1
Nov. 6, 1893.)

DEED—ACKNOWLEDGMENT—PLEA IN ABATEMENT
—PENDENCY OF ANOTHER ACTION—REMITTITUR
—SURETIES ON APPEAL BOND—INSTRUCTIONS—
NECESSITY OF DEFINING WORDS.

1. A certificate of acknowledgment of a deed, which states that the person named therein as acknowledging it "personally appeared" before the officer taking it, substantially complies with the statute, which requires the certificate to state that such person is "personally known" to such officer.

2. Where an answer sets up the defense of a former suit pending between the parties on the same cause of action, plaintiff may dismiss the first action, and proceed to judgment in the second action; and such dismissal may be set up in an amended reply.

3. Where, on hearing of a motion by defendant for new trial, the court, in effect, rules that certain instructions were erroneous as to one of plaintiff's causes of action, and that plaintiff was not entitled to recover thereon, and the latter undertakes to avoid a new trial by entering a remittitur, but fails to remit enough, the case will not be reversed on account of the erroneous instructions, but plaintiff will be permitted to remit in the supreme court the balance of the amount improperly recovered.

4. Such remittitur will not be refused, on objection of the sureties on the appeal bond, because defendant has become insolvent since the appeal was taken, since the question of entering a remittitur should be disposed of according to law and the practice of the supreme court, without regard to such sureties.

5. Where, in an action by a landlord against his tenant for damages for permitting his stock to injure fruit trees on the leased premises, the court charges that, if defendant "carelessly or knowingly permitted" stock to injure such trees, he is liable, etc., it is not necessary for the court to define the word "carelessly" to the jury.

Appeal from circuit court, Jackson county;
R. H. Field, Judge.

Action by George W. Warder against George W. Henry on a written contract, on an oral agreement, and to recover damages to fruit trees on a farm leased by plaintiff to defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

C. O. Tichenor and Jefferson Brumback,
for appellant. E. Robinson, for respondent.

BLACK, C. J. The petition in this case sets up three separate and distinct causes of action: The first is based upon a writing dated 20th January, 1890, whereby defendant, Henry, agreed to pay to the plaintiff, Warder, on or before six months after date, the sum of \$10,000, to be paid in bonds of a description fully set forth, or, at the option of Henry, in cash. In the second, the plaintiff states that defendant is indebted to him in the sum of \$1,775 on account of the pro rata unexpired premiums on certain fire insurance policies held by the Warder Grand Opera House Company on its property, of which property Henry became the purchaser, and which policies were duly assigned to said Henry. The plaintiff admits that he owes defendant \$351.05 on account

of certain other unexpired policies turned over by defendant to him. Other items were set out in this cause of action, but, as they are not in dispute in this court, they need not be mentioned. It is alleged in the third cause of action that defendant, while in possession of a certain farm as the lessee of the plaintiff, unlawfully permitted cattle to break down, injure, and destroy fruit and ornamental trees on the farm, to the damage of the plaintiff in the sum of \$1,600.

To an understanding of this case, and the various defenses set up to the several causes of action, it is necessary to go back to the beginning of the transactions which give rise to this contest. The Warder Grand Opera House Company, a corporation, hereafter called the "Opera House Company," owned certain property in the city of Kansas known as the "Warder Grand Opera House" and the "Hotel Warder." On the 10th March, 1888, the corporation executed a deed of trust upon the before-mentioned property to secure a debt of \$85,000. This deed of trust was recorded the same day, though there is a claim made in this suit that it was not entitled to record, because not properly acknowledged. Thereafter, and in the month of November, 1888, the Opera House Company leased that part of the property known as the "Warder Grand Opera House" to one Crawford for a period of five years. On the 10th January, 1890, the Opera House Company, by its president, and the defendant, Henry, made a lengthy written contract, whereby the company sold all of the first-mentioned property to Henry for the consideration of \$350,000, to be paid as follows: First, to the National Bank of Commerce the sum of \$150,000, on account of the said secured debt of \$85,000, and of certain mechanics' liens, all then held by said bank; second, to convey to the Opera House Company, or to any person it might designate, a farm of 500 acres in the state of Illinois, known as the "Rossland Park Farm," subject, however, to a mortgage thereon of \$50,000; third, to deliver to the Opera House Company, or to its order, \$40,000 worth of cattle then on the farm; fourth, a note payable to the Opera House Company, or its order, for \$15,000; and, fifth, "said Henry shall also, within six months from time of conveyance to him, deliver to said Opera House Company, or to any one it may designate, bonds to the amount of (\$10,000) ten thousand dollars, in the aggregate, out of bonds aggregating \$200,000, all of which shall be first mortgage bonds on the property particularly described in paragraph one of this contract, or may, in lieu of said bonds, pay said Opera House Company, or to its order, ten thousand dollars cash, and shall pay such cash if the bonds be not delivered within said six months." The agreement recites the fact that the property was then being advertised for sale under the \$85,000 deed of trust, and that Crawford held the above-men-

tioned lease. The Opera House Company reserved the right to procure a cancellation of the Crawford lease, if it could do so, and in that event it agreed to convey the property to Henry by a warranty deed. It was further agreed that if the company could not procure a cancellation of the lease held by Crawford, then the property was to be sold under the deed of trust, and purchased by Henry at not less than \$350,000, to be paid as before mentioned. The contract contains the further stipulation that, if Henry should take title under the trust deed, the said "Opera House Company shall also make to him a warranty deed of the property." The contract contains other stipulations, which need not be noticed. The above contract was duly ratified by the board of directors of the Opera House Company, and at the same time the board ordered Henry to execute to Warder, who was president of the company, the \$15,000 note, to be by him discounted for the purpose of paying off liens over and above the \$150,000 to be paid by Henry. The board also found that the company was indebted to Warder to an amount exceeding \$78,000, and at the same time made an order directing Henry to turn over the cattle, and to convey the farm to Warder, and to deliver to Warder the \$10,000 in bonds, or the cash which Henry had the right to pay in lieu of the bonds. The Opera House Company was unable to procure a cancellation of the Crawford lease, and the property was sold under the \$85,000 deed of trust, to Henry, at the price of \$350,000, and he received a trustee's deed, dated the 20th January, 1890. On the same day the Opera House Company executed a deed conveying to Henry the opera house and hotel property, being the same property conveyed to Henry by the trustee's deed. This deed professes, on its face, to be made in consideration of one dollar, and other valuable considerations. It sets forth, by way of recital, the trustee's deed of the same date, and it is then stated that it is made to ratify and confirm the trustee's sale. The deed also contains full covenants of warranty and against incumbrances, making no exceptions, save as to some unpaid taxes. On the same day, — the 20th January, 1890, — Henry executed a deed conveying the farm to Warder. At the same time, and in compliance with the previous contract, and the order of the board of directors, he gave Warder a writing thereby acknowledging that he owed Warder \$10,000, due in six months, to be paid in the described bonds, or, at the option of Henry, in cash. This writing is the basis of the plaintiff's first cause of action. Crawford refused to deliver possession of the opera house to Henry, and thereupon the latter brought suit against Crawford in ejectment. That suit was decided by the trial court in favor of Crawford, on the ground that he had no actual notice of the deed of trust at the time he took the lease, and be-

cause the deed of trust was not well acknowledged, and therefore the record of it did not charge Crawford with constructive notice. Henry did not call upon or notify the Opera House Company or Warder to defend that suit. As a defense, Henry sets up the Opera House Company deed to him, the Crawford lease, and claims that the lease constitutes a breach of the covenant in that deed, and that the damages should be set off against the plaintiff's first cause of action. He also pleads a former suit pending, the facts of which will be noted hereafter. The trial court directed a verdict for plaintiff on the first cause of action.

1. The first question is whether the deed of trust, of date March 10, 1888, made to secure the \$85,000 debt, was well acknowledged, so that the record thereof charged Crawford with notice, when he, at a subsequent date, accepted the five-year lease. The certificate of acknowledgment, omitting the caption and attestation of the notary, is in these words: "On this first day of March, 1888, before me personally appeared George W. Warder, who, being by me duly sworn, did say that he is the president of the Warder Grand Opera House Company, a corporation duly organized under the laws of the state of Missouri, and that the seal affixed to the within and foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said George W. Warder acknowledged said instrument to be the free act and deed of said corporation." The notary public, in making this certificate, undertook to follow the form given in the third section of the act of April 2, 1883, which form begins with these words: "On this — day of — 18—, before me appeared A. B., to me personally known, who, being by me duly sworn," etc. The point of the objection is that the acknowledgment omits the words "to me personally known," after the words "George W. Warder," where they first appear in the acknowledgment. Now, take the statute, and it will be seen the officer should certify that "before me appeared George W. Warder, to me personally known." The certificate states "before me personally appeared," etc. The officer, in making this statement that George W. Warder personally appeared before him, includes therein the proposition that Warder was to him personally known, for, unless personally known, how could he say Warder personally appeared? The meaning and sense of the certificate of acknowledgment are the same as the statute. The transposition of words does not affect the validity of the certificate. There is certainly here a substantial compliance with the statute, and that is all the law demands, as has been time and again held by this court. *Alexander v. Merry*, 9 Mo. 514; *Robson v. Thomas*, 55 Mo. 581; *Hughes v. McDivitt*, 102 Mo. 77, 14

S. W. Rep. 660, and 15 S. W. Rep. 756; *Wilson v. Quigley*, 107 Mo. 98, 17 S. W. Rep. 891. As the deed of trust was well and properly acknowledged, Crawford had constructive notice of it, and the foreclosure of the deed of trust by the trustee's sale to Henry cut out the lease. By the trustee's deed, Henry took a title superior to the lease. If we lay aside the trustee's deed, and look alone to the deed executed by the Opera House Company, then the Crawford lease constituted a breach of the covenants in that deed set forth, for the covenants are general. But that deed recites the existence of the trustee's deed to the same grantee, and the two deeds are parts of one and the same transaction, and are to be construed together. General covenants in a deed may be restrained by a contemporaneous sealed instrument. *Rawle, Cov. (5th Ed.)* § 205. But it is not essential to pursue this inquiry, for we understand it to be conceded that, if the deed of trust was properly acknowledged, then there was no breach of the covenants in the opera house deed. There being no breach of the covenants in that deed, Henry sustained no damage which he could set up as against the Opera House Company; and, this being so, he sustained no damage which he can set up against Warder.

2. The next contention of the defendant is that his answer of a former suit pending between the same parties for the same cause of action, set up to the plaintiff's first cause of action, should have prevailed. The facts, as declared by the pleadings and evidence, are these: On the 4th September, 1890, Warder commenced a suit in the Jackson county circuit court against Henry and against the Kansas City Auditorium Company, the Illinois Trust & Savings Bank, and the National Bank of Commerce, based upon the same agreement set up in the first cause of action in the case. That was a suit in equity, in which Warder prayed for judgment against Henry for \$10,000, and that the same be enforced as an equitable lien upon the opera house and hotel property. Henry was served with process in that suit before the commencement of this one. This suit was commenced on the 16th of September, 1890, and Henry filed an answer setting up as a second and further defense the pendency of the former suit. To this second defense, Warder filed a reply on the 13th November, 1890, stating therein that the former suit had been dismissed, and also denying some of the allegations made in the answer. To this reply, Henry demurred. The former suit had not been dismissed, as to Henry, when the reply was filed, but it was dismissed as to him on the 24th December, 1890. On the 2d January, 1891, Warder, with leave of the court, withdrew his reply, and at the same time refiled it. The demurrer had not yet been determined. To this action of the court, Henry excepted. He at the same time refiled his demurrer to the re-

filed reply, which demurrer the court overruled on the 2d January, 1891, and on that day a jury was impaneled to try the cause. Our Code of Civil Procedure provides that the defendant may demur to the petition when it shall appear upon the face thereof that "there is another action pending between the same parties for the same cause in this state," and, if that objection does not appear upon the face of the petition, it may be raised by answer. Counsel for defendant insist that the statute must be strictly construed; that, if the answer was true when made, the defense is good, and the plaintiff cannot avoid its effect by a dismissal of the former suit, but must go out of court. We do not agree to these propositions. Though, under our Code, a former suit pending is a matter of defense, and must be pleaded with matter going to the merit of the action, still such defense is matter in abatement of the suit. The ground on which courts proceed in the abatement of subsequent suits is that they are unnecessary, and are therefore deemed vexatious and oppressive. Such is the language of this court in *State v. Dougherty*, 45 Mo. 294; and this observation was approved in *Jacobs v. Lewis*, 47 Mo. 344. It is true, no mention was there made of this statute, but it does not follow that this court did not have the statute in mind. These decisions of the court show that this statute is not an iron rule. Like many other provisions of the Code, it is but declaratory of the common law; and, in its application, regard should be had to the substantial rights of the parties. Says Judge Bliss: "It is sufficient if the other action pleaded was pending at the commencement of the suit, but the plaintiff may dismiss his action in one court, and he is thereby enabled to retain it in the other;" citing *Rush v. Frost*, 49 Iowa, 183, which supports the text. Bliss, Code Pl. (2d Ed.) § 410. There is, no doubt, a conflict in the authorities upon this subject; but we hold that where the answer sets up the defense of a former suit pending between the same parties, founded upon the same cause of action, the plaintiff may dismiss the former suit, and proceed with the second one. He may even set up the dismissal by an amended reply, filed with leave of court, as was done in this case. We believe this conclusion to be in perfect accord with the spirit of our Code of Civil Procedure. As the first suit was one in equity to enforce an equitable lien, and the second an action at law against Henry alone, there is ground for saying that the remedies are concurrent, and the pending of the first is no objection to the prosecution of the second; but, as this question is not discussed in the briefs, we pass it without expressing any opinion thereon.

3. As to the second cause of action: On the 20th January, 1890, when Henry received the deed for the opera house property, and Warder received the deed for the

farm, Warder, as president of the Opera House Company, assigned and transferred to Henry unexpired policies of insurance on the opera house property. At the same time, Henry agreed to, and thereafter did, assign to Warder certain other policies on the buildings on the farm. Warder avers that Henry agreed to pay him the difference. This Henry denies, and avers that the opera house policies belonged to the Opera House Company, and not to Warder. The defendant asked two instructions to the effect that Warder could not recover on account of the opera house policies because the Opera House Company, and not Warder, was entitled to what was due on account of them, both of which instructions were refused. At the request of the plaintiff, the court directed the jury to find for the plaintiff the value of the opera house policies, if there was an agreement between the Opera House Company and Warder to the effect that all the unsold property of the company should become the property of Warder, to reimburse him for expenditures made by him. The jury allowed Warder the sum of \$1,751.13 for the policies, and also an undisputed item of \$83.33, and allowed the defendant, for policies turned over to Warder, the sum of \$557.72, and found a balance in favor of Warder of \$1,276.74. When the motion for new trial came on for hearing, the court expressed the opinion that the evidence failed to show that the opera house policies were the property of Warder. Thereupon, the plaintiff remitted \$1,276.74, and the motion for a new trial was overruled. It is now objected by Henry that the court erred in giving the plaintiff's instruction, in refusing his instructions, and in accepting the remittitur of only \$1,276.74, when the plaintiff should have remitted \$1,751.13. It is manifest from what has been said that, if the plaintiff was bound to remit anything, he was bound to remit \$1,751.13, the whole amount allowed Warder for the opera house policies. The trial court, in effect, held and ruled, on the motion for new trial, that it had erred in giving the instruction asked by plaintiff. The plaintiff accepted this ruling as correct, and undertook to avoid a new trial by entering a remittitur, but failed to remit enough. He ought to have remitted the full amount, and no doubt intended to do so. He will be allowed to remit the further sum of \$474.33 in this court.

4. We now come to the plaintiff's third cause of action. It appears Warder leased to Henry the Illinois farm. The evidence produced by Warder tends to show that there was an orchard on the farm; that a large number of trees therein had been barked and otherwise injured by stock owned and under the care and keeping of Henry, while the farm was in his possession as lessee of Warder; that Henry's employes suffered and allowed the stock to run in the orchard; and that the orchard was thereby

damaged to the amount of \$1,600 or over. Henry, testifying in his own behalf, stated that there was an old orchard on the farm; that he placed little or no value on the trees, because they bore little or no fruit; that the orchard was in an inclosure of about 17 acres close to the barn; that the orchard had always been used as a pasture; that there was a young orchard on the farm at another place, the trees in which had not been injured; and that he pastured and used the old orchard the same after as before the sale of the farm to Warder. On this evidence the court, at the request of the plaintiff, gave the following instructions: "(4) The court instructs the jury that if the defendant had possession of the Roseland Park farm, as tenant of plaintiff, from January 20, 1890, until the 1st day of April, 1890, and if they further believe from the testimony that, during said period, he or his employees, in charge of said farm, carelessly or knowingly permitted cattle or other stock to go into the orchard, and destroy or injure the fruit and ornamental trees therein, then the jury will allow plaintiff, on the third count of his petition, whatever amount of damages plaintiff sustained by such injury to said trees, not to exceed the sum of \$1,600. The defendant asked no instruction bearing upon this cause of action. The jury allowed Warder \$500 damages. The first objection to this instruction is that the word "carelessly" is not defined or explained. This court has on several occasions held that the expression "gross negligence," when used in an instruction, should be defined. *Wiser v. Olesley*, 53 Mo. 549; *Mueller v. Insurance Co.*, 45 Mo. 84. On the other hand, it has been held that a failure to define the words "reasonable care and diligence," "remotely," "care and prudence," and "by diligent inquiry," constitutes no ground for reversal. *Johnson v. Railroad*, 96 Mo. 340, 9 S. W. Rep. 790; *Oottrill v. Krum*, 100 Mo. 397, 13 S. W. Rep. 753. As said in the case last cited, it is not necessary that the meaning of ordinary words and phrases, used in their usual and conventional sense, shall be explained in instructions. There may be cases where the words "careless" and "negligent," and their adverbs, should be explained; but we do not see how the jury could have been misled in this case. There is an implied obligation, arising out of the relation of landlord and tenant, that the tenant will use reasonable care to prevent damage to the inheritance, (*U. S. v. Bostwick*, 94 U. S. 53;) and to carelessly permit stock to go into the orchard and destroy fruit trees is a want of reasonable care. If the defendant desired an explanation of the term, he should have asked it by request for further instruction. This is technically an action for waste, and the damages to be allowed are the damages done to the inheritance,—to the farm. The contention that the instruction allows damages for injuries to the trees, treating them as personal prop-

erty, is rather too refined. The trees were a part of the farm, and must have been so regarded by the jury. There is no error in the instruction, calling for a reversal; certainly so, in the absence of any request for further instructions.

5. The appellee asks leave to remit the excess before mentioned, and that the judgment be affirmed for the balance. As the excess can be easily ascertained from the special findings of the jury, the request should be granted, according to the well-settled practice of this court. But the sureties on the appeal bond, though not parties to this record, appear by counsel, and object to such a disposition of the case. They insist the judgment should be reversed, and the cause remanded. In support of this claim, they file affidavits to the effect that Henry has become insolvent since the appeal was taken, and that he failed, neglected, and refused to indemnify them, as he had agreed to do. It may be stated here that one of the objects of requiring an appeal bond is to protect the respondent against the insolvency of the appellant. Again, this respondent has had nothing whatever to do with any difference between the appellant and the sureties concerning the agreement of appellant to indemnify them. But the appeal bond itself is a full and complete answer to the objection made by the sureties. As that bond is not before us, we must assume that it complies with the requirement of the law. According to the statute, the conditions of the bond are "that the appellant will prosecute his appeal with due diligence to a decision in the appellate court, shall perform such judgment as shall be given by such court, or such as the appellate court may direct the circuit court to give, and if the judgment of such court or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed." It will be seen that the appeal bond, by its own terms, contemplates that the judgment may be affirmed in part, only, and the sureties bind themselves for the performance of the part so affirmed. The question of entering a remittitur should be disposed of according to law and the practice of this court, without regard to the sureties on the appeal bond. The respondent remits the sum of \$474.39, and the judgment of the lower court is affirmed for the balance. Respondent will pay the costs of this appeal. All concur.

STATE v. KLOSS.

(Supreme Court of Missouri, Division No. 2
Nov. 9, 1893.)

MURDER—MANSLAUGHTER—SELF-DEFENSE.

1. The fact that an aged cripple replies to insulting questions asked him by defendant, a young and vigorous man, "none of your d—n business," and shoves defendant, and raises his

hand as if to strike defendant, does not reduce to manslaughter a series of brutal assaults on the old man by defendant, who knocked him down, and kicked him to death; and defendant cannot complain of a verdict finding him guilty of murder in the second degree.

2. The fact that some one, after the old man had been twice knocked down, called out that he was getting his gun, did not give defendant the right to again attack and jump on him, without even looking to see if he was getting or had a pistol; and the refusal of the court to instruct on the law of self-defense was proper.

Appeal from circuit court, Nodaway county; C. A. Anthony, Judge.

Albert Kloss was convicted of murder in the second degree, and appeals. Affirmed.

The other facts fully appear in the following statement by SHERWOOD, J.:

The defendant killed Patrick H. Thompson by beating him with his fist, and kicking him to death. He was indicted, charged with murder in the first degree, and on trial was convicted of murder in the second degree; his punishment being assessed at 10 years in the penitentiary, the lowest term of punishment provided by law for the perpetration of that crime; the trial court refusing or declining to give any instructions for a higher grade of crime than that of which defendant was found guilty. The substance of the evidence adduced at the trial is as follows:

Patrick H. Thompson was an aged man,—some 80 years old, as testified to by Ashford, who had known him several years. He was a spectacle peddler, by occupation; a cripple, who used a crutch and a cane to walk with; and on the occasion in question he supported himself with his crutch, while he held the cane over his shoulder, and on it he carried a satchel which contained his small stock in trade,—his little all. On February 13, 1893, about 7 o'clock in the evening of that day, he was wending his way slowly along the public road which runs along the dividing line between Andrew and Nodaway counties. He had chosen the latter county as the scene of his humble labors. While he was proceeding along the road, it being a starlight night, and objects quite easily discernible, he was overtaken by Al. Cunningham and defendant, Albert Kloss, who were driving in a buggy. They drove on to Elijah Jackson's house, near by, stopping to inquire about some colts. There, Kloss, who was wholly unacquainted with Thompson, told young Jackson, who came up to the road in answer to his call: "There is an old man down there in the road. He will burn the barn down, unless you let him stay at your house all night." Thereupon, at defendant's invitation, young Jackson went down with him to the road to see Thompson, and met him coming up the road with his crutch under his arm, a cane over his shoulder, with a satchel on it. The defendant began a conversation with him by saying,

"Howdy do, old man? What are you doing?"

Old man Thompson said, "None of your business;" defendant, "You want a night's lodging?" Thompson, "Yes;" defendant, "You can't stay;" Thompson, "Do you live up there?" defendant, "Certainly, I do." Thompson, "Can't you keep me all night?" defendant, "No; what are you going to do about it?" Thompson, "None of your business;"—when defendant struck him in the face, knocking him down, and kicking him in the side. About this time, Cunningham appeared, and asked defendant why he had struck him, when defendant said, "I have struck him down." Just then the old man started to raise his head, and the defendant said, "Don't raise your head, or I'll stomp the liver out of you;" and he then, the second time, knocked him down, and kicked him. The old man begged the boys to help him up, and not let defendant strike him any more. He was raised to his feet, but—unable to stand, or to hold in his hands his crutch or cane—was laid back upon the ground. About this time a Mr. Marshall came down the road, and some one suggested that he go and get a lantern, which he did; and, when he returned, defendant said, "he was very sorry he had knocked him (the old man) down, and said he would not do it any more." They then attempted to get the old man up again, who, being unable to stand, reached out towards defendant, to help himself up, when defendant said, "G—d—d—n you! you can't stick your hands in my pocket," and again struck the old man, and knocked him down, when all present told defendant to stop, and begged him not to hit the old man any more. About that time defendant claimed to have lost his ring, and the boys took the lantern, and began making search for it; and when some one said, "The old man is getting in his valise," the defendant again struck the old cripple, jumped onto him, and began beating him in the face, and kicking him in the head. With much difficulty, the four young men who were present pulled defendant off of him; and even after that, as the old man attempted to raise his head from the ground, the defendant again kicked him in the head. The defendant, at the time, had on a pair of heavy boots. The testimony, except that of defendant, shows that no resistance of any character, no assault, no violent or abusive language, was made, used, or applied by the old peddler towards the defendant; that his assault on this harmless old cripple was unprovoked and without excuse. The crowd dispersed, when young Jackson went home, and, when his father came back home, narrated his trouble to him; and they, with some of the neighbors, returned; found the old man where the assault has been committed. They then carried him to the home of Mr. Jackson, where they bathed him, applied hot, wet cloths to his feet, and finally sent for a doc-

tor, who, upon examination, found that Thompson's skull had been fractured,—“a dint in his head that you could lay your finger in;” his nose seemed broken, and several severe bruises and cuts inflicted upon his face and head and side,—from the result of which, two days later, (February 17th,) he died. The attending physician stated that death was occasioned by the injuries inflicted by defendant. No autopsy was held on the deceased, and so the extent of his injuries cannot be known. Thompson was unconscious from the time he was carried from the road to Jackson's home. The testimony is that the assault was committed, and most of the injuries inflicted, on the north side of the road, and in Nodaway county, and that deceased died in that county. After the old man died, his clothing, valise, and effects were searched, and no weapons of any character were found. A warrant being issued immediately for the arrest of defendant, he could not be found, but about a week later was located and arrested in Oklahoma territory, whither he had fled, and where he was in jail.

There was testimony adduced for the defense to the effect that, just before the defendant jumped on the old man for the last time, some one cried, “Look out! he is getting his gun;” but the testimony of some of the witnesses is that the only thing uttered was, “The old man is getting into his satchel.” There was also testimony that as the cry mentioned was made, whatever it was, the defendant said, as he sprang on the old man with both feet, and as he did so, “God d—n you, you can't draw no gun on me.” But the defendant denied that he made use of any such exclamation. He also denied that he told young Jackson about a man being down the road who would burn the barn, etc., though this is positively testified to by Jackson. The defendant attempted to excuse his conduct by saying that old man Thompson told him, in response to his question, “It's none of your d—n business,” and shoved him, and raised his hand as if he was going to strike him, etc.; but he does not deny the statement of Jackson that he told old man Thompson, “Don't raise your head, or I'll stomp the liver out of you,” nor does he deny the other statements heretofore related. He claims, indeed, that he was acting in self-defense when he jumped on the aged, decrepit, and crippled man the third and last time; that he was afraid that the poor old creature would shoot him or hurt him,—at a time, too, when all the evidence shows that the old man was incapable of raising his head from the ground, only for a moment, and that, after receiving his coup de grace from the brutal kick of defendant, “his head dropped to the ground, and he never moved his head from the ground no more.” Nor did he speak afterwards.

This, in brief, was the testimony, and upon that the trial court, of its own motion, eliminated the element of murder in the first degree from the indictment, and instructed the jury as to that offense in the second degree. An instruction was also given as to manslaughter in the second degree. The eleventh instruction was the following: “(No. 11) If the jury believe from all the evidence that at the time the defendant struck and kicked the said Thompson, if you believe from the evidence that defendant did kick the said Thompson, and inflicted the injuries from which the said Thompson afterwards died, the defendant was acting under a violent passion, suddenly aroused by reason of Thompson having used towards defendant insulting and abusive language, and having shoved or struck him with his hand or stick, or by reason of a reasonable apprehension upon the part of the defendant that Thompson was in the act of drawing some weapon upon him for the purpose of killing him, or inflicting upon him some personal injury, you cannot find the defendant guilty of murder, for in that case the law presumes that such injuries were inflicted without malice, but by reason of such passion. On the other hand, although you may believe that defendant struck and kicked the said Thompson, while in a violent passion, suddenly aroused as above stated, yet if you shall further believe from all the evidence that such injuries to Thompson were inflicted by the defendant, and that such injuries were not necessary to the self-defense of the defendant, as explained in other instructions, you will find the defendant guilty of manslaughter in the fourth degree, so stating in your verdict, and assess his punishment at imprisonment in the penitentiary for a period of two years, or at imprisonment in the county jail for a period of not less than six months nor greater than one year, or by a fine of not less than \$500, or by both a fine of not less than \$100 and imprisonment in the county jail not less than three months.” In addition to that already quoted, another instruction was given on the law of self-defense. All of these instructions, as well as the others mentioned, were given by the court of its own motion. This instruction about self-defense was given in the teeth of all the testimony,—that the victim of the defendant's brutal rage was, except when held up by others, incapable of standing or sitting up; incapable of holding his cane or his crutch in his hands; lying prone on his back on the ground; and unable even to raise his head, except but for a moment. And the uncontradicted testimony of young Jackson also shows that, at the time the poor old cripple was assaulted the last time, he was not even sitting up, but “kinder raised himself up with one hand to reach for his satchel.” It is unnecessary to particularize the nine instructions to which objection

is made. They are in stereotyped form, and need no comment.

W. W. Ramsay, Geo. Crossan, and Jas. L. Growney, for appellant. R. F. Walker, Atty. Gen., for the State.

SHERWOOD, J., (after stating the facts.)

1. As there were no errors committed against the defendant in the court below, neither in giving nor in refusing instructions, nor in the admission or rejection of evidence, the judgment should, as to those points, unquestionably, be affirmed. The defendant is not represented by counsel in this court, but it is claimed in the motion for a new trial that "the evidence showed no greater offense than manslaughter, and the verdict for murder in the second degree should not be permitted to stand." With the view to meet this objection, the evidence, contained in the worst and shabbiest transcript ever sent up to this court, has been carefully read, and the substance of it given in the preceding statement. Instead of the verdict being for too high a grade of homicide, the only wonder, resulting from a perusal of the evidence, is that the jury were not permitted to inquire as to defendant's guilt of murder in the first degree. The circumstances already related would surely furnish a sufficient basis for a conviction of that grade of crime. Indeed, it may, with confidence, be said that the whole range and realms of the annals of criminal jurisprudence scarcely furnish a more shocking and flagrant example of a cowardly and brutal murder, unredeemed by a single palliating feature, and unextenuated by a single substantial cause or excuse. Look at the case in outline: A man 80 years of age goes hobbling along on his crutch, bearing on his aged shoulders a satchel containing the materials of his humble vocation. It is winter time, and cold. Nightfall is about to overtake him on the public highway, and he applies at Murray's for shelter for the night. It is denied him, and so he goes trudging along to seek elsewhere. Nearing another dwelling, he is passed by two young men in a buggy. It is then about dusk, but sufficiently light for them to easily discern what manner of man the wayfarer is. (This is shown by the gratuitous falsehood told by defendant,—that "There is an old man down in the road, and he will burn the barn unless," etc.) Shortly thereafter, the old man is approached on the public highway by two young men, one of whom accosts him, asking him impertinent questions, and taunting him. The old man, as he had the right to do, replies to the questions, "None of your business," when he is immediately knocked down, and brutally kicked in the side, by defendant, whose murderous feet were shod with heavy boots. Not satisfied with that, when the old man, a few moments later, attempted to raise his head, the defendant

bawls out, "Don't you raise your head, or I'll stomp the liver out of you;" and, sulking actions to the words, again he knocks him flat with the earth, and kicks him. Not satisfied with that, he makes hypocritical professions of sorrow for what he had done, and promised not to do so any more; and yet, when those present attempted to raise the old man up, and he, unable to stand, reached out towards defendant, in the endeavor to hold himself up, defendant, eager for another chance at the old cripple, says, "G—d d—n you! you can't stick your hands in my pocket," and again struck the aged object of his unmanly rage, and knocked him down for the third time; and this in spite of the remonstrances of those present. A few moments later, while the ring is being looked for, some one cries out, "Look out! he is getting in his valise," or "Look out! he is getting his gun," when defendant, without looking to see if this were true, again jumped on the old man with both feet, and beat him and kicked him. By the united force of four young men, defendant was, with difficulty, pulled off; and not satisfied with this fourth attack, when his aged and helpless victim tried to raise his head for the last time on earth, defendant kicked him in the side of the head, making a place, as one of the witnesses says, "you could lay your finger in." If these touching incidents of soul-sickening barbarity and brutal ferocity do not make out a case of "a heart regardless of social duty, and fatally bent on mischief," then it is needless to consult the authorities in order to discover what kind of heart that is.

We have said that the poor old cripple had the right to reply as he did to defendant's impertinent and taunting questions. This is true, even if he added to his answer the expletive of an oath. Such answers cannot be regarded as insulting, and more words, in such circumstances, are no provocation; but if they were, and even if the old man "shoved" defendant away from him, and afterwards raised his hand as if to strike him, (as to which there is only defendant's unsupported testimony, contradicted by that of young Jackson,) still, this would neither justify, excuse, nor palliate defendant's subsequent outrageous conduct,—out of all proportion, as it was, to what the old man had done, conceding it to be true that the deceased really used insulting words, and did "shove" him. This point is well illustrated by East, touching the subject of homicide in hot blood, where he says: "It must not, however, be understood that any trivial provocation, which, in point of law, amounts to an assault, or even a blow, will, of course, reduce the crime of the party killing to manslaughter. This, I know, has been supposed by some, but there is no authority for it in the law, for where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in

the manner or the continuance of it, and beyond all proportion to the offense, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty. It is one of the true symptoms of what the law denominates 'malice,' and therefore the crime will amount to murder, notwithstanding such provocation." "Barbarity," says Lord Holt in Keate's Case, Comb. 408, "will often make malice." 1 East, P. C. 234. To the same effect, see 2 Bish. New Crim. Law, § 703, and cases cited. Wharton says: "Violent acts of resentment, bearing no proportion to the provocation or insult,—particularly where there is a decided preponderance of strength on the part of the party killing,—are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often imply malice." Whart. Hom. § 425, and cases cited. Blackstone says: "Also, if, even upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design,—the genuine sense of 'malitia.' As where a schoolmaster stamped on his scholar's belly, so that the sufferer died, this was justly held to be murder, because, the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter." 4 Bl. Comm. 199. Under these authorities, and in the circumstances already stated, even if it be true that the old man replied to defendant's impertinent and insulting questions, "None of your d—n business," and shoved him, and raised his hand as if to strike him, the subsequent atrociously malignant and barbarous conduct towards him, an aged and helpless cripple, establishes such a case as would have well warranted an inquiry by the petit jury as to whether the defendant was not guilty of murder in the first degree, and it does not admit of doubt that their inquiry should have been confined to that degree. Of course, there could be no manslaughter, in either degree, in the circumstances of this case, and that inquiry should not have been submitted to the jury.

2. Was an instruction authorized on the theory of self-defense? This is the remaining point to be considered. As shown by the statement heretofore made, old man Thompson had no weapon, and consequently there was no overt act on his part. The right of defendant again to attack his helpless victim did not arise, and could not arise, until he had done everything in his power to avoid doing so. If he could safely have avoided jumping on the prostrate form that lay bleeding before him, it was his duty to have done this, for otherwise he would not have been justified. State v. Johnson, 76 Mo. 121. The duty of defendant was to retreat, or at least to avoid proceeding to the last resort,—to the exercise of the extreme

right of self-defense,—so long as was consistent with his own safety; and certainly there was no such fierceness of assault in this case as sometimes forbids retreat, and justifies instantaneous action. State v. Thompson, 83 Mo. 257; 1 Whart. Crim. Law, (9th Ed.) § 486a; 1 Bish. New Crim. Law, §§ 843, 844, 872. Besides, one who claims to have acted in self-defense must act without fault or carelessness. 2 Bish. Crim. Law, § 644. He cannot act on bare conjecture or surmise, and then claim he had reasonable ground for his acts, and extreme necessity for his justification. In the present instance, defendant seemed all too eager for the attack, and jumped on the old man without even looking to see if he was getting, or had, a pistol. Moreover, that defendant was not acting in self-defense is shown by his conduct throughout the whole series of murderous assaults which he made, and by the final kick in the head which he gave his decrepit and aged victim, after he was pulled off of him the last time. These circumstances show a cruel and malignant heart, and not a reasonable apprehension of immediate and impending danger. State v. Gilmore, 95 Mo. 534, 8 S. W. Rep. 359, 912; State v. Tabor, 95 Mo. 586, 8 S. W. Rep. 744. For these reasons, we hold that there was no basis for an instruction on the theory of self-defense. Indeed, on the facts presented by this record, it is glaringly preposterous to discuss the question. But, for reasons already given, as there was no error committed, prejudicial to the defendant, the judgment must be affirmed. All concur.

SMITH v. CHICAGO & A. R. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1906.)

APPEAL—WRIGHT ON EVIDENCE—DAMAGES—PERSONAL INJURIES TO MARRIED WOMAN—EARNINGS—EXCESSIVE VERDICT.

1. In an action against a railroad company for injuries to a passenger who fell from the car platform owing to the alleged sudden starting of the train, evidence by the plaintiff and her son that she started to leave the car just as soon as the train stopped at a station, and before it started, will support a finding by the jury in her favor, though a number of witnesses for defendant testified that plaintiff did not get up to go out until after the train had started, and though it is proven that the place where she fell from the car platform is one-fourth of a mile from the station platform.

2. Loss of earnings is a proper element of damages for personal injuries to a married woman, since the statute provides that the wages due her for her separate labor shall constitute her separate estate.

3. In an action for personal injuries, proof of loss of earnings is admissible under an allegation in the petition that plaintiff has been deprived of the means of support.

4. A verdict of \$6,500 will not be set aside as excessive where it appears that plaintiff received several cuts and bruises by falling from a moving train; that she was confined to her bed for three months; that she is incapacitated

from following her vocation as seamstress; and that an injury to her head has produced paralysis of one side of her body.

5. In an action for personal injuries sustained by falling from a moving train, it is not error to assume that plaintiff had fallen on rocks along the roadbed, in framing hypothetical questions to an expert witness, where plaintiff's wounds show that she must have fallen on some hard, blunt objects.

Appeal from circuit court, Randolph county; John A. Hockaday, Judge.

Action by Georgia Smith against the Chicago & Alton Railroad Company for personal injuries. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Geo. Robertson, for appellant. Tyson S. Dines and Perry S. Rader, for respondent.

BLACK, C. J. The plaintiff, Mrs. Smith, and her son, 15 or 16 years old, were passengers on one of the defendant's trains from Odessa east to Higbee, both way stations. The local cars in the train were crowded, and the plaintiff and her son took seats in the rear coach, designed for through passengers, pursuant to the orders of the conductor. When the train reached a station called Yates, she and her son attempted to go to a forward car, and in making the attempt she fell from the car platform, receiving the injuries of which she complains. The petition is in two counts. The first states that the servants of the defendant negligently directed plaintiff to go forward to another car when the train reached Yates station. The second states that the servants of the defendant directed her to go forward when the train stopped at that station, and that they negligently failed to stop the train long enough to enable her to go forward in safety. On this state of the pleadings the court gave an instruction, at the request of the defendant, to the effect that the plaintiff could not recover if she did not leave the car in which she was sitting until the train had started. The contention of the defendant now is that the verdict, which was for plaintiff, is contrary to this instruction and the evidence bearing upon this issue. The evidence on both sides shows that the porter of the car in which plaintiff was seated had a conversation with the plaintiff at some point before reaching Yates. The plaintiff says it occurred just before reaching Yates, while the porter says it occurred before that. The plaintiff and her son both testified that the porter told them to go to a forward car as soon as the train stopped at Yates, as the car in which they were riding did not stop at the platform at Higbee, the next station. The porter testified that he gave the plaintiff no such order, but that he said he would assist her forward before they reached the last-named station. He says he intended to move them forward two cars at the water tank near Higbee, but he does

not say he communicated this intention to her. The plaintiff and her son both testified that they picked up their bundles, and started forward, as soon as the train stopped at Yates. She followed the boy, and they both passed through the two car doors, the first being a vestibule door. He crossed over the platform of the car. She says the car gave a jerk just as she stepped upon the platform of the car in which she had been seated, and she fell off on the ground, head foremost; that she did not know how long the car had been in motion when she fell; and that she tried to catch hold of the railing, but does not know that she caught hold of anything. Dr. Hawkins assisted in putting her on the train when it stopped and backed up to where she fell off. He was introduced as a witness by the plaintiff, and on cross-examination testified that he talked with her at that time, and again at Higbee; that she said she went forward in obedience to the order of the porter; that when she got on the car platform the car started; that her head began to swim, and she then sat down. He says she made the further statement that she occasionally had fainting spells, and thought she was going to have one then. Plaintiff says she did not make this last statement. The proof is clear that the cars stopped but a short time at the Yates platform, not long enough to enable the plaintiff to go forward with safety. The defendant called three or four persons who were on the car at the time, and they testified that the plaintiff was slow in getting her packages together, and that she did not get up to go out until the train had started. One witness says the train had moved 300 yards east of the station platform before she started for the forward car. He thinks she was blown off the platform by the wind. The proof shows that the plaintiff fell off at a point about one-fourth of a mile east of the station platform. One witness, who measured the distance, places it at 2,000 feet. While the evidence produced by the defendant, standing alone, shows that the plaintiff did not leave, or attempt to leave, the car until the train had started, still the evidence of the plaintiff and her son is direct and positive to the effect that they started out as soon as the train stopped, and before it started. There is therefore a direct conflict in the evidence on this question. It was the province and duty of the jury to settle this conflict. The point made that the verdict is contrary to the evidence and this instruction is therefore not well taken.

2. The plaintiff was a married woman at the time of the accident. She had not lived with her husband for a period of five years, and during that time she supported herself and son by sewing and making dresses. She proved, over the objections of the defendant, that she earned from \$20 to \$25 per month as a seamstress prior to the accident. and

that she was unable to pursue her occupation because of the injuries which she received. This evidence as to earnings was objected to, on these grounds: First, because a married woman cannot sue for wages earned by her; second, because loss of wages is not claimed in the petition. Our statute provides that all rights in action which may be due to a married woman "as the wages of her separate labor, or have grown out of any violation of her personal rights, shall * * * be and remain her separate property and under her sole control." This statute vests in a married woman the right to sue for and recover wages due to her for her separate labor, and it must follow that she has the right to sue for loss of wages in an action like the one at bar. Loss of earnings is therefore a proper element of damages in this case. The fact that she did not live with her husband at the time of the accident is immaterial so far as concerns this question. The first objection to the evidence is therefore not well taken.

The petition states, among other things, that the plaintiff "was violently thrown from the platform of said car onto the rocks of defendant's roadbed, whereby she received wounds, bruises, and gashes upon her head, face, arm, neck, and legs; that, by reason of said wounds and hurts, she has suffered great pain and anguish, and has been deprived of the means of her support." It is here clearly averred that the plaintiff has been deprived of the means of her support by reason of the injuries which she received, and this averment includes the less comprehensive one that the injuries rendered her unable to pursue her occupation as seamstress. The objection that loss of earnings are not claimed resolves itself into this: The petition is too general, and it should have pointed out in terms what her means of support were. The plaintiff, it may be observed, did not make proof that she had lost the profits of any particular contract. She simply gave evidence of her earnings in the usual course of her business, and she had the right to introduce such evidence under the general averment made in the petition. *Luck v. City of Ripon*, 52 Wis. 196, 8 N. W. Rep. 815; *Wade v. Leroy*, 20 How. 34; *Railway Co. v. Savage*, 110 Ind. 157, 9 N. E. Rep. 85; *City of Bloomington v. Chamberlain*, 104 Ill. 208. If the defendant desired a more specific statement, it should have filed a motion to have the petition made more specific and definite. As the evidence was properly received, it follows, also, that the loss of earnings became an element of damages, and the court committed no error in so instructing the jury.

3. It is further objected that the verdict, which was for \$6,500, is excessive. The plaintiff received two cuts or gashes, one ex-

tending from the mouth to the chin bone, and the other on the side of the face. One tooth was broken, and driven through the lip. One arm and one leg were badly bruised, and there was a bruise on the back of the head. According to her evidence she was unable to get out for over three months, and during that time she could not use the wounded leg. She is still unable to use it in operating her machine. Though the wound on the head did not appear to be serious at the time of the injury, still it then gave and ever since has given her much trouble and loss of sleep. Physicians who examined this wound before the trial say there is a depression of the skull under it, and that it has produced paralysis of one side of the body. On this evidence we cannot say the damages are excessive. The trial occurred some four years after the accident, and it appears the plaintiff has been growing worse all the while. The evidence tends to show permanent injuries of body and mind, and, if the jury believed this evidence, the damages are reasonable.

4. The plaintiff called several physicians, and, during the direct examination, asked them to give their opinions whether the plaintiff would recover, assuming as true a given state of facts. To these questions the defendant objected, on the ground that the facts assumed had not been proven. Such questions should be based upon facts which the evidence tends to prove. *Russ v. Railroad*, (Mo. Sup.) 20 S. W. Rep. 472. We have examined the evidence as set out in the abstracts, and find that there was evidence tending to prove all the assumed facts. It is true that the questions assumed as a fact, among others, that the plaintiff was "violently thrown from the platform of a passenger coach on a railroad track to the rocks of the roadbed," and there is no direct evidence that she fell upon a rock or rocks. But Dr. Scott, to whose office the plaintiff was taken after her arrival at Higbee, in speaking of the wound on the hip, testified that it appeared to have been made by some blunt instrument, probably a rock. We think it may be inferred from the evidence that she fell upon rocks. But, aside from this inference, there is no such error in the instruction as to call for a reversal. The wounds themselves show clearly that they were caused by some hard, blunt object, and the fact that the object is not correctly described in the assumed facts could not have prejudiced the defendant.

5. Some other objections were made, but they were considered on a former appeal. (108 Mo. 243, 18 S. W. Rep. 971,) and will not be reconsidered in this one. The judgment is affirmed.

MACFARLANE, J., not sitting. The other judges concur.

LANIER v. McINTOSH et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

FORECLOSURE SALE—DEFECTS—RIGHTS OF PURCHASER—ESTOPPEL—EJECTMENT.

1. A foreclosure sale and payment of the purchase price, which fail to pass the legal title to the land owing to a misdescription in the advertisement and deed, do not operate as a discharge of the debt and mortgage, but give the purchaser an equitable right to the security of the mortgage for the amount of the mortgage debt.

2. An entry of satisfaction on the record of a mortgage, made by the mortgagee after a foreclosure sale, under the belief that the sale had effectually foreclosed the mortgage, is not conclusive on the purchaser, and he may show that no title passed at the sale, owing to a misdescription of the premises in the advertisement and deed.

3. A foreclosure sale, which does not pass the legal title, owing to a misdescription of the land in the advertisement and deed, will not exhaust the power of sale contained in the mortgage, so as to prevent a resale to correct the error in the first.

4. A mortgagor who accepts the surplus arising from a foreclosure sale of land, and who requests a resale to correct an error in the first sale, and who enters into a contract with the purchaser whereby the latter is to reconvey the land on being reimbursed for the purchase money advanced, is estopped to attack the validity of the resale.

5. A mere right of redemption in a third person, after foreclosure, is not such an outstanding title as will defeat a recovery in ejectment by the purchaser against the mortgagor.

Appeal from circuit court, Newton county; Joseph Cravens, Judge.

Ejectment by L. C. Lanier against Thomas McIntosh and others. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

Geo. Hubbert, Benton & Sturgis, and A. J. Harbison, for appellants. H. C. Pepper, for respondent.

MACFARLANE, J. The suit is ejectment in the usual form to recover a parcel of land 22 rods 6 feet long by 15 rods 7 feet wide, in McDonald county. The answer admitted the possession of McIntosh as tenant of his co-defendant J. D. Shields, but denied all other allegations. It also set up the following special defense: "Defendants, for further answer, say and aver that at one time in the year 1886 defendant Shields gave to one John A. Kunkle a note for the sum of \$270.00, to bear interest at the rate of ten per cent. per annum, to secure which he executed a mortgage upon the property sued for herein to the said Kunkle, but the same has been long paid and satisfied, so no ground of action could exist on that account against him; notwithstanding which defendants are advised and aver that plaintiff pretends to make some claim of right to the possession of the land as a pretended assignee of the said mortgage after condition broken. Defendant Shields, while protesting that the said mortgage was long ago satisfied, comes and of-

fers to pay into the court, for the benefit of the lawful owner of the said mortgage debt, all and every sum and amount which may appear from the evidence in this case to be and remain unpaid thereon, if any, if it be found that the plaintiff is vested with the rights of the said mortgagee." The reply admits the execution and delivery of the note and mortgage by J. D. Shields, but denies that he ever paid the note or satisfied the mortgage, as charged in the answer. In support of his title plaintiff offered in evidence the following deeds: (1) Mortgagee's deed from John A. Kunkle to J. C. Seabourn, dated October 29, 1887. This deed purports to convey the land under power of sale contained in the mortgage made by defendant Shields, and described in the answer. (2) Quitclaim deed from J. C. Seabourn to George W. Corum, dated May 2, 1888. (3) Mortgage deed from George W. Corum to plaintiff, L. C. Lanier, to secure a note for \$300, due in 10 days, with power of sale in case of default, dated April 5, 1889. (4) Mortgagee's deed from L. C. Lanier, under power of sale, to Alphonso Howe, dated May 18, 1889. (5) Quitclaim deed from Alphonso Howe to plaintiff, Lanier. No date given in abstract. The record of the mortgage from defendant Shields to Kunkle showed an entry of satisfaction on the margin, dated October 16, 1886, and signed by Kunkle, the mortgagee. In explanation of that entry of satisfaction, Kunkle testified that prior to the entry he had undertaken to sell the property under his mortgage, but misdescribed the land in both the advertisement and deed. At this sale Seabourn was also the purchaser, paying therefor \$305, which paid the debt and cost and \$17 or \$18 over, which was paid to Shields, as mortgagor, to whom was delivered the note and mortgage, and he then entered satisfaction. That on learning of the misdescription of the land in the previous sale and deed, at request of the purchaser and Shields, he resold the property, merely to correct the mistake. On this sale nothing was paid. The evidence also tended to show that these purchases at mortgagee's sale were made by Seabourn at the request of Shields, his son Abe, and Gus Corum, and Seabourn undertook it for the benefit of defendant Shields. Seabourn gave them an agreement to convey as they should direct upon repaying him. The parties borrowed the money to pay for the land, and Seabourn signed the note as security, with the understanding that when the amount was paid he would convey as directed. Seabourn had the note to pay, but the money was afterwards repaid to him, a part by Abe Shields, but most of it by Corum; and at the request of Shields, Abe, and Corum he conveyed the land to the latter. The evidence is not very clear from or by whom Seabourn was repaid. The evidence shows further that the second sale made under the Shields mortgage was conducted by an agent, the mortgagee then be-

ing sick. Lahler was the stepson of Corum, and married the daughter of plaintiff. There was conflict in the evidence as to who was in possession of the property after Seabourn gave it up, which, if important, cannot be intelligently settled from what appears on the abstract. The facts were tried by a jury, and at request of plaintiff the court gave the following instructions: "The court instructs the jury that if they believe from the evidence that J. D. Shields and wife executed and delivered the mortgage deed to John A. Kunkle, read in evidence, and that after condition broken in said mortgage said Kunkle attempted to advertise and sell the land therein described, but by mistake failed to describe the said land in the advertisement and the mortgagee's deed, and that J. C. Seabourn became the purchaser at such sale, and paid the note, interest, and costs secured by said mortgage; and if the jury further find that by mistake in the first sale Kunkle entered satisfaction on the margin of the record of the said mortgage, and that thereafter, at the request of J. D. Shields, he advertised and sold the land in said mortgage deed according to the conditions therein, and executed and delivered to J. C. Seabourn the mortgagee's deed read in evidence,—then such conveyance vested the legal title to the land in controversy in Seabourn, and that J. D. Shields is stopped from denying Seabourn's title, or those claiming under him; and the successive conveyances from Seabourn and others, claiming under him, had the effect to vest in plaintiff all right and title of defendant Shields." Defendant asked, but the court refused to instruct, (1) that payment of the mortgage debt by Seabourn, the surrender of the note to Shields, and the entry of satisfaction of the mortgage on the record extinguished the power of sale, and the second sale and deed thereunder were nullities; (2) though the attempted sales may have operated as an assignment of the debt and mortgage to Seabourn, yet plaintiff, by the conveyances to him, succeeded to no such rights under the mortgage as would entitle him to recover in ejectment from the mortgagor; (3) that under the pleadings and evidence defendant Shields should have been permitted to recover.

1. It is conceded that the first sale attempted by the mortgagee, in failing to describe the land, either in the advertisement or deed, did not pass to the purchaser the legal title to the property sold. The same result would follow a conveyance with a like error by the owner. It is insisted, however, by defendants, that the sale and payment of the purchase money in discharge of the mortgage debt gave the purchaser no equitable right to the security, but operated as a complete and absolute discharge of the debt and mortgage. To that proposition we do not yield assent. An assignment of a mortgage, in order to transfer the entire legal and equitable

interest of the mortgagee, must be by deed containing such words of grant as will show an intention of the parties to make a complete transfer. When a formal assignment is thus made, and the bond, note, or other evidence of the debt is assigned and delivered the assignee will be invested not only with the legal estate, but with any power of sale contained in the mortgage. *Pickett v. Jones*, 63 Mo. 199; 1 *Jones, Mortg.* § 786; 15 *Amer. & Eng. Enc. Law*, 842. An equitable assignment does not require these formalities. In this state the mere assignment of the debt carries with it the mortgage as an incident, which may be enforced by the assignee in his own name; and an equitable assignment will be declared and enforced by way of subrogation whenever right and justice require that it should be done. So it is held that a sale of the mortgaged premises which is ineffective on account of defects in the execution of the power will operate as an equitable assignment of the mortgage to the purchaser if he paid the purchase money in good faith, and it was applied to the satisfaction of the mortgage debt. *Wilcoxon v. Osborn*, 77 Mo. 632; *Honaker v. Shough*, 35 Mo. 472; *Priest v. City of St. Louis*, 103 Mo. 652, 15 S. W. Rep. 989; *Jones, Mortg.* § 1678. The evidence in this case shows that Seabourn purchased in good faith, and paid to the mortgagee the purchase price, which was applied to the payment of the debt secured. In this purchase he intended to buy, and supposed he had bought, the mortgaged property. He got nothing in law for the money paid, and he was in equity entitled to the security of the mortgage for the amount due on the note when paid.

2. After a foreclosure sale under a mortgage the title of the purchaser comes through the mortgage. The mortgage is not satisfied, but foreclosed. It is therefore, in such case, improper to make an entry of satisfaction on the record. The entry made by the mortgagee in this case was intended to mean nothing more than that the mortgage had been satisfied by a sale of the premises. It could have no greater effect, at least between the parties, than the sale and deed thereunder. Indeed, after the equitable assignment of the mortgage, Kunkle, as mortgagee, as between himself and the purchaser, had no power to enter satisfaction. Entries of this kind are open to explanation by parol evidence, and a direct proceeding to impeach them is not required. *Joerdon v. Schrimpf*, 77 Mo. 384; *Valle v. Iron Mountain Co.*, 27 Mo. 455; *Chappell v. Allen*, 38 Mo. 213. The evidence shows very conclusively that this entry was made without authority, under a mistaken idea of duty, and under the belief that the sale had effectually foreclosed the mortgage. It should not be allowed to stand in the way of the purchaser's rights.

3. As to the effect of the second sale. By a recent well-considered decision of this

court, rendered in banc, it was held that a sale and conveyance of the mortgaged premises by a mortgagee or trustee acting under a power, though defectively executed, passed the legal estate to the purchaser, subject to the right of redemption. In such case the title passes by a conveyance of the property by one holding the title. *Schanawerk v. Hobrecht*, (Mo. Sup.) 22 S. W. Rep. 949. The first sale and conveyance here was not of the mortgaged property at all, owing to a misdescription; and the legal title was not affected, but remained in the mortgagee, who held it in trust for the benefit of the equitable assignee of the debt. Though the validity of the second sale may be questioned by reason of the irregularity arising from the absence of the mortgagee when it was made, and the employment of an agent to conduct it, there can be no doubt that the legal title passed to Seabourn by the deed, and under whom plaintiff claims through mesne conveyances.

4. Aside from all these considerations, we think the evidence conclusively shows that defendant Shields, by his conduct and agreements, is estopped to dispute the absolute foreclosure of this mortgage. The first sale was made or attempted at his request, with the information that his son would buy the property. After the sale he received from the mortgagee \$16 or \$17, which remained of the proceeds of the sale after the debt had been paid. The second sale was made by Kunkle at the request of Seabourn and defendant Shields, and for the purpose, as they declared, of correcting the mistake in the previous sale, and of putting the title in Seabourn. So far as Kunkle acted it was under the direction of Shields. Shields' conduct is explained in the undisputed evidence that Seabourn, in making the purchases, was acting for him, his son, and Corum, under an agreement by which he was to convey the land, according to their direction, upon being reimbursed for what he had advanced. After the title, at the request of Shields, had been vested in Seabourn, a new arrangement was made, wholly independent of the mortgage. Under that agreement Seabourn was to hold the title as security for the money advanced to pay the mortgage debt. Under this transaction and contract the right of redemption, if it would otherwise have existed, was clearly waived by Shields, and he was estopped to dispute the validity of the mortgagee's sales. *Austin v. Loring*, 63 Mo. 22; *Nanson v. Jacob*, 93 Mo. 346. 6 S. W. Rep. 246; *Jones, Mortg.* § 1484. If defendant has any remedy it is upon the contract under which Seabourn took and held the title for him, upon which no issue was made or determined in this record.

5. Under the foreclosure sale the legal title of the heirs of Mrs. Shields, wife of defendant, who died before the first sale, if any they had, also passed to the purchaser, and

no one entitled is seeking to redeem their interest. A mere right of redemption in a third person, after foreclosure, is not such an outstanding title as will defeat a recovery in ejectment. The title "must be such a one as the owner of the title himself could recover on if he were asserting it in an action. It must be a present, subsisting, and operative title." *McDonald v. Schneider*, 27 Mo. 405; *Woods v. Hildebrand*, 46 Mo. 287. We see no error in the record, and the judgment is affirmed. All concur.

WILLIAMS v. WILLIAMS et al.

(Court of Appeals of Kentucky. Nov. 4, 1893.)

WILLS—TESTAMENTARY CAPACITY—EVIDENCE.

On a will contest, it appeared that more than 20 years before making his will, and nearly 30 years before his death, testator was confined to an insane asylum for a few months for religious insanity; that he was a great reader of the Bible and of a religious paper; that before making his will he prayed much at night, and professed to have seen three lights typifying different religious denominations; that in the heat of discussion he talked of religion in an excited manner; that he sometimes had a wild look, and lost much sleep. *Held*, that these facts do not support a verdict of insanity, rendering void the will which devised his property to a religious society, where it further appeared that he amassed a considerable fortune after his release from the asylum; that his relatives, the contestants of the will, often procured him to go on their bond as surety; and that they joined him in business transactions, and allowed him to look after their interests; and where many witnesses, who had known testator intimately for years, testified that he was perfectly rational on all subjects, and that he had perfect health, slept well, and was a fine business man.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Contest of the will of Joseph F. Williams by Lamar Williams and others, on the ground of insanity. From a judgment in favor of the contestants, the executor appeals. Reversed.

J. H. Dorman, Humphrey & Davie, T. J. Hardin, and Strother & Gordon, for appellant. Wm. Lindsay and Lindsay & Botts, for appellees.

BENNETT, C. J. In May, 1881, Joseph F. Williams made his will, devising the bulk of his property to the Baptist Church. He died in March, 1887, and his will was duly admitted to record in Owen county. The appellees, who are his next of kin, appealed the case to the Owen circuit court, and contested it, upon the ground of the religious insanity of testator, to the extent that he was rendered incompetent to make it, and also upon the ground of undue influence. The latter ground has been abandoned, leaving the question of insanity alone in issue. The case was tried in the lower court, and appealed to this court, and this court reversed it for errors of law, and sent it back for a

new trial, which was had, and resulted in finding against the will. 13 S. W. Rep. 250. The case is again here for review. The sole question for decision is, was Joseph F. Williams at the time he made the will incompetent to make it because of religious insanity? We will, in as short a way as practicable, give a full synopsis of the contestants' evidence upon that subject: It is that Joseph F. Williams was insane in 1859 about religion, and was sent to the insane asylum in the same year, and remained there under treatment about seven months, when he was discharged as recovered; that he then returned home, and pursued his ordinary occupation of farming, which he did well and successfully; that he read the Bible and Western Recorder a great deal and almost exclusively; that he was in good health, social, and a good conversationalist, and most persons took an interest in hearing him talk; that he took charge of his old mother, and kept her comfortably as long as he lived, and at no expense to herself whatever, and the money she received from her husband's estate by his management was never used, he supporting her, and caring for her out of his own means; that he was the statutory guardian of two of his nephews for four and eight years, and managed their estate well, and also kept and cared for them; that he adopted an orphan girl, and took good care of her, and was greatly distressed when she ran away from him; that he was on several official bonds as the surety of his brother, bought and sold property, and, by prudence and judgment, amassed a fortune of about \$25,000, and he owned on his return from the asylum, in 1859, only about \$600; that he was drafted during the war twice, the first time paying commutation money, the second time hiring a substitute for a discharge. The principal circumstances relied on to establish religious insanity are—First. That Joseph F. Williams was a great reader of the Bible and the Western Recorder. It is sufficient to say that, if that fact alone tends to prove religious insanity, there are many persons, especially the farming class, that are not above the suspicion of insanity upon the subject of religion. Second. That he often read the Bible aloud. Well, we suppose that that was a matter of taste, and not an evidence of insanity. Third. That before he made his will he prayed much at nights on the farm, and at last he professed to have seen three lights,—a large light, a smaller light, and a still smaller light,—and that God said that the large light was the Baptist Church, the second in size was the Christian Church, and the third was the Methodist Church. Now, these facts, in the light of other evidence, must be considered as the indulgence of only a strong figure of speech, designed to represent the superiority of the Baptist Church. It is not the first time that such expressions have been used to repre-

sent the idea in a strong and vivid manner. The Apostle Paul, the Christian lawyer, philosopher, statesman, and soldier, said that his conversion was caused by a voice in the heavens saying, "Saul, Saul, why persecutest thou me?" And many things were revealed to St. John on the Isle of Patmos. It is not uncommon to hear men of strong and undoubted intellects speak of their conversion in strong and vivid terms, and believe that God was present, aiding them in their efforts. Fourth. That he talked of religion in a loud and excited manner at times. Well, it is believed that such talk grew out of the heat of discussion, for the witnesses all state that he usually talked in a quiet and orderly manner upon that subject. Fifth. It is said that he sometimes had a wild and excited look. But we think that, from the circumstances of this case, that matter proves nothing. Sixth. That he lost much sleep. Well, the evidence is that he was in perfect health. Therefore, how could that fact be evidence of insanity? Seventh. That he rebuked his brother for not having enough confidence in his mother not to require a receipt for money that he paid her. We think this fact showed an affectionate heart, but not insanity. Now, it is strange that the family, some of whom testified to the foregoing facts, would see Mr. Williams pay out money to be released from the draft, and not suggest that he was insane; that they would give him on their official bonds; that they would join him in business transactions, and allow him to look after their own interest; and it would never occur to them that he was a monomaniac until he put his property out of their reach. The appellants' witnesses, consisting of lawyers, bankers, merchants, church members of different denominations, and farmers, who had known Joseph F. Williams intimately for years, and who had seen him at church meetings and revivals and in lodges, testify that he was perfectly rational upon the subject of religion, and upon all other subjects; that he had perfect health, slept well, and was a fine business man, and managed his business affairs successfully. We think that the evidence establishes so conclusively that Joseph F. Williams was of sound and disposing mind at the time he made his will that the verdict of the jury was the result of passion and prejudice. The judgment is reversed, and remanded for a new trial.

HARGIS et al. v. LOUISVILLE GAS CO.
(Court of Appeals of Kentucky. Nov. 4, 1893.)

ATTORNEY—COMPENSATION—CONTRACT.

Where attorneys are employed to procure an injunction pending an appeal, the fact that they are unable to carry out their contract owing to the advancement of the cause on the docket and its speedy decision by the court of appeals in their client's favor, due largely to their advice and efforts, does not prevent

them recovering for the value of their services, though not the fees prescribed in the contract for procuring the injunction.

Appeal from Louisville chancery court.

"Not to be officially reported."

Action by Hargis & Eastin against the Louisville Gas Company for professional services as attorneys. From a judgment in defendant's favor, plaintiffs appeal. Reversed.

Simrall & Bodley, Muir & Heyman, O'Neal, Jackson & Phelps, Thos. H. Hines, and Hargis & Eastin, for appellants. Humphrey & Davie, Helm & Bruce, and Dodd & Dodd, for appellees.

LEWIS, J. It was evidently not contemplated by parties to the contract in question as at all probable the supreme court would in due course of business reach and try the case of Louisville Gas Company against Citizens' Gaslight Company before December 1, 1888, when corporate existence of the former would end. Consequently the only way by which the latter could be "excluded from making and vending gas in the city of Louisville and to its citizens" on and from October 1, 1885, was by means of provisional remedies. To accomplish that object, Hargis & Eastin advised application for an order of supersedeas to be followed by action for injunction restraining the Citizens' Gaslight Company making and vending gas pending appeal in the supreme court, and they were employed principally for that purpose. But the effort to obtain the order of supersedeas, though abortive, resulted in an order for advancement and submersion of the case, November 1, 1885; and it was actually tried and decided in favor of the Louisville Gas Company in December, a few days more than two months after October 1, 1885, and more than three years before expiration of corporate existence of the Louisville Gas Company. Thus the provisional remedies contemplated by the contract became of little, if any, practical value to the Louisville Gas Company. But it is plain the case would not have been advanced and tried by the supreme court but for the advice and efforts of Hargis & Eastin to apply for an order of supersedeas, and therefore, while they did not nor could they stop the Citizens' Gaslight Company making and vending gas by the identical day mentioned in the contract, the result followed their advice and efforts soon thereafter, and in time to subserve the purpose of their employment by the Louisville Gas Company; so that, as they acted in good faith throughout, and did not obtain the injunction contemplated simply because their previous service had rendered it unnecessary, and not desired by the company, it seems to us the chancellor should, and is now directed to, fix value, and allow for their services in procuring or causing the case to be advanced and tried in the supreme court, as well as for advice and service in respect to the ac-

tion for an injunction. But as the condition upon which the company agreed to pay the fee of \$25,000 was not performed, the simple criterion of recovery now is the value of services rendered, without regard to the contract, except as to the fee of \$500 already paid.

SLAUGHTER et al. v. KARN.

(Court of Appeals of Kentucky. Nov. 2, 1893.)

HOMESTEAD—CONTIGUOUS TRACTS.

Where a debtor, owning 84 acres of land, exchanges 20 acres for a smaller tract, on which there is a house, and moves into it, his residence lot and the remaining 64 acres, connected by a passway 150 yards in length, constitute one tract, which he is entitled to hold as his homestead if less than \$1,000 in value.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by Slaughter & McCulloch against J. A. Karn to subject a tract of land owned by defendant to a judgment in plaintiffs' favor. From a judgment for defendant, plaintiffs appeal. Affirmed.

Weir, a Weir & Walker, for appellants. Karn & Hayes, for appellee.

PRYOR, J. The appellee in this case owned a tract of land containing 84 acres, upon which he lived, and upon which an execution in favor of the appellant had been levied, and the land valued at a sum sufficient to give the debtor the whole tract as a homestead. The appellee, his residence being in a dilapidated condition, exchanged with one Boone 20 acres of the 84-acre tract for a lot of 6 acres of land, on which there was a house, and moved into it. This house was not directly connected with the balance of the 84-acre tract, but a passway was given the appellee for the distance of 200 yards that did connect the house he lived in with the balance of the tract, and the appellee used both as one farm. The question presented by the appeal is, can the appellee have a homestead in two several tracts of land? This must depend altogether on what constitutes several or separate tracts. One may own land divided by a public way, and may have separate deeds for each parcel, but when using both as one tract, with only a highway intervening, he is entitled to a homestead of the value of \$1,000, and, if he fails to get that much on the one side of the road, the deficiency is made up on the other, upon the idea that it is all one tract. *Franks v. Lucas*, 14 Bush. 395. In this case is the proximity of the 64 acres to the house and lot such as would justify the conclusion that it is one tract, and is it one tract in contemplation of law? It all belongs to the appellee, and is directly connected by a passway, not exceeding 150 yards in length, and is used as one tract, and therefore the appellee is entitled to the homestead in this tract, consisting of the lot and the 64 acres.

There is a plain distinction between this case and one where the distance is such, the one tract from the other, as would make the two separate tracts; and in this case the two should be regarded as one, and homestead allotted. This the chancellor has done by giving to the appellee the lot upon which the house stands, valued at \$350, and then gives him \$650 to be paid out of the proceeds of the 64 acres. This is equitable, and, if the creditors are willing to give more for the 64 acres, it must go, subject to the homestead lien. Judgment affirmed on original and cross appeals.

CARPENTER et al. v. ELLENBROOK.
(Supreme Court of Arkansas. Oct. 28, 1893.)

APPEAL—REVIEW.

It appearing by the decree that oral testimony was heard at the trial, and this not having been brought into the record, it will be presumed that the findings were correct.

Appeal from circuit court, Garland county; Alexander M. Duffie, Judge.

Suit by Kate Ellenbrook against Harriet Carpenter and others. Judgment for plaintiff. Defendants appeal. Affirmed.

U. M. & G. B. Rose, for appellants. A. Curl, for appellee.

MANSFIELD, J. This was a suit to foreclose a mortgage. The answer alleged that the mortgage was executed under duress; but the finding of the chancellor was against the defendants, and the relief sought by the complaint was granted. They have appealed. The decree recites that oral testimony was heard at the trial; and this was not brought into the record, either by bill of exceptions, or by reducing it to writing, and causing it to be filed as a part of the evidence. All the testimony not being before us, we must, according to the practice of this court in such cases, presume that the finding made upon it is correct. And, as the appeal presents no question that can be determined without considering the sufficiency of the evidence to establish the defense relied upon, the judgment will be affirmed. *Casteel v. Casteel*, 38 Ark. 477; *Hershy v. Berman*, 45 Ark. 309; *Lemay v. Johnson*, 35 Ark. 230; *Hershy v. Rogers*, 45 Ark. 303.

STATE v. PIGGUESE.

(Supreme Court of Arkansas. Oct. 28, 1893.)

MISDEMEANORS—CONVICTIONS—SECURITY FOR FINE—DEFAULT IN PAYMENT.

Manuf. Dig. § 1213, provides that, when one is convicted of a misdemeanor, the judgment shall direct that he be put at work till the fine and costs shall be paid, not exceeding a day for each 75 cents thereof. Act April 5, 1887, "An act to facilitate the collection of fines and costs in criminal cases," provides that

when one is convicted of a misdemeanor, and shall give security for the fine and costs, the officer taking it shall forthwith file it, and, if it be not satisfied at maturity, execution shall issue against defendant and his sureties. *Held*, that the giving of the security ended the criminal prosecution, and, though it was not paid, defendant could not be taken into custody to work out his fine.

Appeal from circuit court, Howard county; William P. Feazel, Judge.

Boston Pigguese was convicted of a misdemeanor, and released on security for fine being given. The security not having been paid, and execution thereon returned nulla bona, the state petitioned for execution against defendant, containing a capias clause. Defendant's demurrer thereto was sustained, and the state appeals. Affirmed.

James P. Clarke, Atty. Gen., for the State. W. S. Curran, for appellee.

BUNN, C. J. The appellee, Boston Pigguese, was indicted at the August term, 1892, of the Howard circuit court, for the crime of gaming, and, on his plea of guilty, was fined \$10. Judgment was rendered under section 1213, Manuf. Dig., and appellee then gave his obligation, with sureties, under the act of April 5, 1887,¹ entitled "An act to facilitate the collection of fines and costs in criminal cases." Default was made at the maturity of the obligation, and execution was issued against appellee and his sureties, as provided in the act in such cases, the obligation having the force and effect of a judgment. The execution was returned nulla bona, neither the appellee nor his sureties having property out of which the amount could be made. At the February term, 1893, of said court, the state, by her attorney, petitioned the court for an execution against the defendant, containing a capias clause, to which the defendant demurred, which was by the court sustained, and the state appealed.

Thus we are presented with the question

¹ Manuf. Dig. § 1213, provides that, when any person shall be convicted of a misdemeanor, the judgment shall direct that the person convicted be put to labor in any manual labor workhouse, or on any bridge or other public improvement, or that the person be hired out until the fine and costs be paid, which shall not exceed one day for each 75 cents of the fine and costs.

² Act April 5, 1887, provides: "Section 1. That whenever any person shall be convicted of a misdemeanor by any court or justice of the peace and shall give security for the fine and costs adjudged against him the sheriff or other officer taking such security shall forthwith file with the clerk of the court or justice of the peace rendering the judgment the bond or note so taken which bond or note when so filed, shall have the force and effect of a judgment, and if the same be not satisfied at maturity thereof, the clerk of the court or justice of the peace, as the case may be, shall issue an execution against the defendant and the said securities, which execution so issued shall have the same force and effect as other executions in criminal cases."

whether or not, the note or bond mentioned in the first section of the act of April 5, 1887, having been given, the same is intended to operate as a finality, as to the defendant, so far as the criminal prosecution is concerned. This, of course, involves an inquiry into the meaning of that act, when taken in connection with section 1213, and other sections, of Mansfield's Digest. There is nothing in the act itself which authorizes the sheriff to continue his custody of the defendant after he has given the obligation required. He is then released from the custody of the sheriff, to all intents and purposes, just as he would have been on his bier having given the required obligation, had he been hired out under sections 1213, 1214, Mansf. Dig. He seems to be no longer the subject of the sheriff's custody, in any manner. The act makes no provision for his reception. It evidently contemplates that there is nothing else left to do but to collect the obligation. We cannot sanction the arrest and imprisonment of misdemeanants without some express authority for it, or at least some more strongly implied authority than we have been able to find in the law on the subject, as it now stands. The judgment of the Howard circuit court is therefore affirmed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 23, 1893.)

HOMICIDE—INSTRUCTIONS.

On a murder trial, evidence that deceased and another, armed with a knife, advanced on defendant, warrants an instruction on the law of self-defense, but does not require one on manslaughter.

Appeal from district court, Lavaca county; T. H. Spooner, Judge.

James Williams was convicted of murder in the second degree, and appeals. Affirmed.

Ellis & Allen, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 15 years in the penitentiary. The parties concerned and the principal witnesses are colored. There are numerous errors assigned, and all based upon assumed errors in the charge; but, after a careful consideration, we can find no reversible error therein. There is no error in the charge on manslaughter. Indeed, so far as the record shows, there was no testimony requiring a charge on manslaughter. It is true, one witness, Holland, states that, at the time of the killing, deceased and Searcy were advancing on defendant, Searcy armed with a knife; that defendant fell, and Searcy and deceased fell on him. If there was any truth in this statement, it is fully covered by the charge of the court on self-defense. The

evidence clearly shows a deliberate murder of an unarmed man, and the verdict is most moderate. The judgment is affirmed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Oct. 23, 1893.)

RECEPTION OF EVIDENCE—REMARKS OF DISTRICT ATTORNEY—BILL OF EXCEPTIONS.

1. The withdrawal of evidence from the jury in a criminal case cures a doubtful error in its admission.

2. Remarks of the district attorney should be promptly called to the attention of the trial court when uttered, and it is too late for defendant's attorney to present the matter to the court for the first time by bill of exceptions.

3. While a trial judge has the right to indorse on a bill of exceptions the reasons explanatory of his ruling, he has no right to contradict the bill; and if it is incorrect, and the attorney does not agree to the proposed correction, the judge should prepare his own bill, as required by Rev. St. art. 1866.

4. The attorney who accepts a bill of exceptions, with the qualifications indorsed thereon by the trial judge, and files the same, ex-tops himself from claiming it to be unfair and injurious to his client.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Fred Jones was convicted of burglary, and appeals. Affirmed.

W. B. Sorrells, L. M. Byrd, and J. H. Morgan, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of burglary, and his punishment assessed at two years in the penitentiary, from which he appeals.

1. Appellant claims the court erred in admitting the conversation between himself and the witness Rutland that occurred a short time before the burglary was committed. It is unnecessary to pass upon the question, for, if there was any error, which is doubtful, it was obviated by the court withdrawing the evidence from the jury.

2. The remarks of the district attorney should have been promptly called to the attention of the court when they were uttered. The defendant's attorney should not remain quiet, and then present the matter to the court for the first time in a bill of exception. *Mason's Case*, 15 Tex. App. 534; *Kennedy's Case*, 19 Tex. App. 618.

3. The appellant further excepts specially to the trial judge's explanations and qualifications on his several bills of exceptions, on the ground that the same were improper, and prevent and deny defendant a fair record upon appeal. In the second bill of exceptions the court states that the remarks of the district attorney are not correctly set out. It has always been the practice of the best judges to indorse upon a bill of exceptions the reasons explanatory of the ruling. This has been done not only as a matter of justice

to themselves, but because it has been found to be of great assistance to the appellate court in enabling it to weigh the objection in all its bearings. But this right to explain does not include the right to contradict the statements in the bill of exceptions. A contradiction is not an explanation. A trial judge should not approve a bill he does not believe to be correct. If the attorney does not agree to the proposed corrections, the judge should decline to approve the bill, (Rev. St. art. 1365,) and should prepare his own bill, (as required by Id. art. 1366.) *Lanier v. Perryman*, 59 Tex. 109; *Willson's Crim. St. § 2304*; *Tyson's Case*, 14 Tex. App. 390. When, however, the counsel accepts a bill with the qualification indorsed thereon, and files the same, he estops himself from claiming it to be unfair and injurious to his client. While the law in reference to saving bills of exceptions may seem plain, in practice it has always been found difficult, and the source of much trouble. It is to the interest of all parties, and for the sake of fairness, that the bill should be taken as soon as possible after the objection is made. If the court is compelled to stop proceedings to allow a bill whenever an objection is raised, it would simply delay the proceedings at the will of counsel disposed to delay them, or annoy the court. If presented to the opposite counsel, he may delay by asking a more convenient season. If left to the close of the trial to be examined and approved, they are often so changed and qualified as to be of little service to the objector; and all opportunity of resorting to bystanders, at best an impolitic proceeding, is hopelessly gone. While it would be the duty of the trial judge to allow and sign a bill of exceptions at the time when taken, yet, if the course of the trial or want of time forbid such a method, it justifies the trial judge in refusing to stop the case to allow bills. A great deal of trouble would be obviated if he would keep a memorandum of the objectionable matter, with the grounds of objection thereto, which, when made, is stated or read over to counsel at the time, to see that there is no misunderstanding between court and counsel as to the exact point objected to; and at the close of the trial furnish the memorandum to counsel, to assist in the preparation of the bill of exceptions. But a careful examination of this case fails to disclose any error made by the court, or any injustice done the appellant by the judgment. He voluntarily went before the grand jury and confessed his guilt, and there could have been no other verdict. The judgment is affirmed.

AUGUSTINE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 23, 1893.)

HIGHWAYS—PROSECUTION FOR OBSTRUCTING.

Where a deed is made to a married woman during coverture, the presumption is that

the land is community property, in the absence of proof that it was purchased with her separate estate; and hence her grantee, on a prosecution for obstructing a public road on the land laid out at the instance of her husband, cannot object that the husband had no authority to grant a right of way without the consent of the wife.

Appeal from Coleman county court; H. A. Orr, Judge.

Sam Augustine was convicted of obstructing a public highway, and appeals. Affirmed.

Sims & Snodgrass, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of obstructing a public road, and his fine assessed at one dollar, from which he appeals. We think the evidence clearly shows that the road in question was a public road, and that it was unlawfully and wilfully obstructed by appellant. Not only is it shown that the road was located according to law by a jury of view, but that the location was the result of a change made at the instance of D. Augustine, the father of appellant, and before appellant purchased, and it was done for the benefit of the land. The public road, as originally run, crossed the Augustine land some hundred yards or more north of Hords creek. To enable D. Augustine to fence nearer the creek, the jury of view changed the road to the place pointed out by him. The appellant objects that the land was the separate property of Mrs. Mary E. Augustine, the wife of D. Augustine, and that appellant purchased the land without notice; that D. Augustine had no right to make the agreement for an easement over the land without consent of his wife, which was not shown, and, if he did, appellant bought without notice of the grant. The deeds are not before us, but it appears the deed was made during coverture to Mrs. Mary E. Augustine, and the presumption of community will be indulged, in the absence of recital or proof of purchase with her separate property. Neither does it appear that any consideration was paid to his mother by the said Sam Augustine for the 33½ acres deeded to him. But concede all that is claimed by appellant; this is not the case of the dedication of an easement or grant of right of way over land. It existed before, and only the locality was changed to benefit the owner of the land. The cases cited by appellant have no application. We deem it unnecessary to notice other errors. The judgment is affirmed.

DAVIS v. STATE. (No. 622.)

(Court of Criminal Appeals of Texas. Oct. 23, 1893.)

THEFT—INDICTMENT—VARIANCE—EVIDENCE—ARGUMENT OF COUNSEL.

1. Where an indictment for grand larceny, charging the stealing at the same time of paper

money, gold, and silver, alleges that the number and size of the bills and coins are unknown, and it appears that the number and size of the silver coin could not have been ascertained, and the proof that the silver was stolen is sufficient to convict, there is no variance, though the number and size of the bills and gold coins could have been given by the use of due diligence.

2. On indictment for larceny, evidence that defendant at the same time stole other money, not charged in the indictment, is admissible.

3. If remarks of the prosecuting attorney are not authorized by the evidence, defendant should ask the court to stop him, and to instruct the jury to disregard them.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Robert Davis was convicted of larceny, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant prosecutes this appeal from a conviction of theft for money. The property is described in the indictment as follows, to wit: "\$200 in United States currency, money of the value of \$200, the number and size of the bills being unknown to the grand jury; \$200 gold coin of the United States money, legal tender, of the value of \$200, the number and size of the pieces and value of each being unknown to the grand jurors; \$50 in silver money, coin of the United States, of the value of \$50, the size and value of each piece being unknown to the grand jurors." The evidence tending to show that some of the paper money, as well as some of the gold pieces, could have been particularly described by use of ordinary diligence, counsel for defendant contends, it constitutes a fatal variance between allegation and proof. It is not pretended that, if McKinley and Thornton both had been before the grand jury, a better description of the \$50 in silver could have been given than that set out in the indictment; hence there is no variance, nor laches in regard to the silver. If appellant stole the silver, he is guilty of a felony, whether he took the gold and paper money or not. Evidence that he committed theft of the gold and paper, whether alleged in the indictment or not, was admissible to prove the theft of the silver, all the money having been taken by one act. The grand jury was not guilty of negligence; hence the supposed variance is not in this case. We are not to be understood as holding that the indictment fails to give a sufficient description of the gold and paper money, for we believe it does.

Remarks of counsel complained of were authorized by the evidence in this case, and, if not, appellant should have called upon the court to stop counsel, and instruct the jury to disregard the remarks. The testimony, we think, is sufficient to support the conviction. The judgment is affirmed.

FARMER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

APPEAL—RECOGNIZANCE.

A recognizance requiring appellant to abide the judgment of the "court of appeals," instead of the "court of criminal appeals," is insufficient, and the appeal will be dismissed.

Appeal from Rains county court; W. H. Teague, Judge.

Tom Farmer was convicted of crime, and appeals. Dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Motion to dismiss appeal. The recognizance requires appellant to abide the judgment of "the court of appeals," not "the court of criminal appeals," which is necessary to be sufficient. The appeal is dismissed.

ELLEGE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

Appeal from Henderson county court; W. R. Dickerson, Judge.

Sam Ellege was convicted of a crime, and appeals. Appeal dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The recognizance is fatally defective, in that it binds the appellant to "abide the judgment of the court of appeals." In order to be sufficient in this respect, the requirement should have been to "abide the judgment of the court of criminal appeals." This has been so held by this court in several cases. Acts 1892, pp. 38, 39, §§ 32, 33. The motion of the assistant attorney general is sustained, and the appeal is dismissed.

POWERS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

RECOGNIZANCE—SUFFICIENCY.

Where, on an appeal to the court of criminal appeals, the recognizance binds the appellant to "abide the judgment of the court of appeals," instead of to "abide the judgment of the court of criminal appeals," as required by Act 1892, § 32, the recognizance is fatally defective.

Appeal from Nacogdoches county court; H. F. Dunson, Judge.

Jim Powers was convicted of a crime, and appeals. Appeal dismissed.

E. W. Smith, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The recognizance found in the record binds the appellant to "abide the judgment of the court of appeals," instead of to "abide the judgment of the court of criminal appeals," as required by section 32 of the act of 1892. The recognizance is fatally defective in this respect; wherefore the motion of the assistant attorney general is sustained, and the appeal dismissed.

DAVIS v. STATE. (No. 621.)

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CRIMINAL LAW—HEARSAY EVIDENCE—NEW TRIAL.

1. Defendant cannot prove by third persons that another, and not he, was pointed out as the person who had been seen at a certain place, as the evidence is hearsay.

2. A new trial, on the ground of newly-discovered evidence, is properly denied, where the evidence was known to defendant before the trial.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Robert Davis was convicted of burglary, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Appellant was convicted of burglary. The defendant did not have the right to prove by any one that he was not pointed out, while in jail, as the person who was seen in Hunnicutt and Shortridge's buggy; nor had he the right to prove by Vince Anglen that Lon Lyons, in the jail, pointed out Lee Sapp and William Day as the persons whom he had seen in said buggy. Lyons not being a witness in the case, what he said and did was hearsay, pure and simple.

In his motion for new trial, appellant states that Lyons' testimony is newly discovered. Defendant's bill of exception No. 1 shows that he was aware of Lyons' testimony before his trial, because he contends that Lyons pointed out Lee Sapp and William Day, prior to said trial, as the parties who were driving the Hunnicutt and Shortridge buggy and team the evening of the burglary. We are of opinion that the evidence is sufficient to support the verdict. The judgment is affirmed.

SCREWS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 7, 1893.)

CRIMINAL LAW—REVIEW ON APPEAL—NEW TRIAL—CUMULATIVE EVIDENCE.

1. An alleged error in refusing a special charge will not be reviewed in the absence of a bill of exceptions.

2. A motion for a new trial on the ground of newly-discovered evidence was properly denied when the proposed new testimony was merely cumulative, and such that the trial court was justified in concluding that, if admitted, it would not probably change the result.

Appeal from Wood county court; V. B. Harris, Judge.

C. C. Screws was convicted of carrying intoxicating liquors in the neighborhood of a polling place during an election for the purpose of giving it to others, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of the offense of carrying intoxicating liquor in the neighborhood of the polling place in precinct 10 of Wood county during an election, for the purpose of giving it to others, in violation of article 178, Pen. Code, as amended by act approved March 23, 1887.

1. If there was any error in refusing the special charge, it would not be revised in the absence of a bill of exceptions. Code Crim. Proc. art. 686; Willson's Crim. St. §§ 233, 2365.

2. Even if we concede that the appellant had used due diligence, and the failure to have the alleged newly-discovered testimony was not to be attributed to his negligence, still the court did not err in overruling the motion for a new trial, because the proposed testimony was simply cumulative, and mainly tended to impeach the witness for the state; and in view of the number of witnesses examined in the cause, and the similar nature of their testimony to that proposed, the court was certainly justified in concluding that the newly-discovered testimony would not probably have produced a different result. The judgment is affirmed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CRIMINAL LAW—NEW TRIAL.

On conviction of adultery a new trial will not be granted on the affidavit of the co-defendant, who was acquitted after the trial of defendant, denying that one of the state's witnesses saw her sleeping or having intercourse with defendant, where there was evidence that they occupied the same room for two years, and other witnesses testified that they saw them in bed together.

Appeal from Hopkins county court; J. M. Morris, Judge.

Wilse Jones was convicted of adultery, and appeals. Affirmed.

Leach & James, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The conviction in this case was for adultery. Defendant and Retta Dixon were charged with the offense. The defendant having been convicted, Retta was placed on trial, and acquitted. Attached to the motion for a new trial is the affidavit of Retta, denying that the witness Dumas saw her sleeping or having carnal intercourse

with defendant. She did not, however, deny that for the space of two years they occupied and slept in the same room; nor did she deny that the witnesses John and Peter House saw them in bed together, after retiring for the night on separate occasions, as they testified on the trial. Dumas testified also that himself and wife occupied a bed in the same room with defendant and Retta for seven or eight months, and during which time defendant occupied the same bed with Retta. The testimony is without contradiction that they occupied the same room for two years, and this is rather affirmed by her affidavit. She was taking care of defendant's two children during the two years mentioned, the defendant being a widower, and Retta's husband living separate from her. She denied the adulterous intercourse. We do not think the court erred in refusing the new trial. If the parties cohabited, she was a guilty participant in the crime. Such a witness is not entitled to full credit. Inducements are strong to swerve her from the path of truth, and the law throws discredit on her evidence. Code Crim. Proc. art. 741. Speaking of this character of testimony, this court, in *Jones v. State*, 23 Tex. App. 501, 5 S. W. Rep. 138, said: "With reference to the granting of a new trial upon evidence not attainable at the time of the trial,—that is, the testimony of a codefendant, then incompetent, but since rendered competent by acquittal,—the rule is that, if such evidence be of a suspicious import, if it stand alone, if, though acquitted, it be uncertain whether he is innocent, and if his character be so far compromised as to make it doubtful whether he ought to be believed, the new trial will generally be denied." See, also, *Rucker v. State*, 7 Tex. App. 549; *Smith v. State*, 28 Tex. App. 309, 12 S. W. Rep. 1104. It is not probable that her testimony would change the result in the face of the fact they were seen in the same bed by three witnesses, and it being unquestioned that they occupied the same room for two years. We deem it unnecessary to discuss other questions. We find no error in the record. The judgment is affirmed.

HASTINGS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CRIMINAL LAW—CONTINUANCE.

On a prosecution for aggravated assault, no error is committed in refusing an application for a continuance for an absent witness by whom defendant expects to prove self-defense, where the evidence at the trial shows that the fight was voluntarily entered into by both combatants, and that the expected testimony was, therefore, not probably true.

Appeal from Hopkins county court; J. M. Morris, Judge.

Arthur Hastings was convicted of aggravated assault, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for aggravated assault and battery. Appellant sought to continue the cause for the testimony of an alleged absent witness, by whom he expected to prove facts tending to show that he acted in self-defense. The statement of facts places it beyond question that the fight was voluntarily entered into by the combatants,—both using their buggy whips,—and that appellant also resorted to the use of his knife, which he freely used upon his adversary, cutting him several times. The evidence set out in the application is not probably true. The testimony found in the record excludes any theory of self-defense. The court did not err in refusing the continuance. This view of the case disposes of the remaining questions suggested, to wit, the failure of the court to charge the law of self-defense, and the insufficiency of the evidence to support the conviction. Finding no error in the record, the judgment is affirmed.

WORTHAM v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CARRYING WEAPONS—EVIDENCE.

1. It is no offense to carry a pistol on one's own premises.

2. In a prosecution for carrying a pistol, evidence that defendant separated from the witnesses on arriving at his pasture, he going through the same, while the witnesses went around it, to the place of second meeting, where he was seen with a pistol in his possession, on his own premises, does not prove that he had it in his possession before the separation, where he testifies that he went to his residence, secured the pistol, and carried it with him to the place of second meeting.

Appeal from Lamar county court; John W. Rountree, Judge.

A. R. Wortham was convicted for carrying a pistol, and appeals. Reversed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted for carrying a pistol. When seen with the pistol the defendant was upon his premises. He had the right to have it at the place designated by the witnesses. Shortly before being seen with the pistol, he was met by the witnesses about one mile from his premises. The parties separated, the defendant going through his pasture to the place where he was afterwards seen with the pistol, the witnesses traveling around on the outside of the pasture. The theory of the prosecution seems to be that, inasmuch as defendant had the pistol at the second place of meeting he must have had it when met outside the pasture. This is met by the defendant's evidence, in which he swears that he went by

his residence, secured the pistol, and carried it with him to the place of second meeting. This is not contradicted. As presented to us, we do not think the evidence supports the conviction. The judgment is reversed, and the cause remanded.

NEELY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

SLANDER—IMPUTING WANT OF CHASTITY—INFORMATION.

1. An information charged that defendant did "falsely, maliciously, and wantonly impute to a female in this state, to wit, the said [defendant] did then and there, in the presence and hearing of [two named persons,] and divers other persons, falsely, maliciously, and wantonly say of and concerning the said R. that T. was keeping her, the said R., and that T. was caught on R." Held, that the information was not sufficient to support a conviction for falsely imputing a want of chastity to a female, since it fails to state, except inferentially, what was imputed to the female, or who the female was.

2. In a prosecution for slander imputing want of chastity to a female, while it is unnecessary for the indictment to mention the name of more than one person in whose presence the slander was uttered, yet, when the names of two or more are alleged, the allegations must be proven, since the names then become descriptive of the offense.

Appeal from Henderson county court; W. R. Dickerson, Judge.

Jim Neely was convicted for slandering a female by imputing want of chastity, and appeals. Reversed.

Richardson & Watkins, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of slandering Rosetta Thomas, and his fine assessed at \$150, from which he appeals. Both parties are colored. The information charges that "Jim Neely, in the county of Henderson, Tex., did orally, falsely, maliciously, and wantonly impute to a female in this state, to wit, the said Jim Neely did then and there, in the presence and hearing of Zack Worf and Hanse Manning, and divers other persons, falsely, maliciously, and wantonly, say of and concerning the said Rosetta Thomas that Tom Cleveland was keeping her, the said Rosetta Thomas, and that Tom Cleveland was caught on Rosetta Thomas, against," etc.

1. We believe the motion in arrest of judgment should have been sustained. The offense which the law punishes is falsely imputing a want of chastity, when done wantonly or maliciously. The information here fails to state, except inferentially, what was imputed to a female in this state, or who the female was. It is carelessly drawn, and insufficient to sustain the prosecution, though

we may concede the slanderous words need no innuendo or explanatory averment, which is doubtful. Willson's Crim. St. § 1960, par. 4; Parker's Case, 9 Tex. App. 351; Prophet's Case, 12 Tex. App. 233.

2. The court erred in its charge to the jury, in instructing them that if they believed the slanderous words were spoken in the hearing of Zack Worf and Hanse Manning, and divers other persons, or either of them, to find defendant guilty. While the pleader should mention the name of one person, to give the defendant notice of the time and occasion in which the slander was uttered, when he alleges the names of two or more, he should prove the allegation, for the names there become descriptive allegation, and impose the necessity of proof. Soria's Case, 2 Tex. App. 297; Willson's Crim. St. § 1960, last paragraph. The judgment is reversed, and the cause remanded.

TRAYLOR v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CRIMINAL LAW—EVIDENCE OF CODEFENDANT.

In a prosecution for betting at dice, it is error for the court to reject a witness by whom defendant proposes to prove that he did not play or bet at the game, on a statement by the county attorney that the witness was indicted for playing in the same game and at the same time with defendant, without proof of this fact.

Appeal from Morris county court; J. W. Bolin, Judge.

Ben Traylor was convicted for betting at a game with dice, and appeals. Reversed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of betting at a certain game with dice, and his fine assessed at \$10, from which he appeals. The evidence for the state shows that appellant, with 15 others, was, out in the woods, amidst thick bushes, engaged in playing a game of craps, at the time alleged in the indictment. In his defense, appellant offered to prove by one of the crowd, to wit, Bill Mitchell, that he did not bet or play. The state objected, upon the ground that said witness had been indicted for playing in the same game and at the same time with appellant. The court, without hearing or requiring proof of this fact, sustained the objection, and refused to let the witness testify, to which ruling appellant duly reserved an exception. The court erred. The mere statement of a district attorney, however satisfactory, cannot dispense with the necessity of proof. The judgment is reversed, and cause remanded.

WOLFF v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

LOSS OF INDICTMENT—EFFECT.

When, in a motion for a new trial, it is shown to the trial court that the indictment is lost, it is the duty of the prosecution to substitute the lost indictment; and, on failure so to do, the court of criminal appeals will reverse the case.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Henry Wolff was convicted of aggravated assault, and appeals. Reversed.

Evans & Hargrove, for appellant. B. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of an aggravated assault, and his fine assessed at \$25, from which he appeals.

1. We do not think the evidence insufficient to sustain the finding of the court. Conceding appellant's right to possession of the orchard, the manner, language, and violence shown to his sister was far greater than the occasion demanded.

2. But appellant asks a reversal of the case because the indictment has been lost and mislaid, with no negligence or fault on his part. It is shown that the indictment in this cause was lost after the cause had been submitted to the court, and before the decision, and this fact was brought to the attention of the court in a motion for a new trial. The practice seems to be settled in this state that when, in a motion for a new trial, it is shown to the trial court that the indictment is lost, it shall be the duty of the prosecution to substitute the lost indictment, and, on failure so to do, the court will reverse the case, (*Pate v. State*, 21 Tex. App. 197, 17 S. W. Rep. 460, and cases cited;) that a conviction will not be allowed to stand when the transcript fails to bring up an indictment or information. If there was no indictment substituted, how is the defendant to move in arrest or this court to pass upon it? The judgment is reversed, and cause remanded.

BARCLAY v. STUART.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

PARTITION—DECREE—LATENT AMBIGUITY—PAROL EVIDENCE.

In trespass to try title to a tract of 519 acres, it appeared that, on partition of an estate embracing two tracts, one abstract, No. 195, containing 519 acres, the other abstract, No. 196, containing 477, one of the tracts was set apart to plaintiff, the other to defendant, the report of the commissioners and the decree of the court describing them as abstract No. 195 containing 477 acres, and abstract No. 196 containing 519 acres. *Held* that, there being a latent ambiguity in the descriptions, parol evi-

dence was admissible to explain the decree by showing which tract was intended for plaintiff and which for defendant.

Appeal from district court, Harris county; James Masterson, Judge.

Trespass to try title by Laura Stuart against Mary Barclay. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by WILLIAMS, J.:

The land involved in this litigation is a tract in Harris county, containing 519 acres, the name of the original grantee of which is J. S. Collins, and the abstract number of which is 195. There is another tract in Harris county, containing 477 acres, patented in the name of the same grantee, the abstract number of which is 196. Both tracts belonged to Charles B. Stuart, deceased, and, under a decree of partition of his estate by the probate court of Montgomery county, both parties claim as his heirs. In the report of the commissioners, which was adopted by the court in all respects, and in the decree, into which the substance of the report is copied, it appears that one of these tracts was set apart to Laura Stuart, and the other to Mrs. Barclay. In designating the tract given to Laura Stuart, the report and the decree describe it as abstract No. 196, original grantee, J. S. Collins, 519 acres, valued at \$1,908, situated in Harris county; and that set apart to Mrs. Barclay was named as abstract No. 195, original grantee, J. S. Collins, containing 477 acres, valued at \$1,250, situated in Harris county. It thus appears that the abstract numbers were reversed, that belonging to one tract being given to the other. Each of the parties to this suit claim the 519-acre tract, for which appellee sued, and recovered the judgment from which this appeal is prosecuted. In the trial below, parol evidence was admitted, over the objection of the defendant, tending to show which of the two tracts was intended for Laura Stuart and which for Mrs. Barclay; the two commissioners who testified both stating that the 519-acre tract was given to Laura, because they believed it to be the most valuable of the two, the valuation put upon it being essential to make up her share of the estate to which she was entitled, and that for the same reason the other tract was given to Mrs. Barclay, as she received other property of more value than such as was given to Laura, apart from the tracts in question. They further stated that, if any mistake occurred in the description of the land, it consisted in assigning to the two tracts the wrong abstract numbers. On the other side, testimony was adduced tending to show that the 477-acre tract was at the time of the division considered the most valuable, and for that reason was assigned to Laura Stuart, and the other to Mrs. Barclay, the mistake consisting in stating the acreage given to each, and not in the use of the abstract number. The evidence

thus conflicted, and, if it was admissible, the conflict must be resolved in favor of appellee, for whom the jury decided it. The court submitted to the jury the question whether the tract in controversy was in the partition set apart to the plaintiff or to the defendant, instructing them that the question was one of identity, to be decided under the evidence.

Webb & Finley and Breasheau & Ashe, for appellant. Ford & McComb, for appellee.

WILLIAMS, J., (after stating the facts.) The first assignment complains of the overruling of the exceptions to the petition, on the ground that the action was one to correct the decree of the probate court of Montgomery county, which the court had no jurisdiction to do. As we view the action, it is one of trespass to try title, in which the plaintiff must recover by showing title to the land. The partition cannot be collaterally attacked, and we do not understand that this is sought. The question put in issue is the effect of that proceeding. The allegations in the petition are intended simply to admit evidence to enable the court to ascertain what passed to each party by explaining the latent ambiguity in the description of the land, which had been developed. There is, it is true, a prayer for the correction of the mistake in the decree, but the court could and did properly disregard that. If plaintiff succeeded in showing title under the decree, there was no need to correct it, but the whole purpose of the suit was accomplished. The trial below was conducted upon that theory, which was the correct one. The court did not err in the ruling complained of. If there were portions of the petition which were irrelevant, exceptions should have been taken to those parts. But had this been done, and had the exceptions been overruled, this would have had no influence upon the trial.

There was no error in overruling the defendant's exception to the plaintiff's supplemental petition. The allegations were made in reply to an attempt to set up an estoppel in the answer, and alleged that, at the time of the acts and admission relied on as constituting the estoppel, plaintiff was ignorant of the true facts and of her rights. The fact that she alleged in her petition that she was present when the decree was rendered does not show that she knew the facts which were subsequently developed as to the mistake in the description of the land. Besides, there was no estoppel in the case, and the ruling becomes immaterial.

The third, fourth, fifth, and sixth assignments complain of the admission of the parol evidence referred to in the statement of the case above made, and present the principal question in the case. The description given in the decree of the two tracts of

land on their face would appear to be sufficient to identify the land intended to be adjudged to the parties; but, in the attempt to apply these descriptions to the subject-matter referred to, it is found that one of the particulars in each case fails to apply to the land. The case is presented of a latent ambiguity, which is made to appear by evidence allunde the decree, and which can therefore be removed, if practicable, by such evidence. The object in receiving the evidence in such cases is not to vary or alter the judgment, but to explain its meaning, and enable the court to determine its effect. Whart. Ev. 986; Black, Judgm. 623. If the judgment, by its own terms, when applied to the land, was free from ambiguity, so that the court could say to which of the parties the land in controversy had been set apart, no evidence would be admissible to add to or explain it. But here it is found that, while the number of acres adjudged to the plaintiff is the same as that embraced in this tract, the abstract number does not fit it; and, on the other hand, the abstract number given for the tract awarded to the defendant fits the tract in the controversy, while the number of acres does not. Which is to control? Ordinarily, in a deed or other instrument, the abstract number would, we think, be the more reliable, because more specific. But here the attention of the court and the commissioners is directed to quantity and value, rather than to the particulars of description, the object being to make an equal division. Besides, there being two tracts in the same county, having the same original grantee, of different sizes, the number of acres in them respectively would distinguish them as perfectly and completely as the abstract number. The area supposed to be embraced in the tract would necessarily be known to the commissioners, while the abstract numbers might be unknown to them; and they would naturally attach more importance to quantity, where, as in this case, that affords the means of distinguishing one tract from all others, than to other particulars. We do not therefore think that it can be said that this judgment necessarily had the effect to vest in the defendant title to the 519-acre tract. Either description will apply to either tract if one of the particulars be rejected; and neither description will apply to either tract unless one of the particulars be rejected. We are not prepared to say that the court could properly decide, as matter of law, which one of the circumstances must prevail. If it could not, there was no error in admitting evidence to explain the decree, and guide the court and jury to the real truth.

The special charges, Nos. 1, 2, 3, and 4, asked by defendant, and refused, are not set out, nor their substance stated, in the brief. This is not a compliance with the rules. The fifth instruction, directing a verdict for defendant, was properly refused.

as was the sixth, which declared the effect of the decree of partition to be to vest the title to the land in controversy in the defendant. The seventh, while differently worded, would have had the same effect upon the minds of the jury. The objections made to the charge of the court are not well taken. It follows that there was no error in refusing a new trial. Our conclusion is, with the verdict of the jury, that the decree of partition vested the title to the premises in the plaintiff, and that the judgment should be affirmed.

TEXAS & P. RY. CO. v. BARNHART.¹

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

LIVE-STOCK SHIPMENTS—CONNECTING LINES—LIABILITY OF LAST CARRIER—PENALTY—RECEIVERS.

1. Where a horse transported by successive carriers has been injured in transit, in the absence of evidence to the contrary, the injury is presumed to have been caused through the fault of the last carrier.

2. A railroad company is not liable for the penalty imposed on carriers of animals for a failure to properly care for them in transit, where the penalty was incurred while the road was operated by a receiver.

Appeal from El Paso county court; Allen Blacker, Judge.

Action by H. B. Barnhart against the Texas & Pacific Railway Company. Plaintiff had judgment, and defendant appeals. Modified.

Peyton F. Edwards and W. C. McGown, for appellant. Clark & Barnhart, for appellee.

Conclusions of Fact.

JAMES, C. J. (1) Appellee shipped his family horse, by through shipment, from Austin, Tex., to El Paso, Tex., over the International & Great Northern Railway, the Missouri, Kansas & Texas Railway, and the Texas & Pacific Railway, the last named being the line delivering the animal at El Paso. Appellee paid the freight at Austin, after both the other lines had been consulted as to fixing the through rate. (2) There was no evidence showing that any of the lines had limited its liability to its own line, and no evidence that the contract required claim of damages to be made within a given line. (3) There was evidence to show that the horse, when delivered for shipment, was in good condition, and on arriving at El Paso was in such a damaged condition that he was practically worthless. (4) The evidence did not show the condition of the horse when received by appellant's road, and did not show that any injuries were inflicted prior to the time it was received by appellant; and the only evidence that the horse was fed and watered while on appellant's road, which was for three or four days, was

at one point called Toyah. It was shown that in such shipments it was the rule to collect feed bills from the consignee upon delivery, but in this instance no feed bills were presented. There was testimony to show that the damages were caused by failure to properly feed and water the animal in the transit. (5) The appellant's road was at the time of this shipment being operated by the federal courts through its receiver, John C. Brown, and some months afterwards the receiver was discharged; and it appears with reasonable certainty that property of greater value than this claim was returned to the appellant without a sale, and also that sums largely in excess of this claim were, during the receivership, expended in betterments on the appellant's road. (6) The suit was for \$400, the value of the horse, and \$500, statutory penalty for not properly feeding and watering him en route; and the judgment was for \$800, the value of the horse, and \$100 penalty. (7) The testimony of the value of the animal when shipped was between \$300 and \$400.

Conclusions of Law.

Under the facts, as above shown, the connecting carrier completing the transportation, and delivering the animal in a damaged condition, was liable for the damage, in the absence of evidence that he received it in the condition in which he delivered it, or without proof that some fact existed, exonerating him from liability, such as an act of God. Hutch. Carr. § 761; Railway Co. v. Adams, (Tex. Sup.) 14 S. W. Rep. 666. The facts and circumstances of this case are such as will support the judgment rendered against appellant for \$300 actual damages. Some direct evidence tending to show fault on the part of this appellant in transporting the animal was hearsay, but the judge certifies that he did not consider it; and, as the case was presented, the appellant's liability existed, even in the absence of any evidence on that subject, and consequently it constitutes no ground for reversal. But we think differently concerning the judgment for the penalty. The application of the rule above referred to makes this defendant liable for the actual damages, in the absence of proof of whether or not it failed to properly feed and water the animal en route. The liability was, under the evidence in this case, to some extent, constructive. There is authority for holding that, when a penalty of this character is sought to be recovered in a civil action, the plaintiff must show facts which justify a recovery beyond a reasonable doubt. The evidence here fell far short of this, and on this ground, probably, there should have been no judgment for the penalty. Chaffee v. U. S., 18 Wall. 516; Railway Co. v. Dwyer, 84 Tex. 195, 19 S. W. Rep. 470. There is authority to the contrary. 18 Amer. & Eng. Enc. Law, p. 290. We dis-

¹ Rehearing denied.

pose of this question, however, on another ground, which we consider more free from doubt.

The act of March 19, 1889, entitled "Receivers," was not in force when the damage happened, nor when the property of the road was returned to appellant. The act of 1887, under same title, does not provide that claims unpaid at the close of the receivership the company should be liable for, to the extent of the property redelivered, but, nevertheless, an equitable principle applicable to such cases is that, to the extent of the income used by the receiver in improvement of the property, the company would afterwards be liable for claims arising under, and not paid by, the receiver. We do not think that statutory penalties, incurred while the road was in the receiver's hands, would constitute such a claim against the company as would be included in this equitable rule. Although such penalty is recoverable by the claimant in connection with his claim, yet it does not properly constitute a part of his damages. It has for its object the interest of the public, and is inflicted by way of punishment; and this purpose would not, in any degree, be subserved by visiting upon defendant a penalty for acts committed in the conduct of the road while it was being operated under orders of a court through a receiver. We doubt that punitive damages could be recovered of the company, under like circumstances, for an act committed during the receivership. It is the rule in this state that a railway corporation is not subject to exemplary damages for acts of its servants and agents, unless ratified by it, or some act of carelessness or remissness on its part is shown in connection with them. *Hays v. Railroad Co.*, 46 Tex. 272. Upon this principle, we cannot see why the appellant should be held to respond for the penalty, when the act for which it is sought to be inflicted was not done by it, or its agents or servants, but occurred under a management of its road in other hands, over whose acts it had neither control nor power of ratification. And we do not believe that the statute, in providing that such penalty might be recovered of the carrier, intended that it should apply to a case where the act done was not, and could not be, the act of the carrier, as in this case. Our conclusion is that the judgment should be so rendered here as to affirm the judgment for actual damages, and to set aside that rendered for the penalty.

WATKINS v. JUNKER.

(Court of Civil Appeals of Texas. Nov. 2, 1893.)

JUDGMENT—RES JUDICATA—BREACH OF CONTRACT—MEASURE OF DAMAGES.

1. In an action for services, and for the rental of certain boats, defendant reconvened

for damages for failure of plaintiff to furnish certain other boats, as he had agreed to do, and also pleaded the statute of limitations. There was a judgment against plaintiff on the plea of limitation, and in his favor on the plea in reconvention. He appealed from the judgment against him, but defendant did not appeal from the judgment against him on the plea in reconvention. *Held*, that the reversal of the judgment on such appeal, without restriction, worked a reversal as to all issues, and the judgment on the plea in reconvention was not a bar to the claim for damages thereon on a second trial.

2. Defendant cannot recover, as damages for failure to furnish dredge boats, as agreed, to enable the former to perform a contract for building revetments for the United States, the value of revetments built by defendant, but not paid for by the government because the dredging required by its contract had not been done, where it is not alleged that plaintiff knew that payment for their construction depended on the dredging, nor that such was the contract, though plaintiff knew that defendant could not procure such dredge boats elsewhere.

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Action by J. B. Watkins against Guy W. Junker to recover for services, and for the rental of certain boats, in which defendant filed a plea in reconvention for damages for the failure of plaintiff to furnish certain other boats which he had agreed to furnish to defendant. From a judgment sustaining defendant's exceptions to plaintiff's plea in bar of the cause of action pleaded in reconvention, and overruling plaintiff's exceptions to defendant's plea, plaintiff appeals. Reversed.

Greer & Greer, for appellant. Perryman, Gillsaple & Bullitt, O'Brien & O'Brien, and Gordan Bullitt, for appellee.

GARRETT, C. J. J. B. Watkins brought this suit to recover of Guy W. Junker upon an account for services rendered, and the rental of certain boats. Defendant pleaded the statute of limitation to said account, and, in reconvention, for damages for the failure of the plaintiff to furnish, also, certain dredge boats, as it was alleged he had contracted with the defendant to do. This is the second appeal in this case. The first appeal was from a judgment of the court below in favor of the defendant on his plea of limitation, and in favor of the plaintiff on the defendant's plea in reconvention for damages. Plaintiff appealed from the judgment against him, and brought the case properly before the supreme court for revision, with an appeal bond and assignment of errors. Defendant made no cross assignment of errors on the judgment against his plea in reconvention for damages, and did not in any manner appeal therefrom. The judgment of the court below was reversed, and the cause remanded for a new trial. 19 S. W. Rep. 390. After the case went back to the district court, and again came up for trial, the plaintiff pleaded the former judgment of said court in bar of the cause of action set up in

defendant's plea in reconvention, and that the cause of action set up therein was res adjudicata, and the defendant was concluded by said former judgment of the district court in plaintiff's favor as to the matter set up in said plea of reconvention, the defendant not having appealed therefrom. To this plea the defendant interposed an exception, which the court sustained, and this question is now presented for decision by this court: Whether the judgment against the defendant on his plea in reconvention stood unreversed by the judgment of the supreme court when the case was before the supreme court on the former appeal.

In passing upon the questions then presented, the following language appears in the opinion of the court, after showing, from the charge of the court below and the verdict of the jury, that the plea in reconvention had been adjudged adversely to the defendant: "As it is obvious, therefore, that the plea in reconvention for damages did not enter as an element into the formation of the verdict, we are of the opinion that the questions raised by the 1st, 2d, 3d, 5th, 6th, 7th, and 8th assignments, each of which is predicated on alleged errors of the court in ruling on exceptions to this plea, and on evidence and instructions relating to and growing out of this plea in reconvention, are eliminated from the case, and are not necessary to be considered, under this view." The court then proceeded to consider the one remaining question, of limitation, and, because it was of the opinion that the verdict of the jury was not supported by the evidence upon that issue, reversed the judgment, and remanded the cause for another trial, from which it appears to us that the judgment was reversed as an entirety. The language of the judge, used in reasoning in the opinion or in stating the cause, is not any part of the judgment of the court, though it may be looked to in order to determine what had been adjudicated; and without entering into a consideration of the effect of a judgment which should undertake to reverse as to the plaintiff's cause of action, and affirm as to the defendant's plea in reconvention, we think it sufficient to say that both parties being before the court, and the court, without restriction, having reversed the judgment of the court below, it stood reversed as to all the issues, and that there was no error in overruling the exception.

Plaintiff renewed his exceptions to the cause of action set up in the defendant's plea in reconvention, which were overruled by the court, and an exception was taken to said ruling. Plaintiff had sued upon a verbal contract, made by and through his authorized agent, with the defendant, by which the plaintiff undertook to do certain towing for the defendant, and the defendant was to rent from plaintiff a quarter boat, a pile driver, and a barge. Defendant admit-

ted the correctness of the amount claimed by the plaintiff for said service and rental of the boats, but he pleaded in reconvention damages against the plaintiff because of the failure of the plaintiff to furnish, also, two dredge boats, which he alleged plaintiff's agent had agreed to furnish. Defendant alleged, substantially, in his said plea in reconvention, that, as a part of the contract set out in plaintiff's petition, the plaintiff was to furnish the defendant, within 10 days after demand by him, two dredge boats, to be used by him in certain work he was then engaged in for the government of the United States, namely, the building of a revetment on each side of a canal at the junction of Calcasieu lake and Calcasieu pass, in the state of Louisiana, and dredging and deepening out the channel between said revetments, and dumping the mud behind the revetments. That said dredge boats were to be furnished to the defendant at a rental of \$20 a day each, and were necessary and peculiarly adapted to dredging out said canal, and dumping mud behind said revetments, and were absolutely necessary to the defendant therein, all of which was well known to plaintiff. That, relying upon said contract, defendant proceeded about April 4, 1887, to erect and construct a revetment or wooden wall on each side of said channel, and had, up to May 31, 1887, erected and constructed 6,000 lineal feet of said revetments; the plaintiff, in the mean time, having done the towing, and furnished the pile driver, quarter boat, and barges, but having failed and refused to furnish said dredge boats, after demand made by defendant on or about May 21, 1887, by reason whereof defendant was prevented, hindered, and delayed in the prosecution and carrying out of said work. That the government of the United States had contracted with defendant to pay him 40 cents a lineal foot for said revetments so constructed,—in the aggregate, \$2,400,—and would not receive and pay for said revetments until the mud had been dredged from the channel and dumped as aforesaid; and that the government had never received and paid for the same, nor any part thereof, by reason of the defendant's failure to do so, which was the result of the failure of the plaintiff to furnish said dredge boats. That if plaintiff had furnished said dredge boats, as he had contracted to do, within 10 days after demand for the same, defendant could and would have received from the government the said sum of \$2,400 for the revetments constructed, and in addition thereto would have received 9 cents a cubic yard for the mud excavated from said channel, and deposited behind said revetments. Defendant further alleged that he was induced to enter into said contract with the United States government by reason of the promises of the plaintiff to furnish him said boats, and would not otherwise have entered into said contract. That

plaintiff continually, up to the 31st day of May aforesaid, promised and represented to the defendant that he would furnish him the said dredge boats; and, being induced to believe that the same would be furnished, he continued to construct said revetments, at great expense, to wit, \$3,000. That, after plaintiff had refused to furnish said dredge boats as aforesaid, defendant tried and used all endeavors to procure a dredge boat or dredge boats adapted to said work from other sources, but was unable to do so; neither could he have a machine or dredge boat constructed to do the work. Wherefore, he averred, the contract value of said work was an absolute loss to the defendant, and he was damaged in the sum of \$2,400, for which he prayed judgment.

The ordinary measure of damages for the failure of the plaintiff to furnish the dredge boats would be the difference between the rental value agreed on, and the price at which such boats could have been rented by the defendant. It is the rule that only such damages may be recovered for a breach of contract as reasonably enter into the contemplation of the parties, and are the natural result of a breach of the contract; such as would probably and naturally flow therefrom. The fact that the defendant could not secure other dredge boats, if the plaintiff knew that he could not, or on account of the character of the boats, or a known difficulty in procuring such things, should have reasonably known of such difficulty, might render him liable for a different measure of damages, but they would be such as would probably result from the breach. The allegations of the answer are perhaps sufficient, however, to render the plaintiff liable, if taken as true, for lost profits on the dredging, as it was alleged that the purpose for which the defendant wanted the dredge boat was to dredge out the channel, under a contract with the government, which was known to the plaintiff, but it is not alleged what the profits of the dredging would have been. In order to recover special damages, the facts constituting or giving rise to the same must be specially pleaded, and it must be shown that they were reasonably within the contemplation of the parties when the contract was entered into. It is not averred in the answer that the plaintiff knew what the contract between the defendant and the government was, or knew that the payment for the construction of the revetments depended on the dredging; nor is it, in fact, alleged that such was the contract. From all that appears in the pleading, the payment for the revetments may have been wrongfully withheld from the defendant by the government. The damages claimed, which are the loss of the contract price of the construction of the revetments, do not appear, from the allegations of the answer, to have been reasonably within the contemplation of the parties when

the contract was made. We think that, upon proper allegation and proof, there might be a state of facts upon which the value of the revetments constructed might be the proper measure of damages; but the pleadings present no such case, and the plaintiff's exceptions should have been sustained.

We are of the opinion that the proof does not show that Thompson had authority, either implied or actual, to enter into a contract with the defendant to rent him the dredge boats. Actual authority is expressly denied, and there are no circumstances whatever shown, from which his authority so to do ought to be implied. If the circumstances were such that the defendant was warranted in inferring that Thompson had the authority to rent him the dredge boats, then a contract, if any was made, would be valid. But if he learned before he commenced the work that Thompson had no actual authority to make the contract, and that the boats would not be furnished, then we think that the defendant should have done all that he reasonably could have done to prevent the damages from accumulating. The question whether interest should have been allowed is not properly presented. For the errors pointed out, the judgment of the court below will be reversed, and the cause remanded.

PERRY v. BLAKEY.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

COLLATERAL ATTACK—ADMINISTRATOR'S SALE.

1. In a collateral attack on an administrator's deed, a recital in the order of sale by the probate court that an application to sell has been made is sufficient proof of such application, though it does not appear in the records of the probate court.

2. Where the probate court orders a sale of all the land of an estate to pay debts, and there are several purchasers of the different tracts, the fact that the order confirming the sale does not identify the land sold to each purchaser will not render the sale void, so as to subject it to collateral attack, but it will be presumed that the confirmation related to the land conveyed to each purchaser by the administrator's deed, which had been previously executed.

3. The fact that the administrator violated the terms of sale prescribed by law and the order of court, by conveying part of the land to a creditor in payment of his claim, does not render the sale void, so as to subject it to collateral attack.

4. While cases tried by the court without a jury will ordinarily be finally disposed of on appeal, such disposition will not be made where the court has erroneously ordered a nonsuit at the close of plaintiff's evidence; and the case will be remanded for a new trial, to enable defendant to make his defense.

Appeal from district court, Cass county; John L. Sheppard, Judge.

Trespass to try title by Mrs. S. H. Perry against Levi Blakey. From a judgment in defendant's favor, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by FINLEY, J.:

This is a suit of trespass to try title, brought July 1, 1889, by Mrs. S. H. Perry against Levi Blakey, to recover 640 acres of land situated in Cass county, Texas,—the David Colville headright. The pleadings consisted of the petition of plaintiff in the ordinary form of trespass to try title, and defendant's plea of not guilty. The case was tried February 14, 1891, by the court without a jury, and judgment was rendered in favor of the defendant for the land. The defendant introduced no evidence of title, and the judgment entered for him was the result of the failure of the plaintiff, in the opinion of the trial court, to prove such title as would justify a recovery of the land. Plaintiff's evidence was, in substance, as follows: (1) Patent from the state of Texas to David Colville to the 640 acres of land, dated May 3, 1861. (2) Bond for title upon cash consideration from David Colville to J. H. Johnson, dated July 3, 1843, for the land. (3) Order of probate court of Red River county, as follows: "County court, October term, A. D. 1843. William S. Todd, adm'r of the estate No. 184, James H. Johnson, deceased. And now at this day comes the administrator, and filed his inventory and appraisal of said estate, duly sworn to by the appraisers of said estate, which rec'd by the court, and orders to be filed. The said administrator also filed his report and petition praying an order of sale to sell the lands belonging to the estate lying and being situate in the county of Cass; and the administrator is hereby ordered to sell the above-mentioned property on a credit of twelve months, securing the payment of the same as the law directs, except so much as may be necessary to raise an amount sufficient to pay the funeral expenses, taxes now due by said estate, and the expenses of administration which have accrued up to this date, for which said amount the said administrator is ordered to sell so much of the above property for cash as will be sufficient to pay same, and cause continued." (4) Order of probate court Red River county, as follows: "County court, November term, 1849. William M. Lambert versus The Succession of James H. Johnson, Deceased. W. S. Todd, Adm'r. Petition for the sale of property to pay debts. It appearing to the satisfaction of the court that the plaintiff's claims have been already too long deferred, and the administrator having reported that he has no funds belonging to said succession, and it appearing further that it is doubtful whether lands can be found sufficient in their sales to satisfy the claims, therefore it is ordered that said administrator proceed to sell on the first Tuesday in January next, at the county seat of Cass county, so much of the land belonging to the estate, if to be found, as will be sufficient to pay the debts; and,

should the proceeds of said sale not be sufficient to pay the debts, it is further ordered that the said adm'r, on first Tuesday in February next, proceed to sell at the county seat of Red River county so many of the slaves of said estate as will supply the deficiency. Sales to be made on a credit of twelve months, with bond and security and a lien on the property according to law, and a copy of this order to be served on adm'r." (5) Order probate court Red River county, as follows: "Monday, Nov. 24th, A. D. 1851. Estate of James H. Johnson, dec'd. No. 184. William S. Todd, administrator. Citation to report sales of land. This day came the administrator, William S. Todd, and presented his report of a resale of lands in the counties of Cass and Titus belonging to said estate, ordered at a previous term of this court, amounting to the sum of — dollars and — cents; and, the court being sufficiently advised that said sale was made in conformity with law, it is ordered that said sale be in all things approved and confirmed, and that said report of sale be recorded; and it appearing to the court that the bond of James H. Johnson, dec'd, is for 664 acres, the C. Smjth h'd'right, it is ordered that the sale as to the (6) six labors & a fraction be only confirmed, so far as same will not render it impossible to satisfy said bond, the purchasers having the right to accept or reject the sale under this modification. Confirmation proceeded to convey to the purchasers James D. Todd, Jephtha D. Crawford, R. P. Crump, Ben F. Cock, & B. Taylor, all the right, title, and interest that the decedent, James H. Johnson, had in and to the same at the time of his death, retaining a lien thereon to secure the final payment of the purchase money upon their complying with the terms of said sale; and it is further ordered that said administrator proceed against the defaulters at the first sale reported for the deficit in the amount of sale, and five per cent. upon the original bid. That adm'r have a copy of this order & cause continued." All the above orders are duly certified as being true copies by the clerk of the county court of Red River county, under seal of county court. (6) Deed from Jephtha D. Crawford and wife to Sardina H. Perry, (plaintiff,) dated April 19, 1859, ordinary warranty deed. Plaintiff also offered to read in evidence a deed of W. S. Todd, administrator of the estate of James H. Johnson, deceased, to Jephtha D. Crawford, dated May, 1850. The defendant objected to the introduction of this deed, and the court sustained the objection, and refused to permit it to be read in evidence, upon the ground, as stated by the judge, that it was not shown that there was any application made for an order to sell the land, nor any order of the probate court confirming the sale made by the administrator.

Todd & Rowell, for appellant. Schluter & Allday, for appellee.

FINLEY, J., (after stating the facts.) The action of the court in excluding the administrator's deed, forming a link in plaintiff's chain of title, is complained of, and made the basis of the several assignments of error presented in the brief of appellant, and constitutes the vital question in the case. The copies of the probate record from Red River county, introduced in evidence by the plaintiff, unquestionably show that the administration of the estate of James H. Johnson, deceased, was conducted with great informality and looseness; and a number of gross errors and irregularities on the part of both the administrator and the court are clearly apparent. But, notwithstanding such errors and irregularities in the administration proceedings, which might have been corrected at the instance of parties at interest in a direct proceeding timely instituted for that purpose, if it can be determined that the court had jurisdiction of the estate, that the disposition made by the administrator of the land was such as the court had power to order, and that the court gave its judicial sanction to the sale, though in an irregular manner, such sale must be held valid against collateral attacks. It clearly appears that the estate of James H. Johnson, deceased, was administered upon in the probate court of Red River county; that W. S. Todd was the acting and recognized administrator; and, as there is no evidence to the contrary, we must assume that the jurisdiction of the court was properly exercised, and that the administrator was duly appointed and authorized to act in the capacity in which he was recognized by the court. It is also apparent that the court had the power to order the sale of the lands in question. It is true that no application for an order to sell the lands of the estate appeared among the probate records introduced in evidence on the trial. Each of the orders of sale introduced in evidence recited the fact that application for such order had been made. Independent of such recitals, however, the presumption must be indulged that the court acted regularly, and, therefore, that application for the order to sell was made and presented to the court. *Davis v. Touchstone*, 45 Tex. 496; *Withers v. Patterson*, 27 Tex. 491; *Hurley v. Barnard*, 43 Tex. 87. This disposes of one of the grounds of objection to the administrator's deed upon which it was excluded.

The other, and more serious, objection to the deed is that there was no confirmation of sale by the probate court. This objection is doubtless based upon the idea that in the orders of sale and order of confirmation there is not sufficient description of the lands to which they relate to identify them with the lands described in the deed of the

administrator to Jephtha D. Crawford. It will be seen from the order of sale made in October, 1848, that the administrator came in and filed his inventory and appraisement of the property of the estate, and at that time made application to sell the lands belonging to the estate situate in Cass county; and the order was made to sell the lands "mentioned" on credit of 12 months, except that a sufficient amount should be sold for cash to pay funeral expenses of deceased, taxes, and expenses of administration already accrued. In November, 1849, William M. Lambert, a creditor of the estate, presented his petition for a sale of the property of the estate to pay debts, and we learn from the order of the court thereon that the creditor's claim had been too long delayed, that the administrator had no funds with which to pay it, and that it was doubtful if there were enough lands to realize upon sale sufficient money to pay the debts of the estate. Upon this state of facts, an order that the administrator proceed to sell enough of the lands, if to be found, sufficient to satisfy the debts, was made; and, in the event the lands were not sufficient for the purpose, he was ordered to sell enough slaves to supply the deficiency. No return or report of sale by the administrator appears among the proceedings, but on the 24th day of November, 1851, an order was made, purporting to be the action of the court upon a report of such sales, filed in answer to a citation commanding him to report the sales. This order recites that the administrator presented his report of a resale of lands in the counties of Cass and Titus belonging to the estate, ordered at a previous term of the court, and the court proceeded to approve all the sales, except as to six labors and a fraction of the O. Smith headright, which was qualifiedly approved, and which is not involved in this suit. This order directs the administrator to proceed to convey the lands to the purchasers, naming them, and among the purchasers named is Jephtha D. Crawford. The inventory filed by the administrator is not among the probate records, but it will be presumed to have been before the court at the time the sale was ordered, and that the lands ordered to be sold were fully identified to the court by the application and inventory. It is reasonably clear that all the lands of the estate were ordered to be sold to pay the debts of the estate; and it is equally clear that Jephtha D. Crawford became a purchaser at such sale of some of the lands, and that the court approved the sale, and ordered the administrator to convey the lands to him. The deed to Jephtha D. Crawford is dated in May, 1850, while the order approving the sale to him is dated November, 1851. There is nothing in this circumstance to indicate that the sale evidenced by the deed was not the sale intended to be approved. The date upon which the sale

was ordered to be made was the first Tuesday in January, 1850, and it has not been at all uncommon for administrators to execute deeds to purchasers after sale and prior to order approving same, subject, of course, to the action of the court upon the report of sale. The order of confirmation, if effective at all, would be equally so through the deed of the administrator was made before the entry of the order under the circumstances stated. What sale of land to Jephtha D. Crawford by the administrator did the court approve? The order of confirmation does not inform us, but the report of sale which the court had before it certainly identified the land to the court; and, in the absence of all evidence that there was ever any other sale of land by the administrator to Jephtha D. Crawford, may not it be presumed in favor of the correctness of the official action of the administrator that he reported to the court the sale of the land to Crawford which he had previously evidenced by his written deed? It has been held in this state that the failure of the order of sale to describe the land to be sold does not render the sale void; and administrator's sales have been upheld against collateral attacks where there was no attempt to identify the land, either in the application to sell or the order of sale. *Wells v. Polk*, 36 Tex. 121; *Davis v. Touchstone*, 45 Tex. 497. It has also been held that, where the application for the order to sell, the order of sale, and the order of confirmation are all vague and indefinite in description of the land, the sale is not thereby rendered void, but the description may receive aid from other sources. *Hurley v. Barnard*, 48 Tex. 88. At the time of the trial the deed in question was 41 years old. It had stood all these years unassailed by the parties interested in the estate. The administration under which it was made was shown to have been carelessly carried on, and it is not likely at this late date that full proof can be made of the probate proceedings. It is the policy of the law to uphold the proceedings of our probate courts. They are courts of record of general jurisdiction in all matters relating to administration of estates of deceased persons, and its judgments in such administration of estates, intrusted to its control by law, are to be regarded, in collateral actions attacking their validity, as entitled to the same presumptions as the judgments of any other court of record of general jurisdiction. *Gulford v. Love*, 49 Tex. 719.

In view of all the facts disclosed by the record, after this great lapse of time, while full proof of the probate proceedings exhibiting the power of the administrator to make the deed was not made, we think that it should have been presumed that the court confirmed the sale of the land to Jephtha D. Crawford as embraced in the administrator's deed, and that the court erred in not admit-

ting the deed in evidence. While it does not appear from the record, it is stated by counsel on both sides of the case that the deed shows that the consideration which passed was the payment of a debt due by the estate to Crawford; and it is contended that this fact also renders the sale void. In view of the disposition which we shall make of the case, we think it proper to indicate our views upon this point. It has been held in cases of administrators' credit sales that the administrator may violate the terms of sale prescribed by the law and the order of sale, and thereby become responsible on his bond, but that the sale is not thereby rendered void. *Sypert v. McCowen*, 28 Tex. 639; *Old. & W. Dig. art. 782*. In keeping with the authorities on this point, we are of opinion that this fact, stated as to the deed in question, does not render the sale void. While it is ordinarily the rule to make final disposition in this court of cases tried by the court below without a jury, inasmuch as the introduction of the administrator's deed would have presented an entirely different state of facts than that upon which the case was decided, and it being possible that the defendant had evidence of title in himself which he would have introduced had such a state of evidence confronted him, we think it proper to reverse and remand the cause for another trial, and it is so ordered.

STATE v. VINSON.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

LIQUOR DEALER'S BOND—ACTION BY STATE.

A liquor dealer's bond, providing for a penalty in case the dealer permits any game prohibited by the laws of the state to be conducted on the premises, must be strictly construed; and the state cannot maintain any action thereon for the penalty when the bond is made payable to the county judge, instead of to the state, as required by Act March 29, 1887.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Action by the state of Texas against N. B. Vinson on defendant's bond as a liquor dealer. From a judgment sustaining a demurrer to the complaint, the state appeals. Affirmed.

C. A. Culberson, Atty. Gen., for the State.
Croft & Croft, for appellee.

LIGHTFOOT, C. J. This suit was brought by the state of Texas upon a statutory bond given by appellee, as a liquor dealer, for \$5,000, under the act of 1887,¹ to recover "\$500, as stipulated damages," for the use of Navarro county, for the alleged violation by appellee of the terms of the bond, in this: that "he did rent or let a part of his house or place in which he sold spirituous, vinous, or malt liquors, or medicated bitters capable of

¹Act March 29, 1887.

producing intoxication, in quantities less than one quart, to a person or persons, whose name or names are unknown to plaintiff, for the purpose of running and conducting games, etc., prohibited by the laws of the state of Texas." The bond, as declared upon, is payable to the county judge of Navarro county. The defendant below filed a general demurrer and special exceptions to the petition, on the grounds (1) that the bond declared upon was not made payable to the state of Texas, as required by the act of 1887, but to the county judge, as required by the repealed act of 1881; (2) that plaintiff failed to allege that the bond was duly filed with the county clerk, and kept by him as required by law; (3) because plaintiff fails to allege, affirmatively, that any games prohibited by law were played on any part of the premises, etc. The court sustained the demurrer, and the state appeals.

The character of a bond required by law, in so far as it affects a recovery by the state for the use of the county, is undoubtedly penal in its nature, and cannot be otherwise construed. The statute prescribes that the bond must be "payable to the state of Texas," and after providing the conditions of the bond, and that it may be sued upon at the "instance of any person or persons aggrieved," etc., provides, further, that: "In addition to civil proceedings for individual injuries brought on said bond as above indicated, if any person, firm, or association of persons, shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the state of Texas, for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the breach of any of the conditions thereof." Sayles' Civil St. art. 3226a, § 4. In that portion of the act which allows a suit on this bond by individuals, it is said to be for "liquidated damages;" in that portion which allows a suit in addition to civil proceedings by individuals, it shall be by the state, and for the recovery of "a penalty." As a penal bond, upon which a suit is brought for a penalty by the state, it should be more strictly construed than a voluntary bond, which would be good at common law. *Johnson v. Erskine*, 9 Tex. 10; *Wooters v. Smith*, 56 Tex. 198; *Sacra v. Hudson*, 59 Tex. 207; *Hanks v. Horton*, 5 Tex. 104; *Pierce v. Wallace*, 48 Tex. 399; *Warren v. State*, 21 Tex. 510; *Patton v. State*, 35 Tex. 92. In the case of *Johnson v. Erskine*, above, the court says: "We believe that, if a bond intended to be taken by the authority of a statute cannot be sustained as a statutory bond, it cannot be valid as a common-law,

voluntary bond, unless it will stand as such without the aid of the statute by which it has been repudiated. There is a class of bonds that may well be sustained, from their form and structure, without the aid of any statute,—injunction bonds, bail bonds, replevy bonds, forthcoming bonds, appeal and writ of error bonds, and all such as are made payable to the beneficiary or the interested party. They would be valid at common law, without resorting to the statute to give them effect as such." In that case there was a suit for damages against a ferryman, upon his bond, which was required to be given by him in order to procure his license. It must be borne in mind, in this case, that the act for which the penalty is sought is not an act denounced by this statute as an offense, and for which the penalty of \$500 is prescribed; but it is made one of the conditions of the bond "that he or they will not rent or let any part of the house * * * to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of the state." Hence, the penalty must be recovered under the bond or not at all. The very object of the statute in making the bond payable to the state was that suit might be brought in the name of the state, for the use of the county, for a recovery of the penalty prescribed; and, without its being so payable, the state has no interest in the suit, either as beneficiary, trustee, or otherwise. As was well said in the case just quoted: "Any latitude allowed to officers, whose duty it was to take bonds, in departing from the terms required by the statute in the structure and framing the bond, will be an encouragement to a further disregard and inattention to its requisitions, and it must be productive of an evasion of the statute altogether." To recover a penalty prescribed by statute, in whatever form, the party seeking it must bring himself strictly within the terms of the act. In the case of *Schloss v. Railway Co.*, 85 Tex. 604, 22 S. W. Rep. 1014, the supreme court says: "But without this statute he could not recover the damages or penalty specified in it. Therefore, he must bring himself strictly within the provision of the act." *Railway Co. v. Dwyer*, 84 Tex. 199, 19 S. W. Rep. 470; *Railway Co. v. Cruse*, 83 Tex. 460, 18 S. W. Rep. 755; *Murray v. Railway Co.*, 63 Tex. 407; *Scogins v. Perry*, 46 Tex. 111; *De La Garza v. Booth*, 28 Tex. 490; *Suth. St. Const.* § 398. It seems to us clear that the petition does not set out a sufficient cause of action, and it is useless to consider the other assignments of error. It does not matter which one of the demurrers the court below based its judgment upon, if the correct result was reached. *Wooters v. Smith*, 56 Tex. 211. The judgment is affirmed.

MUHLE v. NEW YORK, T. & M. RY. CO.¹

(Court of Civil Appeals of Texas. Oct. 26, 1893.)

EMINENT DOMAIN—RES JUDICATA—ABANDONMENT.

1. Certain land of plaintiff was, in 1862, condemned for depot purposes, on application of defendant railway company. In an action to recover the land, plaintiff averred that after the judgment of condemnation she and her husband occupied the land as a homestead until 1883, when defendant recovered judgment in an injunction suit against them; that, notwithstanding such injunction, plaintiff had continued to occupy the land as a homestead until 1889, during which time defendant had not attempted to use the land as a depot; that, in 1889, plaintiff was twice adjudged guilty of contempt for violating the injunction, and an order was made placing defendant in possession; and that there was no necessity for the use of land for the purpose for which it was condemned, but that it was inclosed by defendant, and used as a park for adorning other property of defendant. *Held*, that the necessity for the condemnation of the land for depot purposes was conclusively determined by the judgment of the county court condemning it.

2. Plaintiff alleged in her petition that she had never received any payment for the land. *Held*, that the judgment of the district court in the injunction suit settled the question as to the payment of the amount at which the value of the lots was assessed, for, if it had not been paid, defendant was not entitled to judgment.

3. The order authorizing defendant to take possession was conclusive of all matters relied on by plaintiff for a recovery of the land at the time such order was issued, and for the same reason plaintiff's plea of the statute of limitations was of no avail.

4. The fact that a depot was not constructed on the land showed no abandonment thereof, it appearing that the land adjoined the depot, and was improved and used for beautifying the depot grounds.

Appeal from district court, Victoria county; H. Clay Pleasants, Judge.

Trespass to try title by Henrietta Muhle against the New York, Texas & Mexican Railway Company. Judgment was entered for defendant, and plaintiff appeals. Affirmed.

Fly & Hill, for appellant. Proctor & Proctor, for appellee.

GARRETT, O. J. This is a suit of trespass to try title to lots 2 and 3, block 233, in the city of Victoria, brought by the appellant, Henrietta Muhle, against the New York, Texas & Mexican Railway Company. Plaintiff's petition was filed October 14, 1890. After allegations in the usual form of trespass to try title, the plaintiff proceeded to set out the facts in support of her claim. She alleged that on the 27th day of February, 1882, she was in possession of the lots in controversy with title thereto; that on that date the defendant corporation made application to the county court of Victoria county for the condemnation of said lots for its use for depot purposes; and that afterwards, on the — day of —, 1892, the county court, acting on said application, entered an order

condemning said lots for the use of defendant as depot grounds. Plaintiff set out the order in full, which showed that, by proper proceeding, said lots had been condemned for the use above stated, and the title vested in the defendant, which was required to pay therefor the sum of \$250. It appeared from said order that appraisers had been appointed, who assessed the market value of the lots at \$250; that, being dissatisfied with the amount, the plaintiff and her husband objected to the same, and the matter was tried in the county court with the same result. Plaintiff further averred that the said lots were the homestead of herself and her husband, and that, after the judgment of condemnation was entered, they continued to reside thereon, and use and occupy the same as their homestead, until May 30, 1883, when defendant company recovered a judgment against them in the district court of Victoria county in an injunction suit filed therein by the defendant. This judgment is set out in full in the petition, but does not show what the injunction was that was granted and was then perpetuated, and referred to as "the injunction heretofore awarded." She alleged that the injunction was granted upon the oath of defendant's vice president, Hungerford, that the defendant was then in the act of building on said lots a freight depot, and was prevented from doing so by the residence thereon of plaintiff and her husband, and that defendant had constructed a roundhouse near said lots, and the use thereof was necessary to enable said company to deliver freights. She averred that, notwithstanding said injunction was granted and perpetuated by said order of the court, she had continued to occupy the lots as the homestead of herself and husband up to the time of his death, and afterwards as her homestead; and she had not owned any other homestead since the year 1882. Plaintiff further alleged that the defendant had never erected a freight depot on said lots, for which purpose they had been condemned and the injunction had been granted, but occupied and used for a freight depot a building on a different lot altogether, about a quarter of a mile distant. That the roundhouse referred to in the application for injunction was a temporary structure, and had long since been abandoned as such, and had not been used in any manner whatever. The plaintiff continued to occupy and enjoy the lots in controversy as her homestead until May 27, 1889, during which time there was no attempt by the defendant to use said premises for a freight depot, or in such way as it was authorized to use the same under the law granting the right of condemnation for such purposes, and as the order of condemnation and said injunction authorized said lots to be used. That on said date defendant filed a motion in the district court to attach plaintiff for contempt in disobeying the injunction, setting out in said motion that it de-

¹ Rehearing denied.

sired to lay water pipes across said lots, and the purpose of defendant and the Gulf, West Texas & Pacific Railway Company to erect a union depot, and that said lots were to be included in the land used for that purpose. She then set out the judgment of the court on said motion, which showed that she appeared and answered, and, after evidence was heard, she was held to be guilty of contempt in violation of the order of the court made in the injunction suit, and was fined \$200. That, after this proceeding, plaintiff continued to occupy the lots until November 22, 1889, when she was again taken before the court by attachment for contempt. That in answer to the motion for attachment for contempt she set up her homestead rights to the property, and her continuous occupancy thereof since the order of condemnation and the granting of said injunction, unmolested by defendant or any one else; and alleged the forfeiture of any right of the defendant to take possession of said property upon the ground that the defendant had never used, nor had a necessity for using, the lots for the purposes for which they were condemned, and that the defendant was then attempting to take the possession and use of said property for purposes entirely different from those for which it was condemned; also, that the defendant had abandoned said property; and pleaded, also, the statute of limitations; that, after hearing the evidence, the court again adjudged her guilty of contempt, ordered her imprisoned for three days, authorized the defendant to enter upon said lot and remove her household goods and dwelling house therefrom, and that the sheriff, if required, should attend to prevent a breach of the peace, etc. That in obedience to said order she was arrested, and, while held in confinement by the sheriff, the defendant removed her house. Plaintiff further alleged that the only claim of right defendant had to the lots arose from the order of condemnation upon the ground of public necessity. That the alleged necessity for the use thereof was for a freight depot, which did not then exist, nor had ever existed, and the lots had never been used for the purpose for which they were condemned. That the title to said lots had never been divested out of plaintiff,—only the right to the use thereof for certain purposes; and, such use never having been made thereof, the right to take possession of the lots remained in the plaintiff. That, if defendant had ever used the property for the purposes for which it had been condemned, such use had long since been abandoned, and the right of possession had reverted to plaintiff. Other allegations follow, with reference to location and position of the passenger and freight depots of the defendant and the Gulf, West Texas & Pacific Railroad, which two companies are alleged to be under the same management, and it is charged that neither of the depots are on said lots; and that the lots have never

been used, nor is there necessity to use the same, for the purposes for which they were condemned; and that, if there was ever any such necessity, it had long since ceased, and, if ever there was any such use or occupancy, the same had long since been abandoned. That the said lots had been inclosed, and were then inclosed, and used by the defendant as a park for adorning property of the said two companies, and not for any public use or from public necessity. Plaintiff alleged that she had never received from the defendant any remuneration for her said property; that the injunction was wrongfully granted upon the false representation of the defendant company that the property was necessary for public use as a freight depot; that the orders of the court holding her in contempt for violation of said injunction were also entered by reason of such false representations; and that the order of condemnation in the county court was also upon such false and fraudulent representations. She prayed for a review of the proceedings, etc., and for judgment setting aside and annulling the order of condemnation and the orders of the district court in the injunction suit, for the removal of cloud from title, for restoration to the possession of said property, and for damage, and general and equitable relief.

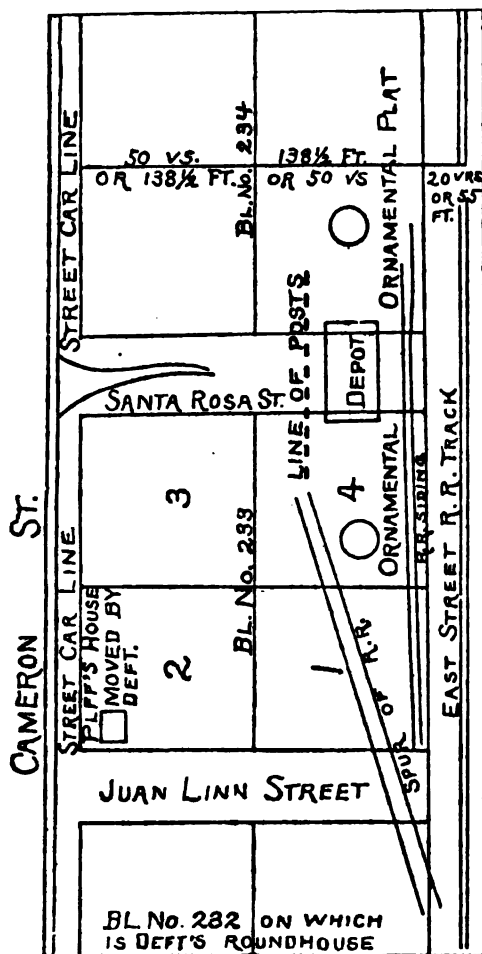
Defendant demurred to the petition that it showed no cause of action, and that (1) it appeared therefrom that the matter in controversy was *res adjudicata*. (2) The condemnation of the premises was *res adjudicata*, and it did not appear that there had been any such abandonment or change of the use of the premises as authorized the plaintiff to recover. (3) There was no allegation that the defendant did not intend to make proper use of the premises within a reasonable time. (4) and (5) present substantially the same causes as the preceding exceptions do. (6) Plaintiff's petition shows no change in the use, or any use, of said premises by defendant, which causes any additional burden upon, or in any manner affects, plaintiff's estate of fee. (7, 8) The plaintiff could not avail herself of the plea of limitations because her possession was in violation of the injunction, and was pending legal proceedings, and was not peaceable and adverse. It also pleaded not guilty, and a general denial. On hearing, the defendant's exceptions to the petition were sustained, except that portion which alleged abandonment of the use of the lots for the purpose for which they were condemned and their use by the defendant as a park. Plaintiff excepted to this action of the court, and with leave filed a trial amendment, in which the allegations with respect to the abandonment and diversion of the use of the lots were elaborated, and the case was tried upon this issue. Trial was had by a jury, and, after the evidence was heard, the court instructed the jury to return a verdict for the defendant, which was

done, and judgment entered in its favor. Appellant has assigned errors upon the action of the court in sustaining the exceptions to her petition, and to the exclusion of evidence, and the charge of the court directing a verdict in defendant's favor.

The evidence submitted to the jury showed:

(1) It is admitted that the title to the lots in controversy is in plaintiff, and that the defendant is holding the same under the judgment of the court, entered in 1882, condemning them to defendant's use as depot grounds.

(2) The following plot shows the relative position of the lots in controversy, and defendant's passenger depot and grounds, its railway tracks, etc.:



(3) Lots 2 and 3, in block 233, (the lots in controversy,) are on the west side of the block, which is 100 varas, or 138 1/2 feet, square. The spur track runs to within a very few feet of lot 2. Defendant's passenger depot and general office is across Santa Rosa street, and is partly upon lot 4, block 233, and lot 1, in block 234. The streets are 20 varas, or 55.25 feet, wide. Defendant's roundhouse is on block 232. A line of posts extends across Santa Rosa street north of the

depot, as shown on the plot, to prevent the too near approach of vehicles thereto, and a portion of lot 3—a strip about 20 feet in width along Santa Rosa street—was left uninclosed, and used with said street for the use of the public as an approach to the depot. Plaintiff's house, before its removal, was situated in the southwest corner of lot 2 in controversy.

(4) With the exception stated, lots 2 and 3 were inclosed with a plank fence which had only one opening,—a single gate,—at the east corner of said inclosure, which was kept locked. Defendant had set out some shade trees at intervals around the fence, but the inclosure was not open to the public, nor used by the public in any manner; nor have the lots been used by the defendant in any other way. Defendant inclosed them early in 1889.

(5) The court admitted evidence which showed that in a written application to the city council of Victoria for permission to put the line of posts across Santa Rosa street the defendant represented that it sought "the privilege solely for the purpose of maintaining its depot in a proper manner with regard to the convenience of its passengers from jam and confusion in the immediate vicinity of its said depot, and for the further purpose of beautifying its grounds, and securing convenient and dry access to its passenger depot by constructing proper walks, etc. Said company desires to make its depot building and grounds attractive, and an ornament to the city of Victoria, as well as to make the same safe and convenient to the traveling public," etc.; also that the privilege was granted by the city council by resolution on condition that 25 feet be left open on the side of each block adjoining Santa Rosa street, to widen it.

In connection with the foregoing evidence showing the application of defendant, etc., plaintiff offered evidence to show that defendant's vice president, Monseratte, as an inducement to the granting of the privilege sought, exhibited to the council a plot of said lots 2 and 3, inclosed and divided into walks, beds, and promenades, and promised the council that, in consideration of his receiving the privilege asked for, he would convert the lots into a beautiful park, according to the design represented; but upon objection by the defendant this evidence was excluded, and the plaintiff excepted.

We are of the opinion that there was no error in the action of the court in sustaining the defendant's exceptions to the petition. The necessity for the condemnation of the lots for the use of the defendant for depot purposes was conclusively determined by the judgment of the county court condemning the same, and the plaintiff cannot reopen the case upon the allegation contained in her petition. *Nichols v. Dibrell*, 61 Tex. 539. The judgment of the district court in the injunction suit settles the question as to the payment of the amount at which the value of

the lots was assessed, for, if it had not been paid by the company, it was not entitled to judgment. While the proceedings for attachment of Mrs. Muhle for contempt for the violation of the injunction might not ordinarily be conclusive as to the state of facts that existed when she was adjudged guilty of contempt, for the reason that she may have been adjudged guilty of a violation of the injunction by acts that occurred some time prior to the proceedings and without reference to her right to the property, still, the petition shows that she set up in her answer, as justification of all the matters now pleaded by her, and that, after hearing the evidence, the court not only adjudged her guilty of contempt, but proceeded to put the company in possession of the lot. The order authorizing the defendant to take possession is conclusive of all matters relied on by the plaintiff for a recovery of the lots in controversy up to the time it was entered. If for no other reason, plaintiff's plea of limitation would also be disposed of by said order adversely to her.

The court overruled the demurrer as to the allegations that the defendant had abandoned the lots for the use for which they had been condemned and converted the same into a park, but, after the evidence had been heard, charged the jury to return a verdict for the defendant. It may be doubted if the plaintiff would be authorized to maintain an action of trespass to try title when there is a misuse of the property. *Lyon v. McDonald*, 78 Tex. 77, 14 S. W. Rep. 261; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 8. Be this, however, as it may, we are of the opinion that the facts show that there was no abandonment of the lots as depot grounds, and the admission of the excluded evidence would not have affected the case. There can be no reasonable objection to the beautifying the grounds of a railroad company reserved for depot purposes, and not necessary to be left open, and there are many reasons why it would be desirable to have the land immediately adjoining a railroad depot unoccupied by others, which are not necessary to be stated here, for in such matters a large discretion would be allowed to the defendant's directors. As the jury, upon the facts, could have returned no other verdict, there was no error in directing a verdict for the defendant.

The contention of the defendant's counsel that, under the statute authorizing the assessment of the market value when the entire property is taken, the defendant acquired the fee to the lots, has reason to support it, but it is held otherwise in *Lyon v. McDonald*, supra. But see expression in *Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co.*, 72 Tex. 457, 10 S. W. Rep. 537. There being no error for which the judgment should be reversed, it will be affirmed.

PLEASANTS, J., did not sit in this case.

WOOD et al. v. LENOX et al.
(Court of Civil Appeals of Texas. Sept. 5, 1893.)

JUDGMENT—EQUITABLE RELIEF—CHANGE OF VENUE—RECONVENTION.

1. To warrant a court of equity in reviewing a judgment and in enjoining proceedings thereunder, the party seeking the relief must show, not only that injustice has been done him, but also that he was prevented from prosecuting his cause of action, or interposing his defense, by fraud, accident, or the act of the opposing party, wholly unmixed with any fault or negligence of his own; and the diligence required to be used to prevent injury is such as prudent and careful men would ordinarily use in their own causes of equal importance.

2. The fact that a party to a suit is in delicate health, and goes abroad to recover, does not excuse him from making some provision by which his interest will be protected, and is no ground for a review of a judgment obtained against him.

3. The fact that defendant's counsel informed plaintiff that the records of the case had been destroyed by fire does not excuse the failure of plaintiff or his counsel to pay any attention to the action, where the papers are subsequently produced in court, and given to plaintiff's counsel several months before the trial.

4. The destruction of the records in a case will not excuse plaintiff, who has sequestered property of his adversary in an amount largely exceeding his claim, from paying any attention to the case; and a judgment for defendant on his plea in reconvention for damages for wrongful sequestration will not be disturbed on the ground that plaintiff was abroad for his health when it was rendered, and that he thought nothing would ever be done in the case.

5. Change of venue may be taken directly from the county court of one county to the district court of another, having jurisdiction of the subject-matter, where the county court of such other county has been abolished.

6. Where a change of venue has been taken from the county court of one county to the district court of another, the jurisdiction of the district court is the same as though the action had been originally brought in that court, and it may render judgment in defendant's favor on his plea in reconvention in an amount exceeding the jurisdiction of the county court from which the case was removed.

7. No notice need be given to plaintiff of a plea in reconvention filed by defendant.

Error from district court, Cass county; John L. Sheppard, Judge.

Action by T. H. Lenox and others against M. J. Wood and others to review a judgment obtained by defendants against plaintiffs, and to enjoin proceedings thereon. There was a judgment in plaintiffs' favor, and defendants bring error. Reversed.

Horace Vaughan, for plaintiffs in error.
Todd & Hudgins, for defendants in error.

RAINEY, J. In September, 1888, T. H. Lenox, one of the defendants in error, brought suit in the county court of Bowie county against M. J. and S. C. Wood, plaintiffs in error, to recover of them \$423.52, and to foreclose a mortgage upon certain property therein described. A writ of sequestration was issued and levied upon same. In January, 1889, the courthouse of Bowie county was

destroyed by fire, and afterwards the attorney for the Woods informed Lenox that the papers in the case had been destroyed by said fire. At the April term of said county court the papers were produced by the Woods' attorney, and the cause continued on account of the sickness of said attorney. The papers were at that time delivered to Lenox's attorneys, and kept by them until the July term, and were brought into court at that time by order of the court. At said term a change of venue was granted at the instance of the Woods, and the cause was transferred to the district court of Cass county, the county court of said county having been abolished. The attorneys of Lenox had notice of the motion to change venue. After the case reached the district court of Cass county, the Woods, by leave of the court, amended their answer, and reconvened for damages for the wrongful seizure of their property,—the amount claimed being \$2,355. The Woods demanded a jury, paid the fee, and had the case put on the jury docket. By agreement of counsel the case was set for trial September 11, 1889. On that day the case was regularly reached on call of the docket. Lenox and his attorneys failed to appear. The case was withdrawn from the jury, and a judgment was rendered against Lenox and his sureties on sequestration bond for \$1,055, the value of the property seized. Lenox, as he claims, on account of delicate health, and under the advice of his physician, in May of that year left for Europe, and remained away until after said judgment was rendered. On October 9, 1889, Lenox and his bondsmen instituted this suit to set aside said judgment and enjoin its enforcement, and also to recover as prayed for in the original action. A trial was had without a jury, resulting in a judgment for defendants in error as prayed for, from which this writ of error is prosecuted.

That an action may be instituted to review a judgment rendered at a former term of court, and to enjoin proceedings thereunder, has been often adjudicated in this state; but, in order to invoke the equitable powers of the court to grant relief in such cases, it is not enough for the party seeking relief to show that irregularities were committed by the court in the trial of the cause, and that he has a meritorious cause of action or defense, but he must also show that something more than injustice has been done him. He must show that he was prevented from prosecuting his cause of action, or interposing his defense, by "fraud, accident, or the acts of the opposing party, wholly unmixed with any fault or negligence of his own." In *Johnson v. Templeton*, 60 Tex. 238, the court, in passing upon a similar case, says: "Such bills seeking relief from final judgments, solemnly rendered in the due and ordinary course of the administration of justice by courts of competent jurisdiction, are always watched by courts of equity with extreme

jealousy, and the grounds upon which interference will be allowed are confessedly narrow and restricted. It will not be sufficient to show that injustice has been done by the judgment sought to be enjoined. It must further distinctly and clearly appear that this result was not caused by any inattention or negligence on the part of the person aggrieved; and he must, among other matters, show a clear case of diligence and of merit to obtain the interference of a court of equity in his behalf at such a stage of the case." In *Nevins v. McKee*, 61 Tex. 413, Justice Willie, in discussing this same question, says: "A court of chancery has power to grant such relief, but it will not do so except upon facts which show the clearest and strongest reasons for its interposition;" citing *Johnson v. Templeton*, *supra*, from which he quotes approvingly. This doctrine is fully supported by *Roller v. Wooldridge*, 46 Tex. 485; *Taylor v. Fore*, 42 Tex. 256; *Crawford v. Wingfield*, 25 Tex. 416; *Musgrove v. Chambers*, 12 Tex. 32; *Weaver v. Vandervanter*, 84 Tex. 691, 19 S. W. Rep. 889; *Harn v. Phelps*, 65 Tex. 597; *Eddleman v. McGlathery*, 74 Tex. 281, 11 S. W. Rep. 1100. The diligence required to be used to prevent the injury is such as prudent and careful men would ordinarily use in their own cases of equal importance. When this standard has not been reached, equity will give no relief. *Taylor v. Fore*, *supra*. Has Lenox brought himself within the rules above laid down?

Two propositions raised by him go to the jurisdiction of the district court to render the judgment in the original case of *Lenox v. Woods*. The first is: "The statutes of the state regulating change of venue in civil cases do not contemplate or warrant the removal of a cause from the county court of one county directly to the district court of another county." The statutes contemplate the removal of causes from one county to another, under circumstances prescribed, and that the court having jurisdiction of the subject-matter in the county to which said cause was removed will take jurisdiction of the case. The county court of Cass county having been abolished when the case reached that county, the district court having jurisdiction of such cases, it properly entertained jurisdiction of that case; and such is the evident contemplation of the law.

The second proposition is: "The venue having been changed to the district court of Cass county, that court was without authority to permit defendant to set up a new cause of action in reconvention, without notice to the plaintiff, and render judgment thereon for an amount in excess of the jurisdiction of the county court from which the case was removed." We know of no law, nor have appellees cited us to any, that requires notice to be given to plaintiff of a plea in reconvention filed by the defendant. When the cause reached Cass county, the

district court's jurisdiction attached to it, and its jurisdiction of the matters therein involved was the same as though the action had been originally brought in that court. *Smith v. Hardin*, 68 Tex. 120, 3 S. W. Rep. 453; *Cleveland v. Tufts*, 69 Tex. 580, 7 S. W. Rep. 72.

The other errors complained of in the proceeding of the original suit at most are mere irregularities, which we do not deem it necessary to notice, unless we should conclude that the judgment was rendered against Lenox in that suit without fault or negligence on his part.

We will now proceed to determine whether such judgment was procured through fraud, accident, or mistake, unmixed with negligence on Lenox's part. We have carefully examined the record, and have been unable to detect any fraud in the proceedings that led up to the judgment. Counsel of defendants in error in their brief fail to point to any fact or circumstance showing that any fraud had been perpetrated in the procurement of said judgment. Then we take it that fraud is eliminated from the transaction, and on that ground Lenox is not entitled to relief. No accident is claimed, unless the delicate health of Lenox can be so termed. He claims that he was in such a state of health that he was advised by his physician to take a trip to Europe, which he proceeded to do, being gone about five months, leaving his case to the tender care of his adversary. The evidence of Lenox shows that he had been in delicate health for some time, but sufficiently able to look after this case. Being able so to do, he cannot excuse himself for not making some provision by which his interest could have been protected. No witnesses were subpoenaed, no depositions were taken, not even his own. As far as the record shows, no effort was made to get an agreement from opposing counsel to postpone the cause or make any disposition of it until Lenox could return. In fact the whole case seems to have been totally ignored by Lenox. Lenox attempts to excuse himself from exercising diligence on the plea that Woods' counsel informed him some time after the burning of the courthouse of Bowie county, in January, that the papers in the case had been destroyed in the fire, and that he thought nothing would ever be done in the premises. It seems that this information was incorrect, and the papers were produced in court at the April term thereof, and given to Lenox's attorney. This was several weeks before Lenox left for Europe. The counsel should have looked after the matter, and, if he failed, then he is to blame; and Lenox, as far as Woods is concerned, must suffer the consequences. *Eddleman v. McGlathery*, 74 Tex. 281, 11 S. W. Rep. 1100. The evidence shows that the statement of Woods' counsel about the records being burned was a mistake. But suppose it had been true, would

it have excused Lenox from prosecuting his suit? Certainly not. He had invoked the aid of the law to assist him in the collection of a debt. At his instance it had reached forth its strong arm, and laid hold of property belonging to Woods in value exceeding double the amount of his debt, for the purpose of securing his claim. He had resorted to a harsh remedy. True, it is sanctioned by the law; but, when resorted to, it is done at the peril of the actor, and if he is not diligent in its prosecution he must suffer the consequences. If the records had been destroyed, the law provides an ample remedy by substitution, by which he could, without much delay, have pursued the collection of his claim without unnecessary injury to Woods. If Lenox did not see proper to look into the matter, or did not care to substitute the lost record, he could not excuse himself for that reason, for Woods had the right to substitute the records; and it is unreasonable to suppose that they would lie still and await the pleasure of Lenox to prosecute the suit when there was property belonging to them, tied up by the suit, in value more than double Lenox's debt. Even if they knew that Lenox's claim was just, it would have been to their interest to have had the matter settled as soon as possible, that they might get the use of the surplus fund. From an examination of the facts, it seems to us that the plea of Lenox is wholly without merit to entitle him to recover. There is neither fraud, accident, nor mistake that shows any equitable grounds which entitle him to relief at the hand of the court. His injury, if any, was caused solely by his own negligence. This being the case, he must suffer the consequences. The judgment of the court below is here reversed, and here rendered for plaintiffs in error.

McSPADDEN et al. v. FARMER et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

COLLATERAL ATTACK—DECREE OF PROBATE COURT.

The decree of a probate court, having jurisdiction of the subject-matter, admitting a will to probate, cannot be collaterally attacked.

Appeal from district court, Navarro county.

Action by Medora McSpadden and others, heirs of Alexander Younger, deceased, against A. F. Farmer and others, for the recovery of land purchased by defendant at a sale under execution issued on a judgment against the executors of the deceased. From a judgment in defendants' favor, plaintiffs appeal. Affirmed.

Croft & Croft, for appellants. Frost & Etheridge, for appellees.

Conclusions of Fact.

LIGHTFOOT, C. J. The 640 acres of land involved in this suit were the property of A.

Younger in his lifetime. He died in 1866, leaving his last will and testament, which was probated in the same year by the county court of Navarro county. By the terms of the will, the land in controversy was not disposed of, and R. H. Younger, R. A. Younger, and A. Barry were appointed as independent executors. R. A. Younger died in 1868. On November 2, 1878, J. W. Younger and John A. Younger obtained judgment in the district court of Navarro county for about \$1,285 against R. H. Younger and A. Barry, executors, and the heirs of the estate of A. Younger, deceased, (except Mrs. M. E. Barry,) which judgment was afterwards purchased by Mrs. M. E. Barry for her separate estate, and paid for out of such estate. An execution was issued out of said court upon the judgment, and levied upon said land, which was sold under execution, and bought in by B. T. Barry, the son of M. E. Barry, and afterwards deeded by him to her; and appellees claim under this sale. Plaintiffs claim as heirs of A. Younger, deceased. The case was tried below, and there was a verdict and judgment for defendants, from which plaintiffs have appealed.

Conclusions of Law.

The county court of Navarro county had jurisdiction in the probate of the will of A. Younger, deceased, and its judgment cannot be attacked collaterally in this suit. The title is clearly in appellees, and the appellants have shown no good ground on which it can be overthrown. The facts proved below, and relied on by the appellants as constituting a fraud sufficient to overthrow the judgment and execution sale, are not regarded by the court as badges of fraud, so as to authorize the submission to the jury of that issue. We find no material error in the judgment, and it is affirmed.

RICHARDSON et al. v. JANKOFSKY.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

DAMAGES—WRONGFUL SEIZURE OF PROPERTY UNDER EXECUTION—LIABILITY OF JUDGMENT CREDITOR—INSTRUCTIONS.

1. For seizing plaintiff's property under execution against a third person, the measure of damages is the market value of the property at the time and place of the levy, with 8 per cent. interest thereon.

2. A judgment creditor is bound by the acts of an officer in levying execution under the instructions of the attorneys who obtained the judgment, and who had charge of its collection.

3. An omission to charge on a given point is not ground for reversal, where no instruction was requested.

Appeal from district court, Camp county; S. P. Pounders, Special Judge.

Action by L. Jankofsky against J. P. Richardson and L. O. Dupree, sheriff of Camp county, and his sureties, and J. W. Hooper and John A. Thompson, for \$3,000 actual

and \$5,000 exemplary damages. From a judgment in plaintiff's favor, defendant Richardson appeals. Affirmed.

The complaint alleged that Richardson, acting through his attorneys, Hooper & Thompson, caused Sheriff Dupree to seize and convert a stock of merchandise, the property of L. Jankofsky, of the alleged value of \$2,989.52, under an execution against one J. Slotsky. Defendant Richardson answered that the property levied on was Slotsky's, who had exclusive possession of same, and that Jankofsky conspired with Slotsky to defraud Slotsky's creditors, and that he (Richardson) did not advise, authorize, or approve the levy, and that he never heard of same until cited in this case. Dupree and sureties demurred to plaintiff's claim for exemplary damages, which was overruled, and pleaded that the execution was placed in defendant Dupree's hands by Hooper & Thompson, attorneys of Richardson, and that the levy was made at their direction, and prayed for judgment over against Richardson. Suit was dismissed as to Hooper & Thompson, and case was tried before a special judge by a jury, and resulted in a verdict in favor of Jankofsky, against Richardson and Dupree and their sureties, for \$3,304.70, and in favor of Dupree and sureties for like amount. Richardson filed motion for new trial, gave notice of appeal, filed cost bond on appeal, assigned errors, and brings the case to the supreme court for revision.

Geo. H. Plowman, for appellant. W. P. McLean and M. L. Morris, for appellee.

LIGHTFOOT, C. J. In this case, the first assigned error complains that the charge of the court failed to charge the separate liability of Richardson. The testimony shows that the levy was made by the sheriff under the direction of Richardson's attorneys, and we think the charge of the court was correct. If any additional charges were desired, they should have been asked. The second assignment is, also, that the court failed to charge the jury upon a point desired by appellant, and which he failed to ask the court to charge upon. The court correctly charged the jury that the measure of damages was the cash market value of the goods at the time and place of the levy, with 8 per cent. interest thereon. Blum v. Thomas, 60 Tex. 158.

Under the fourth assignment of appellant, if the officer made the levy under the instructions of Richardson's attorneys, who obtained the judgment, and had charge of its collection, Richardson is as fully bound by the acts of the officer as if he had given the directions himself. We think this question was fairly submitted to the jury, and the recovery was limited by the court to the actual damages,—the cash market value of the goods, and interest at 8 per cent. per annum. There are no exceptions in the rec-

ord, and no charges requested by appellant. The verdict is supported by the evidence, and is affirmed.

BOWDEN et al. v. ROBINSON et al., (NUMMY, Intervener.)

(Court of Civil Appeals of Texas. Nov. 2, 1893.)

GARNISHMENT—RELEASE OF JUDGMENT DEBTOR—CONTRACT—VALIDITY—EVIDENCE.

1. In garnishment proceedings on a judgment against N. and others, in which money due them was attached, he intervened, and alleged that the judgment creditors had agreed to release him on payment of \$25 as his pro rata share of such judgment, and that he paid them such sum. *Held*, that it was error to admit evidence of an agreement to release each one of the judgment creditors on payment by him and by one S. (who was sued, but discharged on his plea of infancy) of \$25 each.

2. Such alleged agreement is not supported by evidence that such judgment creditors agreed with all the judgment defendants that they would release them from payment of the judgment if each of them would pay \$25, and not that they would release each one on payment by him of \$25.

3. Recitals in receipts given to some of such judgment debtors, to the effect that the judgment creditors agreed to give to the party making the payment a receipt in full for his pro rata on payment of \$25, are not inconsistent with an arrangement between the parties for each to pay his pro rata share, and do not show any agreement by such creditors to release each on payment by him of a part, only, of the judgment.

4. A payment of a part of a debt is not a discharge of the whole though it is accepted as such by the creditor.

Appeal from Anderson county court; A. W. Gregg, Special Judge.

Garnishment proceedings on a judgment in favor of Bowden & Erwin against James Nummy and others, in which Robinson Bros. were attached as garnishees, and in which Nummy intervened, and claimed a release from liability on the judgment. From a judgment in favor of the intervener, and discharging the garnishees, the judgment plaintiffs appeal. Reversed.

Thos. B. Greenwood, for appellants. Holli-day & O'Quinn, for intervener and appellee, James Nummy.

GARRETT, C. J. Bowden & Erwin, creditors of James Nummy, and five others, instituted this garnishment proceeding against appellees Robinson Bros., setting out in their affidavit for garnishment that they had recovered a judgment in the justice's court, precinct No. 1, Anderson county, against the said James Nummy and Claud Busby, John Rogerson, Will Bronson, William Ferrell, and W. A. Roscoe, on the 26th day of August, 1890, for the sum of \$175, with 8 per cent. interest and \$11.90 costs of suit. The garnishees answered that as bankers they had in their possession, on deposit to the credit of James Nummy, the sum of \$175. Nummy intervened, and al-

leged that the judgment had been discharged as to himself by a special agreement with the plaintiffs that, if he would pay to them \$25, they would receive it as his pro rata share of said judgment, and release him from all further liability thereon; that he paid plaintiffs said sum of money, and took their receipt therefor, showing that he had paid his pro rata on mule, the said judgment being for the value of a mule, for the loss of which plaintiffs had sued the defendants in said judgment, and that it was then and there agreed that, in consideration of said sum paid, the said Nummy was released from further liability on said judgment. The case was tried in the county court on appeal from the justice court without a jury, and resulted in a judgment in favor of the intervener, and also discharging the garnishees.

Under the pleading of the intervener, evidence was improperly admitted to show an agreement to release each one of the defendants on the payment by him and by one Stoddard (who had been sued with them, and discharged on his plea of infancy) of the sum of \$25 each; and the conclusion of the court that there was such an agreement, even if the evidence had been admissible, is not supported by the evidence. Busby's evidence was that Bowden & Erwin had agreed with all the defendants against whom they had recovered judgment that they would release them from payment of same if each of them would pay the sum of \$25, and not that they would release each one upon the payment by him of \$25. The evidence relied on to show an agreement in writing to release is the recital in receipts given to some of the defendants who had made payments, to the effect that plaintiffs agreed to give the party making the payment a receipt in full for his pro rata on the payment of \$25, and in the case of Rogerson a receipt for \$22, reciting that said sum was his pro rata liability on said judgment and cost. These recitals are not inconsistent with an arrangement of the parties between themselves for each to pay his pro rata share of the judgment, including, also, Stoddard, who was not bound by the judgment. The evidence does not show any agreement on the part of plaintiffs to release each of the parties upon the payment by him of a part of the judgment. Although the judge found the fact, as before stated, he did not rest the judgment thereon, because said release had not been pleaded; yet he found that under the facts of the case the defendant was discharged on the payment made by him. In this we think there was error. Nummy was not released by his payment to plaintiffs of a part of the judgment. It was not shown, in the first place, that there was any intention to release him, nor, in the second place, that there was any consideration for such release. A payment of part of a debt is not a discharge of the whole, although it may be accepted as such. The judgment of the court below will be reversed.

and, as the facts necessary to the rendition of a judgment here in favor of appellants appear in the record, such judgment will be rendered as ought to have been rendered in the court below.

The statement of facts shows that plaintiffs recovered judgment, August 28, 1890, for the sum of \$175, to bear interest from said date at the rate of 8 per cent. per annum, and costs of suit, \$11.90; and that said judgment should be credited as follows:

January 15, 1891. Busby.....	\$20 00
January 15, 1891. Rogerson.....	22 00
January 15, 1891. Stoddard.....	10 00
April 15, 1891. Busby.....	5 00
April 17, 1891. Roscoe.....	5 00
June 10, 1891. Roscoe.....	5 00
June 15, 1891. Busby.....	5 00
June 16, 1891. Roscoe.....	5 00
March 15, 1892. Numpy.....	25 00

Judgment will be rendered in favor of appellants against the appellees Robinson Bros. for the balance due on said judgment, and the costs in justice court—\$11.90—added thereto, besides all costs of this proceeding, the whole not to exceed the said sum of \$175 in their hands, with an allowance of \$5 to said garnishees as compensation for their answer.

SCHURENBERG et al. v. WILHELM.
(Court of Civil Appeals of Texas. Nov. 2, 1893.)

Limitation of Actions—Written Contract.

An action for the breach of a written contract granting a license to manufacture and sell a patented article may be brought at any time within four years after the breach.

Appeal from district court, Washington county; B. Bryan, Judge.

Action by F. W. Schurenberg and others against Albert Wilhelm. From a judgment for defendant, plaintiffs appeal. Reversed.

Searcy & Garrett, for appellants.

WILLIAMS, J. This suit was for damages for breach of two contracts, between appellants and appellee. The petition alleged that both the contracts were in writing; that, by one, appellee, the inventor and patentee of a certain plow, sold to plaintiff the exclusive right to sell such plow, except in Washington county; and that, by the other, appellee agreed that plaintiff should have the right to manufacture and sell the plow in Washington county. The terms of the contract were alleged in detail, and a breach of them, resulting in damage to the plaintiffs, was sufficiently averred. The breach was alleged to have taken place on the — day of —, 1890, and the suit was brought October 7, 1891. An exception to the petition on the ground that the action was barred by limitation was sustained, the court below being of the opinion that the period of two years applied. This ruling presents the on-

ly question raised on this appeal. Under the decision in the case of *Robinson v. Varnell*, 16 Tex. 382, we held that the limitation prescribed for this kind of action, as well as others for breach of a contract in writing, is four years, and that the court erred in holding that the action was barred. Reversed and remanded.

HOUSTON CITY ST. RY. CO. v. AUTREY.
(Court of Civil Appeals of Texas. Nov. 2, 1893.)

NEGLIGENCE—EVIDENCE—DANGEROUS PREMISES.

Evidence that plaintiff's horse came to its death from a wound received while being driven over defendant's street railway, and which was caused by a nail used in constructing or repairing the track, does not justify a verdict for plaintiff for the value of the horse, in the absence of anything to show that the company had knowledge of the dangerous condition of the track in that regard.

Appeal from Harris county court; W. C. Ackers, Judge.

Action by A. M. Autrey against the Houston City Street Railway Company for the death of a horse. From a judgment for plaintiff, defendant appeals. Reversed.

Jones & Garnett, for appellant. W. P. Hamblen, for appellee.

PLEASANTS, J. The appellant assigns several errors, but we refrain from noticing any of them, save the three following: "(8) The verdict of the jury is contrary to, and is not supported by, the evidence, and is against the great preponderance of the evidence, in this: That there was no evidence showing that the nail which penetrated the foot of plaintiff's horse was placed on the track or street by the defendant, or that the said nail was in any plank on defendant's track, or in any plank belonging to defendant, or in any way connected with defendant's road or track. (9) The verdict of the jury is unauthorized by the evidence, and wholly without evidence to support it, because, even admitting that the horse of plaintiff had a nail penetrate his foot on defendant's track, there is no evidence to warrant the jury in finding that such nail was placed there by the defendant, or that such nail was ever used by or owned by the defendant, in or about its track, in any manner whatever. (10) The verdict of the jury is contrary to law, and against the law." The foregoing three assignments raise the same question, and are adopted as a proposition. These assignments question the sufficiency of the evidence to sustain the verdict of the jury. The evidence, if considered from the aspect most favorable to the appellee, established this, and nothing more: That the plaintiff's horse came to its death, without negligence on part of plaintiff, from a wound received while being driven over defendant's railway, and which was inflicted by puncture from a nail

which had been used by defendant in constructing or repairing its railway track. If the evidence warrants the above conclusions of fact, about which we express no opinion, does it follow that the defendant company was guilty of negligence? This question we are constrained to answer in the negative. If the defendant's track was in such condition as rendered it dangerous to animals passing through the streets, the evidence does not show that defendant knew of such condition, nor does the evidence show facts which would charge defendant with notice. For the error of refusing to set aside the verdict, the judgment of the court below is reversed, and the cause remanded.

CASEY et al. v. KINSEY et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

DISQUALIFICATION OF JUDGE—INTEREST IN ACTION.

Where, in trespass to try title, the judge in whose court the cause is pending has possession of the land in controversy, claiming title thereto, he is "interested," within Const. art. 5, § 11, providing that "no judge shall sit in any case wherein he may be interested," and is disqualified to try the cause, and the failure of plaintiff, through ignorance, to make him a party, does not change the rule.

Appeal from district court, Willbarger county; G. A. Brown, Judge.

Trespass to try title by Martin Casey and another against F. M. Kinsey and another. From a judgment for defendants, plaintiffs appeal. Reversed.

W. W. Flood and Barrett & Eustis, for appellants. Stephens & Huff, for appellees.

STEPHENS, J. At the threshold of this case is the question of the disqualification of the judge before whom it was tried. In the motion for a new trial, which was verified by the affidavit of appellants' attorney, it was alleged that the judge trying the case was in possession of and claiming title to the land in controversy under a title adverse to that of appellants, and that appellants' counsel was not aware of this till after the trial had begun, and the case was nearly disposed of, when he was made acquainted with the facts by the judge. In overruling this motion the court found and adjudged the facts it contained to be true, but held that they did not disqualify him as judge in the case. The question for us to determine, then, is, was he "interested" within the meaning of that word as used in our constitution? Const. art. 5, § 11.¹ That the person in possession of land had an interest in the result of an ejectment suit, though not a party thereto, was recognized by the English

courts in the early history of that action. In order to prevent the abuses resulting from "clandestine ejectments," the rule was established that no plaintiff should proceed in ejectment to recover the land against a casual ejector, unless notice of the suit was first given to the tenant in possession. The principle of this ancient and wholesome rule is still recognized in our action of trespass to try title, substituted for that of ejectment. Article 4790, Rev. St., provides: "The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied." It may be urged that the occupant's title cannot be affected by a suit to which he is not a party; that the judgment therein would not conclude his rights when set up in another suit. Neither was the judgment in the action of ejectment conclusive upon the title or right of property even between the parties; but, as each ouster was a separate trespass, the action could be repeated, and the same question retried indefinitely. The possession only was recovered. And yet two centuries ago Holt, C. J., deemed it a precedent worthy of perpetuation in law literature that "the mayor of Hereford was laid by the heels for sitting in judgment in a case where he himself was lessor of the plaintiff in ejectment, though he, by the charter, was sole judge of the court." It will be remembered that the lessor of the plaintiff was not a party to the suit, though his title was the foundation of the action, which was brought in the name of the lessee to recover the possession. In *Castleberry's Case* the supreme court of Alabama, construing a statute containing the word "interested," used this language: "To constitute such interest as will disqualify the judge, within the meaning of this section, from proceeding, it is not necessary that he should be a party. It is sufficient if he is in any wise interested in the subject-matter." 23 Ala. 91. It seems to us that this language is broad enough to cover the present case, and that the true principle to be applied in the construction of such enactments is correctly stated by the supreme court of California as follows: "This provision should not receive a technical or strict construction, but rather one that is broad and liberal;" and, quoting from the supreme court of Michigan: "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." *Mining Co. v. Keyser*, 58 Cal. 315, 322. It seems to us that a judge ought not to try the title to land which he himself claims to own and is in possession of, hold

¹ Const. art. 5, § 11, provides that no judge shall sit in any case wherein he may be interested.

ing adversely to one of the litigants; and that the failure of the plaintiff (through ignorance) to make him a party defendant, as he should have done, ought not to change the rule. In this particular case, however, no harm was done appellant, as the court decided the case correctly on the merits, as heretofore held by us in a similar case, (*Marshall v. Creager*, [Tex. Civ. App.] 21 S. W. Rep. 545;) but, solely for the reason that he was disqualified, the judgment will be reversed, and the cause remanded.

**ESPUELA LAND & CATTLE CO., Limited,
v. BINDLE et al.**

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

**CORPORATIONS—INSOLVENCY—APPOINTMENT OF
RECEIVERS.**

1. Rev. St. art. 1461, authorizing a judge of any court of competent jurisdiction to appoint a receiver for an insolvent corporation, does not empower a stockholder or lien creditor of an insolvent corporation, which is still a going concern, to have a receiver appointed to take charge of the entire assets and convert them into money for general distribution, on the sole ground of insolvency.

2. The application of a few persons owning comparatively small interests in an insolvent but going corporation is not sufficient to induce a court of equity to appoint a receiver therefor, and to order a speedy sale of its property during a period of great financial stridency.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Application by John Bindle and others for a receiver to take charge of the property of the Espuela Land & Cattle Company, Limited, and to convert the same into money for distribution. From an interlocutory order granting the application, defendant appeals. Reversed.

Coke, Tucker & Coke, for appellant. John W. Wray, for appellees.

STEPHENS, J. This appeal is from an interlocutory order appointing a receiver to take charge of and convert into money, for distribution among the creditors and stockholders of appellant company, all its assets in the state of Texas, which included the entire assets except a little office furniture in the city of London. The complaining litigants in the court below were John Bindle, who filed the original petition in July last, as the owner of 10 shares of preference stock in said company; A. M. Britton, who intervened as the owner of certain other shares; and Walter Katte, who intervened as a lien creditor. Of these, Britton was the moving and controlling spirit, though Bindle, his German cook, to whom for a nominal consideration he had assigned the 10 shares of stock, preceded him one step in the litigation, while just behind him came his brother-in-law, Katte, of New York. At the hearing of the motion for the appointment of the

receiver it was developed that nearly 10 years ago appellant company was formed, under the Companies Acts of Great Britain, to acquire by purchase and to operate the cattle ranch in the Pan Handle of Texas, then belonging to the Espuela Land & Cattle Company of Ft. Worth, a Texas corporation, which was accordingly done. The Texas company being burdened with a debt of about \$1,000,000, through the efforts of Britton, who was largely interested therein, was enabled to transfer to the London company, free of incumbrance, its entire herd of cattle, consisting of about 35,000 head, besides horses and other personalty, and also its grazing lands, subject to the lien for purchase money thereon, consisting of about 400,000 acres. The authorized capital of the new company was 40,000 shares of preference stock, of which about 26,000 were actually issued, and 60,000 ordinary shares, of which 30,000 were actually issued; the face value of each of the shares being five pounds. There were afterwards issued, as a means of raising money for the concern, 26,000 prior-lien debentures, and nearly 100,000 income debentures. The annual interest on the latter was payable only out of the net income, and was cumulative; and the time and manner of enforcing the collection of both principal and interest were left largely to the discretion of a majority of the debentureholders. These securities, as well as preference shares, were mostly held by Englishmen, and were declared to be a lien, in the order named, on the entire assets, subject to the mortgage on the lands. Katte and wife owned three income debentures, of the face value of £1,000 each, and two prior-lien debentures of the aggregate face value of £60. It was further made to appear that the London company had substantially the same amount of assets, though of reduced value, as in the beginning, with the debt evidenced by the debentures superadded; that no dividend had ever been paid to stockholders; that the stock, whether preference or common, was of little or no value; that the debentures had several years to run; that all interest on the prior-lien debentures had been paid; that by their terms none was payable on the income debentures for want of a net income; that the foreign company had all the time been under the management of a board of directors at London; and, although in the beginning Britton was made managing director in America, that he did not long hold that position, but had for several years been unable to exert any potential influence in the management of the company. The order appointing the receiver rests on these conclusions of the trial court: "(1) I find as a matter of fact that the defendant corporation is, and was at the institution of this suit, insolvent. (2) Plaintiff John Bindle and interveners Britton and Katte are, and were at the institution

of this suit, shareholders and owners in said company. (3) That the interveners, Britton and Katte, are and were lien creditors of defendant company. [This finding as to Britton is admitted to be a mistake.] I therefore decide the law to be in favor of plaintiff and interveners, and that they are entitled to have a receiver appointed of and for the defendant, and it is accordingly ordered."

While it is not very clear to us that the fact of insolvency was established, we are of opinion that we would not be warranted in disturbing the finding on that issue. The question then arises, can a stockholder or lien creditor of an insolvent corporation, which is still a going concern, have a receiver appointed to take charge of the entire assets, and convert the same into money for general distribution, on the sole ground of insolvency? While the pleadings of appellee abound with allegations of unprofitable management on the part of the great majority of the company and the board of directors, without any hope of a change for the better, we think the case developed at the hearing is fully covered by the above question, and was so construed by the district judge, as from his conclusions seems manifest.

The answer to this question involves a construction of article 1461 of our Revised Statutes, which provides, in substance, that any judge of a court of competent jurisdiction may appoint a receiver in case where a corporation is insolvent. This question has never been directly adjudicated in this state, that we are aware of. Statutes of identical import with ours have been construed by the supreme courts of California and Indiana, but the decisions seem to be directly in conflict. *French Bank Case*, 53 Cal. 553; *First Nat. Bank v. U. S. Encaustic Tile Co.*, (Ind. Sup.) 4 N. E. Rep. 851. In the former case it is said: "There is, of course, no such thing as an action brought distinctively for the appointment of a receiver. Such an appointment, when made, is ancillary to, or in aid of, the action brought." It was there held that the statute providing for the appointment of a receiver where a corporation becomes insolvent, in the absence of more explicit legislation, did not "confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it was insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver." In the latter case the opposite conclusion seems to have been reached. We can discover no difference in the statutes, except that that of California limits the power of appointment to the court (or judge thereof) in which an action is pending, while the Indiana statute provides generally that the receiver may be appointed by the court, or the judge thereof in vacation. Ours provides for the appointment by any judge

of a court of competent jurisdiction. We deem this difference unimportant, and are of opinion that the better reason is with the California decision. Mr. Spelling, in his work on *Private Corporations*, (volume 2, § 851) cites a case from Colorado as being in line with the California case, but it is not accessible to us. We see nothing in our statute to indicate that the legislature intended thereby to so change the whole scope of receiverships as to convert a merely auxiliary proceeding into a primary object of litigation. The seventeenth section of this very act of 1887 expressly provides that a stockholder may have his action against the company, and may have a receiver appointed as in ordinary cases. Why this qualifying provision, "as in ordinary cases," if insolvency be sufficient in any case? According to our construction, unless a stockholder or creditor who seeks to place in the hands of a receiver, for sale and distribution, the assets of an insolvent corporation which is still prosecuting its charter purposes, can show that his interest as such stockholder or creditor requires the appointment to be made, the application should be denied. There is no statute in this state which empowers a stockholder or creditor to bring a suit to wind up an insolvent going corporation. No such case is provided for in chapter 5, Rev. St., on the subject of the dissolution of private corporations. It has been decided since this statute was enacted that insolvency does not work a dissolution. *Bank v. Sachtleben*, 67 Tex. 421, 3 S. W. Rep. 733. To appoint a receiver to sell all the assets of such corporation and distribute the proceeds of sale among creditors and stockholders is to do indirectly what the law has not authorized to be done directly. It can only be lawfully done where the interests of creditors or shareholders of right require it to be done, according to well-established principles. So far as appellees sought relief as shareholders, they made the usual case only of a very small minority endeavoring through the court to control the action of the majority pertaining to matters within the scope of the charter powers. That the affairs of a private corporation are liable to be managed by the majority against the wishes and even the interests of the minority is one of the ordinary risks of such ventures, which must be held to have been within the contemplation of each incorporator or his assigns. In the absence of legislative enactment to that effect, the courts should not undertake to administer corporate estates, but leave them in the hands of a majority of the owners, so long as they proceed lawfully under the charter, though foreigners they be, who have discarded their sole American director.

As creditor, appellee Katte presented a very little, if any, stronger case. Of the prior lien debentures, which were a first lien on the personal estate, he owned \$60 only. Debentures of this class were not due, and were

amply secured, with all interest paid up. If they were threatened with loss or impairment, it was certainly very remote. The income debentures did not place the holder in a materially better position than did preferential stock, to which they bore a striking similarity. The interest was payable only out of net profits, and the collection of the principal, as well as interest, was largely, if not entirely, dependent on the will of the majority of the holders, and hence was not payable when the proceeding below was had. Provision was made for debenture-holders to assemble and act very like shareholders. The number of these debentures held by Katté was small, compared with the whole number outstanding. By their terms, as already seen, a condition was imposed upon the holder of being governed by the will of a majority, which made his attitude similar to that of a minority stockholder seeking redress against the lawful action of the majority. He accepted them cum onere, and cannot invoke the aid of the courts to give him a better class of paper than he bargained for.

Viewing the whole case as an equitable proceeding for the appointment of a receiver, it seems to us that it was not sufficiently strong to induce a court of equity to subject to a speedy sale, as prayed, this vast property, in a time of great financial stress, at the instance of a few persons resident here, and owning comparatively small interests therein, to the great detriment, probably, of the bulk of the owners and security-holders across the seas. Unless the statute providing for the appointment of a receiver enabled appellees to sue where they would otherwise have had no cause of action, the appointment should have been denied. As already seen, we cannot give the statute such a construction. Until a plaintiff has a cause of action of some sort, until he can show himself entitled to recover something, he is not in an attitude to appropriate any of the merely ancillary remedies of the courts. He must show a violated or imperiled right, either legal or equitable, before he is entitled to a remedy. It follows, therefore, that the order appointing a receiver in this case must be reversed, and the receivership vacated.

WHEELER v. GRAY et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

INJUNCTION AGAINST JUDGMENT—DISSOLUTION.

Where, in an action by a judgment debtor against his creditor and the officers of the county court to restrain the collection of the judgment, plaintiff's ground for injunction rests primarily on an indebtedness exceeding the

judgment, alleged to be due him from the judgment creditor, and the answer specifically denies the existence of such indebtedness, and intelligently avers facts excluding the possibility thereof, it is not error to dissolve the injunction and dismiss the action.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by W. A. Wheeler against T. R. Gray and the officers of the county court of Wilbarger county to enjoin the collection of a judgment. From a judgment dissolving the injunction and dismissing the suit, plaintiff appeals. Affirmed.

G. W. Walters, for appellant.

TARLTON, O. J. This is a proceeding in injunction, in which W. A. Wheeler, appellant, sought to restrain T. R. Gray and the officers of the county court of Wilbarger county from the collection of a judgment for \$88.06. This judgment Gray had recovered from Wheeler in a justice's court, and again, on appeal, in the county court. This appeal is from the judgment of the district court dissolving the injunction and dismissing the suit. Appellant in his brief refers to three assignments of error. As he sets out, however, but one of these, (the first,) we ignore the remaining two. *Chappel v. Railway Co.*, 75 Tex. 82, 12 S. W. Rep. 977. The assignment set out is to the effect that "the court erred in dissolving the injunction on the motion of the defendant, because the answer of defendant was insufficient to repel and overcome the allegations in the petition." We overrule this assignment. The plaintiff's ground for injunction rests primarily upon an indebtedness of \$904, alleged to be due him by the defendant. The answer specifically denied the existence of such an indebtedness, and intelligently averred facts excluding the possibility thereof. Indeed, the petition of plaintiff was, we think, subject to the general demurrer with which the defendant assailed it. The alleged indebtedness grew out of a partnership for the buying and selling of meat, existing from December, 1890, to February 17, 1891, between the plaintiff and defendant. The inference from the averments of the petition is quite strong that all the partnership transactions, including those giving rise to the indebtedness claimed, were fully settled between the parties about February 17, 1891; that Gray, in settlement of these transactions, executed his note to Wheeler for \$51.15; and that this note was itself litigated as an offset by Wheeler in the suit which resulted in the judgment sought to be enjoined. The petition for injunction does not seem to meet the requirements of article 2876, Rev. St., that it shall contain "a plain and intelligible statement of the grounds for such relief." The judgment is affirmed.

LAZARUS v. BARRETT et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

JUDGMENT BY DEFAULT — CITATION — DECREE OF PARTITION—WHEN SUPPORTED BY PLEADING.

1. Sayles' Civil St. art. 1220, requires, in order to effect service of citation, that, to a defendant residing without the county in which the suit is pending, the officer shall deliver the "certified" copy of the petition accompanying the citation. *Held*, that where the officer serving citation on a defendant who was temporarily residing without the county in which action was brought delivered to such defendant only an uncertified copy of the petition, and no copy of a supplemental petition which had been filed, it was error to render judgment against him by default.

2. A decree awarding a partition of lot 15, in block 14, in a certain town, is not supported by a petition which seeks partition of lot 5, of block 14, in such town.

Error from district court, Clay county; George E. Miller, Judge.

Action of partition by L. O. Barrett and others against Sam Lazarus and others. There was a decree for plaintiffs, and defendant Lazarus brings error. Reversed.

R. D. Welborn and Head & Dillard, for plaintiff in error.

TARLTON, O. J. This is a suit for partition, in which judgment by default was rendered against Sam Lazarus, plaintiff in error, as one of the defendants in the action. The original petition, filed August 27, 1889, alleged the resident of the defendant Lazarus to be in Grayson county. Afterwards, on March 1, 1890, no citation having issued on the original petition, plaintiffs filed a paper styled "First Supplemental Petition," averring "that the defendant Sam Lazarus, who lives in Grayson county, is temporarily in Tarrant county, Texas," and praying for citation to the latter county. Thereupon, on March 8, 1890, citation was issued to Tarrant county, requiring the defendant to answer the petition filed August 27, 1890, but ignoring the supplemental petition, of which the defendant had no notice. The citation thus issued was accompanied with a copy (not certified, however) of the original petition. This process was served by the sheriff of Tarrant county, as indicated by the following return: "Came to hand this the 12th day of March, A. D. 1890, at — o'clock M., and executed the 12th day of March, A. D. 1890, by delivering to Sam Lazarus, the within named defendant, in person, a true copy of this writ, together with the accompanying copy of plaintiffs' petition." We do not think such service sufficient to authorize the judgment by default. Our statute, (article 1220, Sayles' Civil St.,) unlike the provision (Pasch. Dig. art. 1433) which preceded it, and for which it was substituted, requires, in order to effect service, that, to a defendant residing without the county in which the suit is pending, the officer shall deliver the

certified copy of the petition accompanying the citation. While it is not necessary that the copy of the petition shall be authenticated by the seal of the court, we yet think that it must be attested by the certificate of the officer who issues it; and this, in order that the absent defendant may know with certainty the character of the complaint against him. That which purports to be a mere copy, possibly or probably made by any person, however irresponsible, would not answer the purpose stated. Requirements with reference to the service of citations justifying default judgments are not supplied by *intendment*. *Railway v. Pope*, 1 White & W. Civil Cas. Ct. App. § 242; *Durham v. Betterton*, 79 Tex. 223, 14 S. W. Rep. 1060; *Graves v. Drane*, 66 Tex. 658, 1 S. W. Rep. 905; *Crawford v. Wilcox*, 68 Tex. 109, 3 S. W. Rep. 695.

In this case the petition seeks a partition of lot 5, in block 14, in the town of Henrietta. The decree awards a partition of lot 15, in block 14. The pleading does not support the decree, which is accordingly erroneous. *Throckmorton v. Davenport*, 55 Tex. 236; *Burnett v. Harrington*, 53 Tex. 363. We abstain from considering other questions presented, as a recurrence of them may be easily avoided on another trial. For the errors pointed out, the judgment is reversed, and the cause is remanded.

HEAD, J., disqualified, and not sitting.

WILLIS et al. v. ROBINSON et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

PARTITION—RIGHTS OF CREDITORS OF TENANT IN COMMON.

Tenants in common, in surveying and platting their land for a town, by mistake included land adjoining theirs, and omitted from the plat a portion of theirs. They afterwards partitioned the land among themselves by lots, and certain creditors of one of them (B.) purchased his lots at sheriff's sale. Some of these were on the land not owned by such tenants, and the title failed. *Held*, that such creditors were not entitled, in partition, to have set apart to them the interest of B. in that part of the land of such tenants which was omitted from the plat, to compensate them for their loss on account of such failure of title.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action of partition by P. J. Willis & Bro. and another against T. Windsor Robinson and others. From a judgment for defendants, plaintiffs Willis & Bro. appeal. Affirmed.

Frank P. McGhee, for appellants. Stephens & Huff, for appellees.

Conclusions of Fact and Law.

HEAD, J. The findings of fact filed by the court below do not connect the appellants, Willis & Bro., with the land in controversy,

in any manner whatever. From the substituted statement of facts, however, we understand that C. M. Byars at one time owned an undivided one-twelfth interest in the south half of section 18 and the north half of section 64 of the Houston & Texas Central Railroad surveys in Wilbarger county; that the several tenants owning this land undertook to lay it off into lots and blocks for the purpose of building a town thereon, but, by mistake as to the correct location of their east line, a portion of this town was surveyed too far east, upon land they did not own, and a corresponding amount of their own land, being a strip 366 varas wide, was left undivided; that after this town was so surveyed and platted the cotenants partitioned it by conveying to each one his interest in lots by numbers, as shown by this plat. After this partition, Willis & Bro. levied an execution upon the lots so conveyed to Byars in severalty, and at the sale thereunder became the purchasers thereof. A part of the lots so purchased were in that part of the town located east of the correct line of said sections, and, their title thereto having, therefore, failed, appellants ask in this suit to be recompensed for such loss by having set apart to them the interest of Byars in the 366-vara strip left undivided as aforesaid.

We believe appellants are not entitled to this relief. If it be conceded that, by their purchase at the execution sale, they acquired Byars' right to the covenants of warranty in this chain of title, (*Flaniken v. Neal*, 67 Tex. 629, 4 S. W. Rep. 212,) including his right to call upon his cotenants for compensation, or, in a proper case, for a repartition, this will not give them his interest in other land, not included in the division, (*Arnold v. Caudle*, 49 Tex. 527.) Where the title of one of the tenants fails to all or a part of the land set aside to him in partition, he has the right, in this state, to look to his cotenants to compensate him; but this does not mean compensation for the entire loss, but only their proportionate part thereof. (*Grigsby v. Peak*, 68 Tex. 235, 4 S. W. Rep. 474. Sometimes this compensation is sought and obtained by a repartition, but in such cases the tenant whose title failed does not get the full number of acres he lost, but only his proportionate share of the remainder, after deducting this loss from the whole. *Grigsby v. Peak*, supra. So, in this case, if Byars had remained the owner, when it was ascertained that he had lost a part of the land set aside to him, other rights not intervening, he might have demanded of his cotenants a repartition of that part of the town, the title to which was good, and in such partition there would have been given him his proportionate share thereof; but he would also have been required to bear his proportionate share of the loss, or he might, if he preferred, have demanded of his cotenants money compensation, to be governed, however, by the same principles as the repartition. But we know

of no principle by which he could have demanded compensation out of other lands his cotenants may have owned. The difficulties that would necessarily attend such an adjustment would be sufficient reason for its rejection. Now, it is only contended that Willis & Bro., by their purchase, acquired the interest of Byars in the specific lots described in their deed, and his right to recover upon the implied covenant of warranty by reason of the partition; and, of course, their right under this covenant could not be greater than his would have been, had he not sold. We know it may be contended that Byars still had an interest with his cotenants in the land that was not included in the first partition, and if he were the acting party this might also be included in the repartition. If the status of all the parties had remained the same, it may be that, under our liberal practice, this could have been done, but Byars did not acquire his interest in this other land by reason of the implied covenant in the first partition, but he owned it outside and independent thereof; and appellants, by their purchase at the execution sale, at most, only acquired his interest in the specific land sold, and his right of action upon that covenant, and did not acquire the title he had in other land by reason of other facts, even though there be nothing to prevent him having it partitioned in that suit, had he so desired. We conclude that the judgment of the court below should be affirmed, as against the appellants, P. J. Willis & Bro., and it is so ordered.

WILBARGER COUNTY v. ROBINSON et al.
(Court of Civil Appeals of Texas. Nov. 1, 1893.)

VENDOR AND PURCHASER—RIGHTS OF PURCHASER—FAILURE OF TITLE.

Defendants, in platting their land for a town site, by mistake left out a part, and included land belonging to others. They afterwards conveyed certain lots of the proposed town site to plaintiff by warranty deed, some of which were on the land included by mistake. *Held* that, on failure of title to such lots, plaintiff was not entitled to have other land of defendants set aside to it, but should look to the covenant of warranty for money compensation.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by the county of Wilbarger against T. W. Robinson and others to compel defendants to convey plaintiff land in place of land already conveyed by defendants, whose title had failed. There was judgment for defendants, and plaintiff appeals. Affirmed.

R. P. Elliott and H. P. Bailey, for appellant. R. T. Sitterly and Stephens & Huff, for appellees.

Conclusions of Fact and Law.

HEAD, J. T. Windsor Robinson and others, being the owners of the south half of

section 18 and the north half of section 64, of block 12, of the Houston & Texas Central Railroad Company's surveys in Wilbarger county, undertook to divide it into lots, blocks, and streets suitable for a town thereon, but made a mistake as to the location of their east line, and surveyed a portion of their town on the land of their neighbors on the east, and left an equal amount of their own undivided on the west. This was a strip 366 varas wide. After this, and before the mistake was discovered, Robinson and his associates executed to J. Doan, as county judge of Wilbarger county, their bond for title, by which they agreed to convey to him and to his successors in office, for the use of said county, 130 of the lots, being two front and two rear lots, in each of the even-numbered blocks of said town laid off as aforesaid, so soon as patent should be obtained from the state therefor. Thereafter, the patent to the land having been obtained, but the mistake in the location of the line not yet discovered, Robinson and his associates, in compliance with their said bond, executed their deed, the material part of which is as follows: "Have granted, bargained, sold, and conveyed, donated and transferred and set apart, and by these presents do bargain, sell, donate, transfer, set apart, unto J. Doan, county judge of Wilbarger county, Texas, and his successors in office, for the use and benefit of said county, all of our right, title, and interest in and to block 4, for courthouse; block 51, for a jail. Also, in and to the following described lots and parcels of land, being situated in the town of Vernon, in said county, as follows, to wit: Two front and two rear lots in every even-numbered block, as is shown by the town plat of said town now on record in the county clerk's office of said county, to which reference is hereby made for a more particular description, as follows." Then follows a description of the lots conveyed by numbers, making 130 in all, and concludes with the covenant of general warranty of title. The consideration of this title bond and deed was a proposition made to the voters of the county for the location of the county seat at the town survey as aforesaid, which had been done at an election held between the date of the proposition and bond for title. A part of the lots conveyed to appellant were in that part of the town laid off east of the land owned by Robinson and his associates, and, its title thereto having, therefore, failed, it seeks in this case to have compensation out of the 366-vara strip that was left undivided as above set forth.

We think it plain, from an inspection of this deed and bond for title, that the land intended to be conveyed thereby is correctly described therein, and it is therefore an ordinary case of a grantor conveying land to which he has no title. In such case the grantee must look to his covenant of war-

ranty for money compensation, and cannot have other land of his warrantor set aside to him. *Arnold v. Canble*, 49 Tex. 527; *Koenigheim v. Miles*, 67 Tex. 113, 2 S. W. Rep. 81; *Willis v. Robinson*, 28 S. W. Rep. 822, (this day decided by us.) The judgment of the court below is affirmed.

WESTERN UNION TEL. CO. v. HousWRIGHT.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—QUESTION FOR JURY.

In an action against a telegraph company for failure to promptly deliver a message announcing the serious illness of plaintiff's father, plaintiff testified that if it had been delivered promptly he could have reached his father in time to see him alive, assuming that a certain train was running between certain points on a connecting railroad. On cross-examination he stated that he did not know whether such train was running or not. The evidence of the train dispatcher, offered by defendant, showed that the first train carrying passengers between such points, which plaintiff could have taken, arrived at the point nearest his father's home after the latter's death. *Held*, that it was error to submit to the jury the issue as to whether or not plaintiff would have been able to reach his father before he died.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by A. C. Houswright against the Western Union Telegraph Company to recover damages for failure to promptly deliver a telegraph message. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. *Reversed*.

Stanley, Spooner & Meek, for appellant. Stephens & Huff, for appellee.

HEAD, J. This suit was instituted by appellee to recover of appellant damage alleged to have been caused by its negligence in failing to promptly deliver a telegraphic message announcing the serious illness of his father. The message was started on October 23, 1889, at 10:20 A. M., at Wylie, Tex., but was not delivered to appellee at Vernon until October 25th, at 5 A. M. Appellee's father died at Wylie, October 24th, at 4 P. M. Appellee, on direct examination, testified in general terms that, had the message been promptly delivered on the 23d, he could and would have reached Wylie in time to have seen his father alive, basing this upon the assumption that a train known as the "Bobtail" was at that time running between Wichita Falls and Ft. Worth, which reached the latter place in the forenoon; but on cross-examination he said: "I think the Bobtail was running at that time between Wichita Falls and Ft. Worth. About that time circulars were being thrown around the street to the effect that it would be put on. I do not know whether that Bobtail was running on

October 23d, 24th, or 25th, or not. If it was not, I could not have arrived in Wylie until eleven o'clock P. M. on the night of the day on which my father died at four P. M., and I would therefore not have been able to see him alive, but I would have been there in time to have been present at his burial. I, of course, suffered more from not being able to see him before he died than I did from not being able to attend his funeral." Appellant, in reply to this, introduced the train dispatcher, who exhibited the train sheets for those days, and testified that the only train besides the regular passenger that carried passengers between Wichita Falls and Ft. Worth was a local freight, which left the former place at 5 A. M., and arrived at the latter at 5:45 P. M. of the same day. In this state of the evidence the court submitted to the jury the issue as to whether or not appellee would have been able to reach his father before his death, and in this we think there was error. We see no conflict in the evidence as to the running of these trains. It is conceded that appellee could not have reached his father by the regular passenger train until 11 P. M. of the day his father died at 4 P. M., and by the only other train that carried passengers he could not even have gotten to Ft. Worth until nearly two hours after the death of his father at Wylie, still further on. It has been often held reversible error for the court to charge the jury upon an issue not fairly raised by the evidence. *Railway v. Gilmore*, 62 Tex. 391; *Railway Co. v. Faber*, 77 Tex. 153, 8 S. W. Rep. 64. The judgment of the court below is reversed, and the cause remanded for a new trial.

WETSEL et al. v. STATE ex rel. HOLLAND.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

DISQUALIFICATION OF JUDGE—ENJOINING COLLECTION OF TAX.

A judge who owns property subject to a city tax which is sought to be collected is disqualified to render a judgment enjoining the collection thereof.

Appeal from district court, Potter county; H. H. Wallace, Judge.

Proceeding on the relation of J. T. Holland against W. W. Wetsel and others. From a judgment denying an application to set aside a judgment rendered in favor of relator, said Wetsel and others appeal. Reversed.

Joseph Hall, for appellants.

HEAD, J. Appellants, on March 18, 1893, filed their written application in the court below, asking that a judgment entered in said court on the 28th of September, 1892, against them as respondents in favor of the state upon the relation of J. T. Holland, be set aside and held void, because the judge who

rendered the same was disqualified by reason of interest in the matters in controversy. The judgment sought to be vacated was one dissolving the corporation of the city of Amarillo, and enjoining appellants as officers of said city from collecting the occupation and ad valorem taxes which had been levied upon the inhabitants and property therein. It was agreed that the judge who rendered the judgment owned real and personal property upon which said tax was sought to be collected, and that the collection of his tax was enjoined with the rest. In the case of *City of Austin v. Nalle*, 85 Tex. 534, 22 S. W. Rep. 663, 960, in speaking of the disqualification of one of the judges of the court of civil appeals, our supreme court says: "The bonds already issued were alleged to amount to the sum of \$900,000. The sum of the bonds the issue of which was sought to be enjoined was \$500,000. If the latter obligations should be issued they would, at least, authorize the assessment and collection of a tax upon all taxable values in the city for their payment. If their issue should be restrained, no such tax could be levied. It follows, therefore, as we think, that every holder of property in the city which is subject to taxation has not only an interest in the question to be determined by the suit, but also a direct pecuniary interest in the result." A pecuniary interest in the result of a suit disqualifies a district judge, both at common law and under our constitution and statute. We regard this decision as conclusive of the question presented by this record, and hold that the court below erred in refusing to vacate the judgment rendered at the previous term. The judgment of the court below will be reversed, and the cause remanded, with instructions to that court to set aside the judgment referred to, and, as the information was also filed by permission of the same judge, it also must be dismissed.

LEAGUE v. SNYDER et al.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

VENDOR AND PURCHASER—UNRECORDED DEED—NOTICE FROM POSSESSION—EVIDENCE.

At the time of plaintiff's purchase of the land in suit, defendant had title thereto by a deed which was not recorded, and possession of the land was held by one who had leased it from defendant by a lease, the term of which had expired. This lessee took possession before he obtained title under defendant's lease, and had exclusive possession down to the time of suit; and though, since the expiration of the lease, he had paid no rent, he had not notified defendant that he refused to hold as her lessee. Plaintiff had no knowledge of any adverse claim to the land, but failed to inquire if any one was in possession. *Held*, that the lessee's possession operated as constructive notice of defendant's claim.

Appeal from district court, Mitchell county; William Kennedy, Judge.

Trespass to try title by J. C. League against T. S. Snyder and others. From a judgment for defendants, plaintiff appeals. Affirmed.

G. E. Mann and Earnest & Shepherd, for appellant. R. H. Looney, for appellees.

TARLTON, C. J. September 22, 1890, the appellant brought this action of trespass to try title against the appellees Thomas S. Snyder, Mrs. Pernecy Parks, and others claiming in privity with her, to recover survey No. 7, block No. 15, in Mitchell county, containing 640 acres. The defendant T. S. Snyder filed a disclaimer of title, alleging possession, however, as lessee of his codefendant. The remaining defendants pleaded not guilty, and the statute of three years' limitation. This appeal is from a judgment in favor of the defendants.

Conclusions of Fact.

The appellant and the appellees Parks claim from the Southern Pacific Railway Company, as a common source of title; the appellant, by deed dated September 24, 1888; and the appellees named, by deed dated November 1, 1862. In November, 1882, the appellee Thomas S. Snyder fenced and took actual possession of the tract in controversy, and, though he had no title to the land, he has ever since had notorious and exclusive possession, claiming either as owner or lessee. After he took possession, he leased the tract from the defendants Parks, by written lease, for the years 1883, 1884, and 1885, paying as rent, annually, \$25, in advance, for these three years. Since the expiration of this period, he has not paid any rent to the defendants Parks, but he has never notified them that he refused to hold as their lessee. The plaintiff, at the date of his deed, September 24, 1888, paid a valuable and adequate consideration for the land. At this date the deed of the defendants Parks was not recorded. Before his purchase, the title of record was examined by plaintiff's attorneys, and by them it was approved as clear of record. The plaintiff had no personal knowledge of the condition of the land, or of any adverse claim thereto; but he failed, in any way, to investigate, or inquire whether any one was in possession of the land.

Conclusions of Law.

We entirely concur with the trial court in holding, under the foregoing facts, that the plaintiff is not to be deemed a purchaser without notice of the prior deed of the defendants Parks. At the date of his deed, the latter, through their tenant, Snyder, were in the open, notorious, and visible possession of the premises. Such possession operated as constructive notice to appellant of the unrecorded deed under which it was held. *Watkins v. Edwards*, 23 Tex. 443; *Hawley v. Bullock*, 29 Tex. 216; *Mullins v. Wimberly*, 50 Tex. 466; *Mainwarring v. Templeman*, 51

Tex. 212. Nor, in our opinion, is this conclusion of constructive notice to be affected by the fact that, before his attornment to Parks, Snyder was a trespasser upon the land, or by the further fact that at the date of League's purchase the term of Snyder's written lease had expired. It is not pretended that, in attorning to Parks, Snyder was in any way the victim of fraud, mistake, or misrepresentation, and under such circumstances his attornment estopped him from questioning his landlord's title. *Tyler v. Davis*, 61 Tex. 674. The relation of landlord and tenant between Parks and Snyder continued to exist even after the expiration of the term of the written contract of lease. Inasmuch as he did not thereafter repudiate the tenancy, and give notice to the landlord of the repudiation, the possession of Snyder was not adverse to that of the defendants Parks. It was, in effect, the possession of the latter at the date of plaintiff's purchase. *Flanagan v. Pearson*, Id. 305. The judgment is affirmed.

FT. WORTH & D. C. RY. CO. v. JOHNSON.

(Court of Civil Appeals of Texas. Nov. 1, 1893.)

ARGUMENT OF COUNSEL—AROUSING PASSION—FOREIGN MATTER.

In an action for balance due plaintiff from defendant for services as station agent, defendant reconvened for loss caused by plaintiff's negligent management, and showed that, when discharged, plaintiff was short a large sum in his accounts. Plaintiff's counsel, in closing, accused defendant of hounding and persecuting plaintiff, and being determined to "down him," and added that plaintiff had been tried and acquitted by a jury, yet defendant still kept following him up in the courts. *Held* prejudicial, not only as tending to rouse passion, but as importing the matter of plaintiff's prosecution and acquittal, which was foreign to the record, and damaging to defendant.

Appeal from Wichita county court; W. P. Skeen, Judge.

Action by A. S. Johnson against the Ft. Worth & Denver City Railway Company for \$95.85, balance of salary and ticket commissions for services as station agent at Wichita Falls in October, 1890. Defendant reconvened for \$200, loss by plaintiff's negligent management during the same period, and showed that he was short in his accounts nearly \$4,000. There was judgment for plaintiff for \$95.10 in the justice's court, and on appeal to the county court, and trial by a jury, plaintiff had verdict and judgment for \$95.85. Defendant appeals. Reversed.

Appellee's counsel used the following language in his closing argument to the jury: "The Fort Worth & Denver City Railway Company is hounding and persecuting Johnson, and are determined to 'down him' at all hazards. They have hounded and persecuted him continually since this thing occurred.

* * * It looks like there should be an end to these things. They have persecuted and hounded this man. This matter should be stopped. Plaintiff was tried and acquitted by a jury of his country, yet they still keep hounding and following him up in the courts."

Stanley, Spoons & Meek and J. H. Davenport, for appellant.

STEPHENS, J. The bills of exception 1 and 2 show such a flagrant and persistent violation of the rule on the part of counsel in the closing argument as to require that the judgment, by that means in part obtained, be reversed. The language employed was not only calculated to arouse passion, but counsel made himself a witness before the jury as to matters foreign to the record and of a damaging character. We are of opinion that the evidence thus imported into the jury box, and emphasized by the vigorous language of counsel, must have had some weight in the decision of the case. The judgment will therefore be reversed, and the cause remanded for a new trial.

FT. WORTH & D. C. RY. CO. v. JOHNSTON.

(Court of Civil Appeals of Texas. Nov. 3, 1893.)

CONNECTING CARRIERS — CONTRACTS — RECEPTION OF EVIDENCE.

1. Rev. St. art. 4251, obliges railroad companies, for a reasonable compensation, to draw over their road the merchandise and cars which may enter and connect with their railroad. Plaintiff showed that the bill for his goods was a through bill of lading, that the delivering company's line did not reach the place of shipment, but that rates were made over its line and connecting lines to and from that point; that said company issued an expense bill, when the goods arrived, for the exact amount called for by the bill of lading; that the car containing the goods came through from the place of shipment. *Held*, that these facts were not enough to prove conclusively a contract of agency or partnership between the companies, nor a ratification by the delivering company, so as to bind it to the freight rate named in the bill of lading.

2. Plaintiff having rested his case, defendant placed on the stand a nonresident of the county, to prove important averments of its special answer. The witness was taken suddenly ill and had to leave court, and, defendant's counsel being unable to say when he would be able to testify, the court refused a postponement. Two hours later, after plaintiff's counsel had made his opening argument, the witness was again tendered, but the court refused to hear him. *Held*, that defendant had shown due diligence in producing the witness, and the court should have allowed it opportunity to supply the proof, under Sayles' Civil St. art. 1296, empowering the court at its discretion, at any time before conclusion of argument, where necessary to justice, to allow a party to supply an omission in the testimony on such terms as it may prescribe.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by W. E. Johnston against the Ft. Worth & Denver City Railway Company for penalty for refusal to deliver merchandise to consignee. Judgment for plaintiff. Defendant appeals. Reversed.

Stanley, Spoons & Meek, for appellant. Stephens & Huff, for appellee.

TARLTON, C. J. This appeal is from a judgment in the sum of \$2,450, recovered by the appellee from the appellant, under section 3, art. 4258a, Sayles' Civil St., prescribing a penalty for the refusal of a railroad company to deliver merchandise to the consignee upon payment, or tender of payment, of the freight charges due, as shown by the bill of lading. The goods in question were certain articles of hardware, weighing 35,000 pounds, shipped from Louisville, Ky., and consigned to W. E. Johnston, at Vernon, Tex., at a freight rate not to exceed 70 cents per hundred pounds, as shown by the bill of lading executed by the Louisville, St. Louis & Texas Railway Company. The latter company was the initial carrier. The transportation was completed by the defendant company over its line from Henrietta, Tex., to Vernon, Tex., at which place the appellee and consignee resided. After the arrival of the merchandise at Vernon, the appellant for several days refused, on tender of payment of the freight charges shown by the bill of lading, to deliver the goods. It contended then, and contends now, that it was not a party to the bill of lading, and it demanded, as freight due, 73 cents per hundred pounds, instead of 70 cents, as specified in the bill of lading.

It follows that the controlling question on the trial was whether the defendant was a party to the bill of lading. The plaintiff, declaring on that instrument as a through bill, alleged that the Ft. Worth & Denver City Railway Company, the Missouri, Kansas & Texas Railway Company, and the Louisville, St. Louis & Texas Railway Company had, prior to this shipment, entered into a freight association whereby each was authorized to bind the other in the execution of through bills of lading; that by virtue of this agreement the defendant was bound by the act of the Louisville, St. Louis & Texas Railway Company, in the execution of the instrument in question; that, in effect, (as we interpret the averments,) the latter was the agent of the defendant in the transaction; and, further, that after the arrival of the goods the defendant ratified the execution of the bill of lading by finally, after a refusal from August 12, 1890, to August 25th, accepting the amount shown by the bill, and delivering the merchandise to the appellee. After the general denial the defendant pleaded, specially and under oath, that it did not receive or transport the goods by virtue of any bill of lading, but in discharge of its duty under the laws of Texas; that it re-

ceived them from the Missouri, Kansas & Texas Railway Company, at Henrietta, Tex., and transported them to Vernon, Tex.; that the bill of lading was not executed by it or by its authority; that, under its established rates, 73 cents per hundred pounds was the correct freight charge; that it made no contract to carry the goods at 70 cents per hundred pounds; that it did not ratify, nor intend to ratify, any unauthorized contract of the Louisville, St. Louis & Texas Railway Company; that it at no time had knowledge of the association or agreement alleged by plaintiff. Under this plea, which is, in effect, a plea of non est factum, and a verified denial of the partnership or association charged, the burden rested upon the plaintiff to connect the defendant with the execution of the bill of lading. Articles 1265, 2262, Sayles' Civil St.; *Waterworks v. White*, 61 Tex. 536; *Fisher v. Bowser*, 1 Posey, Unrep. Cas. 346; *Railway Co. v. Tisdale*, 74 Tex. 8, 11 S. W. Rep. 909. This privity the appellee claims to have established by the proof of circumstances, consisting, among others, in the facts that the goods were shipped on a through bill of lading from Louisville, Ky., to Vernon, Tex.; that appellant's line of road does not extend to Louisville, Ky., but that rates are made over its line and connecting lines to and from that point; that appellant issued an expense bill, on the day of the arrival of the goods, for the exact amount of freight charges called for in the bill of lading; that the car containing the goods came through from Louisville without reshipment of the goods; that, after the expense bill had been presented, appellant demanded more freight than was charged in the bill of lading. Facts, in our opinion, substantially the same as these, under our statute requiring railroad companies "for a reasonable compensation to draw over their railroad * * * the merchandise and cars which may enter and connect with their railroad," (Rev. St. art. 4251,) have been held insufficient to justify the conclusion stated; and by this result we abide. *Railway Co. v. Baird*, 75 Tex. 256, 12 S. W. Rep. 530; *Miller v. Railway Co.*, 83 Tex. 520, 18 S. W. Rep. 954; *Railway Co. v. Williams*, 77 Tex. 125, 13 S. W. Rep. 637; *Railway Co. v. Fuller*, (decided by us May 17, 1893,) 22 S. W. Rep. 1006.

The appellee, however, additionally relies upon the recitals in the bill of lading showing that by its terms the initial carrier contracted for the connecting lines, stipulating that they should be considered a part of the route to the place of destination, limiting their liability, and giving the delivering carrier a lien on the goods for damages in addition to the carrier's common-law lien. The bill of lading thus providing was read in evidence without objection on the part of appellant. To what extent, if at all, these terms of the instrument, thus admitted, would

affect the application of the doctrine above referred to, a disposition of this appeal does not require us to consider. The case made by the evidence was in any event, under defendant's pleading, subject to rebuttal. For this purpose, as shown by the bills of exception, the defendant on the day of trial, about 11:30 A. M., after the plaintiff had rested his case, placed a witness, C. C. Drake, upon the stand. This witness was a resident of Tarrant county, in the employ, as chief clerk of the freight department, of the defendant. It had secured his personal attendance upon the court. It suffices to say, without repeating it, that the testimony of the witness thus offered by the defendant was in every material respect in substantiation of the averments, already set out, of the special answer. As he was about to testify, the witness was taken suddenly ill,—to such an extent as to necessitate his leaving the courthouse. The defendant's counsel being unable to assure the court when he would sufficiently recover to proceed with his testimony, the court refused a postponement. At 1:30 P. M. of the same day, after the plaintiff's attorney had made his opening argument, the witness, having sufficiently recuperated, was again tendered by the defendant, with the request that his testimony be heard. This the court refused, as we think, erroneously. In our opinion, sufficient diligence had been shown to secure the testimony. The necessity for issuing a subpoena, had the witness resided in the county, was obviated by his personal attendance, and the taking of his deposition as a nonresident would have been but the substitute for his personal attendance, which could not be enforced by subpoena. The evidence was obviously most material. It is strikingly similar to that recited in the opinion, and evidently approved as constituting a defense, in *Railway Co. v. Williams*, 77 Tex. 125, 13 S. W. Rep. 637. We think the court, in the exercise of a sound discretion, should have permitted the defendant to supply the omission in its testimony caused by the sickness of its witness. Sayles' Civil St. art. 1298. As the refusal was excepted to at the time, and was made the ground of a motion for a new trial, and is here assigned as error, we conclude that the judgment of the court must be reversed, and the cause remanded. It is so ordered.

ROBERTSON et al. v. WOOLEY.

(Court of Civil Appeals of Texas. Nov. 3, 1893.)

BARBED-WIRE FENCES—INJURY TO STOCK—NEGLIGENCE.

Maintenance of a barbed-wire fence on one's premises along a highway, though in a city, if not prohibited by ordinance, is not negligence per se, and, in the absence of other evidence showing it a nuisance, its owner will not be liable for injury to stock occasioned thereby.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by F. P. Robertson and others against Richard Wooley, Jr. From a judgment for a smaller amount than asked, plaintiffs appeal. Reversed, and judgment rendered for defendant.

Lane & Mayfield, for appellants. Upson & Bergstrom, for appellee.

NEILL, J. This suit was instituted in the justice's court of precinct No. 1 of Bexar county by appellants against the appellee to recover \$200 damages for the alleged injury of 56 head of horses by coming in contact with a barbed-wire fence alleged to be owned and negligently maintained by appellee within the corporate limits of the city of San Antonio. The trial in the justice's court resulted in a judgment in appellants' favor for \$180 and costs, from which judgment Wooley appealed to the district court, where the case was tried without a jury, and appellants obtained judgment for \$25 and for costs in the justice's court, the costs in the district court being assessed against them, from which judgment this appeal was taken.

The only error assigned is that the judgment is contrary to the evidence, in that the evidence showed that appellants should have judgment for the full amount sued for. The contention of appellee is that the construction and maintenance of a barbed-wire fence near a public street or road is not per se a nuisance, so as to entitle the owner of stock damaged by reason of injuring themselves on such fence to recover therefor against the owner of the fence; and that, as there was no other proof showing negligence on appellee's part, causing injury to appellants' stock, the mere construction and maintenance of such fence did not authorize a recovery by appellants. The evidence shows that on March 11, 1890, the appellant Robertson, together with three other hands, drove the stock from the International & Great Northern Railroad pens in San Antonio out on the Fredericksburg road, to a pasture; that when they were about a mile and a half from the main plaza, and within the corporate limits of San Antonio, they entered with the stock a lane with a barbed-wire fence along both sides of the road, and extending several hundred yards; that the fence was made of three barbed wires and three plain wires on posts, the posts being from 16 to 18 feet apart, and the fence $3\frac{1}{2}$ feet high; that there was neither board nor rail hung to the top wire, nor anywhere else on the fence, and that the fence was the same on both sides of the road; that a mare became entangled in the fence, and the noise of the wire, made by her movements, caused the others to stampede, and run against the wires on both sides of the road, and that thereby 25 head of the stock were injured. The fence was constructed by appellee on his

land, and was not in the road. This is all the evidence introduced in relation to the fence. There is no evidence shown by the record that the erection and maintenance of a barbed-wire fence in the corporate limits of San Antonio were prohibited or regulated by the ordinances of said city. The public have no right in the land beyond a highway, and the owner of the adjacent land has the right to use it in any way not injurious to the public. There is no law in this state against the construction and maintenance of a barbed-wire fence by one on his own premises. Such a fence is not per se a nuisance. The owner of land in this state has the right to construct upon it such fences as are in general use, and of such material adapted for that purpose as is most readily attainable. And in these portions of the state where, on account of the scarcity of timber, wire is used almost exclusively for fencing, if it should be held that such fences could only be maintained along a highway at the peril of the owner being subject to damages for injuries to animals coming in contact with it, the effect would be virtually to deprive such person of his property without compensation. In *Worthington v. Wade*, 17 S. W. Rep. 521, the supreme court, in passing upon a case, so far as the fence is concerned, somewhat similar to this, says: "We should hesitate long before holding that the mere proof that the fence consisted of barbed wire stretched upon posts is sufficient to show that the parties constructing it were guilty of negligence, even should the fence have been along a public highway." And we now hold that the construction and maintenance of a barbed-wire fence by one on his own premises along a public highway, though in an incorporated city, if not prohibited by an ordinance, is not negligence per se, and, in the absence of any other evidence tending to show that such a fence is a nuisance, its owner will not be liable in an action of damages for an injury to stock occasioned solely by its construction and maintenance; and, there being no such other testimony in this case, the judgment of the court below is without evidence to support it. It is therefore reversed, and judgment is here rendered for the appellee.

BURROWS v. GONZALES COUNTY.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

FERRIES—OPERATION BY COUNTY—LICENSES—RENEWAL—DEMURRER—APPEARANCE.

1. The overruling of a demurrer is not a final adjudication, preventing the court, on renewal of the demurrer, from revising its ruling.

2. It is immaterial whether an amendment to a complaint amounted to the bringing of a new suit, where defendant voluntarily appeared in reference to it.

3. Rev. St. art. 1514, empowering and requiring the county commissioners' court to establish public ferries whenever the public in-

terest may require, authorizes it to create and operate a ferry.

4. Rev. St. tit. 87, c. 6, authorizing the county commissioners' court to grant licenses for ferries, does not take away its power, under article 1514, to create and operate a ferry.

5. One to whom a license for a ferry has been granted has no cause of action because the county commissioners' court refused to renew it.

Appeal from district court, Gonzales county; George McCormick, Judge.

Action by S. R. Burrows against Gonzales county. Judgment for defendant. Plaintiff appeals. Affirmed.

Harwood & Harwood, for appellant. W. S. Fly, for appellee.

Conclusions of Fact.

JAMES, C. J. The original petition was filed December 7, 1889, by S. R. Burrows, claiming damages for the value of a ferry franchise which had been granted him by the county commissioners' court of said county for the year beginning February 11, 1889, and for the value of a ferryboat, and expenses incurred by him in complying with the bond required by the county in the premises; alleging that plaintiff had complied with the law in such cases provided, and that about September of the year 1889 the county commissioners' court, on a public road previously opened during the year, at a point about 50 yards below petitioner's ferry, established and opened for use a public ferry, and operated the same, thereby diverting all travel from petitioner's ferry, and utterly destroying his franchises, rights, and property acquired and prepared under his license from said court; and praying for damages accordingly. The original petition did not contain an allegation that the claim sued on had been presented to the county commissioners' court. General and special demurrers to it were, however, overruled. Afterwards, on July 5, 1890, plaintiff filed an amended original petition, which, as stated by appellant's brief, presents the same case as the original petition, without change, except that it alleged that the claim sued on had been presented to the county commissioners' court at its May term, 1890, and rejected, and sets up an additional cause of action accruing since the original suit was filed, in the refusal of the commissioners' court to renew plaintiff's ferry license, although, as he alleges, he was the owner of the bank on both sides of the river, and entitled, under the law, to a ferry franchise, and was willing and prepared to comply with the law, and alleges that there was no cause for refusing to renew the license. This petition also alleges that in February, 1889, the commissioners negotiated with him to purchase his ferry, but the purchase was not consummated; also, that, while the ferry established by the county was called a free public ferry, it was free only for citizens of Gonzales county, toll being exacted from others. After the filing

of the amendment of July 5, 1890, continuances were had by defendant at the July term, 1890, and January term, 1891, and at the July term, 1891. Defendant filed its supplemental answer, consisting of general demurrer and special exceptions to the petition of July 5, 1890, and general denial. The special exceptions were (1) on the ground that the account was shown to have been presented to the commissioners' court after the suit had been filed; (2) to that portion of the petition which sets up damages for \$1,200 on account of the refusal to renew the license, because the same was too remote, and there is no law requiring the court to grant license for ferries, but it is left discretionary with the court. The demurrers were sustained, and the cause dismissed.

The following is the substance of the assignments of error relied on: (1) The court erred in entertaining the demurrers, general and special, because two terms had intervened, and the case had been called for trial at the last preceding term, and continued by defendant, and the same were, therefore, not presented at the proper time; (2) that, there being no substantial difference in the original and amended petitions, so far as the general demurrer was concerned, the court, having once overruled it, could not, at a later term, revise its ruling; (3) the court erred in sustaining the general demurrer, as the amended original petition stated a good cause of action; (4) the court erred in sustaining the exception based on the fact that the claim was presented to the commissioners' court after this suit was filed.

Conclusions of Law.

The general and special demurrers to the amended original petition were not filed until the term at which they were disposed of, and rule 25 relating to district courts has no application. We do not agree with appellant's counsel that the action of the court, overruling a demurrer, has any of the qualities of a final adjudication; and it is proper for the trial court, at a later term, on renewal of the demurrer, during the pendency of the cause, to revise the former ruling, if erroneous.

The plaintiff's right to sue had not vested when he filed the original petition, as there had been no presentation of his claim to the commissioners. Realizing that difficulty, he afterwards presented the claim, and, upon its rejection, filed his amended original petition, in which he supplies the necessary allegation; and one of the exceptions invoked the ruling of the court upon the question whether or not, such fact not having existed when the suit was filed, it could be introduced by an amendment. It is unnecessary to discuss the question of whether the amended original petition constituted an amendment to the pleading or a new suit, for defendant voluntarily appeared in reference to it. If it were regarded as the bringing of a new

suit, all that defendant could have required was to be cited, and an appearance waived this. This ground, as an exception to the petition, was not substantial.

The material question is the sufficiency of the pleading on general demurrer. The amended original petition contains all the allegations necessary for plaintiff to maintain his action, provided the damage he alleges is such as the county is liable for. The law vests in the county commissioners' court the power, and makes it its duty, to establish public ferries whenever the public interest may require. Rev. St. art. 1514. It is asserted by appellant that the statutes of Texas do not contemplate or provide for the operation of a ferry by the county commissioners' court. We think otherwise. In the case of *Macdonell v. Railway Co.*, 60 Tex. 594, our supreme court says that the power to establish ferries carries with it the power to do all such acts as may be necessary to construct them, and as their construction would be a useless thing, unless they were operated, it also carries the power to operate them. We hold, therefore, that the power to create and operate a public ferry is included in the powers granted the county commissioners, and that court, necessarily, has general power to provide and maintain the agency by which a ferry may be operated. The mode of establishing and operating ferries is ordinarily through corporations and individuals, by means of licenses or franchises granted for the purpose; and Rev. St. tit. 87, c. 6, provides for the granting of these licenses for ferries, and for the regulation of the same. In this manner, appellant obtained his license. The plaintiff's cause of action can have no foundation, unless it be that chapter 6, tit. 87, supersedes the provision in article 1514, or limits the power of the commissioners to one mode of providing ferries, viz. by means of licenses granted to individuals. We are unable to give it that construction. The power to establish and regulate ferries is a governmental function to be exercised for the general welfare, and has been, by law, vested in commissioners' courts of the several counties of this state. The statute authorizing the granting of licenses by that court would vest in the licensees certain privileges and rights,—not superior, however, to the power of the commissioners' court, itself, to establish ferries. The rights of a ferryman duly licensed are protected against unlicensed interference, but he is without redress for acts done by the government in the exercise of its power in the establishment of ferries. He would not be entitled to damages in cases where the court sees fit to grant a license to a rival, and we do not perceive how he can have a greater right, if, instead of granting the license to another, the commissioners provide directly for constructing another ferry.

It is not an unreasonable supposition that individuals might not be found to operate ferries. It is not the expressed intention of the legislature to circumscribe the powers of the court to establishing ferries through the medium of licenses, and such intention will not be implied. Sutherland on Statutory Construction, speaking on this subject, says: "The object and end of all government is to promote the happiness and prosperity of the people by which it is established, and it cannot be assumed that the government intended to diminish its power of accomplishing the end for which it was created. It is, therefore, never implied that it has surrendered, in whole or in part, any of its sovereign power of legislation for the general welfare, of police, of taxation, or of eminent domain. In its grants of law, there is implied no covenant to do or not to do any further act in relation thereto. So, in grants of a public franchise to a corporation, as to build and maintain a road or bridge, or to establish a ferry, no contract is implied that it will make no new, competing grant." *Suth. St. Const.* § 378. The license to plaintiff was granted subject to the statutes as they existed, and therefore subject to the power conferred on the commissioners' court to establish ferries at any time. This consideration and limitation entered into his franchise, and it follows that he had no such right as would be the foundation for damages resulting from the exercise of such power.

That portion of the petition asking damages of the county because the commissioners' court refused to renew the license is clearly untenable. Our conclusion is that the judgment was correct, and it is affirmed.

FLY, J., having been of counsel, did not sit in this case.

NELSON v. HART.¹

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

CERTIORARI TO JUSTICE OF THE PEACE.

1. On motion to dismiss a certiorari to a justice of the peace because the bond fails to show in what county or before what justice the judgment was rendered, the court may look to the petition, writ, and transcript; and where the petition fully describes the court and suit, and there is no variance between the description of the judgment in the bond and the transcript,—the latter being merely more detailed, though failing to name the sureties on the bond,—the dismissal will be refused.

2. Plaintiff's petition alleged that he was the owner of certain property; that he borrowed \$7.50 from defendant, and then got very drunk, and while drunk was induced, as he was informed, to sign a bill of sale of his property; that he could not read or write, and, if he signed said bill, he was so drunk that he could not remember it; that said bill was obtained through fraud, and plaintiff never parted with possession of said property; that later defendant took it by force, and kept it; that plain-

¹ Rehearing denied.

tiff tendered defendant what he owed him, and tried to get his property, but could not; that plaintiff sued before a certain justice to recover it; that the cause was not tried on the day set, but in some way passed on nine days, when it was tried, and judgment rendered for defendant for all said property, and costs; that, at and before the time of trial, plaintiff was very sick in another town,—unable to come to the trial; that the cause was set without plaintiff's knowledge or consent; that injustice had been done him; and that he had a meritorious cause. *Held*, that the petition showed, prima facie, that an injustice had been done plaintiff, without his negligence, as required by Rev. St. art. 308.

3. The petition for certiorari to a justice of the peace need not, in every case, set out the entire evidence produced before said justice. It is enough if it show that injustice has been done petitioner, or that he was deprived of a legitimate prosecution or defense without fault on his part.

Error from El Paso county court; J. E. Townsend, Judge.

Certiorari on petition of Frank Hart to J. D. McKie, justice of the peace of precinct No. 1, El Paso county, in the matter of an action by petitioner against H. Nelson to recover possession of certain personal property. Certiorari granted. Defendant brings error. Affirmed.

Millard Patterson and C. N. Buckler, for plaintiff in error.

FLY, J. This suit originated in a justice court of El Paso county, and was taken by certiorari to the county court. There is no statement of facts, and the only error assigned is the action of the county court in refusing to dismiss the certiorari. The first assignment of error, not being copied into the brief as it appears in the record, should not be considered, but we have done so. The first assignment sets up that the bond is insufficient because it does not show in what county, or before what justice of the peace, the judgment was rendered, and because it misdescribes the judgment. In considering a motion to dismiss a certiorari, the district or county court should look to the petition and the writ, as well as the transcript from the justice court, in order to determine the merits of the motion. *Seeligson v. Wilson*, 53 Tex. 369. By a reference to the petition, it will be seen that the court and suit are particularly described. There is no variance between the judgment described in the bond and that described in the transcript from the justice court, the description in the latter simply being fuller than that in the bond. The names of the sureties are not mentioned in the judgment. When taken in connection with the petition and writ of certiorari, the bond sufficiently describes the suit and judgment. In the case of *McMahan v. Chambers*, 36 Tex. 277, cited, there was a material variance between the record sent up by the justice of the peace and the bond, and the opinion fails to show whether the bond was construed with the petition or not. The

cases cited in that opinion to sustain its decision are not in point, and are decided on fatal misdescriptions, and not on lacking description. *McGarrah v. Burney*, 4 Tex. 287; *Hollis v. Border*, 10 Tex. 278; *Smith v. Oheatham*, 12 Tex. 37.

The petition alleges that in November, 1889, plaintiff was the owner of a certain open hack, set of harness, and two horses, of the value of \$150; that during said month plaintiff borrowed the sum of \$7.50 from defendant, (appellant,) and then became very drunk, and while in his drunken state he had been induced, as he had been informed, to sign a bill of sale to his property; that he could neither read nor write, and that, if he executed said bill of sale, he was so drunk he did not remember it; that the same was obtained through fraud; that he had never parted with the possession of his property; that afterwards defendant, by force, had taken his property, and detained it; that plaintiff had tendered to defendant the amount he owed him, and endeavored to get possession of his property, but could not; that thereafter, to wit, on the 26th day of November, 1889, plaintiff brought suit before J. D. McKie, justice of the peace of precinct No. 1, El Paso county, Tex., for possession of his property; that the first day of the court to which the cause was returnable was December 9, 1889; that on said day said cause was set for trial at 1 P. M. on the 10th day of December; that said cause, not being tried on that day, was in some manner passed to the 19th day of December; that on said date the cause was tried, and judgment rendered for all of said property, and costs of suit; that plaintiff at the time of the trial, and before that time, was very sick in Juarez, Mexico, and remained sick until about December 23d; that he was confined to his bed, and unable to attend to business, and was too sick to come to El Paso; that the case was set without the knowledge or consent of plaintiff; that his property had been delivered to defendant; that injustice had been done him; that he had a just and meritorious cause, on account of his incapacity to attend court; and he prayed for a writ of certiorari. Appellant objects to this petition because it does not show any sufficient reason for not prosecuting his suit in justice court; does not show what evidence was introduced, or give any reason for failing to do so, etc. We are of the opinion that sickness of the plaintiff was a sufficient reason for his not being present, and prosecuting his suit before the justice court. *Cordes v. Kauffman*, 29 Tex. 179. Under the circumstances of this case, the plaintiff being sick and absent, it was an impossibility for him to state, of his own knowledge, what testimony was introduced; and we have seen no decision holding that it was essential for an applicant for the writ of certiorari to swear to things of which he was ignorant, and it is

even hinted in *Seelligson v. Wilson*, 58 Tex. 360, that an affidavit made upon information might be reached by motion on that account. While the writ of certiorari may, possibly, not be one of right, as has been held, we are of the opinion, when the affidavit shows a meritorious cause, and that injustice has probably been done which was not caused by his negligence, a substantial compliance with the law is all that is demanded. Rev. St. art. 303. There is no form prescribed for the affidavit, and if an injury is shown to have been perpetrated the law will be satisfied. In the case of *McKenzie v. Pitner*, 19 Tex. 135, the supreme court said: "There should be a reasonable degree of certainty in a petition for certiorari, but not that extreme degree which is described in law as certainty in every particular, and which rebuts every conclusion to the contrary." In the case of *King v. Longcope*, 7 Tex. 236, it was said that a certiorari ought to be granted where, from the averments of the petition, if true, it appears that the party has merits, and there is reason to apprehend that injustice may have been done him, without any fault of his. This is reiterated in *Hooks v. Lewis*, 16 Tex. 551; in *Connally v. Renn*, 17 Tex. 123; in *Jones v. Nold*, 22 Tex. 380; and in *Seelligson v. Wilson*, 58 Tex. 360.

We hold that it is not necessary, in every case, to set out the entire testimony on the trial in the justice court, in order to obtain a certiorari, but the petition must either state all the evidence, or show that a material and vital error occurred in the proceedings, or that injustice has been done petitioner, or that he had been unable to avail himself of a legitimate prosecution or defense, by no fault or neglect of his. One or all of these causes must be set forth, not by a general allegation of the wrong, but must be pleaded with sufficient succinctness and detail, showing that there is a prima facie case presented, entitling the petitioner to another hearing of his cause. *Oldham v. Sparks*, 28 Tex. 425. Appellee was entitled to his writ of certiorari, and a jury of his city has determined that the facts set forth in his petition are true, and their verdict will not be disturbed. The judgment of the lower court is affirmed.

ATCHISON, T. & S. F. R. CO. v. CLICK.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

DAMAGES FOR PERSONAL INJURIES—EXPENSES—INSTRUCTIONS.

1. Where there is evidence, in an action for personal injuries, that plaintiff had used drugs and medicines, but no proof of the cost of them, a charge to the jury to consider the expense of medicines, in estimating damages, is prejudicial error.

2. Under Rev. St. art. 1318, providing that the court's charge shall be filed, and shall constitute part of the record, and be deemed excepted to, and subject to revision, without a

bill of exceptions, an instruction on a matter not in issue is ground for reversal, when it was assigned below on motion for new trial, though it was not excepted to, nor a countercharge requested.

Appeal from district court, El Paso county; T. A. Falvey, Judge.

Action by C. M. Click against the Atchison, Topeka & Santa Fe Railroad Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

Hague & Davis, for appellant. Leigh Clark, M. W. Stanton, and H. H. Neill, for appellee.

FLY, J. This is an appeal from a judgment for \$3,500 for personal injuries sustained by appellee by jumping from a moving train of appellant when the tender of the engine had left the rails, and an accident to the whole train seemed imminent and impending. There are two errors assigned, the first being as follows: "The court erred in instructing the jury to consider, in estimating damages, all expenses for medicines." There is in the record no evidence as to the value of the medicines used by the appellee after, and in consequence of, his injuries, although there is considerable evidence about prescriptions, lotions, liniments, and anodynes that were used by appellee. It was error in the court to instruct the jury to consider, in rendering their verdict, an item of damages about which there was absolutely no evidence upon which they could come to a correct conclusion. *Railway Co. v. Tierney*, 72 Tex. 312, 12 S. W. Rep. 586. It is evident to us that this was an oversight on the part of the learned judge, but it was called to his attention in the motion for a new trial, and he should have granted it.

It is argued in the brief of appellee that when no exception is taken to an erroneous charge in a civil case, or a countercharge asked, it is not sufficient ground for reversal. Article 1318, Rev. St., reads as follows: "Such charge shall be filed by the clerk and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exception thereto." This statute plainly renders it unnecessary for a party to take bills of exception to the charge, and the appellant brought the matter before the court in his motion for a new trial, and gave the court an opportunity to correct its error. It is true that defendant had the right, under the statute, to present a special instruction on the subject; but the mere fact of a failure to so present the special charge would not deprive defendant of the right to have none but the proper issue presented by the allegations and the proof before the jury. It has been often held that a failure by the trial court to give all the law applicable to the facts in its general charge will not be

ground for reversal, unless special charges, presenting the view of the case omitted, are requested by the party desiring the presentation, or unless there was positive error in the instructions given, or it appeared that he had received injury from them. *Ford v. McBryde*, 45 Tex. 498. This is not a case of a failure to give all the law applicable to the facts, but in giving a charge upon a question about which there was an utter lack of proof. We are unable to say that this charge did not materially affect the verdict, for there is considerable testimony about different medicines that were used by appellee after his injury; and it is natural to suppose that the jury, upon reading the objectionable charge, would conclude that it was their duty, in the absence of proof, to fix the value of the medicines, as they did the balance of the damages. How much they may have considered necessary for this purpose, and embodied in their general verdict, cannot be ascertained. We cannot, as suggested by appellee, conclude that, because there was no evidence to support and justify the objectionable charge, therefore the jury did not regard it in arriving at a verdict. It is to be presumed, on the other hand, that the jury did their utmost to comply with the demands of the charge, especially as the judge had reminded them, in the opening of his charge, that "the law applicable to this case you will take from this charge, and be governed thereby." It is incumbent upon appellee to show that this erroneous charge was not calculated to mislead the jury, and unless this is done the judgment should be reversed. This has not been done by appellee, and neither does it appear from the record that no injury resulted. *Railway Co. v. Hardy*, 61 Tex. 230; *Railway Co. v. Greenlee*, 62 Tex. 345.

The other assignment sets up that the verdict is excessive, but it is unnecessary for us to pass upon that question, as the case will be returned for a new trial. For the error discussed, the judgment is reversed, and the cause remanded.

NEILL, J., having been of counsel, did not sit in this case.

TUFTS v. STUART et al.¹

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

SALE—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where one who agreed to buy an article to be manufactured, repudiates the contract without cause before delivery, the measure of damages is the difference between the contract price and the value of the article when the seller received notice that the buyer repudiated the contract. *Tufts v. Lawrence*, 14 S. W. Rep. 165, 77 Tex. 526, followed.

Appeal from El Paso county court; J. E. Townsend, Judge.

¹ Rehearing denied.

Action by James W. Tufts against Stuart & McNair to recover for a breach of contract. There was judgment for defendants, and plaintiff appeals. Reversed.

Merchant & Teel, for appellant.

FLY, J. Appellees on February 12, 1889, signed an order to appellant to forward to them a soda-water fountain and appliances which are particularly set forth in the order. Appellees lived in El Paso, Tex., and appellant in Boston, Mass. The order contained an agreement that, upon receipt of the bill of lading, payment would be made by paying a certain sum in cash, and by executing 35 notes for \$25 each, and one for \$32.20, payable monthly until the whole were paid, the notes to bear 6 per cent interest from date of shipment; "the delivery of the goods to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of James W. Tufts [appellant] until paid for." Plaintiff in his petition sets up the contract and its breach by defendants, and asks for damages in the sum of the whole contract price. Defendants answered by a general denial. A trial was had, and, after the introduction of the testimony of plaintiff, a verbal demurrer of defendants to the evidence was sustained, and the jury instructed to return a verdict for defendants, which was done. The testimony shows that the plaintiff did not keep such goods as were ordered in stock, but that they had to be manufactured to suit each order; that in compliance with the order he had manufactured the soda fount and appliances, and had it ready for shipment, when he received a telegram and letter from defendants countermanding the order, and offering to pay any damages that might have arisen by their failure to comply with the contract. However, plaintiff refused to declare the contract off, and afterwards shipped the goods to defendants. They were not received, and were afterwards shipped to Dallas, presumably by order of plaintiff. There was no dispute about the facts.

Plaintiff, under the facts in this case, could not recover the contract price of the goods from defendants, but he was entitled to recover all damages that accrued to him up to the time of the repudiation of the contract. The goods were to be manufactured after the order was received, and it has been uniformly held that, where goods are to be manufactured after an order is received, the contract is an executory one, and no title would pass until the article is not only completely finished and ready, but is either actually delivered to the vendee, or at least is set aside and accepted by him. *Gammage v. Alexander*, 14 Tex. 420. A case almost identical with the one we are considering was before our supreme court, and we quote their lan-

guage as to the measure of damages that is proper in this case: "The telegram sent by appellees on the 2d day of June, and received by appellant before the goods were ready for delivery, was a repudiation of the contract. After it was received, appellant had no right to proceed with the performance, or to recover the contract price as if the property in the goods had passed to appellees. His remedy was to sue for damages for breach of contract, and he was entitled to recover the difference between the contract price and the value of the goods in the condition they were in when he received notice at the place of their manufacture." *Tufts v. Lawrence*, 77 Tex. 520, 14 S. W. Rep. 165. We are of the opinion that the demurrer to the evidence should not have been sustained, but the case should have been submitted to the jury under proper instructions. There was a breach of the contract, and defendants, in effect, admitted that they were responsible to plaintiff in some damages, by an offer to pay the amount he had been damaged, and plaintiff had the right to have the amount assessed by the jury. This damage, whatever it may have been, must have been suffered before the telegram was received by appellant, and he cannot recover for any damage incurred after that time. For the error of the court below in sustaining demurrer to the evidence, the judgment is reversed, and the cause remanded.

BAIL v. CITY OF EL PASO.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

MUNICIPAL CORPORATION—LIABILITY FOR DEFECT IN SIDEWALK—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. The fact that one uses a sidewalk, in ordinary use by the public, with knowledge of a defect therein, instead of taking another route to his destination, does not constitute negligence.

2. It is reversible error for the court to group certain facts, and to instruct the jury that such facts, if found to exist, constitute negligence.

Appeal from district court, El Paso county; T. A. Falvey, Judge.

Action by John Bail, as next friend of Charles Ball, against the city of El Paso. From a judgment for defendant, plaintiff appeals. Reversed.

John Mitchell and J. A. Buckler, for appellant.

FLY, J. Appellant, as next friend of his minor son, Charles Ball, sued appellee for damages alleged to have accrued by reason of a defect in a certain sidewalk. Defendant filed a general denial, and alleged contributory negligence on the part of the minor. We are of the opinion that there was no

error in the court refusing to give a special charge asked by appellant, instructing the jury that the burden of proof of contributory negligence was upon the appellee. The allegations in the petition and the facts in proof are such as required proof at the hands of the plaintiff that he was not guilty of contributory negligence in falling upon the sidewalk. The rule, as stated by Wharton, and approved by our supreme court, is as follows: "No doubt where, in an action for injuries caused by failure of duty on the part of the defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion." *Whart. Neg.* 426; *Railway Co. v. Spicker*, 61 Tex. 427. Care should be exercised by a trial judge not to give undue prominence to any phase of the case in his instructions to the jury, for it has a tendency to impress them with the idea that the judge wishes to give particular stress to that portion of the charge. On the subject of contributory negligence, we are of the opinion that the charge of the court is open to criticism, as it is given undue and unnecessary prominence.

The third assignment of error is not well taken. The jury is instructed very fully on the subject of the use of ordinary and reasonable care, and the instructions are qualified, so as to cause the jury to take into consideration the age of the boy in passing upon the question of care.

Appellant assigns as error the action of the court in giving the following charge: "If plaintiff saw the defect in the sidewalk,—that is, if he saw that the same was higher than the street,—then, if he passed over the same, if you believe that a person such as plaintiff might reasonably be expected to have gone around the same, (if there were other routes that he could have gone without any material difference as to distance and convenience,) or if by the exercise of such care and prudence as might be reasonably expected of a person such as plaintiff, knowing of the condition of said sidewalk, he could have avoided such injury, then plaintiff would be guilty of contributory negligence, and could not recover for such injury, whether defendant was guilty of negligence or not." This charge is clearly erroneous. Under repeated decisions of the higher courts of Texas, it has been held reversible error for a court to group certain facts in a case, and instruct the jury if they find these facts to be true they will constitute negligence. Negligence is generally a question of fact to be found by a jury, and it is a safer plan in all cases for the judge

to submit the question of whether certain facts constitute negligence to the jury. *Denham v. Lumber Co.*, 73 Tex. 78, 11 S. W. Rep. 151; *Railway Co. v. Briggs*, 23 S. W. Rep. 503; and *Railway Co. v. Long*, 23 S. W. Rep. 499, (decided by this court at the present term.) Again, we are not aware of any rule of law that would require a person walking the streets of a city to take another and different course to his point of destination than the one in which a defect in the sidewalk exists. It is the duty of the citizen to exercise reasonable care and prudence in providing for his own safety, but it is not his duty to leave a sidewalk in the business part of a city, that is daily and constantly being used by the public, and go off in quest of another route, even though it be a nearer and safer one. We can readily see that circumstances might arise—for instance, when the sidewalk is temporarily torn up for some purpose by the authorities, or where it is obstructed necessarily for building purposes—when a person would be held responsible for not seeking another and safer route, but no such rule can prevail where the accident occurs on a street that the public are invited to use by the municipal authorities. Cities and towns are held responsible for the condition of their streets and sidewalks, and they cannot be permitted to shield themselves from the charge of negligence in this respect by making the defense that the person injured might have gone to his point of destination by some other route. The rule on this subject is that, in order for an act to be deemed negligent per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that it can be reasonably said without hesitation or doubt that no careful person would have done it. It is also the rule that, if a highway or street is out of repair, or is obstructed, and this is known to the person injured, he is guilty of contributory negligence if he places himself in the way of it, provided as safe and as near a way is open to him. *Railway Co. v. Gasscamp*, 69 Tex. 546, 7 S. W. Rep. 227. In the case we are considering it is the contention of appellee that the sidewalk was perfectly safe, and was in daily use by many people, and under the circumstances it would be a singular species of law that would permit it to justify an alleged act of negligence in keeping its sidewalks, by saying the injured party ought not to have used its unsafe sidewalks, but have gone to his destination in another direction. Even if it had been incumbent on appellant to have gone by a different street, his act in going where he did was not in itself such want of care as would justify a judge in taking the question from the jury, and telling them it was negligence. The question of contributory negligence in this case was purely one of fact, and as such should have been submitted, under appropri-

ate instructions, to the jury for their determination. For the errors indicated the judgment is reversed, and the cause remanded.

NEILL, J., did not sit in this case.

GARZA v. MANCHKE.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—PAYMENT—EVIDENCE.

In an action by the holder on a note indorsed in blank, and which defendant had paid to the indorser, plaintiff's testimony as to his ownership was contradictory, and he had, according to defendant's testimony, acted in relation to the payment in such a way as induced defendant, and was calculated to induce a reasonably prudent man, to believe the indorser was the owner. *Held*, that a judgment on a verdict for defendant should not be disturbed.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Leonardo Garza against Ludwig Manchke on a note. From a judgment for defendant, plaintiff appeals. Affirmed.

A. S. Chevalier, for appellant. Upson & Bergstrom, for appellee.

NEILL, J. This suit was brought by appellant in the justice's court of precinct No. 1 of Bexar county to recover of appellee the sum of \$100 upon a promissory note executed by appellee, and payable to the order of D. J. Kearney, and by said Kearney indorsed to Tom Harrison, and by said Harrison indorsed in blank. The appellee admitted the execution of the note, but denied that plaintiff was the legal owner and holder of it, and alleged that Harrison was the owner of it, and that he had paid Harrison the amount due on the note, and that the note had simply been left by Harrison with appellant for safe-keeping. Upon the trial in the justice's court, judgment was rendered in favor of appellee, from which appellant appealed to the district court, where the case was tried by a jury, and judgment again rendered for appellee, from which appellant prosecutes this appeal.

The evidence shows that appellee paid Harrison the note, and obtained his receipt in full for such payment. The evidence is conflicting as to whether Garza or Harrison was the owner of the note. The testimony of the appellant in relation to his ownership of the note is somewhat contradictory. After the first payment was made by appellee to Harrison, if appellee's testimony is to be believed, the appellant acted towards appellee in relation to such payment, in such a way as induced him, and was calculated to induce a reasonably prudent man, under the same circumstances, to believe that Harrison was the owner of the note. The issues were fairly submitted to the jury by the

charge, which appellant does not complain of; and, there being evidence to support the verdict of the jury, this court does not feel authorized in disturbing it upon appellant's assignment of error, that it is contrary to the law and evidence. The judgment of the district court is affirmed.

JAMES, C. J., being disqualified, did not sit in this case.

CALLAGHAN, County Judge, v. SALLIWAY.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

MANDAMUS—To COUNTY JUDGE—CLAIMS AGAINST COUNTIES—WARRANTS.

1. Where one has presented a claim against the county to the commissioners' court, as authorized by law, and they have allowed the same, and ordered a warrant to be drawn, a petition for a writ of mandamus to compel issuance of the warrant cannot be defeated on the ground that there is an adequate remedy by suit against the county, as under Rev. St. art. 677, the commissioners' court must have refused to allow a claim before an action thereon can be brought against the county.

2. As Rev. St. art. 1514, gives the commissioners' court power to audit and settle all accounts against the county and direct their payment, an order allowing an account and directing a warrant to be drawn is conclusive, unless set aside by the district court, and cannot be collaterally attacked by the county judge in mandamus proceedings to compel him to sign the warrant.

3. Where the county commissioners' court has allowed a claim against a county for services under a contract for superintending construction of a courthouse, it is not necessary that the claim shall be registered by the treasurer, as Rev. St. art. 960, does not contemplate that claims against the county shall be registered by the treasurer, unless they are such, upon their face, as he is authorized to pay off.

4. As the statutes require some claims against counties to be paid out of the treasury on the certificate of the county judge, and some on the certificate of the clerk, the word "or" will not be read "and," in Rev. St. art. 986, providing that all warrants or scrip issued against the county treasurer by any judge or court shall be signed, and attested by the clerk "or" judge of the court issuing the same; and, as there is no statute requiring the county judge to sign warrants issued on claims audited and allowed by the county commissioners' court, a warrant issued by the clerk, on an order of said court allowing a claim, and directing its payment, need not be signed by the county judge.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Petition by Henry B. Sallaway against Bryan Callaghan, county judge, for a writ of mandamus. The writ was granted, and defendant appeals. Reversed.

A. W. Dillard and L. N. Walthall, for appellant. Tarleton & Altgelt, for appellee.

NEILL, J. The appellee brought this suit in the district court of Bexar county, against the appellant, for a mandamus to compel him, as county judge of Bexar county, to

sign and deliver a warrant in his favor on the treasurer of said county for \$100. Appellee alleged in his petition that it was appellant's duty, as county judge, to sign all warrants authorized by the county commissioners' court of Bexar county, to be drawn upon and against funds belonging to said county in the hands of its treasurer, in order that the treasurer might be lawfully authorized to pay such warrants; that on the 23d day of February, 1893, and prior thereto, the commissioners' court of Bexar county duly made and entered an order and judgment on the minutes of said court, ordering that a warrant be issued by the county clerk of Bexar county in favor of appellee for the sum of \$100; that he then requested appellant to sign said warrant in his official capacity, as it was his legal duty to do, but that he, without lawful excuse, failed and refused to sign the same, and thereby prevents the proper and lawful order and judgment of the county commissioners' court from taking effect, by reason whereof he is deprived of the value of said warrant, which he avers to be of the value of \$100, and he is prevented from obtaining said money, which he alleges he is justly and lawfully entitled to. The appellant filed—First, a general exception to the petition; and, second, excepted specially, upon the grounds (1) that it appears from plaintiff's own showing that said \$100 is a claim against the county, and that petitioner has another and adequate remedy for the recovery of the same, if he be entitled thereto, to wit, a suit in a court having jurisdiction thereof; (2) that neither the commissioners' court nor the members thereof were parties to this suit, and if he is entitled to have his voucher signed, then the members of the court are authorized and empowered to sign the same; and (3) that it appears from petitioner's own showing that said claim for \$100 is a claim against the county, and it is not averred, and does not appear, that said claim has been duly registered as the law requires; and, third, by special plea, in which he averred "that the said claim of one hundred dollars is a claim for superintending the erection and construction of the county courthouse for said county; that such employment of plaintiff is without authority and void, in that the county commissioners' court has employed, by a contract in writing, another and a different person to superintend the said erection and construction, etc.; and that such contract is still in full force and effect, and that while such contract is in force there is no authority of law to employ another superintendent to perform the same services," etc. The special plea of defendant was excepted to by plaintiff, which exception was sustained. The general and special exceptions to plaintiff's petition were all overruled. The case was tried by the court without a jury, and judgment rendered, awarding appellee a peremptory writ of mandamus against appellant, requiring him, as

county judge of Bexar county, and as ex officio presiding officer of the commissioners' court of said county, to sign the warrant as prayed for, from which judgment this appeal was taken. The action of the court in overruling defendant's general and special exceptions to plaintiff's petition, and in sustaining plaintiff's exception to his special answer, is assigned by appellant as error.

Conclusions of Fact.

(1) On the 17th day of November, 1892, the county commissioners' court of Bexar county, by an order entered upon its minutes, appointed Henry B. Sallaway superintendent of construction of the new county courthouse, agreeing to pay him \$100 per month for his services, and he thereupon entered upon the discharge of his duties under said appointment, and was paid for his services by warrants drawn on the county treasurer, and signed by the county judge, up to January 16, 1893. (2) That on the 17th day of February, 1893, he made out his account of \$100 for services as superintendent of construction of the new county courthouse of Bexar county, extending from January 17, 1893, to February 16, 1893, and presented it to the county clerk of said county, who made out a warrant on the county treasurer for said amount, and presented it to Bryan Callaghan, county judge, for his signature, which he refused to sign. (3) After appellant refused to sign said warrant, the appellee presented his said account of \$100 for such services, as a claim against Bexar county, to the county commissioners' court of said county for approval and allowance, which court, on the 23d day of February, 1893, by an order entered upon its minutes duly approved the same, and ordered the county clerk to draw a warrant of the county for the amount payable to Sallaway out of the courthouse fund. (4) After the order approving said account, a warrant was drawn under authority of said order by the clerk, and presented to the appellant for his signature, which he refused to sign, giving his reason for his action, that a Mr. Gordon had been employed as architect and superintendent of the county courthouse, and that there was no law for employing Mr. Sallaway. (5) Bryan Callaghan was at the time said warrant was presented to him for his signature, and is now, the county judge of Bexar county, Tex.

Conclusions of Law.

From these facts it appears to us that the appellee was entitled to a certificate or warrant from some officer authorized by law to issue the same on the county treasurer for his money. It will not do to adopt as law the contention of appellant that he should have instituted his suit against the county for the amount, and had his right to it judicially determined. A condition precedent to a suit against a county is that the claim upon which it is founded must be presented

to the county commissioners' court for allowance, and the court have neglected or refused to audit or allow the same. Rev. St. art. 677. Appellee so presented his claim, and it was audited and allowed by the court, and by such action of the court he was not able to meet the condition necessary to enable him to institute and maintain his action, nor was a suit against the county necessary. By article 1514, Rev. St., county commissioners' courts are given the power to audit and settle all accounts against the county and direct their payment. This power of the court was invoked by the appellee on his claim, and the court, in the exercise of it, made the order allowing it referred to in our findings of fact. The effect of this order is a judgment having all the incidents and properties attached to a similar judgment pronounced by any regularly created court of limited jurisdiction, acting within the bounds of its authority; and the action of the court on the claim is *res judicata*, and is as conclusive of the county's liability as though the adjudication had been made by a court of general jurisdiction. 2 Freem. Judgm. § 531. By article 5, § 8, of our constitution, it is provided that the district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions as may be prescribed by law. To set aside or avoid the effect of an order of the county commissioners' court auditing and allowing a claim against a county, this jurisdiction of the district court must be invoked in the proper manner, by an appropriate proceeding; and until it is done, the action of the county court must stand as a judgment, and cannot be collaterally attacked by the district or any other court. What we have thus said is, in effect, to hold that appellant's assignments of error to the court's overruling the first and second special exceptions of defendant to plaintiff's petition, as well as his assignment to the court's sustaining plaintiff's exception to his answer, are not well taken.

Nor was there any error in the court's refusing to sustain defendant's third special exception to plaintiff's petition. It is not contemplated by article 960, Rev. St., that claims against a county shall be registered by the treasurer unless they are such upon their face as he is authorized to pay off; for article 966 requires him to pay off the claims in each class in the order in which they are registered. The first assignment of error is that "the court erred in overruling defendant's general exception to plaintiff's petition, because it is insufficient in law to require him to answer thereto;" and the sixth is that "the court erred in rendering judgment in favor of plaintiff, and awarding him a writ of mandamus, because under the facts of the case the plaintiff was not entitled thereto." These assignments involve substantially the same question, for, the plain-

tiff having proved everything he alleged, his proof entitled him to the writ if his allegations were sufficient. Article 998, Id., prohibits the county treasurer from paying any money out of the county treasury except in pursuance of a certificate or warrant from some officer authorized by law to issue the same, and makes it his duty, if he has any doubt of the legality or propriety of any order, decree, certificate, or warrant presented to him for payment, not to pay it, but to make report thereof to the county commissioners' court for their consideration and direction. The questions arising from this statute are: Is the county judge an officer authorized by law to issue a certificate or warrant on a claim against the county which has been audited and allowed by the commissioners' court? And, if so, is he the only officer vested with such authority? If these questions should be answered in the affirmative, we should be strongly inclined to hold that, if such exclusive authority devolved upon him, it is a duty purely ministerial, which upon his failure to discharge, he could be compelled to by a writ of mandamus; for if an officer upon whom is imposed the exclusive duty of issuing such certificate or warrant should arbitrarily or capriciously disregard it, and could not be forced to discharge the duty, claims against the county, which are in effect judgments against it, would be rendered valueless by the arbitrary and capricious action of the county judge, and a county thus prevented from discharging its obligations and carrying out its contracts.

It is contended by appellee that the duty of signing warrants upon claims against a county which are audited and allowed by the commissioners' court is imposed by article 986, Rev. St., which provides that "all warrants or scrip issued against the county treasurer by any judge or court, shall be signed and attested by the clerk or judge of the court issuing the same, under his official seal," etc. To give such effect to the statute, it is argued by appellee's counsel that the word "or" between the words "clerk" and "judge" should be construed to mean "and." This statute must be so construed, if practicable, as to harmonize with other statutes in relation to the payment of demands or claims against a county. Upon examination of these statutes it will be seen that the payment of certain demands against counties are required to be paid out of the county treasury upon the certificate of the judge, as in article 983, Rev. St., and article 1070, Code Crim. Proc. Others are required to be paid upon the certificate of the clerk, as in article 3105, Rev. St., and article 1085, Code Crim. Proc. There are many other statutory provisions of the same character, but those referred to are sufficient to show that some claims are required to be paid on the certificate of the judge, and others on the certificate of the clerk, which show that,

to give the word "or" the meaning contended for by appellee, the statute quoted would be inconsistent with other statutes on the same subject. If the words in the statute are given their usual, ordinary, and accepted meaning, it is not ambiguous nor inconsistent with other statutes relating to the same subject. Other statutes are found that provide that certain accounts shall be examined by the commissioners' court, and, if allowed, it shall order a draft to be issued for the amount upon the treasurer and others, that are silent as to what shall be issued on the treasurer. The statute under which appellee's claim was allowed simply provided that the commissioners' court should direct its payment. The order of the court directed the county clerk to draw a warrant of the county for the amount in favor of the appellee. There is no statute requiring the county judge to sign warrants issued upon claims audited and allowed by the county commissioners' court, and we do not think that it is necessary to the validity of such a warrant that he should sign it. The county clerk is the ex-officio clerk of the county commissioners' court, and keeps a record of its proceedings; and, when a claim is allowed against a county, a certified copy of the order from the minutes of the court, attested and signed by the county clerk under the seal of the county commissioners' court, is all that is required or necessary to authorize the county treasurer to register and pay the claim. From this it follows that appellee has the right to apply to and demand from the county clerk such certified copy of the allowance of his claim; and it not appearing that he had made such application or demand on the clerk, or that the clerk has refused to issue such certificate to him, it is clear that he has not exhausted his remedy, and is not, therefore, entitled to a mandamus against the appellant. The judgment of the district court is reversed, and judgment here rendered for appellant.

JAMES, C. J., did not sit in this case.

CORLEY et al. v. ANDERSON.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

EXECUTORS -- SALES UNDER ORDER OF COURT -- CONFIRMATION -- JUDGMENT -- COLLATERAL ATTACK -- LIMITATION OF ACTIONS -- INSTRUCTIONS.

1. The rule that all the executors named must join in a sale does not apply to executors in whom no power of sale is vested by their appointment, but who obtain the power only from the court; and, though there may be two executors when proceedings for sale of a decedent's lands are had, an order for one of them to sell, and a sale reported by him, and confirmed by the court, is sufficient to pass title as against a collateral attack.

2. Though an entry in the minutes of the court in relation to an executor's sale of a land certificate was not in terms a confirmation, yet where no further sale was ordered, and no objection was raised, and the money was paid,

and possession of the certificate taken, by the purchaser, this is equivalent to a confirmation, and is sufficient to pass title.

3. As a certificate to some extent located would naturally be in the surveyor's office, an executor's sale thereof under order of the court is not invalid because it was not in his possession at the time of the sale.

4. The burden is on one who pleads coverture to defeat the statute of limitations, not only to show her marriage, but also to show that the coverture continued for a sufficient time.

5. The county court, in probate matters, is a court of general jurisdiction, and its orders and judgments cannot be collaterally attacked.

6. A charge not applicable to the evidence is properly refused.

7. It is not error for the court to assume uncontradicted facts, or to instruct the jury that they have been established; nor is it error to submit the existence of such facts to the jury.

8. If a party desires a charge to the effect that a certain fact is or is not proved, he should request it.

Error from district court, Bandera county; T. M. Paschal, Judge.

Action by Susan H. Corley and others against Chris Anderson. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

James B. Goff, for plaintiffs in error. McLeary & Fleming, for defendant in error.

JAMES, C. J. Plaintiffs in error, as heirs of Henry W. Karnes, brought suit to recover a tract of 480 acres, surveyed in 1856, by virtue of bounty warrant No. 407, issued to Henry W. Karnes on July 2, 1836, patent issued July 6, 1839, survey made in 1856. Defendant pleaded not guilty, also the three, five, and ten years limitations, improvements, and vouched his warrantors, who made similar answers. Verdict and judgment were for defendant.

Conclusions of Fact.

That patent was to Henry W. Karnes, and most of plaintiffs were shown to be his heirs. About 1840, Karnes died, and his will, probated in Bexar county, named Thomas Addicks, William Winston, John W. Smith, and John C. Hays executors, (not independent executors,) and provided, among other things, for the payment of his debts. Winston did not qualify, but it appears that the others did, and at the January term, 1841, Smith resigned, up to which time all three were the executors, and thereafter Addicks and Hays were the executors. In December, 1840, an inventory was returned in the estate by John C. Hays and John W. Smith, executors, which described, besides certain lands, the following: "One military warrant, No. 3,965, for 1,280 acres of land, as applied for on the Rio Frio, appraised at \$100.00. One donation warrant, No. 407, for six hundred and forty acres, not applied for, appraised at \$50.00." In September, 1841, an additional inventory appears to have been filed. This inventory was not shown, but enough appears to satisfy

us that it was for personal property not embraced in the original inventory. On October 25, 1841, an order was made that Addicks, one of the executors, sell the personal property in the supplemental inventory, and also the real estate of the succession. From the notice of sale immediately following, (November 7, 1841,) and from the account of sales filed January 6, 1842, by Addicks, the certificate seems to have been regarded as located, for in the notice the two certificates appear to be referred to as surveys, and in the account of sales the warrant in question is described as follows: "Land warrant for 640 acres of land, No. 407, granted to the deceased, together with the benefit of the location on Sandies creek, sold to James Robinson for \$30.00,"—from which we conclude that at the date of the order of sale this certificate was either located, or in such condition as to have been regarded by the court as real estate in making the order of sale, and was intended to be included in such order. It appears that the account of sales was filed by Addicks under oath on January 6, 1842, in vacation, and at the following term the court made the following entry with reference to it: "Sale bill returned by one of the executors, amounting to one hundred and seventy-five dollars and seventy-two $\frac{3}{4}$ cents, which was filed on the 6th instant, during vacation." Nothing seems to have been done afterwards in the estate, and no deed or transfer from the executors, or either of them, was produced or shown, and there was no other evidence of payment by Robinson of the purchase money for the certificate. The warrant was not placed upon the particular land in controversy until 1856, it having been obtained by the representative of James Robinson's estate from the surveyor's office. There appeared to be debts against the estate.

The court, among other charges, gave the following: "Charge 1. If the jury find from the evidence that the land in controversy was patented to H. W. Karnes, that he died before the 20th of May, 1839, and that plaintiffs have established the fact of heirship as claimed, this would constitute a prima facie case entitling them to recover the land sued for, unless you further find, under the instructions hereinafter given you, that defendant has shown title out of Karnes' estate to himself, or unless his title is defeated by limitation; and you will, in case you find the above facts proven, and that defendant has not shown title out of H. W. Karnes' estate as aforesaid, or unless defeated by limitations, you will find a verdict for plaintiffs. Charge 2. You are instructed that the transcript or certified copies of orders of probate proceedings from the probate court of Bexar county in the estate of Henry W. Karnes, deceased, introduced in evidence by the plaintiffs and defendant, establishes (1) a valid administration on said estate; (2) an order to

sell at public sale the land certificate by virtue of which the land in controversy was located; (3) a return of said sale by the executor ordered by the court to make it, and the order of the court recognizing the return of said sale, amounting to a confirmation or approval thereof. These facts *prima facie* vested the title to said land certificate in the purchaser, James Robinson; and the deeds from said Robinson's heirs to Hoffman and Schmidt to Johnson and Anderson, introduced in evidence by the defendant, Anderson, had the effect to vest title of said Robinson in the defendant Chris Anderson, provided it further appears from the evidence, and you so find, that said Robinson paid the amount of the purchase money for said land warrant No. 407. And if you so find the facts to be, you need go no further in your investigation of this case, but will return a verdict for defendant." By charge 3 the court instructed the jury that if they found that the purchase money was not paid by said Robinson they would proceed to consider the defenses of limitations, etc., and in this charge it was stated by the court that plaintiffs' counsel admitted that all of the plaintiffs except Susan H. Corley, Ellen M. Cox, Arkansas P. Denison, and Annie O. King were barred by limitations. After charging the jury formally in regard to the several plans of limitations, the court stated further as follows: "But in this connection the jury are charged that the statutes of limitation, as herein charged, do not run against a married woman during her coverture; and, the plaintiffs having replied to defendant's plea of limitation that they were married women, you are therefore charged that if you believe that the plaintiffs, or either of them, were married women at the time the defendant's adverse possession commenced, then the statute of limitation did not run against such plaintiffs so long as such disability existed; but in this connection you are charged that the burden of proof is on the plaintiffs to show the date of such marriage and period that they continued under such disability." There was evidence showing such possession as satisfied the statutes of limitations by defendant, Anderson, and those under whom he held, from and since 1872, with deeds registered, and payment of taxes. The suit was filed May 20, 1899. There was no evidence as to Arkansas P. Denison's coverture or heirship. Annie O. King was shown to have married in 1865, and she sues as a feme sole. Ellen Cox was married in 1856 to R. M. Cox, and sues with her husband, R. M. Cox. Susan H. Cooley was married in 1844 to W. H. Cooley, and sues with her husband, W. H. Cooley. Defendants showed a regular chain of title from and under Robinson.

Conclusions of Law.

The first assignment of error is that the court erred in its first charge, above copied.

for, as is stated by appellants, "submitting to the jury a question of law, and making their finding that the land was patented to Henry W. Karnes a condition precedent to their finding a verdict for plaintiffs." The patent to Henry W. Karnes was in evidence without question, and it would have been proper for the court to have so stated to the jury without leaving it to them to find the fact. That the legal effect of the patent was to vest title in Karnes is stated in the charge. It is not error for the court, when facts are proved without contradiction, to assume such facts, or to instruct the jury that they have been established. At the same time it is not error to submit the existence of such facts to the jury as other facts are required to be submitted. If a party desires a charge to be given to the effect that a certain fact is proved or not proved, he should ask for it. *Ivey v. Williams*, 78 Tex. 687, 15 S. W. Rep. 163. This was not done in this instance. Besides, it appears that the other portions of the charge virtually instruct the jury that the title to the survey was originally in Henry W. Karnes, and it is altogether improbable that any detriment resulted to plaintiff in this particular.

It is insisted that the second charge was erroneous, because the evidence showed that the sale was made at the instance of and by one of the executors only, and that the evidence does not show a confirmation of the sale of this warrant to Robinson. It appears that the court instructed the jury that the facts in evidence relative to the sale showed a sale and a confirmation thereof, and that title to the warrant was thereby vested in Robinson, provided the jury should find from the evidence that he paid the purchase money. This last-named fact was the only one left to the determination of the jury in this connection.

The principle invoked by appellants that it requires the joint action of executors to convey property applies to executors who are trustees, such as independent executors. Where more than one of such have qualified, they must all act, to exercise powers derived from the will, the reason being that the power has not been vested in any one of them. We do not believe this principle is applicable to administrators or to executors in whom no power to convey is vested by their appointment, and who obtain what power they may exert in the premises from the court under whose direction they act. *Schouler, Ex'rs*, § 404. A sale by the ordinary administrator is not a sale by him, but it is in reality a sale by the court,—a species of judicial sale. Where, as in this case, there were two executors when the proceedings of sale were had, an order of the court for one of them to sell, and a sale reported by him and confirmed, will be held to pass title to the property, certainly as against collateral attack, as effectually as if both had

acted. The sale is not a nullity. In *Wells v. Mills*, 22 Tex. 302, where there were two administrators, a sale made by one of them, and returned by him alone, was regarded as a sufficient return, although in that case it seems that both afterwards joined in making deed to the purchaser.

The entry made in the minutes of the court relative to the account of sales was not, in terms, a confirmation of the sale. The court thereby merely noted the fact that the return had been made. But we cannot say that the district judge erred in declaring that it was a confirmation, in view of the undisposed facts connected with it. The entry was not a rejection of the sale. No further sale was ordered, no objection was made to the sale by creditors or others, no further action whatever is shown to have taken place in the estate, and no question has been since raised by those interested concerning it, and the certificate was taken possession of by Robinson's representative. If there was error in the court assuming that these facts and circumstances established a confirmation of the sale, the error was rendered immaterial by submitting the fact of the payment of purchase money by Robinson, and charging the jury that for the proceedings to have passed the title to the purchaser it must appear that Robinson paid the purchase money, and by the finding of the jury thereon. This question of fact was correctly submitted to the jury under the facts and circumstances presented by the testimony, and their verdict necessarily implies that they concluded the purchase money had been paid. This fact being found, it followed that the purchaser was entitled to a confirmation of the sale by the court, and this, together with the other facts stated, was undoubtedly equivalent to a confirmation, and should operate to confer title. *Neill v. Cody*, 26 Tex. 290; *Moody v. Butler*, 63 Tex. 210. It is insisted also that an executor's sale of personal property not in his possession or present at the sale is invalid. What merit there may be in this as a proposition of law we need not examine into, because, if correct, it has no application to this case. The evidence indicates that the certificate had become identified with a location, and was thus sold; and naturally the certificate would be in the surveyor's office, where it was afterwards found by the representative of Robinson and withdrawn. Appellants emphasize this condition of the warrant in their assignments and brief. It cannot be seriously contended that, if sold as a located certificate, it was necessary that it should have been in the administrator's hands at the time of the sale. We will here add that the case presented is not one where a land certificate was sold after it had become merged into land. It appears to have been to some extent located, and the order authorized the sale of realty as well as per-

sonalty, and the warrant, with the right to the location, was the subject of the sale. *Farris v. Gilbert*, 50 Tex. 350. That the location was afterwards abandoned, and another location made, would not affect the title to the certificate.

It follows, after disposing of the above features of the case, that appellants have no legal reason to complain of the verdict, unless certain errors assigned in the charges on limitations are well taken. The fifth assignment of error is as follows: "The court erred in the fifth paragraph of defendant's special charge, virtually instructing the jury that it was incumbent on the plaintiffs, who had shown themselves to have been married women at the time possession was taken, to prove the additional fact that the marital relation had not been dissolved, which is manifest error, inasmuch as, when a marriage has been proven, the legal presumption is that the relation subsists till otherwise shown." It is incumbent on plaintiffs who seek for disability to avoid the effect of the statute of limitations to prove that at the date the adverse possession began the disability existed, and that it continued to exist for a sufficient time to prevent the statute from having its effect. The court's charge (No. 3, above) states a correct proposition of law on this subject as applicable to the facts of this case; and if, as appellants contend, a presumption obtains in such case that a disability once proved to exist continues to exist, they should have requested such a charge. We are of opinion that this general rule of evidence concerning presumptions of fact does not apply in respect to disabilities relied on to defeat the statute of limitations. The statute is a complete bar against the title, when the facts supporting it are shown, presumably against all persons, even those under disability. To avoid its operation the claimant must by some affirmative evidence establish both the existence of the disability at the time the statute commenced to run and its continuance for a sufficient period. In this case the charge that appellants argue should have been given would not have been applicable to the evidence. Of the four females claimed by appellants to have been under disability of coverture, one of these, *Arkansas P. Denison*, is not shown to have been married, or to be one of the heirs. Two of them, *Susan H. Corley* and *Ellen M. Cox*, were both suing jointly with their husbands, and the evidence shows they were man and wife, respectively, long before the possession began, and it was not necessary to resort to presumptive evidence of the continuance of their coverture. The remaining one, *Annie O. King*, was married to *W. J. King* in 1865. She sues as a feme sole, and it does not appear from the evidence when she ceased to be a married woman. It is not even shown that she was still a married woman in 1872, when the adverse possession

began. It would, we believe, have been improper to charge the jury in her case that they could presume that she was under coverture in 1872, and for a period afterwards sufficient to obviate the bar of the statute.

The seventh assignment of error is this: "There being no deed or evidence of payment of the purchase money, or confirmation of the sale of the warrant, defendant showed neither title nor color of title deraigned from the sovereignty of the soil, as contemplated by the statute; hence the refusal of the court to give to the jury plaintiff's special charge No. 1 was error." The charge asked was that the statute of limitations of three years did not apply to the facts of the case. The conclusions of this court already given dispose of this assignment in favor of the applicability of the three-years statute.

It is further contended that to sustain the judgment it was essential that an application should have been made by all the executors for that purpose, and for good cause shown. It was once held in this state that the county court in probate matters was one of limited jurisdiction, and that such an application must be shown to have been made, in order to give the court jurisdiction. *Finch v. Edmonson*, 9 Tex. 504. This idea has been abandoned, and the more enlightened doctrine now prevails that such court, in matters pertaining to estates, is one of general jurisdiction, and its orders and judgments are supported by presumptions, as other courts of general jurisdiction on collateral attack. *Weems v. Masterson*, 80 Tex. 46, 15 S. W. Rep. 590; *Gillenwaters v. Scott*, 62 Tex. 672. Our conclusion is that there is no error requiring a reversal, and the judgment is affirmed.

CLIFFORD v. LEE et al.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

EXECUTION—TIME OF ISSUANCE—ACTION FOR DAMAGES—INSTRUCTIONS—NEW TRIAL—REMITTITUR.

1. Under Rev. St. art. 1632, allowing an execution, in less than 10 days after rendition of judgment, on the filing of an affidavit that defendant "is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding creditors," it is not necessary to state that the property is being removed with intent to defraud creditors.

2. In an action for damages for issuing an execution in less than 10 days after rendition of the judgment, an award of exemplary damages is not warranted, where there was no malice on the part of defendant, and plaintiffs were removing their property out of the county.

3. In such action, it is error to charge that, unless it is shown that plaintiffs were about to remove "all" their property out of the county, the execution was wrongful, as the execution is warranted if a large portion of the property is about to be removed.

4. In such action, it is error to charge that "the issuance of an execution immediately upon the rendition of a judgment, upon the filing of the proper affidavit, without waiting

for the lapse of ten days, is summary, and might be rendered exceedingly harsh and oppressive, by resorting to it wrongfully," as the charge intimates that the court thinks a wrong has been done.

5. Though malice may be inferred from want of probable cause for issuing an execution before expiration of the 10 days allowed after rendition of judgment, it is error to so instruct the jury.

6. Where the damages allowed are excessive, the court cannot allow a remittitur, instead of granting the new trial applied for.

Appeal from El Paso county court; Allen Blacker, Judge.

Action by Lee & Smith against James Clifford. From a judgment for plaintiffs, defendant appeals. Reversed.

T. L. Nugent and N. W. Stanton, for appellant. Millard Patterson and C. N. Buckler, for appellees.

FLY, J. This is a suit for damages alleged to have arisen by reason of a levy of an execution on certain cattle, the levy having been obtained on same day judgment was rendered, by virtue of an affidavit that the appellees were about to remove their property out of El Paso county. The evidence shows that appellant had obtained a judgment in the justice court against appellees for \$185, and that on same day T. E. Clifford, agent for appellant, made the affidavit, and obtained an execution, which was levied on 100 head of cattle belonging to appellees. Appellees sued for \$300 actual and \$600 exemplary damages, and the jury returned a verdict for \$300 actual and \$184 exemplary damages.

After appellant had filed his motion for new trial, and after the county judge had indicated that he was of the opinion that the verdict was excessive, the plaintiffs were allowed to file a remittitur of \$144 of the actual damages. To this action of the court the defendant reserved a bill of exceptions. The court should not have permitted the remittitur, but should have granted a new trial. Under the facts in this case, the verdict of the jury was clearly excessive; and it was not in the power or authority of a judge to again pass upon the facts, and, in effect, render the verdict he thought the jury should have rendered. *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. Rep. 1048. Under the facts in this case, the judgment for actual damages, after the remittitur, is in excess of the amount proved up by the witnesses.

The court charged the jury "that the issuance of an execution immediately upon the rendition of a judgment, upon the filing of a proper affidavit, without waiting for the lapse of ten days, is summary, and might be rendered exceedingly harsh and oppressive, by resorting to it wrongfully." Such language should not be used in a charge to a jury, for it is calculated to lead the jury to believe that the court thinks a great wrong has been done, and may influence them in the verdict they render. In this case the jury was clearly influenced, in some manner,

to return a verdict unsupported by the facts, and this charge may have had its influence in leading to that result. The evidence in this case does not support a finding for exemplary damages, as there does not appear from the facts that there was any malice on the part of the appellant; and it does appear, from the testimony of all the witnesses, that the appellees were removing their property out of the county, and that there was probable cause for making the affidavit for the summary execution. Article 1632, Rev. St., allows the issuance of an execution from a justice court, in less than 10 days, "upon the filing of an affidavit by the plaintiff in the judgment, or his agent or attorney to the effect that the defendant is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding his creditors;" and it was not necessary for the appellant's agent to have sworn that the cattle were being removed out of the county with intent to defraud creditors, as that applies only to an affidavit as to secreting or transferring property. Mere proof that the cattle were being removed from the county would justify getting out the execution before the expiration of 10 days from date of judgment.

It was error in the court to instruct the jury that, unless it was shown that the plaintiffs were about to remove all their property out of the county, the issuance of the execution would be wrongful. Appellees admit, themselves, that they were removing their property at the time the writ was levied, and the statute does not require the affidavit to state that the whole or a part of the property was being removed; and proof that a large portion of the property was about to be removed would justify the affidavit, and the issue of the execution would not be wrongful.

The court should not have instructed the jury that malice is to be inferred from want of probable cause. Malice may be inferred from want of probable cause, but this does not imply that it is proper to so charge a jury. The court not only, in its charge, gave this instruction, but, at the request of appellees, repeats it in a special charge. *Biering v. Bank*, 69 Tex. 600, 7 S. W. Rep. 90.

We have reviewed the material questions alleged as error, not deeming it incumbent on us to follow appellant through his voluminous brief of 93 pages. For the error indicated, the judgment is reversed, and the cause remanded.

BLUM et al. v. JONES et al.¹

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

FRAUDULENT PURCHASES AND TRANSFERS — CONSPIRACY — EVIDENCE — INSTRUCTIONS.

1. The issue in a case being whether a conveyance to plaintiff firm was fraudulent, it is

proper to show that a witness for plaintiffs, alleged to have participated in the fraud, in making a deposition, consulted the attorney of the firm before making his answers, was assisted by a member of the firm in giving them, and had his deposition taken by a clerk of the firm.

2. Where F. obtained goods of defendants on credit, with the intention of not paying for them, for the purpose of transferring them to plaintiffs in payment of debt, his purchase is fraudulent, and gives him no title, and plaintiffs, knowing the facts, get no title against defendants.

3. In an action involving the right to the goods, defendant alleged that plaintiffs had conspired with F., whereby he was to purchase goods on credit, and afterwards deliver them to plaintiffs in payment of their debt. *Held* that, in connection with other evidence of the conspiracy, it was proper to show that F. purchased such lines of goods as were carried by plaintiffs in their business, and made purchases out of proportion to his own business.

4. Under the allegations of a conspiracy, declarations of F. as to the value of the goods were admissible.

5. Where evidence is properly admitted under the pleadings, but is not relevant to the issues submitted to the jury, parties fearing that the findings may be affected by such testimony should ask that the jury be directed to disregard it.

Appeal from district court, Val Verde county; Winchester Kelso, Judge.

Action by Leon Blum and others against W. H. Jones and others. Judgment for defendants. Plaintiffs appeal. *Affirmed*.

Denman & Franklin, for appellants. H. C. Carter, for appellees.

NEILL, J. This suit was brought by appellants, Leon & H. Blum and Isaac Blum, against W. H. Jones, sheriff of Val Verde county, and the sureties on his official bond, to recover damages for the alleged wrongful taking of certain property claimed by appellants. It was alleged by appellants that some of the property was taken by virtue of a writ of attachment issued against Joseph Friedlander in a suit of Zaberber & Behan, some under a writ of attachment against Friedlander issued in a suit of the St. Louis Wire Mill Company against said Friedlander, and some by virtue of a writ of sequestration issued against Friedlander in favor of N. K. Fairbanks Company, and that the defendant sheriff sought to justify the taking of the goods under said writs. The damages were laid at \$800. The said sheriff and his sureties answered by general demurrer and special exceptions. The demurrer and exceptions, save one we will hereinafter notice, were overruled. They also answered by a general denial, and specially alleged that said Friedlander, on or about the 13th day of November, 1889, and for some time prior thereto, was a merchant doing business in the town of Del Rio, Tex., and was then, and had been for a long time prior thereto, insolvent, and that his insolvency was well known to plaintiffs. That plaintiffs, being desirous of practicing a fraud, some time prior to said date conspired with said Fried-

¹ Rehearing denied.

lander in a scheme whereby said Friedlander was to buy from every point and merchant in the country all such goods as he could possibly obtain on credit, and subsequently to turn them over to plaintiff on a claim which plaintiffs would have ready for the occasion as an indebtedness against said Friedlander. That, in pursuance of said conspiracy, the said Friedlander did purchase goods of upwards of \$25,000 in value, with the intention never to pay for same, and with the intention to turn same over to Leon & H. Blum in pursuance of said conspiracy. That among others from whom said Friedlander thus purchased goods was the St. Louis Wire Mill Company, from whom he obtained goods of the amount of \$831.48, and that he was indebted to said company in said sum at the time appellants' alleged attachment issued in the suit of said wire company against him. That Friedlander also purchased from Zaberblie & Behan goods of the value of \$603.62, for which sum he was indebted to said firm at the date appellants allege the attachment was levied which issued in suit of Zaberblie & Behan v. Friedlander. That, after allowing time for said goods purchased to arrive at his storehouse, said Friedlander, in pursuance of said conspiracy, attempted, on or about the 13th day of November, 1889, to turn over and transfer all of his stock of goods, including the \$25,000 worth obtained as aforesaid, to said Leon & H. Blum, and that said stock of merchandise constituted all the estate of said Friedlander. That the sole object of the transaction between Leon & H. Blum and Friedlander was to hinder and delay creditors of Friedlander, and to obtain goods of others. In order that said Friedlander might turn same over to said Leon & H. Blum in satisfaction of an alleged debt which said Friedlander pretended to owe said Leon & H. Blum. It was also averred that said indebtedness had no real existence, but was wholly concocted for the purposes aforesaid; that said transfer was in effect an assignment, and void as an attempt to prefer creditors; that the reasonable value of the stock of goods so transferred to said Leon & H. Blum was far in excess of the amount of the indebtedness claimed by them to be canceled by said transfer; that said transfer was therefore absolutely void, and made for the purpose of defrauding, hindering, and delaying the creditors of said Friedlander, and that the said sheriff in seizing the goods acted under writs of attachment issued by courts of competent jurisdiction. Zaberblie & Behan and the St. Louis Wire Mill Company appeared and made themselves parties defendant to the suit, and adopted the answer of the original defendants, and agreed that, if judgment was rendered against the original defendants, said defendants might have judgment over against them. The case was tried before a jury, who found a verdict for

defendants, upon which the judgment was rendered for defendants from which this appeal is prosecuted.

Conclusions of Facts.

(1) W. H. Jones, on the 21st day of November, 1889, and subsequent to that time, was the sheriff of Val Verde county, Tex., and as such sheriff he executed a bond with H. A. McKee and Oscar Leffering as sureties, as alleged in plaintiffs' petition. (2) That the writs of attachment described in plaintiffs' petition were issued and executed by W. H. Jones, as sheriff of Val Verde county, upon certain goods in appellants' possession, as alleged by plaintiffs. (3) On the 13th day of November, 1889, J. Friedlander executed to appellants a bill of sale to his entire stock of goods, wares, and merchandise in Del Rio, Tex., which was all the property owned by Friedlander at that time. (4) The consideration for such sale was a credit of \$18,471 given Friedlander by appellants on an account due them by him, and the assumption of certain debts of Friedlander by appellants, which credit and debts aggregated \$25,000, as stated in the bill of sale. (5) The goods levied on by the sheriff under said writs of attachment were a part of the goods conveyed appellants by Friedlander, and were worth about \$1,500. (6) The goods conveyed by Friedlander to appellants were reasonably worth, at the time of such conveyance, \$32,000. (7) That at the time of such conveyance Friedlander was insolvent, and the fact of his insolvency was known to appellants. That he owed for said stock of goods, besides the amount assumed by appellants, the sum of \$21,241.22, and that appellants knew of such indebtedness or could have known of it by the use of ordinary diligence. (8) That a short time before the conveyance to appellants Friedlander purchased over \$21,000 of said goods with the intention of not paying for them, and that appellants knew of such fraudulent purpose of Friedlander at the time he conveyed them their goods, or could have known it by making proper inquiry. (9) The goods levied on by appellee Jones by virtue of the writs of attachment were a part of the goods fraudulently purchased by Friedlander, and that the debts upon which said attachments were sued out were due for goods so fraudulently purchased.

Conclusions of Law.

The special exception to plaintiffs' petition which was sustained by the court was that it appeared from said petition that they could not recover for 400 boxes of soap as sought, because it was alleged therein that the soap was taken by virtue of a writ of sequestration directed to defendant Jones as sheriff, and that neither he nor his bondsmen could be held liable in damages for doing that which the petition shows the sheriff

was by the law compelled to do. The action of the court on this exception, and upon another subject relating to the same matter, were assigned as error. But the appellants have filed in this court an admission that said assignments of error are not well taken; therefore they will not be considered.

There was no error in the court's overruling the plaintiffs' objections to the answers of the witness Sylvian Blum to cross interrogatories 6, 30, 32, 42, 43, 46, and 47. Without commenting upon what these answers, taken in connection with other testimony developed upon the trial, may tend to establish, we will say that, in our opinion, none of them were irrelevant, but were all pertinent to the issues made by the pleadings, and were proper to be considered by the jury, in connection with other testimony in the case, in determining whether the conveyance by Friedlander to appellants was fraudulent. As to the relation of these answers to other testimony in the case, if any, the effect that should be given them, and what they, either alone or considered in connection with other testimony, may or may not prove or tend to establish, are matters within the exclusive province of the jury, and on which we can give no intimation. We simply hold that the answers of the witness were properly admitted in evidence, to be considered by the jury with all the other testimony in the case. Where there is an issue of fraud in a case, every act of a party who is charged to have participated in its commission that may in any way relate to the matter of inquiry is subject to the closest scrutiny; and we are not prepared to say that when the depositions of an alleged participant and sharer in the fruits of the fraud are taken at his own instance, it is incompetent to show by him, on cross-examination, that he had himself written out his answers to the interrogatories, when the manager of the credit department of his firm was present and assisting him; that he had consulted the attorney of his firm before making his answers, and that the officer purporting to take his depositions was his clerk, in the employment of his firm at the time. The question as to whether the witness' depositions on this account should be suppressed is not before us, and we make no intimation on the subject. But we do hold, in consideration of the subject of inquiry, that appellants' assignments of error to the court's admitting the testimony of the witness Blum in answer to cross interrogatories 51, 50, and 49, and to the admission of the testimony of Aaron Drey that Joseph Labatt, the notary before whom Blum's depositions were taken, was in the employ of the mercantile house of Leon & H. Blum at the time, are not well taken, and that it was proper that such testimony should go before the jury, and be considered by it in connection with the other evidence.

We think also that the testimony of the witness Baily to the effect that just before the failure of Friedlander he had received a large amount of goods, the admission of which is complained of by appellants in their fifth assignment of error, was, in view of the issues in the case, when considered in connection with all the testimony, relevant. The eighth assignment complains of the refusal of the court to entertain appellants' motion to strike out the testimony referred to in the preceding assignments. As we have held that the testimony was properly admitted, it follows that the motion should not have prevailed.

Special charge No. 1, asked by appellants, the refusal of which to give is assigned as error, practically requested the court peremptorily to instruct the jury to find a verdict for the plaintiffs. On this assignment it is sufficient to say that, under the evidence developed upon the trial of this case, the court would not, under the law, have been warranted in giving any such charge. The principle of law embraced in the second special charge asked by appellants was substantially given by the court in its general charge, and it was not necessary, if it would not have been error, to repeat it. The appellants asked the court to instruct the jury as follows: "If you believe from the evidence that J. Friedlander acquired the property in controversy for the purpose of transferring same to plaintiffs for the purpose mentioned in the conveyance by him to them, and plaintiffs knew the fact when said property was acquired by said Friedlander, and when same was conveyed by him to plaintiffs, such facts did not justify the taking of such property from the possession of plaintiffs under the writs of attachment." We cannot subscribe to any such doctrine. If Friedlander obtained said property on a credit with the intention of not paying for it, for the purpose of transferring it to plaintiffs in payment of their debts, such acquisition, if not theft, was fraudulent, to say the least of it, and no title passed to him to the property. And if the appellants, at the time they obtained possession of the property, knew that said property was acquired by Friedlander for such fraudulent purpose, if not guilty of receiving stolen property knowing it to be stolen, they were knowingly the recipients of the fruits of Friedlander's fraudulent acts, which the law would not permit them to hold and enjoy at the expense of Friedlander's creditors who had been swindled out of their property. The law will not extend its hand in aid of one who knowingly pockets the fruits of crime. What we have thus said relates strictly to the charge asked by appellants, and is not intended in any way as referring to or in any degree relating to the facts developed upon the trial of this case. The charge was properly refused by the court.

During the trial of the case defendants

offered to prove by witness Friedlander, who had been placed upon the witness stand by defendants, in what line of business each of the various creditors whose debts were not secured by the conveyance by him to said Leon & H. Blum and said Isaac Blum was engaged, in order to show that said Friedlander had purchased articles of merchandise such as were carried by the firm of Leon & H. Blum, and also articles of merchandise that were not salable in the quantities in which he purchased them, and to prove that said witness purchased large quantities of boots, shoes, clothing, soap, musical instruments, cards, and dry goods from said creditors, to all of which testimony plaintiffs objected upon the ground that same was entirely immaterial and irrelevant to any issue in the case, and there was no testimony showing that plaintiffs, prior to the time said conveyance was made to them by said Friedlander, had any notice of the character of Friedlander's purchases, or the extent of same, which objections were overruled by the court, and said testimony admitted, showing that many of said creditors dealt in the same line of goods as plaintiffs, and the other facts above noted. The action of the court in admitting this testimony is assigned as error. It was alleged as a defense that plaintiffs had entered into a conspiracy with Friedlander whereby he was to purchase goods on a credit, and afterwards deliver them to the plaintiffs in payment of their debt. If such a scheme was devised between the parties, it would be fraudulent, and vitiate every act done in pursuance of it; and if defendants could prove that Friedlander procured the goods the value of which they are sued for, which such fraudulent purpose, and that they were transferred to plaintiffs in pursuance of such conspiracy, they would establish a complete defense to plaintiffs' action. In connection with other cogent evidence found in the record of the alleged fraudulent conspiracy, when the relationship and prior dealings between the parties are considered, we think it was admissible, as further evidence of such fraudulent agreement, to prove that Friedlander, a short time prior to the time he conveyed to plaintiffs, made large purchases on a credit of merchandise such as was carried by Leon & H. Blum, and also articles of merchandise that were not salable in Del Rio in the quantities in which he purchased them. He usually carried about a \$14,000 stock of goods, to which stock, within a short time prior to the pretended conveyance to appellants, he added by purchases from other merchants over \$20,000 worth of goods, many boxes and cases of which were unpacked and had never been opened at the time the goods were delivered to appellants. Why was this done? Friedlander was insolvent at the time he made these purchases, and the appellants must have known that fact, or could have known it

by the exercise of any kind of diligence. Friedlander knew that he could not pay for the goods, and had no reason to believe that he could sell in the course of his trade such a large stock, and pay for them with the proceeds of the sale. At the time he was receiving all these goods he was not taking in enough money from his business to pay the freight on them, and had to borrow money from the appellants for that purpose. The evidence is most cogent that Friedlander's design in the obtention of over \$20,000 worth of goods was fraudulent, and the appellants' own proof shows that they reaped the benefit of this fraud. According to their own evidence, Friedlander owed them \$28,883.98. They took the goods at \$25,000, and, after paying Friedlander's Texas creditors, credited his debt to them with \$18,471. The fruits of the fraud were worth, if not more, at least over \$18,000 to them. If they were not parties to this fraud, they could have known it by the exercise of such diligence as honest, prudent business men would have exercised under like circumstances. If they failed to exercise such diligence, the law fixes and charges upon them the knowledge of such fraud. The evidence complained of was properly admitted, and relevant to the issue of the fraudulent conspiracy made by the pleadings, as well as for the purpose of showing, in connection with other testimony, the quantity and value of the goods at the time they were transferred to appellants.

Defendants also asked the witness Friedlander while on the witness stand if he had not made a written statement to W. K. Jones, an insurance agent, on the 4th day of November, 1889, to the effect that his stock of goods was of the value of \$30,000, to which question plaintiffs then and there objected, and also to the answer thereto, upon the following grounds: (1) That, if the question was asked for the purpose of attacking the credibility of the witness, and to contradict the witness, the same was not in proper form; and that defendants, having placed Friedlander on the witness stand, could not contradict his testimony without showing some reason for so doing, such as surprise, etc., to authorize such contradiction. (2) That proof of the value of said stock of goods on the 4th day of November, 1889, was immaterial to any issue, and said objections were overruled, and said witness answered to said question that he did not remember making any such statement. Thereupon defendants' counsel drew from his pocket a written application for insurance made by J. Friedlander on the 4th day of November, 1889, to W. K. Jones, in which said Friedlander had valued his stock of goods then on hand at \$30,000, and asked the witness if he did not now remember having made such statement, to which question plaintiffs then and there objected upon the grounds above stated, and upon the further grounds that, inasmuch as the witness had

already answered that he did not remember having made such a statement, then he had given no testimony that could be contradicted by showing that he had made such a statement, and that, if such statement is made, it is irrelevant to any issue in the case, and it was not shown that said Blum had any notice of such statement at the time that they took the conveyance of J. Friedlander, which objections were overruled by the court, and the witness allowed to answer that he had made the statement of value contained in the application for insurance, the court stating, however, that this testimony was admitted for the purpose of proving the value of the goods. The action of the court in permitting the witness to be asked if he had not made the written statement to said insurance agent, and admitting the answer of the witness, over objections of appellants, are assigned as error "upon the grounds (1) that said testimony was irrelevant to any issue in the case; (2) that it appeared affirmatively from the testimony that appellants had no notice of said facts when they had purchased the goods in controversy from said witness; and (3) that the witness was placed upon the witness stand by defendants, and said testimony was not admissible for the purpose of attacking his credibility. If the conspiracy between appellants and Friedlander had not been alleged, and had there been no evidence tending to establish it, the application for insurance made by Friedlander to W. K. Jones, in which Friedlander valued his stock of goods at \$30,000, and the testimony of Friedlander in relation to it, would not have been admissible. But, the fraudulent combination having been alleged, and there being some proof of it, we think the evidence was admissible, under the rule that when several persons are engaged in a common enterprise each is responsible for the declarations as well as the acts of the others, and therefore the declarations of one of the parties while engaged in the prosecution of this purpose may be received against the others. Such statements are not considered as mere hearsay, but as legitimate evidence. Upon the theory that there was such a conspiracy, a statement made by one of the conspirators as to the value of property acquired, in pursuance of the conspiracy, for the benefit of all, was admissible when made by Friedlander as evidence against the appellants to show the value of the property so acquired. It is true that the alleged conspiracy was not directly submitted by the court in its charge to the jury, but this failure to directly submit that issue did not affect the admissibility of the testimony. Its admissibility was determinable from the issues raised by the pleading, and not by the charge of the court. The correctness of a charge may be determined by the testimony in a case but the admissibility of testimony can never be determined by the charge. If, after the charge was read to

the jury, it was apparent that the testimony was not relevant to the issues submitted, and it was deemed that said testimony might influence or affect the finding of the jury upon the issues submitted, it was incumbent upon the appellants to ask a special charge directing the jury to disregard such evidence, on account of its irrelevancy, in determining their verdict; and, appellants having failed to ask such charge, they will not now be heard to say that the jury might have been misled by such testimony.

Reading law to the jury as part of argument of counsel is a matter within the sound discretion of the trial judge, and unless it is apparent that the judge abused this discretion, and the party complaining of it was injured by it, a cause should not be reversed on that account. What was read by counsel in this case was argumentative in its nature, and could only have been taken and considered as an argument by the jury. Ordinarily it is not good practice for counsel to read from law books to the jury, but in this case we do not think that what was read was calculated to prejudice the jury, or that appellants could have been injured by it. While the verdict is informal, it is evidently against the plaintiffs, and they have no ground of complaint because a judgment was rendered on it against them. The testimony is ample to support the verdict, and, there being no error in the record affecting appellants, the judgment of the district court is affirmed.

KROHN v. KROHN.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

HUSBAND AND WIFE—SEPARATE ESTATE—ANNUITY.

Where one, before his marriage, conveys property on condition that from the income there be paid him annually a certain amount, the amount due him, whether treated as an annuity, or a debt for the purchase money of the property, is his separate estate.

Error from district court, Travis county; W. M. Key, Judge.

Action by Johanna Krohn against Charles Krohn for a divorce. There was a decree for divorce, but plaintiff brings error, complaining of the part of the judgment which allowed defendant certain property as his separate estate. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

The question in this case is whether an annuity created in favor of the husband before marriage is his separate estate, or community of himself and wife. The question arises in a divorce suit by the plaintiff in error, Mrs. Johanna Krohn, against her husband, defendant in error, Charles Krohn. The court below granted the divorce, and gave judgment in favor of the husband for the amount of the annuity in his hands, and

for the lot purchased by him after marriage with funds received by him as part of the annuity. Plaintiff in error complains of the latter judgment in favor of the husband, claiming that the property was community property of the parties. The instrument creating the annuity is as follows: "State of Texas, county of Travis. Know all men by these presents, that we, Charles Krohn and his wife, Emilie Krohn, for consideration hereinafter set forth, and upon a full compliance in each and every respect with the said herein set forth conditions, have granted, bargained, sold, and conveyed, and by these presents we do hereby grant, bargain, sell, and convey, the following described property,—to R. Bertram and his wife, Bertha, one-fourth interest; to John F. Heinantz and his wife, Emilie, one-fourth interest; to William Brueggerhoff and his wife, Mary, one-fourth interest; and to Wm. Brueggerhoff, in trust that Ernst Krohn take the net rents during his life, and after his death for the children of said Ernst Krohn, one-fourth interest in said property,—which property consists of one and a half city lots fronting on Congress avenue in the city of Austin, and improvements thereon, and being lot No. 1 and the south half of lot No. 2 in block No. 124 of the said city of Austin, and fronting on Congress avenue in said city, together with, all and singular, the rights, tenements, and appurtenances thereto belonging. To have and to hold, one-fourth thereof to said R. Bertram and his said wife; one-fourth thereof to said Jno. F. Heinantz and his said wife; one-fourth thereof to said Wm. Brueggerhoff and his said wife; and one-fourth interest to said Wm. Brueggerhoff, trustee, &c., so long as they shall fully comply with the terms and conditions herein set forth, and, upon their full compliance, then in fee simple forever. The said property is charged with the conditions and burdens, and the estate therein is defeated by the nonperformance of the conditions, following: It is expressly stipulated that there shall be paid by the said R. Bertram, Jno. F. Heinantz, and Wm. Brueggerhoff, on the first day of each month, at some bank in the city of Austin to be designated by the said Charles Krohn, one hundred dollars in U. S. currency or silver coin, as the said Charles Krohn may choose, the one-fourth of which is to be paid out of the rents of the one-fourth interest held by said Wm. Brueggerhoff as trustee, and which is a charge on said trust property. By taking this deed, the said R. Bertram, Jno. F. Heinantz, and Wm. Brueggerhoff are further obliged to pay all outstanding indebtedness of the said Charles Krohn, which payment is a condition precedent to their taking possession of the property, and the one-fourth of the sum which they shall so pay with their own funds shall be charged upon the one-fourth interest conveyed in trust to said Wm. Brueggerhoff; and the said Wm.

Brueggerhoff, as trustee, is and shall be authorized to apply the rents of the said trust estate, after taxes and repairs, to the keeping down of interest, and payment of any loan made to meet the payment of the said charge upon said trust estate; it being the intent herein to charge the one-fourth of all the burdens in payment of debts, taxes, and repairs of the property, and in payment of the said monthly installments specified, upon the share so conveyed to said Wm. Brueggerhoff in trust. It is further stipulated, and made a condition in this deed, that no one of said shares or interests shall be sold to a stranger, but any one may purchase the interest of another, until the one-fourth interest held by Wm. Brueggerhoff as trustee shall be turned over as provided herein, and the trust be fully executed. The said Wm. Brueggerhoff is required to administer carefully said trust, and, after discharging the incumbrances herein mentioned, to pay over, quarterly, the net rents on said one-fourth interest so held by him to Ernst Krohn during his lifetime, and after his death to the children of said Ernst Krohn; said children to receive, as they shall become of age, his or her proportional interest in said one-fourth interest. It is further stipulated, and made part of this conveyance, that the monthly payments shall be continued to the said Charles Krohn, or to Emilie Krohn if she survive her husband, and shall be continued so long as either shall live. Should said parties, Charles and Emilie, ever separate, or said Charles go to Europe, then, of said one hundred dollars, \$75 shall be paid to him, and \$25.00 shall be paid to said Emilie Krohn; but, on death of either, the survivor to have the whole of said monthly payment. It is further expressly imposed as a condition to the estate passed herein that the taxes shall be paid, and the buildings kept in good repair, and the said monthly payments regularly made; and upon the failure in the regular payment, in whole or in part, then the estate herein conveyed shall cease, and, on the option of said Charles Krohn, (or of Emilie Krohn, she surviving,) he can receive possession without repayment on his part of any money he may have received. It being expressly and distinctly understood that said Charles and Emilie Krohn shall, during their lifetime, and that of the survivor of them, receive one hundred dollars a month as aforesaid, and that the estate conveyed herein shall continue only while and during the time when said regular payments shall be made, and that the estate shall cease, and this conveyance become void, upon the failure by the grantees in making such payments; nor shall the failure of said Charles Krohn and Emilie, or of either, or of the survivor, to take advantage of such failure, or of any breach of the conditions annexed as necessary to the continuance of this estate, be a waiver of the right

to enter and hold for any breach at any subsequent time. This contract to be recorded, and upon such record a certified copy from such record shall be, in the hands of any party in interest, admissible in evidence as the original." Emille Krohn, named in the foregoing instrument, first wife of Charles Krohn, died prior to 1884, thus vesting in him the sole right to the annuity, after which he and plaintiff intermarried. There is no statement of facts. The court's findings of facts are taken as true, and we adopt the same.

John Dowell, for plaintiff in error. Sheeks & Sheeks, for defendant in error.

COLLARD, J., (after stating the facts.) Whether treated as an annuity, or as a debt due Charles Krohn for the purchase money of the real estate conveyed by the foregoing instrument, the amount due him thereon would be his separate estate. It was acquired by him before marriage with plaintiff, and could not be acquests or gains of the marital partnership. It would be of the same nature, and vest, as any other property acquired before marriage, as the principal upon a promissory note, or any debt wholly created in the husband's favor before marriage. Rev. St. arts. 2851, 2852. It follows that the lot purchased by him with funds received by him by virtue of the above contract would take the same character as the fund itself, and would be his separate estate. There was no error in the judgment of the court below, as assigned, and it is affirmed.

KEY, J., did not sit in this case.

GUINN et al. v. O'DANIEL, et al.
(Court of Civil Appeals of Texas. Nov. 8, 1893.)

CONTRACT—PARTIES—JOINT AND SEVERAL LIABILITY—PLEADING—AMENDMENT AT TRIAL.

1. A joint and several liability of two contractors for materials furnished was shown by evidence that one of the contractors ordered the materials for both, and that the other contractor said that the account, when presented, was correct, and that he would pay half if the orderer would pay the other half.

2. After the testimony was all in, it was not error for the court to refuse to allow plaintiff to file a trial amendment that the contractors were partners, and that the materials were sold to them as such.

Appeal from district court, Tom Green county; J. W. Timmins, Judge.

Action by G. B. Guinn, R. S. Allen, and F. L. Allen, as partners under the firm name of Guinn, Allen & Co., against J. D. O'Daniel and William Thaison, for materials furnished and labor done. Judgment for plaintiffs against O'Daniel, and for defendant Thaison. Plaintiffs appeal from the judgment for Thaison. Reversed.

Joseph Spence, for appellants.

BROWNE, Special Judge. This was an action brought in the district court of Tom Green county, Tex., by a partnership firm composed of G. B. Guinn, R. S. Allen, and F. L. Allen, against J. D. O'Daniel, William Thaison, and John H. Houghton. Pending the suit, R. S. Allen died, and his administrator, John D. Rodgers, became plaintiff in his stead. Before the trial, suit was dismissed as to John H. Houghton, and it is therefore unnecessary to notice the averments in the petition under which he was impleaded in the cause.

Plaintiffs below are appellants in this court. They alleged in their petition, as their cause of action against J. D. O'Daniel and William Thaison, that in 1888, at the special instance and request of said O'Daniel and Thaison, they furnished material and labor of the aggregate value of \$682 for the erection and completion of certain buildings in the town of San Angelo, in Tom Green county, which the said O'Daniel and Thaison, as contractors, were building for J. H. Houghton. They set out in their petition an itemized statement of the material furnished and labor performed by them, and the value of each item, which value footed up the aggregate stated; and they averred that O'Daniel and Thaison verbally promised and agreed to pay them for said material and labor when said buildings were completed, and that they were completed during the year 1888. They further averred that, by reason of the foregoing facts, said O'Daniel and Thaison became indebted to them in said sum of \$682; that they refused to pay same; and they asked for judgment for said sum, and interest thereon from January 1, 1889.

O'Daniel and Thaison answered separately, each one pleading a general demurrer and general denial. A jury was waived, and the cause submitted to the court, and trial was had on the 15th day of April, 1890. Judgment was rendered in favor of plaintiffs, and against O'Daniel, for said sum of \$682, and interest thereon at 8 per cent. per annum from January 1, 1890, amounting in all to \$742.86, and for costs, and that, as to Thaison, plaintiffs take nothing, and that he recover against them his costs. From that part of the judgment in favor of Thaison, plaintiffs appealed.

On the trial the plaintiffs introduced in evidence the account sued on, being the statement of the items of indebtedness made part of their petition. G. B. Guinn, one of the plaintiffs, testified that the account sued on is a correct statement of the account on the books of the firm of Guinn, Allen & Co. against O'Daniel and Thaison; that the items charged for therein were reasonably worth the amount claimed, and that they

were purchased from O'Daniel and Thaison by O'Daniel; that O'Daniel ordered the goods; and that Thaison did not order any of them himself. Joseph Spence, attorney for plaintiffs, testified that he endeavored to collect the account sued on from Thaison; that Thaison said the account was correct, and that he would pay half of it if O'Daniel would pay the other half. Our conclusion is that this evidence sufficiently establishes the material averments in the petition, and shows a joint and several liability on the part of O'Daniel and Thaison for the value of the material and labor which is sued for.

It appears that, after the testimony was all introduced at the trial, the plaintiffs asked leave of the court to file a trial amendment setting up that O'Daniel and Thaison were partners, and that as partners said material and labor were sold to them. The court refused to allow the amendment. To this action of the court, exception was taken, and it is made the ground of appellants' second assignment of error. In the matter of allowing amendments to pleadings, pending a trial, to meet the proof, the rule in this state seems to be that the trial judge should allow the amendment if it appears that the new matter to be pleaded was not known to the party when he filed his pleadings, and that it raises no new issue in the case, and that, to meet the ends of justice, the amendment is necessary. *Telegraph Co. v. Bowen*, (Tex. Sup.) 19 S. W. Rep. 555; *Petty v. Lang*, (Tex. Sup.) 16 S. W. Rep. 999. The new matter which the appellants proposed to set up in their trial amendment in this cause does not come within the rule, as stated. We do not think the court erred in the ruling complained of in this assignment.

The first and third assignments of error raise substantially the same question. The same question was also made a ground of the motion for a new trial. The error complained of in these assignments is that the pleading and proof in the case showed that appellee Thaison was bound, as was O'Daniel, for the payment of the debt sued for, and the court erred in not rendering judgment in their favor against Thaison, as well as against O'Daniel. In our opinion, this ground of error must be sustained. We hold that the petition alleged a joint liability against O'Daniel and Thaison, and that the evidence showed them both liable for the payment of the debt sued for. That part of the judgment of the court below, therefore, from which this appeal was taken, is reversed, and judgment is here rendered in the same terms, and for the like amount, against said Thaison as was rendered in the court below against said O'Daniel. Reversed and rendered.

FISHER, C. J., did not sit in this case.

GULF, C. & S. F. RY. CO. v. CUSENBERRY.¹

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

RAILROAD COMPANIES — FIRES SET ON RIGHT OF WAY—ESCAPE ON ADJOINING PREMISES—MEASURE OF DAMAGES — POSSESSION BY TENANT OF INJURED PREMISES—WAIVER OF OBJECTIONS.

1. In an action against a railroad company for damages from fires set on its right of way, the court properly refused to charge that defendant had a right to kindle such fire to burn off the right of way, if it used reasonable care to prevent it from spreading and injuring the property of others.

2. The testimony showed permanent injury to the land, and there was no testimony as to the separate value of the grass. Plaintiff, in testifying to the difference in the value of the land immediately before and after the fires, doubtless included the grass destroyed. *Held*, that it was not error to charge that the measure of damages was the difference in the value of the land before and immediately after each fire, with interest from such time to date of trial, at 8 per cent. per annum.

3. Where plaintiff proved more injury to the land than the aggregate amount awarded by the jury, the omission to charge as to the value of the grass separately was not prejudicial to defendant, even if there was evidence of such value.

4. It appeared that one fire occurred while a tenant was holding over after the expiration of his lease; that two months thereafter plaintiff and such tenant made a new lease, dated on the day the prior lease expired, which contained new provisions; that it stipulated that plaintiff relinquished all claims for fire from the railroad after the date of execution of such lease. *Held*, that such lease was equivalent to an assignment to plaintiff of the tenant's claim, if he had any, against defendant for damage caused by such fire.

5. Where the charge of the court is correct as far as it goes, the judgment will not be reversed because of omission to charge fully on any particular phase of the case, in the absence of any request for a special charge to supply the supposed omission.

Appeal from district court, Coleman county; J. W. Timmins, Judge.

Action by W. P. Cusenberry against the Gulf, Colorado & Santa Fe Railway Company to recover damages caused by several fires set by defendant, and by the killing of a cow by defendant. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by KEY, J.:

This is a suit for damages caused by four separate fires, and for the value of a cow killed by the railroad. Upon the testimony in the record this court finds as follows:

"(1) Title. (a) Plaintiff showed title in his wife to G. H. & H. R. R. Co. survey No. 38, and to E. T. R. R. survey Nos. 170 and 171, and made the following attempt to show title in the other surveys: A patent from the state of Texas to T. S. Goodman for survey No. 307, by virtue of bounty warrant No.

¹ Rehearing pending.

1,326; deed from M. B. Branch to W. P., E. T., and D. B. Cusenberry, conveying one-half interest in the Goodman survey, recorded February 10, 1883; deed from W. P., E. T., and D. B. Cusenberry to Mrs. Willie R. Cusenberry, conveying the same interest, recorded February 10, 1886; patent to James A. Willard for B. B. B. & C. R. R. survey No. 67; deed from James A. Willard to George Willard, conveying same survey, deed recorded May 3, 1878; deed from George Willard to Ben F. Thomas, conveying the same survey, recorded May 14, 1878; deed from Ben F. Thomas and wife to W. P. Cusenberry, conveying the northeast quarter of the west half of said survey No. 67; deed from J. A. Ricker to W. B. Cusenberry for the southeast quarter of said survey 67, deed recorded November 9, 1882; deed from W. P., E. T., and D. B. Cusenberry to Willie R. Cusenberry, recorded February 10, 1886; patent from the state of Texas to James A. Willard for B. B. B. & C. R. R. Co. survey No. 65; deed from James A. Willard to George Willard, conveying said survey, recorded May 7, 1878; deed from George Willard to W. H. Thomas, conveying said survey, recorded May 14, 1878; deed from W. H. Thomas to H. H. Stubbs, conveying the southwest quarter of said survey; deed from H. H. Stubbs to W. P., E. T., and D. B. Cusenberry, conveying the southwest quarter of said survey; deed from W. H. Thomas to Samuel Perry, conveying the southeast quarter of said survey, deed recorded August 1, 1881; deed from Samuel Perry to W. P., E. T., and D. B. Cusenberry, conveying the southeast quarter of said survey, recorded February 14, 1883; quitclaim deed from J. T. Evans and H. D. Walker, conveying to W. P. and E. T. Cusenberry the southwest quarter of said survey No. 65, recorded August 7, 1885; deed from W. P., E. T. and D. B. Cusenberry to Willie R. Cusenberry, conveying the whole survey, recorded February 10, 1886. W. P. Cusenberry testified: 'The pasture was inclosed during the summer of 1883. The fencing was begun during the summer of 1882. It has been under fence continuously since the summer of 1883, except about two months in the summer of 1885, during which time the fence was down, it having been cut. It was rebuilt as soon as I could rebuild it. This pasture was fenced by W. P., E. T., and D. B. Cusenberry, who held possession until the sale to Mrs. Cusenberry.' Witness testified: 'The taxes on said land were paid by the said Cusenberry brothers up to the time the same was sold to Mrs. Cusenberry, and after the sale to Mrs. Cusenberry she paid all taxes up to the present time.' (b) Willie R. Cusenberry was shown to be the plaintiff's wife. It was shown that she, and those under whom she claims, inclosed the tracts above referred to in a pasture in 1882 and 1883, and that they have held continuous, actual, visible, and notorious possession

thereof ever since, up to the time of trial in the district court, and that they had paid all the taxes due thereon for said years.

"(2) Fires, etc. The averments of the petition as to the number of fires, their dates and causes, are sustained by the evidence; and it was also shown that one of appellant's trains killed a cow belonging to plaintiff, as alleged, worth \$25.

"(3) Negligence. The several allegations of negligence in plaintiff's petition are sustained by the evidence.

"(4) Damages. The fires referred to burnt the grass on about 1,735 acres of land, and injured the roots and sod, and the amount of damages allowed by the jury therefor finds support in the testimony.

"(5) Possession, etc. The plaintiff leased the land in question, with other land, all constituting the Cusenberry pasture, for a term extending from June to December 1, 1888, to the Day Ranch & Cattle Company. At the expiration of this lease, said company remained in possession of the land without making any other contract of lease, and the record does not show that the plaintiff either consented or objected to such holding over. About February 1, 1889, plaintiff and said company entered into another lease contract, which reads as follows: 'State of Tex., Coleman Co. This article of agreement, made and entered into this day, Dec'r 1st, 1888, by and between W. P. Cusenberry of the 1st part, and Day Ranch Cattle Co. of the second part, witnesseth: That the said party of the first part has leased his pasture, known as the Cusenberry pasture, to party of the second part, as follows: Consideration \$75.00 per month, paid at the end of every three months. Pasturage on mule-shoe brand of cattle is to go to party of second part. 1st party reserves the right to put in 100 head of his own cattle, also relinquishes all claims for burns made by railroad after Feb'y 1st, 1889. Party of 2nd part to have said pasture until 1st Nov., 1889, unless said party concludes to discontinue, in which case they are to give 30 days' notice. Party of 2nd part is limited to 1,000 head, on an average, per month. In case the 1st party should make sale of said pasture, party of 2nd part is to give possession by having 30 days' notice. It is further understood that, if the party of the 1st part has not leased the pasture on Nov. 1st, party of 2nd part can retain possession 1 month longer at the same rate as above specified. Witness our hands. W. P. Cusenberry. Day Ranch Cattle Co., by W. H. Doss. Witness: Mabel Day.' The former lease contract, as to consideration, was similar to this one, except that it allowed the plaintiff to keep in the pasture 200 head of stock, instead of 100 head, and the latter contract allows the lessee to collect the charges for pasturing the mule-shoe brand of cattle.

"About February 25, 1889, a cow belonging

to plaintiff's wife was killed by one of defendant's trains. This cow was worth \$25 at the time."

J. W. Terry, for appellant. Sims & Snodgrass, for appellee.

KEY, J., (after stating the facts.) The court's charge was correct, as far as it went. If, on any phase of the case, it was not as full as appellant desired, it should have asked a special charge supplying the supposed omission. The defendant asked the court to instruct the jury that it had the right to kindle a fire on its right of way for the purpose of burning it off, if it used reasonable care to prevent it from spreading and injuring the property of others. This charge was properly refused. Appellant did not have the right, under all circumstances, to kindle a fire on its right of way. It may have permitted combustible material to accumulate on its right of way to such an extent that the very act of setting it on fire would constitute negligence, regardless of the care that was exercised to prevent the fire spreading and injuring the property of others.

On the measure of damages the court charged the jury as follows: "You are instructed that if you find in plaintiff's favor for damages for all or any of said fires, then you will estimate the amount of said damages by determining from the evidence (1) the date of each fire for which you allow damages; (2) the number of acres burned or injured; (3) the difference in the value of the land before the burn and immediately after the same; and (4) interest on such damages as you may determine plaintiff entitled to from the date of the accrual of said damages to present time, at the rate of eight per cent. per annum." The testimony shows injury, permanent in character, to the land. As to this injury, the charge quoted applied the correct measure of damages. *Railway Co. v. Hogsett*, 67 Tex. 686, 4 S. W. Rep. 365; *Railway Co. v. Horne*, 69 Tex. 643, 9 S. W. Rep. 440. Had the testimony shown the value of the grass separate and apart from the land, the plaintiff, perhaps, would have been entitled to have the jury instructed to find such value, and the difference in the value of the land without the grass, immediately before and after the burns, as the measure of damages. However, there was no testimony tending to show the value of the grass separately; and doubtless the plaintiff in estimating, while on the witness stand, the difference in the value of the land immediately before and after the burns, included the grass destroyed. This being the case, the court did not err in giving, without qualification, the charge referred to. But, if such were not the case, the plaintiff proved more injury to the land than the aggregate amount awarded by the jury. It follows, therefore, that the omission to charge concerning the value of the

grass separately was not prejudicial to appellant.

It is contended that when the first fire occurred—December 3, 1888—the land covered by the fire was leased, and therefore that plaintiff was not entitled to recover for the value of the grass destroyed by that fire. The testimony shows the land was leased for part of the year 1888; that the lease expired the last day of November or the first day of December; that, without any further arrangement or understanding, the tenant remained in possession until February following, when a new lease contract was made, the terms of which were more favorable to appellee than those of the former. The latter contract was dated December 1, 1888, though it was not executed until February thereafter; and it stipulated that appellee relinquished all claims for burns made by the railroad after February 1, 1889. If in any case a tenant at will or by sufferance can maintain an action for the destruction of uncultivated native grass, we think the lease contract made in February, 1889, construed in the light of surrounding circumstances, is equivalent to an assignment to the appellee of whatever claim the tenant had against appellant for burning grass on the land in question prior to the execution of said contract. It shows that the question of damages resulting from grass burning by the railroad was considered by the parties; that by the new contract, while the lessee was to pay rent at the same rate as formerly, appellee's right to pasture stock on the land was curtailed one-half, and the tenant was to have the fees owing by a third party for pasturing stock on the land; and the relinquishment to the tenant of all claims for damages caused by subsequent fires carries with it the implication that all claims for damages caused by previous burns should belong exclusively to appellee.

There was no error in the court's charge in assuming that appellee had shown title to the land in his wife, as alleged. *Parker v. Railway Co.*, 71 Tex. 133, 8 S. W. Rep. 541.

The verdict is supported by the testimony, and, finding no reversible error, the judgment is affirmed.

WILLBURN v. TOW.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

TRESPASS TO TRY TITLE—PRACTICE—COSTS—WRIT OF POSSESSION—REFORMATION OF JUDGMENT.

1. Where defendant disclaims a portion of the land sued for, but remains in possession of part of the land disclaimed, plaintiff is entitled to recover the disclaimed land, and to have judgment for costs.

2. A judgment for the recovery of land, which does not provide in express terms for the issuance of a writ of possession, will be reformed on appeal.

Appeal from district court, Llano county; W. M. Allison, Judge.

Action by F. C. Willburn against William R. Tow to recover land. Judgment for plaintiff for recovery of part of the property. Plaintiff appeals. Judgment reformed.

W. T. Dalrymple, for appellant.

KEY, J. The record in this cause contains no statement of facts, and the findings of facts filed by the court below are adopted by this court as the basis for the judgment here rendered.

While it is true that the defendant disclaimed as to all the land sued for, except such portion of it as was in conflict with the William Jennings survey, still, as the facts show that the defendant was in possession of a part of the land sued for and not covered by the Jennings survey, the plaintiff was not only entitled to recover the land sued for and not in conflict with said Jennings survey, but he was also entitled to a judgment for costs. *Wootters v. Hall*, 67 Tex. 513, 3 S. W. Rep. 725; *Capt. v. Stubbs*, 68 Tex. 225, 4 S. W. Rep. 467; *Johnson v. Schumacher*, 72 Tex. 334, 12 S. W. Rep. 207; *King v. Haley*, 75 Tex. 163, 12 S. W. Rep. 1112.

It is also complained that the judgment rendered in the court below for the plaintiff for part of the land sued for should have, in express terms, provided for the issuance of a writ of possession. This contention is correct.

The judgment of the court below will be reformed, and, in addition to the judgment there rendered, this court will render judgment for the appellant for the land recovered in the court below, and for all costs in said court, as well as the costs of this appeal; and he will also be awarded a writ of possession. Reformed and rendered.

EVANS v. GOGGAN et al.¹

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

RESCISSION OF CONTRACT—FRAUD—RATIFICATION—PROVINCE OF COURT AND JURY—LIMITATION OF ACTIONS.

1. Whether a contract alleged to have been obtained by defendant through fraud was ratified by plaintiff after discovery of the fraud is a question for a jury, and in an action to rescind such contract an instruction as to what acts of plaintiff would constitute a ratification is erroneous.

2. Rev. St. art. 3207, providing that every personal action "for which no limitation is otherwise prescribed shall be brought within four years," applies to an action for the rescission of a contract on the ground of fraud.

Appeal from district court, Travis county; James H. Robinson, Judge.

Action by George O. Evans against Thomas Goggan & Bro., for the rescission of a con-

tract, and other relief. Defendants had judgment and plaintiff appeals. Reversed.

John Dowell, for appellant. Z. T. Fulmore, for appellees.

COLLARD, J. This suit was brought August 5, 1890, in the district court of Travis county, by appellant, George O. Evans, against appellees, Thomas Goggan & Bro., to cancel a written contract of date the 10th day of April, 1888, for the purchase of a piano by appellant from appellees, upon the ground of fraud,—that the piano furnished was not of the quality and value it was represented to be by the vendor when bought. Prayer for cancellation, and for judgment for amount paid on the piano, and for exemplary damages for the alleged fraud. Defendants denied the allegations of fraud, and prayed for judgment for balance unpaid upon the contract. Verdict and judgment were rendered for defendants for the balance due upon the contract, \$134.70, from which plaintiff has appealed.

The court charged the jury, substantially, that to entitle plaintiff to recover he must show that the alleged fraudulent representations were made to induce him to make the purchase; that he relied upon them, himself using ordinary care; that the piano was materially different, as alleged, in character and value from the representations; that he repudiated the contract within a reasonable time after he discovered the fraud, or ought to have discovered it by the exercise of ordinary care; that he had not affirmed or waived the fraud by use of the piano or payment on the same as stipulated, after the discovery of the fraud, or after he ought to have discovered it, and that all these facts must concur to warrant a cancellation of the contract. After the jury had retired to consider of their verdict, they came into court, and asked additional instruction upon the question of waiver by plaintiff of the alleged fraud (by use of the piano) after its discovery, when the court gave additional instruction as follows: "If the jury find from the evidence that the defendants did perpetrate a fraud upon the plaintiff in the sale of said piano, and if they further find that after plaintiff knew, or by using ordinary diligence might have known, of the false statement made by defendants to induce plaintiff to enter into said contract, the plaintiff continued to use said piano as he would use his own property, then such conduct on the part of the plaintiff would, in law, amount to a waiver of his rights to have said contract rescinded, as such acts on the part of plaintiff would amount to a ratification of the said contract, and would render him liable upon the same." This charge is assigned as error, and we think the assignment is well taken. A fraud may be ratified, and remedies against it may be lost or waived, by a material act deliberately done

¹ Rehearing pending.

by the defrauded party with full knowledge of the facts of fraud, and with the intention to ratify. Or it may be done by acquiescence; that is, as is said by Pomeroy, by "some act, not deliberately intended to ratify, * * * but recognizing the transaction as existing, and intended in some extent at least to carry it into effect, and to obtain or claim the benefits from it." 2 Pom. Eq. Jur. §§ 964, 965. This acquiescence, or tacit adoption of the contract, after notice of the fraud, is a question for the jury, to be determined by them from all the facts and circumstances of the case. It was not proper for the court to instruct the jury that a given fact—the one stated in the charge—would constitute ratification. The jury had the right to look at all the facts showing the true effect of the use of the piano. It may be that the fact stated would be deemed by the jury as sufficient, or that it, considered with other facts, was not sufficient. We are constrained to say that the charge was not the law of the case.

Appellant complains of a charge of the court which applied the two-years statute of limitation to plaintiff's prayer for recovery of the amounts paid on the contract upon its cancellation. The charge in this respect was erroneous. The suit was for rescission of the contract, and upon judgment of that character the consequences of rescission would follow. The question was, when would the right to a rescission be barred? The statute does not specifically provide for it, but provides that every other personal action "for which no limitation is otherwise prescribed shall be brought within four years next after the right to bring the same shall have accrued, and not afterward." Rev. St. art. 3207. It has been decided that the statute of four years applies to an action for rescission of a contract consummated in fraud. *Cooper v. Lee*, 75 Tex. 114, 12 S. W. Rep. 483. If, then, the plaintiff is entitled to a rescission, and is not barred by limitation in that action, he would be entitled to complete restoration of his rights upon rescission. The amount paid on the contract should be restored to him, and its recovery would not be governed by a different period of limitation from that which would govern the action itself. The two-years statute, as for debt or open account or money had and received, would not apply. Other questions need not be decided on this appeal. The judgment of the court below should be reversed, and the cause remanded, and it is so ordered.

MISSOURI PAC. RY. CO. v. WALKER.
(Court of Civil Appeals of Texas. Nov. 9,
1893.)

INJURIES TO BRAKEMAN—EVIDENCE.

In an action by a brakeman against the railroad company for personal injuries, plaintiff testified that the conductor ordered him to "go

to the front;" that he went forward, and got on the pilot of the engine, and, thinking that the brake beam of the engine was down, he jumped off, as was his duty, to see; that, when he attempted to board the train again, he caught the hand ladder on a car, and drew himself up, but, finding no step, he was obliged to drop to the ground, and that he fell under the car, and was injured. He also testified that it was not dangerous to board a train moving at the speed of his train, (seven or eight miles an hour;) that he did not look to see if the step was on the car, because the car would have passed him while he was looking. Defendant produced the testimony of two surgeons that plaintiff stated immediately after the accident that he went to the engine to get a drink of water; that he fell under the car while jumping from the engine; and that the accident was not caused by the negligence of any of defendant's employees. The fireman testified that, when plaintiff got on the pilot, the engineer asked him (witness) to tell plaintiff that he could not ride on the pilot, but he did not know how plaintiff got off. *Held*, that the evidence was not sufficient to sustain a verdict for plaintiff. 7 S. W. Rep. 791, followed.

Error from district court, Harris county; James Masterson, Judge.

Action by T. H. Walker against the Missouri Pacific Railway Company to recover for personal injuries. There was a judgment in favor of plaintiff, and defendant brings error. Reversed.

Baker, Batts, Baker & Lovett, for plaintiff in error. G. W. Thorp, for defendant in error.

GARRETT, C. J. On a former appeal in this case to the supreme court, the judgment of the court below then appealed from was reversed, because, as stated in the opinion of the court, "there is such a preponderance of testimony in favor of the defendant that the judgment should not be permitted to stand." 7 S. W. Rep. 791. Upon the second trial of the case, which resulted in the judgment upon which the present writ of error has been sued out, the evidence, in the opinion of the majority of the court, was not materially different from that on the first trial. Plaintiff's cause of action is damages for personal injuries sustained by him September 27, 1886, while a brakeman in the employment of the defendant, running on a freight train between Taylor and Palestine. The only evidence as to how the accident happened is that of plaintiff. He testified substantially that the conductor to whose orders he was subject directed him to "go to the front, and head into boarding house." He went to the front, and was forward brakeman at the time he was hurt. He went forward to the engine, and got out on the pilot, where he had ridden about 200 or 300 yards when he was ordered off the pilot. He went to the left-hand side of the engine, and looked out, and saw some dust flying, and said to the engineer: "If you don't run any faster, I will get down. I think a brake beam is down." He says he jumped down, and saw it was only the dust rising from a little road crossing in

attempting to board the train again, he caught the hand hold on about the sixth car to go up the ladder, and drew up his knees twice, and could not find the bottom of the step, and had to turn loose, when he fell on the track, and a wheel of the car ran over his arm. He stated that it was a part of his duty to see that that portion of the train was all right, and that, if there had been a brake beam down, it would have been his fault; that he attempted to board the train in the ordinary way in which other brakemen boarded trains; that the train was running seven or eight miles an hour, and it was not dangerous to attempt to board the train running at that speed; that the absence of the step was the cause of his falling, and he would not have been hurt if the step had been there. It appeared also from the testimony of the plaintiff that the bottom of the car is about four and a half feet above the ground, and the step is screwed beneath to the sill of the car, and projects downward. He stated that it is screwed to the sill under the car from the outside, also putting it at different times six, four, and three inches, and that it projected below, as variously stated, from four to ten inches. That he did not notice whether the car had a step on it or not. If there had been a step, there was nothing to prevent him from seeing it if he had stopped right still; but, if he had stopped to look, he would have been left. That, if he had taken time, he could have seen, and then got left. That, if he had seen that there was no step there, he would not have tried to get up on the ladder. That the step is not plainly to be seen, because it is under the car, and you have to step back to see it. You cannot stand up within two feet of the car and see it. He was standing on the ground, about eighteen inches from the train ready to catch the ladder, and did not look to see whether the step was there or not. That it was not the practice of trainmen to look for steps. You would hardly find one in a hundred that would do it. At the first trial, plaintiff testified that, if he had looked, he could have seen the step if any had been there; and at the last trial he testified, as above stated in explanation, why it was that he did not look for the step. Plaintiff put two other witnesses on the stand, but not to any material fact. Defendant read the depositions of the surgeons Boggs and Smith as to the statements made to them immediately after the injury by the plaintiff,—to Boggs, that he fell under the train as he jumped off the engine; and to Smith, that he went over to the engine to get a drink of water, and, as he jumped off the engine, he lost his balance, and fell under the car, and the wheel passed over his arm; that no one saw the accident, and it was not caused by the carelessness of any one in defendant's employ. It was simply an accident,

etc. The depositions of said witnesses, taken since the first trial, were also read in rebuttal of plaintiff's testimony that he had made no such statements, to show the condition of his mind at the time. The fireman Wright was the only other witness for the defense, and he testified, substantially as at the first trial, that Walker got in the engine at Lake, and in leaving the station the engineer asked witness to tell him he could not ride on the pilot. Witness told him, but did not know whether he got off on the ground, or followed him back on the running board. It was against the rules to ride on the pilot. Plaintiff was working as middle brakeman. Puckett, the conductor, and Arnold and McKenna, brakemen, who testified on the first trial, were not witnesses at the last trial.

In the opinion of the majority of the court, the testimony of appellee is substantially what it was on the former trial, and, with the exception of the witness Puckett, the testimony of the witnesses who testified on the former trial, and who were absent at the last trial did not materially contradict appellee's account of the manner in which he was hurt, and that the facts are substantially the same as those passed upon by the supreme court, and that, under the decision of that court, the judgment of the court below should be reversed. The writer, however, is of the opinion that the evidence is sufficient to sustain the verdict as to the manner in which the accident occurred, and does not think that a brakeman boarding a passing train in the performance of his duty should be charged with negligence for failing to look for the step beneath the car, under the facts as the jury must have found them in this case. Reversed and remanded.

ELLIS v. VERNON ICE, LIGHT & WATER CO. et al. (No. 990.)

(Court of Civil Appeals of Texas. May 10, 1893.)

RECEIVER—APPOINTMENT—MOTION TO VACATE—LIENS ON PROPERTY—PRIORITY—PLEADING—DEMURRER TO SEVERAL PETITIONS.

1. An assignment of error to the court's action in overruling intervenor's general demurrer to the petitions of plaintiff and other interveners cannot be sustained, since, if any one of the petitions was good, the demurrer was properly overruled.

2. Where intervenor failed to take any steps in the trial court to vacate a receivership of the property on which he seeks to foreclose a mortgage, and his plea seems to have contemplated the continuance of the receivership, and there was an agreed judgment to that effect, he must be held to have acquiesced therein, and assignments of error to the court's action in appointing a receiver cannot be noticed.

3. Acts 1889, p. 56, provides that all moneys which come into the hands of a receiver shall be applied—First, to the payment of costs of suit; second, wages of employees due from the receiver to the employees; third, debts for materials purchased during the receivership to improve the property; fourth, debts for im-

provements to the property during the receivership; fifth, claims against the receiver on contracts made during the receivership. *Held*, that running expenses, salary, etc., including receiver's certificates, constituted a lien on the property which took precedence over a pre-existing mortgage thereon.

4. Claims of creditors which have accrued prior to the appointment of a receiver, however, do not take precedence of such mortgage.

Appeal from district court, Wilbarger county.

Proceedings in the matter of the receivership of the Vernon Ice, Light & Water Company. W. O. Ellis, a lien claimant, and other lien claimants against the property of the company, intervened. From a judgment giving certain liens priority to his, Ellis appeals. Affirmed in part, and reversed in part.

Eugene Williams, for appellant. Stephens & Huff, for appellees.

Statement.

STEPHENS, J. The assets of the Vernon Ice, Light & Water Company, a private corporation chartered for the purposes indicated by its name, were on the 19th day of December, 1891, upon the application of J. B. Lockett, a creditor without judgment or lien, placed in the hands of a receiver. In February following, at a regular term of the district court, upon the motion of Clower, Harris & Co., judgment and lien creditors, who had intervened in the suit, the receivership was, by order of the court, continued in force. About the same time the First National Bank of Vernon filed its plea of intervention, also praying for the continuance of the receivership. In June following, D. A. Turner and others intervened. In July, appellant, Ellis, the holder of the bonded indebtedness, amounting to about \$18,000, of the said company, secured by the first and only mortgage on its entire plant and assets, filed his plea of intervention, containing a general demurrer to the petitions of plaintiff and the other interveners, a general denial, and a special plea setting up his ownership of the bonds and mortgage with power of sale, alleging default in the payment of interest; and praying a foreclosure of his prior lien, and that the sale be made through himself as trustee, or through such other person as the court might select. He also alleged a title to the lots upon which the waterworks plant was, in part, situated, derived from an execution sale made under one of the judgments in favor of Clower, Harris & Co., foreclosing an attachment lien created subsequent to the deed of trust. There was a trial without the intervention of a jury, and the record contains the court's conclusions of fact methodically stated, but no statement of facts. Our conclusions will therefore rest upon these findings of fact.

Conclusions.

1. The first assignment—that there was error in overruling the general exception of

appellant to the pleadings of the other parties—cannot be sustained. If any one of these pleas was good for any purpose, (which must be admitted,) the general demurrer was properly overruled. *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. Rep. 569; *May v. Jones*, (Ga.) 14 S. E. Rep. 552. Besides, the assignment is very general, and no proposition is submitted under it.

2. The second and third assignments complain of the court's conclusions (1) that the appointment of a receiver at the instance of a simple contract creditor of an insolvent corporation was authorized by the third subdivision of article 1461 of Sayles' Civil Statutes; (2) that, if there was error in such an appointment, the same was cured by the subsequent confirmation of the appointment at the instance of Clower, Harris & Co., who were judgment and attachment-lien creditors. We are of opinion that the findings on this issue should not be disturbed, if for no other reason, because appellant failed to take any steps in the trial court to vacate the receivership. We fail to find in the record any motion or prayer on his part for such relief, and the only assault made upon the receivership by his pleadings in the court below which we have been able to find consisted of the following statement, incidentally made in parentheses: "Not admitting, but denying, the legality of the receivership proceedings herein." The rest of his plea seems to have contemplated the continuance of the receivership, which was supplemented by an agreed judgment to that effect, and we think he must be held to have acquiesced therein.

3. The fourth assignment, in the language of appellant, "goes to the right of the court in any case, other than a railway receivership, to fix upon the corpus of the property a lien prior to the first mortgage bonds," which right is denied by him. This position seems to us to be arbitrary, and without support in reason or authority. The ground upon which this right was denied in case of a navigation company (*Bound's Case*, 50 Fed. Rep. 312, relied upon by appellant) would seem to require that the doctrine should be held as applicable to the waterworks of a city or town as to a railway. In the one case, as in the other, the interposition of sovereign power is required to secure the land upon which it is constructed. It is there laid down that this exercise of the right of eminent domain is bestowed by the sovereign in consideration of the continued public use, which public use, as there defined, arises when the sovereign power is essential to the enterprise, and is exercised because of such use. The bondholder lends his money with the knowledge of this condition. Rev. St. art. 478. See, also, *Karn v. Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431. This question is placed beyond controversy, so far as debts and liabilities arising during the receivership are concerned, by the act

of 1889, p. 56, amending article 1466 of the Revised Statutes, (Sayles' Addend. art. 1466.) This conclusion overrules the seventh assignment, also, which reads: "The court erred in finding and decreeing that the cost, expenses, salary, etc., including receiver's certificates, should be paid out of the proceeds arising from the sale of the property as preference liens."

4. We are of opinion, however, that the sixth assignment, reading, "The court erred in finding and decreeing that the \$2,404.55 of the earnings of the defendant were diverted to such purpose as gave the interveners and plaintiff a right to be paid to that extent out of the proceeds arising from a sale of the property itself," must be sustained. These claims all originated long before the receivership. It appears that there were no net earnings from the operation of the plant pending the receivership; nor does it appear that the revenues previously expended upon the improvement and extension of the plant enhanced its value; nor that the holders of these claims had been in any way prevented from collecting the same by proceedings at law; nor that the company had been allowed by the mortgage bondholder to remain in possession and operate the plant after insolvency and default; nor that it had been suddenly deprived of the control of its property, or the like. This record presents the case of the appointment of a receiver, not at the instance of bondholders or officers of a corporation to the incidental detriment of the favored class of unsecured creditors, but upon the application of holders of unsecured claims for supplies furnished and money advanced, who had neglected to proceed at law to collect their debts, alleging the recent insolvency of the corporation as the sole ground for appointing the receiver, and seeking thereby to acquire a preference lien. To give such claims, under the circumstances disclosed by the record, a preference lien on the corpus of the estate, it seems to us, would be to go further than any case has yet gone in subordinating a fixed lien to a floating debt. *McIlhenny v. Binz*, 80 Tex. 13, 13 S. W. Rep. 655; *Railway Co. v. Humphreys*, 145 U. S. 103, 12 Sup. Ct. Rep. 787, and cases there quoted from. We are strengthened in this conclusion by the legislation had on the subject of receiverships just prior to the transactions involved, which seems to have made more certain the very flexible rules governing receiverships as administered in courts of equity. By the acts of 1887 and 1889 amending and enlarging the statute on that subject, the only claims made liens on the property in the hands of the receiver superior to the mortgage lien are judgments rendered for causes of action arising during the receivership. Sayles' Addend. art. 1466. Claims arising prior thereto are limited to a preference lien on the moneys coming into the hands of the receiver as the

earnings of the property in his hands, and are last in the order of preference. Sayles' Civil St. arts. 1470d, 1470e, Addend. art. 1466. Without net earnings, therefore, no provision is made for their payment. The lien therein repeatedly declared to be superior to the mortgage lien on the corpus of the property is invariably limited to claims or causes of action arising during the receivership. The only provision for the payment of antecedent floating debts out of the proceeds of the sale of the mortgaged property in preference to the debt secured by the mortgage is where the receiver has spent current earnings coming into his hands as such in improving the property, whereby its value has been increased, and then only to the extent of the value of such improvements. Sayles' Civil St. art. 1470d. We think the legislature must have meant something by the minute and full treatment of the subject which these acts manifest, and that the courts should be governed by their provisions. This conclusion sustains also the 8th, 13th, 14th, 16th, 17th, and 18th assignments, and leads to a reversal of the judgment in so far as it gave these claims a preference lien. The other assignments are not believed to be well taken, being, in effect, either disposed of or rendered unimportant by the conclusions already reached. Judgment will be here rendered in favor of appellant, directing the payment of his bonds and of the proceeds of the sale of the property mortgaged in preference to the claims of plaintiff and the other interveners in the court below, but following in other respects the decree there entered; the costs of this appeal to be taxed against said appellees.

ELLIS v. VERNON ICE, LIGHT & WATER CO. (No. 111.)

(Supreme Court of Texas. Oct. 26, 1893.)

RECEIVERS—PRESERVATION OF ESTATE—POWER TO INCUR INDEBTEDNESS—LIEN—SALE OF PROPERTY BY SHERIFF—WHEN TITLE PASSES.

1. A court of equity has power to authorize a receiver of a waterworks company to incur an indebtedness to continue the operation of the works, and to make it a charge upon the body of the estate, with priority over a pre-existing mortgage.

2. In the absence of any showing as to what the evidence was, upon which the power of the court was exercised, it will be presumed that such power was properly exercised.

3. Laws 1889, p. 56, provides that all moneys which come into the hands of a receiver shall be applied (1) to the payment of costs of suit; (2) wages of employees, due from the receiver to the employees; (3) debts for materials purchased during the receivership to improve the property; (4) debts for improvements to the property during the receivership; (5) claims against the receiver on contracts made by him during the receivership. *Held*, that claims under contracts made by a receiver, under direction of the court, for the loan of money to preserve the property, were properly allowed precedence over bonds secured by a pre-existing mortgage.

4. The fact that the court had the property sold by the sheriff could not prejudice such mortgagee, since it was proper to have it sold by a disinterested person, and since such sale would not involve more expense than a sale by a commissioner.

5. Where a sheriff has made a levy on property before the appointment of a receiver, a sale by him after a receiver therefor is appointed is unauthorized, and passes no title; the proper procedure being for the person in whose favor the levy was made to enforce his lien in the court wherein the whole estate is being administered.

23 S. W. Rep. 856, affirmed.

Proceedings in the matter of the receivership of the Vernon Ice, Light & Water Company. W. O. Ellis, a lien claimant, and other lien claimants against the property of the company, intervened. From a judgment giving a certain lien priority to his, Ellis appealed to the court of civil appeals. The latter court affirmed the judgment in part, and reversed it in part, and he applies for a writ of error. Denied.

Williams & Evans, for petitioner.

GAINES, J. At the suit of an unsecured creditor, the Vernon Ice, Light & Water Company, a corporation, was placed in the hands of a receiver, upon the ground that it was insolvent. Subsequently, other creditors having liens upon its property intervened, and, among them, the present applicant for the writ of error. The ground of Ellis' intervention was that he was the holder of the bonds of the corporation amounting, in the aggregate, to \$18,000, which were secured by a mortgage upon its property prior to all other liens. The decree of the district court gave the plaintiff and interveners a judgment against the company for their respective claims, ordered a sale of the property, and directed that out of the proceeds of such sale there should be paid (1) the costs of the proceedings, including commissions, and expenses of making the sale; (2) receiver's certificates, amounting to \$600; (3) \$200 to the master in chancery; (4) all expenses incurred by the receiver not thereinbefore provided for; (5) the sum of \$2,404.55, which was to be appropriated to the payment in full of the judgment of the interveners Claver, Harris & Co., the balance of that sum to be distributed among other creditors,—not including, however, the intervener Ellis; and (6) that the remaining proceeds of the sale should be paid upon the judgment of the last-named creditor. The sheriff of Wilbarger county was ordered to make the sale. In his plea of intervention, Ellis also claimed title to the lots upon which the waterworks were situated, by virtue of a judgment, execution, and levy made before the appointment of the receiver, and a constable's sale, by virtue of such levy, made after the appointment. The court gave judgment against him upon this claim. The applicant having appealed to the court of civil appeals, that

court reversed the judgment of the trial court, in so far as it gave a priority over applicant's debt to the claims of creditors which accrued before the appointment of the receiver, and, in effect, affirmed the judgment in all other respects. The applicant here complains of the judgment in three particulars: (1) In decreeing that the receiver's certificates, the expenses of administering the property, and the costs of the proceedings, should be paid out of the proceeds of the corpus of the property, in preference to the mortgage bonds; (2) in directing a sale of the property by the sheriff; and (3) in adjudging that the title to the lots did not pass by the sale under execution.

As we understand it, the receiver's certificates were issued by authority of the court for the purpose of keeping the company's works in operation. The property yielded no net income during the receiver's administration. On the contrary, it is to be inferred that the works were operated at a loss, at least to the amount of the certificates outstanding at the time of the trial. Now, it is urged in support of the first ground of the application that a court of equity has no right, in any case other than the receivership of the property of a railway company, to authorize a receiver to create an indebtedness, and to make it a charge upon the corpus of the estate, with priority over a pre-existing mortgage. While we have no doubt that the power to authorize a receiver appointed by a court of equity to create debts is liable to great abuse, and are of opinion that in every case it should be exercised, if at all, with extreme caution, we know of no rule or principle that would restrict the power to railway cases, only. In the latter cases, it has been too often recognized in the courts of this country to be called in question at this time. *Fosdick v. Schall*, 99 U. S. 235; *McIlhenny v. Bluz*, 80 Tex. 4, 13 S. W. Rep. 655. In fact, counsel for applicant do not question the power, when applied to railway receiverships. But the contention is that in such cases the authority grows out of the necessity of the situation; that railway corporations are organized for public purposes, with power to condemn private property; and that they owe a public duty, which can only be discharged by the continuous operation of their roads. It is insisted that this applies in no other case. The authority granted to receivers in railway cases to create debts, and to make them a charge upon the corpus of the property of the company, is usually justified upon this ground, and yet it seems that there may be grave doubt whether it affords a solid foundation for the doctrine. It is not clearly seen that the courts have the power to appropriate any part of the property subject to a mortgage in the interest of the public, or to impair the mortgagee's security, and the obligation of his contract, in order to discharge a duty the mortgagor owes to

the public. But when a court has taken the control of property from its owners, and has placed it in the hands of its receiver, it is its duty to direct its management so as to preserve its value for the benefit of all parties at interest. This may be best accomplished by a continuation of the business, although such continued operation may involve the danger of some loss. While, as we have said, such a power should be exercised with the greatest caution, yet it cannot be said that the power does not exist. In the exercise of such authority, the court should have the right to make the expense chargeable upon the corpus of the property, in the event the income may not prove sufficient to pay the expense. The conduct of a business that has proved insolvent is not likely to yield a net income; and, if the creditors of the receiver could only look to such income for the satisfaction of their claims, he would be unable to obtain credit, and the operation of the works would be impracticable. Accordingly, the rule is that the expense of administering and preserving the property is to be charged first upon the net income, and, if that be not sufficient, then upon the property itself, or its proceeds upon sale. *McLane v. Railroad Co.*, 66 Cal. 606, 8 Pac. Rep. 748; *Meyer v. Johnston*, 53 Ala. 237. Nor, while the circumstances which justify the appointment of a receiver, with authority to incur indebtedness in order to keep the property and business "a going concern" until the rights of all parties can be adjusted, and a sale effected, do not ordinarily arise, except in cases of railroad companies, no reason is seen why the same rules should not apply in other cases, under like circumstances. Whether the power to appoint a receiver over the property of a railroad company, and to authorize him to operate the road, and, as an incident thereto, to issue certificates of indebtedness, which are to be a prior charge upon the property in his hands, be maintained upon the ground of the interest of the public in the continued operation of the business, or upon that of the necessity of preserving the property, we apprehend that the action of the district court in this case must be justified upon either principle. If the public have an interest in the continued operation of a railroad, so have they in that of waterworks constructed for the purpose of supplying water to the inhabitants of a city. So, also, if the property of a water company be placed in the hands of a receiver, it may be best preserved by continuing the operation of its works so as to maintain it a going concern. It is true that precedents for the exercise of this extraordinary power, except in cases of the property of railway corporations, are rare; but it does not follow that the authority does not exist in other cases, where the same conditions call for its exercise. In the case of a shipbuilding company, in the courts of Pennsylvania, a receiver was appointed and au-

thorized to issue certificates to complete certain unfinished vessels. The certificates were held valid, and a primary charge upon the general funds in the hands of the receiver. *Appeal of Neafie*, (Pa. Sup.) 12 Atl. Rep. 271. We find nothing in the case of *Bound v. Railway Co.*, 50 Fed. Rep. 312, inconsistent with these views. In this connection, it is to be observed that we do not know, from the record before us, what evidence the district judge had before him, when he made the order authorizing the certificates to be issued. We do know that the order was made; that the certificates were issued; and that, upon final decree, they were directed to be paid out of the proceeds of the sale of the property, prior to the mortgage debt. Whether the action of the court in awarding the certificates was proper, in the first instance, we have no means of knowing. We merely hold that it had the power to make the order, and must indulge the presumption that the power was properly exercised, in the absence of any showing as to what the evidence was upon which it acted. So far as we are informed by the statement of the case given in the conclusions of fact and the opinion of the court of civil appeals, the applicant for the writ of error does not appear to have objected to the action of the court at any stage of the proceedings, until the final decree was rendered.

Let us look at the question from another standpoint. The application states that the applicant's mortgage was filed for record in September, 1890, but when it was executed the record before us does not disclose. It is to be inferred that it was after the act of March 19, 1889, amendatory of that of April 2, 1887, went into effect. The mortgage was subject to the provisions of the existing laws. The act of April 2, 1887, authorized the appointment of a receiver "in cases where a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights." Sayles' Civil St. art. 1461. The section of the act containing this provision was continued in force, but the sixth section was so amended by the act of 1889 as to read as follows: "All moneys that come into the hands of a receiver, as such receiver, shall be applied as follows: First, to the payment of all court costs of the suit; second, to the payment of all wages of employees, due by the receiver; third, to the payment of all debts due by the receiver for material and supplies purchased during the receivership by the receiver for the improvement of the property in his hands as receiver; fourth, to the payment of all debts due for betterments and improvements done during the receivership to the property in his hands as such receiver; fifth, to the payment of all claims and accounts against the receiver on contracts made by the receiver during the receivership," etc. Laws 1889, p. 56. Now, if there were any doubt about the correct-

ness of our conclusion that, upon the general principles of equity, the receiver's certificates were properly chargeable against the corpus of the property of the insolvent corporation, this statute would settle the question. The certificates were contracts made by the receiver, under the direction of the court, for the loan of money,—presumably, for the preservation of the property,—and they were properly allowed priority of payment in preference to the bonds secured by the mortgage. So, also, the allowance to the master in chancery is strictly costs of court incurred in the suit, and, by virtue of the statute quoted, was properly allowed priority of payment. Upon this matter the statute is probably declaratory of the law as it formerly existed. See *Read v. Corcoran*, 1 Ir. Ch. 235. We conclude that the action of the court in these particulars shows no error.

We do not see that the applicant was prejudiced by the action of the court in directing the sale of the property to be made by the sheriff of the county. It seems that the usual practice is to order the receiver to sell the property. *Beach*, Rec. § 727 et seq. Why it was not done in this case, we do not clearly understand. But it does appear that in the final decree the receiver was, by agreement of all parties at interest, left in the custody of the property until the sale should be made, with authority to operate the works upon certain terms specified in the decree; and it would seem that after that he was to be treated more as the custodian of the parties, than as the officer of the court. When there is no receiver, and a sale is directed in the district court, it is not unusual, in this state, to direct the sheriff to discharge that duty. In such a case the officer becomes the court's commissioner. The applicant cannot justly complain that he was not permitted to sell in order to save expense. All the creditors had an interest in the sale, and it should be made by a disinterested person. That a sale by the sheriff will involve more expense than if made by a commissioner is by no means apparent.

We come next to the question of the effect of the sheriff's sale of the lots. At the time of the appointment of the receiver, the constable had levied upon them, and had advertised a sale by virtue of an execution in his hands in favor of the applicant. The sale was made after the appointment, and the applicant became the purchaser. As to the effect of the constable's sale, under the circumstances, there is some conflict in the decisions. It is well established, we think, that, after property has been placed in the hands of the receiver, it is not subject to levy and sale under execution. Being in the custody of the law, through the appointment of a receiver by a court of competent jurisdiction, it cannot be interfered with by process from another court. A party having a

claim upon it must intervene in the court of the receivership, and in the case in which the receiver has been appointed, and establish his right in that tribunal, or must obtain leave of that court to bring an independent action. But the question here is, can the sheriff, who has made a levy upon real estate before the appointment of a receiver over it, proceed to sell, and pass the title, after the receiver has been appointed? The case of *Bank v. Risley*, 19 N. Y. 369, seems to hold the affirmative of the proposition. The opinion in that case lays down the broad doctrine that, if a judgment creditor have a lien upon real estate by virtue of his judgment at the time of the appointment of a receiver, he may be guilty of contempt by the attempt to enforce the collection of his judgment by a sale under execution, but that, if the sale be made, it is neither illegal nor void. The facts of the case were that a judgment creditor, whose execution had been returned unsatisfied, sued his debtor to set aside a fraudulent assignment of real estate, and had a receiver appointed. He prevailed in his suit, and, by order of the court, the receiver sold the property. A few days after, the same property was sold under an execution issued upon a judgment against the same debtor, which was rendered before the appointment of a receiver, and which was a lien upon the property. The court held that the purchaser at the sheriff's sale took a good title. The judgment which was sought to be collected by the suit in which the receiver was appointed was older than the judgment under which the property was sold by the sheriff, and was also a lien upon that property. But the court was of opinion that the defendant, who claimed through the receiver, took only such title as was conveyed to the receiver by the deed of the party over whose property he was appointed, and that this conveyance passed the property subject to the lien of the judgment under which it was sold by the constable, and that, therefore, the purchaser at execution sale took the superior title. It appears that the laws of New York required a conveyance to the receiver, in order to perfect his control over real estate, but that in case of personal property no such conveyance was necessary. Subsequently, in *Walling v. Miller*, 108 N. Y. 173, 15 N. E. Rep. 65, the same court held that where the sheriff had a levy upon personal property, and a receiver was subsequently appointed, a sale by the sheriff after the appointment, without leave of the court, was wholly illegal and void. If these decisions can be reconciled, it must be upon the ground that under the laws of that state the receiver derives his title to real estate only through the conveyance of the defendant in the action, and that, because such conveyance is not necessary as to personal property, a different rule applies. In *re Loos*,

(Sup.) 3 N. Y. Supp. 383. It would seem, however, that in *Walling v. Miller* the court intended to overrule the case of *Bank v. Risley*, although they do not expressly say so. In the later case they rely upon the case of *Wiswall v. Sampson*, 14 How. 52, in which the supreme court of the United States hold that a sale by a sheriff of real estate, over which a receiver had been appointed, is illegal and void, although the levy had been made before the appointment. But, viewed in the light of the later decision, the case of *Bank v. Risley*, if not overruled, would be no authority with us, because here no conveyance to the receiver is required, in order to invest him with control over real estate. However that may be, we think *Wiswall v. Sampson* lays down a doctrine that is founded upon good reason and sound policy. To permit the control of a receiver to be interfered with by virtue of process from another court would be a practice fraught with injustice, and productive of confusion; and that remark applies with especial force to the receivers of insolvent corporations. After all the assets of a corporation have been taken from the hands of its managers, and placed under the control of a receiver, is it just to allow its property to be sold under execution? The court, having deprived the corporation of the power of paying the debt and of avoiding the sale, should, in the interest of all concerned, protect its property from the sacrifice. The receivership does not destroy any liens that may have been acquired before the appointment, but the remedy for their enforcement should be sought in the court in which the whole estate is being administered. We therefore conclude that the court did not err in holding that the applicant took no title to the lots by the execution sale.

Considering the earnest manner in which the application in this case has been pressed upon the court, and the able brief by which it has been supported, as well as of the important questions involved, we have deemed it proper to depart from our usual practice, and to express our views upon the points presented in a written opinion. We find no error in the judgment of the court of civil appeals, and therefore the application for a writ of error is refused.

FIRST NAT. BANK OF COLORADO et al. v. BROWN.

(Supreme Court of Texas. May 3, 1892.)

STOCK ANIMALS—SALE—CONVERSION—POSSESSION —VARIANCE.

1. *Sayles' Civil St. art. 4564*, provides that persons may dispose of stock animals as they run in the range by sale and delivery of the brands and marks, but for the purchaser to acquire title his transfer shall be recorded. *Held*, that where there was actual delivery of the cattle, title passed, though the bill of sale,

describing them by certain marks and brands, was not recorded.

2. *Sayles' Civil St. arts. 4562, 4563*, provide that on the sale of stock actual delivery thereof shall be accompanied by a written transfer, and that on the trial of the right of property of any stock animal possession without the transfer shall be deemed illegal. *Held*, that title may be shown to have passed, though there was no written transfer, by evidence of a bona fide sale on sufficient consideration.

3. Where plaintiff, in an action for conversion of cattle by a naked trespasser, is relying merely on his possession as evidence of title, he may, for the purpose of showing that his possession is legal, give parol evidence of a purchase thereof by him, though a bill of sale was given to him.

4. An allegation as to place in an action for conversion is immaterial, and therefore there will not be held to be a material variance though the evidence shows a different place.

Appeal from district court, Martin county.

Action by N. B. Brown against the First National Bank of Colorado and others. Judgment for plaintiff. Defendants appeal. Reversed.

Chas. A. Jennings and Walton, Hill & Walton, for appellants. Cockrell & Cockrell, for appellee.

FISHER, J. This is an action by appellee against the appellants, the First National Bank of Colorado, Winfield Scott, H. B. Smoot, and S. M. Karr, for \$6,000 as damages,—the value of 550 head of cattle alleged to be the property of appellee, and that were taken and converted by appellants and the defendant Karr. The defendants answered by general demurrer and general denial. Judgment was rendered in the court below in favor of appellee against all of the defendants except Karr for \$3,500,—the value of 350 head of cattle at \$10 per head.

The first assignment of errors complains that the court erred in its charge to the jury wherein they were instructed that the defendants, not having shown any right to or interest in the cattle in controversy, cannot question the plaintiff's right of possession of said cattle if they found plaintiff had such possession. It is urged that this charge is improper, because the evidence shows that the cattle were purchased by the appellee by the marks and brands, when they were loose on the range, and that actual possession was not delivered at the time they were purchased; and that at the time they were taken by the appellants they were not in the actual possession of appellee, but running on the range; and that at the time of such purchase a bill of sale was executed and delivered to appellee, but it was never recorded. It is not pretended that the appellants denied or justified the taking of the cattle, and for the purpose of considering this question, they are regarded as naked trespassers. The appellants' contention would probably be correct if it would fall within the rule announced in *Black v. Vaughan*, 70 Tex. 48, 7 S. W. Rep. 604, and if the facts were as stated by them. Upon the contrary, we think the

evidence shows that at the time the cattle were purchased by the appellee they were actually delivered to him and his agents by his vendor, and that at the time he paid for them the bill of sale was executed at the time, describing cattle in certain marks and brands. The evidence shows that these cattle were in the marks and brands, and were, by the agents of appellee, examined and inspected before purchase, in order to ascertain if they were as represented by the vendor; and they were found as represented, and the sale concluded, and the cattle actually delivered to appellee's agent. The facts further tend to show that the cattle were in actual possession when they were taken and converted by the appellants; but, if there be any question as to the sufficiency of the evidence upon this point, we think the fact that they may have been loose upon the range when taken would not, as a matter of law, place them out of the possession of the true owner. Cattle running upon their accustomed range are held to be in the possession of the owner, and such possession is regarded as sufficient to hold a wrongdoer or trespasser liable who invades it. The fact that the purchase of the cattle was accompanied with an actual delivery takes the sale without the provisions of article 4564, Sayles' Civil St., as construed in *Black v. Vaughan*.

In this connection it is further insisted that the possession of the cattle by the appellee was illegal, because there was no evidence of execution of the bill of sale; that the bill of sale was not offered in evidence, or its absence accounted for, but that the plaintiff relied upon parol evidence of his purchase as justifying and showing a legal possession of the cattle. It seems from the evidence that the plaintiff, in making his case, only proved his purchase of the cattle by parol evidence, and that he had paid the consideration therefor, and relied upon his prior possession of the cattle as the evidence of his right against the trespassers, such purchase being proven in order to show that his possession was legal. Articles 4562, 4563, Sayles' Civil St., were construed by this court in the case of *Wells v. Littlefield*, 50 Tex. 561. There it is said: "The penalty for not taking such written instruments—bills of sale—upon receiving possession of cattle is that the possession shall be deemed prima facie illegal. It is not made conclusively unlawful, but it is open to explanation; and nothing prevents a title to such property from passing without a bill of sale if it can be proved that it was bona fide, made upon sufficient consideration, and that no evasion of the law was intended." We think the evidence shows a bona fide purchase of the cattle by appellee upon a sufficient consideration.

It is next contended that, the existence of the bill of sale being shown, parol evidence of the title was not admissible. The plaintiff, in making his case, was not relying upon

his bill of sale as the evidence of his right to recover against appellants, but relied solely upon his possession of the cattle as evidence of title sufficient to authorize a recovery against a wrongdoer or naked trespasser. The evidence with regard to the purchase was simply to show that he had legal possession of the cattle. It was not necessary to prove the facts establishing a title in order for the plaintiff to recover against a trespasser without the semblance of right. This is not a contest concerning the title to the property, or the rights of different claimants, but it is a proceeding solely against those who have unlawfully invaded the possession of another. In such a case the plaintiff can rely solely upon his possession as evidence of right sufficient to permit a recovery. *Cooley, Torts*, (2d Ed.) pp. 511, 512, 516-521; *Linard v. Crossland*, 10 Tex. 462.

It is insisted that the court erred in instructing the jury "that the place or county where the conversion took place, if they found there was a conversion, was immaterial," for the reason that the plaintiff in his petition alleged the ownership and possession of the cattle in Yoakum county, and the evidence shows that they were in Gaines county. It is insisted that in this respect the evidence does not correspond with the allegations. This may be true, but we do not regard the allegation of the place material. Evidence of an immaterial allegation is not required. But if an effort is made to prove it, and the place shown by the evidence does not correspond with that alleged, such failure does not give importance to an allegation that the law regards as immaterial. This question might only become important when the tort was committed within a different jurisdiction; but that question is not before us, and we express no opinion concerning it. *Cooley, Torts*, (2d Ed.) p. 551.

It is insisted that the verdict is excessive, and that the evidence does not connect the appellants the First National Bank and H. B. Smoot with the trespass, and therefore, in that respect, the judgment is erroneous. We have examined the evidence in the particulars complained of, and find the evidence as to the value and number of cattle taken sufficient to support the verdict, and that the bank and Smoot were parties to the trespass. We deem it unnecessary to notice other assignments. We conclude that the case should be affirmed, and so report it.

On Motion for Rehearing

(May 31, 1892.)

STAYTON, C. J., We have re-examined the record in this case on motion for rehearing, and feel constrained to hold that all the rulings in the former opinion, except one, are correct. In the former disposition of the case it was held that the evidence was sufficient to show the conversion of 350 head of appellee's cattle, but an examination of the evidence now satisfies us that the holding

was erroneous, and on this ground alone the former judgment of this court will be set aside, and the judgment of the district court reversed, and the cause remanded. It is so ordered.

LAIRD v. WEIS et al.

(Supreme Court of Texas. May 31, 1892.)

MORTGAGES—PREFERRING CREDITORS—WHEN CONSTRUED AS AN ASSIGNMENT.

An instrument executed by an insolvent, purporting to convey absolutely all his property to a trustee, and which states that it is "to secure," and is "intended as a mortgage to secure," debts due a part only of his creditors, and authorizes the trustee to sell the property, and prefer certain of such creditors, is a valid mortgage with a power of sale, and not a general assignment.

Appeal from district court, Bastrop county.

Action by Weis Bros. and others against H. Kempinski and J. E. B. Laird to have a certain instrument executed by Kempinski to Laird, as trustee, for the benefit of certain creditors of the grantor, declared a general assignment, and to require the trustee to administer it as such, instead of a mortgage. From a judgment for plaintiffs, defendant Laird appeals. Reversed and rendered.

B. D. Orgain, for appellant. Labatt & Noble, for appellees.

COLLARD, J. Weis Bros., a firm of merchants, and others, creditors of H. Kempinski, instituted this suit in the district court of Bastrop county against Kempinski and J. E. B. Laird to have a certain instrument executed by Kempinski to Laird, as trustee, for the benefit of certain creditors of the former, declared a general assignment under the statute, and to require the trustee to administer the same as such, instead of a mortgage, as he proposes to do, and will do, unless otherwise directed by the court. The instrument is of date November 13, 1889, and is substantially as follows: It recites that Kempinski is indebted to certain persons, firms, and corporations, 28 in number, in stated amounts, and, as Kempinski is "anxious to secure to the full extent of his means the payment of the aforesaid indebtedness," he constitutes Laird a trustee, to whom he sells, transfers, and delivers all of his stock of goods in a certain storehouse then occupied by the grantor in the town of Elgin, Bastrop county, an invoice of which is to be made and attached to the instrument as soon as it may reasonably be done, and also all his notes and accounts, which property is declared to be all the property owned by the grantor subject to forced sale. It is then added: "This transfer and conveyance is intended as a mortgage to secure to the full extent of any effects the payment of the aforesaid claims;" and the trustee is authorized to take possession of the goods, sell the same for cash, by wholesale or retail, at

private or public sale, as he may deem best; and the proceeds of the sales and collections on notes and accounts he is directed to apply to payment of costs and expenses of executing the trust and reasonable commission to the trustee, and then to the payment of certain named and preferred creditors in certain order, six in all, "and the remainder of the said above-enumerated claims shall be paid without distinction or preference." There is no other stipulation in the instrument. Upon hearing, the court declared the instrument to be a statutory assignment, and decreed the attempt to prefer creditors to be null and void. The judgment proceeds: "And it further appearing to the court that the defendant, before the hearing of this cause, had executed the trust by distributing the proceeds of all the goods that had come into his hands among the preferred creditors, in pursuance of the terms of the instrument conveying the goods to him, and nothing in this decree shall prejudicially affect the rights and liabilities of either the plaintiffs or defendant on account of said distribution and payment by said defendant, and that plaintiffs pay all costs of this suit, to which judgment the defendant, J. E. B. Laird, by attorney, then and there, in open court, excepted, and gave notice of appeal," etc. Besides the instrument of trust, the only evidence before the court was that Laird, immediately after the execution of the same, accepted the trust, took possession of "the property transferred to him," sold the goods, and "paid over the proceeds thereof in pursuance of the powers conferred upon him in said instrument." None of the property or its proceeds were in his hands at the time of trial. The statement of facts also shows "that said trust has been fully discharged by him; that \$230 proceeds of the goods were paid out by him before the filing of this suit; and that the balance of said proceeds [were] paid out after the suit was filed and service thereof had upon him." Plaintiffs' claims were proven up under the assignment law, and Laird was notified of the fact after the institution of the suit, "but not until after he had paid out all the proceeds under the powers and directions given him under the said instrument."

There are several assignments of error bringing in question the conclusion of the lower court that the instrument was an assignment under the laws of this state. The instrument was evidently a mortgage with a power of sale. Its object and its terms, as expressed, make it a security for the debts named. It does not stipulate that any residue left over in the hands of the trustee after payment of the debts as directed should be returned to the debtor, but the law would do this if a mortgage was intended. The expressions in the instrument that the purpose of its execution was "to secure" the payment of debts, and the emphatic state-

ment that it was "intended as a mortgage to secure" debts, leave no room for argument. A mortgage is a security, and, whether it so declares or not, the equity of redemption remains in the mortgagor. The instrument is not similar to those in the cases of *Preston v. Carter*, 80 Tex. 383, 16 S. W. Rep. 17, and *Johnson v. Robinson*, 68 Tex. 400, 4 S. W. Rep. 625. In those cases the instruments under consideration were not only absolute conveyances, but there was no intimation that they were intended as a security for debt. In the last case cited, Justice Gaines says: "A mortgage, being merely intended as a security for debt, gives, under our system, merely a lien upon the property with or without a power of sale, leaves an equity of redemption in the mortgagor, and the surplus, if any, after the payment of the debt, within the reach of his creditors, by due course of law." An instrument may contain all the terms of an absolute conveyance, and yet, if it is apparent from its terms that it was intended as a security for debt, it will be treated as a mortgage. Whether a security, or not, is the criterion. The case of *Preston v. Carter* is not opposed to this, but, on the contrary, recognizes the same principle of security for debt as of controlling effect, as was done in the case of *Johnson v. Robinson*. The deed before us leaves no room for construction. It expressly declares its object and intention. The courts cannot gainsay it. It should be noted also in this connection that the deed of trust does not purport to provide for all the debtor's creditors, nor does the testimony show the fact. Stress was laid upon this provision of a general assignment in the case of *Fant v. Ellsbury*, 68 Tex. 7, 2 S. W. Rep. 866; and, under the circumstances of the case before us, the want of such provision is important. It aids us in reaching the conclusion that no general assignment was intended for the benefit of all creditors, (Sayles' Civil St. art. 65a,) or for accepting creditors. The instrument was a mortgage, and, by it, it was lawful to prefer creditors. This being our conclusion, it follows that the judgment of the lower court should be reversed, and rendered for the defendant, Laird, declaring the instrument a mortgage.

ALVEY et al. v. LOGSDEN.

(Court of Appeals of Kentucky. Nov. 23, 1893.)

VENDOR AND PURCHASER—QUANTITY OF LAND—
DEFICIT.

1. Where one, without receiving any consideration, joins in a deed, as one of the grantors, merely for the purpose of perfecting the title, he is not liable for a deficit in the quantity of land.

2. Where land is conveyed by boundary, and the grantee placed in possession, in an action by the grantee for a deficit in the quantity of land, his testimony is not sufficient to show that the sale was by the acre, where three credible witnesses testify to the contrary.

v.28s.w.no.15—55

Appeal from circuit court, Hart county.

"Not to be officially reported."

Action by William Logsdan against Elizabeth Alvey and others. From a judgment for plaintiff, defendants appeal. Reversed.

John Donan and T. N. Lindsey, for appellants. Wm. H. Holt and H. C. Martin, for appellee.

PRYOR, J. James and Benjamin Alvey sold to the appellee, Logsdan, a tract of land lying in Hart county for the sum of \$375 in hand paid. The title to the land was in the heirs of Alvey, deceased, and the appellant Lush, having married a daughter of the decedent, united in the conveyance to Logsdan. The land, in fact, belonged to James and Benjamin Alvey, who sold to Logsdan; and Lush and wife, who received no part of the consideration, only united in the conveyance to perfect the title. The conveyance recites that, in consideration of \$375, the grantors convey to Logsdan a certain boundary of land, (defining it,) containing 99½ acres, closing with the usual warranty as to title. The appellee, Logsdan, filed his petition below, making all of the grantors in the conveyance defendants, and alleging what is termed a "breach of warranty," but really claiming a deficit in the land, averring that the tract contains only 84 acres, and, further, that the defendants represented to him that a valuable spring was included within the boundary, when it was not, and that this spring gave to the land its chief value. The answer made an issue as to all the material averments; the defendants averring that the boundary of land was sold for the consideration mentioned in the deed, and not by the acre, and the appellee knew, when he purchased, that the sale and conveyance did not include the spring. On the hearing of the case, the appellee testified as to the nature of his purchase, and the representations made to him by one of the Alveys as to the location of the spring, as an inducement to the purchase. The appellee is the only witness who testifies as to the representations made, while, on the other hand, three witnesses testify that the appellee was told the spring was not included in the survey, and the boundary of the land, when run, shows that it is on the land of Lush, and not embraced by the conveyance. The chancellor seems to have rejected the testimony of the witnesses, or that of the appellants, and, by a judgment, has taken a part of the land owned by Lush, and required it to be conveyed to the appellee, so as to include the spring.

It is not pretended that Lush made any representation in regard to the spring, and it further appears that he had no interest in the proceeds of sale, but only signed the conveyance that his title, or that of his wife, might pass to the appellee for the land within the boundary of the conveyance. The land had been previously assigned to the Al-

veys. It belonged to them, and, because Lush and wife parted with the mere naked title, the latter's land had been taken to supply a deficit caused by the alleged fraudulent representations of the two Alveys. This was error, and, if not, here is a deed with a definite boundary of land, executed to the appellee, and the latter placed in the possession, with the testimony of three credible witnesses that the deed embraces the land that was really sold, and intended to be conveyed; that it was a sale of the boundary for so much money; and opposed to this is the sole statement of the appellee that is made to change the calls of the deed, and refute the statements of the appellants. We think the facts are conclusive that the appellee obtained all he purchased, and that neither a deficit exists, that should be accounted for, or any false representations established. Judgment reversed and remanded, with directions to dismiss the petition.

GARNETT et al. v. FARMERS' NAT. BANK OF CYNTHIANA.

(Court of Appeals of Kentucky. Nov. 21, 1893.)

APPEAL—MANDATE AND PROCEEDINGS BELOW.

Where a judgment on a verdict for plaintiff on two items distinctly separable on the pleadings and proof is reversed solely on the ground that plaintiff, as a matter of law, was not entitled to recover on one of the items, and that the jury should have been directed to find for defendant on that item, and the cause is remanded "for further proceedings consistent with this opinion," the trial court is not required to retry the issues, but may render judgment for the item as to which there was no error.

Appeal from circuit court, Harrison county. "Not to be officially reported."

Action by the Farmers' National Bank of Cynthiana against William Garnett, Sr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ward & Kimbrough, for appellants. G. C. Lockhart, for appellee.

HAZELRIGG, J. The judgment of the lower court prior to the former appeal of this case was for \$4,622.92. Of this, the sum of \$3,622.92 was for money converted to his own use by the clerk of the appellee, by means of false entries in his individual deposit account, and the sum of \$1,000 was appropriated, and its taking concealed by a change of figures on the deposit blotter. The keeping of the deposit account was within the scope of the clerk's duty. The keeping of the deposit blotter was not. Therefore, this court said on that appeal, (91 Ky. 614, 16 S. W. Rep. 709): "In our opinion, the evidence clearly shows that King, without any other opportunity or means than such as his office of clerk afforded, and while acting entirely within the sphere of that office, fraudulently converted the sum of \$3,

622.92; and the express terms and conditions of the bond being thereby and thus violated, without contributory fraud of the bank, his sureties are liable therefor. But we think it is just as clear they are not liable for the other sum, \$1,000. * * * As the loss of the \$1,000 resulted from the act of the bank in putting King in position where he could and did take it, and his sureties did not bind themselves to answer therefor, they cannot now be held liable; and in that respect the judgment is erroneous, and is reversed for further proceedings consistent with this opinion." Upon a return of the case, the lower court set aside its former judgment, and, over the objection of the appellants, rendered judgment against them for the sum of \$3,617.92. The question on this appeal is whether these were "further proceedings consistent with the opinion." The case, it will be observed, was not sent back with directions for a new trial; and it is evident that no error was committed on the trial, in the opinion of this court, save that an instruction asked by the appellants, and refused by the court, to find for the defendants as to the item of \$1,000, should have been given. The liability of the defendants for the item of \$3,622.92 was determined by a verdict and judgment free from error, and to the extent only that the item of \$1,000 was embraced therein was the judgment deemed erroneous, or reversed. The mandate based on this opinion could properly have set aside the former judgment only as to this item. As said by counsel for appellee, the two items were distinctly separable in the pleadings and proof. The issue as to one of them was properly submitted to the jury, and no error occurred on the trial of that issue. But, as a matter of law, upon the facts presented on the issue as to the item of \$1,000, the sureties were not liable. Why shall the parties be required, or be entitled, to retry an issue already once correctly tried? We think the judgment below was in conformity with the opinion, and it is therefore affirmed.

GREER'S ADM'R v. GREER'S ADM'R. (Court of Appeals of Kentucky. Nov. 4, 1893.)

EVIDENCE—ACCOUNT—BOOKS.

1. Partnership account books, carelessly kept by one partner, a competent bookkeeper, difficult to understand, not posted for a number of years, and omitting many items, are not admissible in evidence in an action by the personal representatives of such partner to recover from the personal representatives of the other a balance alleged to be due on a settlement of the partnership account.

2. Entries in partnership account books, made at the instance of one of the partners, from memoranda and from memory, as to transactions purporting to have taken place 15 and 20 years before, are not admissible in evidence as against his copartner, who denied the correctness of the entries when they were being made, and who refused to settle by them.

Appeal from chancery court, Kenton county.

"Not to be officially reported."

Action by A. L. Greer's administrator against Thomas Greer's administrator to recover a balance alleged to be due plaintiff's intestate in a partnership accounting. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

W. H. Mackey and A. G. Simrall, for appellant. Simmons & Simmons and W. W. Cleary, for appellee.

PRYOR, J. The administrator of A. L. Greer is seeking to recover a balance of \$15,000 from the personal representative of his brother, Thomas Greer, alleged to be due on a settlement of the partnership accounts between them. The court below refused the judgment, and A. L. Greer's administrator has appealed.

The two brothers were partners in the sale of merchandise for a number of years, the partnership beginning in the year 1841. They sold out their stock of merchandise in the year 1851, and it is claimed engaged in the buying, selling, and improving real estate as partners, and that the partnership books show an indebtedness by Thomas Greer to A. L. Greer of the amount claimed by the appellant. That the two brothers were engaged jointly or as partners in purchasing and selling real estate does not admit of doubt, but whether there is any evidence showing the true state of the accounts between them, originating from these transactions, is the question here. They were either partners or joint dealers and owners of this real estate purchased and sold, and it is not important, in view of the conclusion reached by this court, whether they occupied the one relation or the other. They were brothers, and upon the most intimate terms, and their accounts, as is usual in such cases, were carelessly kept, and difficult to understand. A. L. Greer, whose administrator is the appellant here, seems to have been fully competent as a bookkeeper, and whose duty it was, as is contended by the appellant, to keep the books, and a correct statement of the accounts between them. In June, 1881, J. W. Long, an expert accountant, was employed by A. L. Greer to post what is called in this record "Journal and Ledger I," in order to a settlement between the two brothers; and it may be assumed that this employment was made with the approbation of Thomas L. Greer. He seems to have been present when the work began, and made no objection, until ascertaining the manner in which the entries were being made. There is no proof, however, that the appellee's intestate ever examined the books, or that they were the recognized books of the firm; but, conceding that they were, and A. L. Greer the bookkeeper, what knowledge could or would Thomas Greer have of their correctness, kept

in the manner as this testimony shows they were kept by A. L. Greer? He was a skillful bookkeeper, or at least competent for that purpose, and the duty devolved upon him to make such a statement of accounts as could be understood, and to make entries of the transactions as they occurred; but as the books stood when Long took charge of them, the character of the entries, or rather the mode in which the books were kept, conduce strongly to show that they were the individual books of A. L. Greer, and, if not, were properly excluded as testimony showing the accuracy of the accounts. The entries made by Long were made from memoranda that A. L. Greer had, and from the latter's memory. This was in the year 1881 these entries were made, and of transactions purporting to have taken place in the years 1858, 1860, and 1863; some of them 20, and others more than 15, years after the business transactions. When such entries were being made Thomas L. Greer denied their correctness, and refused to settle by them. The settlement then stopped, and after that other entries seem to have been made, and by whom does not appear. The court, very properly, we think, excluded the books as testimony, in the absence of other proof showing the entries to have been proper, as it was the duty of the appellant's intestate, if these were the books of the firm, to have kept them in a proper manner, and not to rely on his memory of what transpired 15 or 20 years before the entry was made, and doubtless had been long prior thereto settled by the parties. This testimony shows that Thomas Greer was sound financially, and ready always to meet his engagements, while the appellant's intestate was much involved, a borrower of large sums of money; and in fact, while this indebtedness to him existed as is maintained, he executed a mortgage to Thomas Greer to indemnify him as his surety for a less sum than he or his representative is now claiming against Thomas Greer's estate. If not a mortgage, each had contributed to the purchase of real estate, and the deed was made to Thomas Greer to indemnify him as surety of his brother. This was in the year 1878, and, at the death of A. L. Greer, Thomas Greer was his surety for \$13,124, and A. L. Greer was indebted nearly \$70,000. Besides, it appears that, not long before the death of Thomas Greer, A. L. Greer made oath in a proceeding where a bond was necessary that Thomas Greer owed nothing, and, after Thomas Greer's death, made a like statement. It is argued that these statements were made under the belief that the partnership assets would pay all the indebtedness; and, while this may have been the case, when these statements are connected with the other facts and circumstances in this case as to pecuniary condition of both, it raises a strong presumption that A. L. Greer believed he had no claim against his brother. If he was the bookkeeper, he ought to have known the

liability of his brother to him. He was involved in debt; mortgaging his property to one he now claims to have been his debtor,—his brother, with ample means, and able to pay. And it is remarkable that he should have overlooked this large indebtedness when his brother could have readily secured him instead of his securing the brother. The books are not evidence of any indebtedness. Long testifies that there was no book from which the entries by him were made, and to admit such evidence in this case would be, in effect, allowing one party to testify, and refusing the same right to the other. The entries were not made in the regular course of business, and the manner in which they were kept made them worthless as testimony. The judgment below must be affirmed.

COMMONWEALTH v. OWENSBORO, F. OF R. & G. R. R. CO. SAME v. LOUISVILLE & N. R. CO. SAME v. ELKTON & G. R. CO. SAME v. MAMMOTH CAVE R. CO. SAME v. BURNSIDE & C. R. R. CO. SAME v. HODGENVILLE & E. RY. CO. SAME v. LOUISVILLE SOUTHERN R. CO., (two cases, Nos. 175 and 180.) SAME v. LOUISVILLE, H. & W. R. CO. SAME v. OHIO VAL. RY. CO. SAME v. LOUISVILLE, ST. L. & T. RY. CO. SAME v. KENTUCKY & I. BRIDGE CO. SAME v. KENTUCKY MIDLAND RY. CO. SAME v. KENSEE COAL CO. SAME v. OWENSBORO & N. R. CO.

(Court of Appeals of Kentucky. Oct. 26, 1893.)

TAXATION—RAILROADS—EXEMPTION—STATUTES—REPEAL—APPEAL.

1. Act Sept. 14, 1886, which constitutes a general revenue system, and which provides for the taxation of all property within the state, including all railroads, except that expressly exempted in the act itself, and which repeals all acts inconsistent with itself, or not in conformity to itself, necessarily repeals Act May 5, 1884, which exempts from taxation the property of all railroads for five years after their construction.

2. The fact that the act of 1886 expressly enumerates a number of acts intended to be repealed, not including the act of 1884, does not continue the latter in force, in view of the express repeal of all inconsistent acts contained in the act of 1886.

3. The fact that the legislature in 1888 adopted a private compilation of the statutes, published in 1887, which embodies both the act of 1884 and the act of 1886 as being still in force, does not conclusively show the legislative intention to continue the act of 1884 in force.

4. Since the plain meaning of the act of 1886 is to repeal the act of 1884, the fact that the executive and administrative officers of the state considered the act of 1884 as being still in force cannot frustrate the object of the repealing act.

5. Railroad companies which began the construction of their roads after the enactment of the repealing act of 1886 cannot claim exemption from taxation under the act of 1884, on the ground that they did such construction work in the belief that the act of 1884 was still in force.

6. The act of 1856, reserving to the legislature the right to repeal or amend "charter privileges" granted by the legislature to partic-

ular persons, does not enable the legislature to repeal the act of 1884, as against railroad companies which, on the faith of the assurance of five years' exemption from taxation therein contained, constructed their roads before the enactment of the repealing act of 1886.

7. In an action to recover taxes the court of appeals will review the legal question arising on defendants' plea of a statute exempting them from taxation, though there had been no motion for a new trial, or a separation of the law and the facts in the decision of the trial court.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Actions by the commonwealth of Kentucky against the Owensboro, Falls of Rough & Green River Railroad Company and various other railroad companies to recover taxes. From a judgment in favor of the railroad companies, the commonwealth appeals. Affirmed in part, and reversed in part.

Wm. J. Hendrick, Reid Rogers, and Thomas H. Hines, for the Commonwealth. Holmes Cummins, E. F. Trabue, Helm & Bruce, John W. & Harry G. Rodman, Dulaney & Mitchell, and Wm. Lindsay, for appellees.

HAZELRIGG, J. The principal questions involved on the foregoing appeals are common to all of them, and for that reason the cases are heard together.

On May 5, 1884, the general assembly of the state adopted the following act: "An act to encourage the building of railroads in the commonwealth of Kentucky, and to exempt from taxation all railroads which may be hereafter built under existing charters, or under charters which may be hereafter granted for a period of five years from the date of the beginning of the construction of such new roads. Section 1. That all railroads which may hereafter be built within this commonwealth under existing charters, or under charters which may be hereafter granted, shall be exempt from all taxation under the laws of this commonwealth for a period of five (5) years from the date of the beginning of the construction of such new roads. Sec. 2. Be it further enacted, that this act take effect from and after its passage." The appellees are railroad companies which began the construction of their respective roads after the adoption of this act; and on the faith of which act they are claiming an exemption from state taxation for five years from the time of such beginning. The appellant, by these suits, instituted in the Franklin circuit court, is seeking to collect taxes from the appellees, in spite of the act aforesaid, on the ground that in May, 1886, by an act taking effect September 14, 1886, the legislature repealed the act relied on by the appellees. This latter act is known as the "Hewett Revenue Bill." It is entitled "An act to amend the revenue laws of the commonwealth of Kentucky." It is an elaborate general revenue statute, providing, under separate articles, (1) the rate of taxation; (2) stocks in banks and other in-

stitutions; (3) railroads; (4) turnpike roads and other corporations; (5) license tax; (6) the assessor and his duties; (7) board of supervisors; (8) duties of clerks; (9) collection of the revenue, etc. Section 1, art. 1, provides that an annual tax of 47 cents upon each \$100 of value of all the real and personal estate directed to be assessed for taxation due and payable the fiscal year assessed, shall be paid by the owner or persons assessed. By section 3 it is provided that all property, real and personal, within the state, "not herein expressly exempt by law," shall be assessed, as nearly as practicable according to a uniform rate, and in the manner provided in detail by the act; and a succeeding section provides what property shall be exempt from taxation, namely, property of the United States, property of the commonwealth, cattle of certain value, etc. Article 2 provides for the taxation of "stocks in banks and other institutions." Section 1, art. 3, provides that "the president or chief officer of each railroad company or other corporation owning a railroad lying in whole or in part in this state shall, on or before the 1st of September in each year, return to the auditor of public accounts of the state, under oath, the total length of such railroad, * * * with the average value per mile thereof;" and by a succeeding section it is provided that the same rate of taxation for state purposes which is or may be in any year levied on other real estate shall be levied upon the value so reported and found of the railroad, rolling stock, and real estate of each company. After providing for the taxation of turnpike roads and other corporations, imposing license taxes, and regulating the duties of assessors, boards of supervisors, clerks, and sheriffs in relation to the revenue, the act concludes (section 5, art. 12) as follows: "Chapter 92 of the General Statutes; the act of March 28, 1872, entitled 'An act to amend chapter 83 of the Revised Statutes, title "Revenue and Taxation;"' the amendment to said act of March 28, 1872, entitled 'An act to amend an act approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax,' approved April 19, 1873; the act approved April 2, 1878, title 'An act to amend section 6, article 6, chapter 92, General Statutes;' 'An act to amend article 2 of chapter 92 of the General Statutes, title "Revenue and Taxation;"' approved May 8, 1884; and all other acts, general and special, and parts of acts, inconsistent herewith, or not in conformity herewith,—are hereby repealed; but nothing in this act shall interfere with any existing local option, or any special or prohibition law in any county, nor with any local or general law for creating or collecting county levy, or with chapter 1315 of the Acts of 1879-80,—[agricultural and mechanical college tax,] or with an act entitled 'An act for the benefit of the branch penitenti-

ry at Eddyville,' approved April 7, 1886." Sec. 6: "Nothing in this act shall be held to repeal or in any way impair the force and effect of any local or special act, or any general law in force or that may hereafter be passed providing for the appointment of collector or state revenue or county levy and poll tax, in any county of the state, nor shall anything herein be construed to repeal or impair the force of any special or local law giving to counties or towns, for road or street purposes, the fines collected for violations of the road or bridge laws of said county."

In determining the force and effect of this latter act on prior legislation, general or special, regulating taxation in the commonwealth, it is evident that its general purpose and intent should be given much weight. Manifestly, the act of 1886 is intended to compass and reform the entire revenue law of the state,—to constitute in itself a general and complete revenue system. As argued by counsel, "It singles out no special defects here and there, but is aimed broadcast at the whole structure. Else why should it have re-enacted, as it does, many old laws in identical and equivalent terms?" This general purpose, to be made effective and uniform, must sweep away a mass of special and class legislation adopted in pursuance of the system theretofore in practice. We notice, first, that all property, real and personal, shall be assessed for taxation, save that expressly exempted in the act itself. Not content with this, the act proceeds to repeal all acts, and parts of acts, general and special, inconsistent with itself, or not in conformity to itself. Can it be said that the act of 1884, providing by a general law for a tax exemption for a specified time of the property of all newly-built railroads in the state, the force of which was to continue the exemption forever or indefinitely, is not inconsistent with an act intended to embrace the whole tax law of the state, demanding the equal and uniform taxation of all property within the state, save the property of the United States, the commonwealth of Kentucky, etc., and demanding specifically, and without exception or exemption, the taxation of all the property of each railroad company within the state? We think not. Manifestly, there is the most positive repugnancy between the two acts, and upon abundant authority, if any were needed to sustain so evident a proposition, the latter act supersedes and repeals the former. "An intention to supersede local and special acts (End. Interp. St. § 231) may be gathered from the design of the act to regulate by one general system or provision the entire subject-matter thereof, and to substitute for a number of detached and varying enactments one universal and uniform rule, applicable throughout the state." "Ordinarily," says Mr. Bishop in his work on Written Laws, (section 152,) "if there are a general statute

and one local or special on the same subject in conflicting terms, neither abrogates the other, but both stand together, the former furnishing the rule for the particular locality or case, the latter for the unexpected places and instances; and it is immaterial which is of the later date. But where, from any thing cognizable by the judges, they are satisfied the general law was meant by the legislature to supersede the local or special one, they will give it that effect." Here the repeal is gathered, not merely because the acts are inconsistent, but because the latter in express terms repeals all acts and parts of acts, general and special, inconsistent therewith, or not in conformity thereto. Sutherland on Statutory Construction (page 214) says that when a general act is passed, "and repeals all inconsistent legislation, it will have the effect to repeal all special acts which are in conflict with it;" and Endlich on Interpretation of Statutes (section 206) says that such a clause removes the chief objection to repeals by implication.

We may notice in this connection that the act of 1884, strictly speaking, is not a local one. Its operation is uniform and general on the class to be affected. As said by counsel, "It was passed for no local purpose, nor with any individual instance in view, but as a general law, of whose benefits corporate persons not yet in being might avail themselves." It was ingrafted into the General Statutes of the state, and formed a part of the general revenue law of the state in existence when the general revenue act of 1886 was adopted; and the latter must be held to repeal the former. In *Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. Rep. 346, the supreme court held that the act of 1886 was a general revenue act; and considering the purpose of its enactment, and the fact that it required the taxation of all property within the state unless expressly exempted by its provisions, and repealed all inconsistent acts, general and special, it was held to repeal the special act of that company exempting it from taxation. Much stronger, we think, is the argument that it repeals the quasi general act exempting newly-built railroads. On the other hand, it is contended that, as there is no reference to the act of 1884 in the alleged repealing act, its repeal would be one by implication, which is not favored. We have seen, however, that, considering the general purpose of the act of 1886 and its express repeal of inconsistent acts, the legislature must have intended the latter act to constitute in itself a complete system of taxation.

It is urged that there had been a legislative construction of this act of 1884 conclusive of the question. In 1887, Messrs. Bullitt & Feland collated and published the acts of the Kentucky legislature regarded as in force and effect; and in 1888 the general assembly, by an act of April of that year,

adopted the edition of the General Statutes as thus prepared from chapter 1 to 113a, inclusive. The act of 1884, relied on by the appellees as exempting them from taxation, is found embodied in the edition of the statutes named. So, however, is found later on, in the same edition, the act of 1886, repealing, as appellant contends, the former act. We are left, therefore, where we started,—with the solution of the question depending, at last, on the terms and provisions of the acts themselves and the circumstances and purposes of their enactment.

It is insisted that there has been a contemporaneous interpretation of these statutes by the officers whose duties were to enforce them favorable to the contention that the one was not intended to repeal the other. Thus, the auditor, after 1886, continued to report these roads as "nontaxable roads." The railroad commissioners, in some of their reports, incorporate the act of 1884 as if in full force and effect, and make report of the length and valuation of the roads merely for statistical purposes. The governor, in his message of December 30, 1889, says: "Taxes were paid, however, on only \$34,174,272 valuation of property, as the residue, amounting to \$10,516,631, is at present exempt from taxation by the terms of their charters." "So," say counsel for the appellees, "we have this act construed by the legislature, the governor, the railroad commissioners, and the auditor, and without the commissioners and the auditor it was impossible to execute the law." It may be admitted that the interpretation given the statute by these officers might be persuasive evidence of its meaning if the repealing act was uncertain, doubtful, or ambiguous. In *U. S. v. Graham*, 110 U. S. 221, 3 Sup. Ct. Rep. 582, it is said of a law considered ambiguous: "Such being the case, it matters not what the practice of the department may have been, or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect." So this court, in *Collins v. Henderson*, 11 Bush, 92, says: "Where the words of an act are obscure or doubtful, and where the sense of the legislature cannot with certainty be collected by interpreting the language of the statute according to reason and grammatical correctness, considerable stress is laid upon the light in which it was received and held by contemporary members of the profession." If the language of an act be certain, its object can never be frustrated by any amount of contemporaneous interpretation, no matter how consistent or how widely adopted it may have been. A construction against the plain meaning of the law as expressed by its terms, even in aid of justice or right, or to

avoid an absurdity, is never permissible. End. Interp. St. p. 506.

Considering, therefore, the question of repeal disposed of, the inquiry remains, what effect does the repeal of the act of 1884 have upon the rights of the appellees, some of whom began the construction of their roads prior to the repeal, and some of them subsequently thereto? It results, of course, without further argument, that the property is subject to taxation of such of the appellees as commenced the construction of their roads after the repeal of the act on which they rely for exemption. Without this exemption act of 1884, their property is upon the same footing as other property in the state. They cannot say after September, 1886: "We relied on this exemption act, expended our money in the construction of these roads on the strength of the act of 1884, and therefore have acquired certain rights which the legislature cannot take away." The exemption had been withdrawn before they had begun the work or expended their money. Certainly, the state takes away none of their property, and circumscribes none of their property rights. It simply treats their property as it does that of others, because subject to the same general law of taxation. The state, however, contends that the same is true of the property of those of the appellees who began the construction of their roads while the law of 1884 was in force; that is, at a time prior to September 14, 1886. It is contended that the exemption act is a mere bounty, which the state may withdraw at pleasure; and, more than that, that, even if the act to encourage the appellees to construct their roads be regarded as forming a contract with the state of an obligatory character, yet the power reserved to the state by the law of 1856 authorized any change in the contract desirable by the state, or even its entire revocation. Quoting from *Tomlinson v. Jessup*, 15 Wall. 454, a leading case on the subject under consideration, counsel contend that "immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, [here 1856,] subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interest that the revocation shall be made." It is sufficient to say of this proposition, which even at first blush strikes one as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the state, and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law, and affected alike all who accepted its provisions or acted on the strength

of them. No contract was made with any person, natural or artificial, upon the adoption of this act, though by accepting its terms certain rights might be secured thereunder of the nature of contract rights. But no reservation, express or implied, can be said to have been made therein by virtue of the act of 1856. Being a general law, it was revocable at pleasure, but it does not follow that it might be revoked so as to injuriously affect the citizen accepting its provisions, in violation of the pledge of the state and the common principles of justice. The state, to promote the ends of development, to afford greater facilities for transportation, and to bring into its borders an increased volume of property shortly to help bear the common tax burden, says to the railroad people, "Build up your enterprises, and expend your capital in our midst, and, in consideration of the premises, we will grant you a brief respite from the tax gatherer." We think the state cannot withdraw its pledge of immunity from those who acted upon the assurances of the act, and that the property of the appellees, beginning their work prior to the repealing act of September 14, 1886, and thus accepting the provisions of the act of 1884 while it was in force, cannot be subjected to the taxation sought to be imposed in these actions. The private exemption acts pleaded by some of the appellees come clearly within the principle decided in *Water Co. v. Clark*, supra. The immunity claimed was withdrawn by the act of 1886.

A question of practice only remains for settlement. The plaintiff alleged the facts with reference to each road constituting its cause of action thus: That annual reports of the railroad authorities to the auditor of the length and valuation of their respective roads within the state had been made; that these were annually, and before September 1st, laid before the railroad commissioners, who proceeded to value and assess the property set forth in these reports; that a statement of such was thereupon returned to the auditor, who notified the defendants of the amount of the assessment and the tax due, etc. The defendants denied these allegations in detail, explaining as to the reports of their officers when made that they were furnished for statistical purposes merely. In a separate paragraph, the act of May, 1884, was pleaded as affording them immunity from the taxation sought to be imposed. A demurrer to this paragraph was overruled. This defense constituted a complete bar to recovery, and, no matter what proof might be adduced by the state in support of the issues otherwise made by the answers, the end necessarily resulting from the ruling of the court in sustaining this plea of exemption was bound to be a dismissal of the petition. The state, looking perhaps to the contemplated appeal, and

with a view of having all the controverted facts established by proof, and having the cases ready for a final judgment should the legal questions be determined in its favor in the appellate court, introduced the secretary of the state railroad commissioners and the auditor's clerk, who proved facts conducing to establish the allegations in the petitions. The defendants introduced no witness, but had three witnesses to file certain additional reports or records. The court, on final hearing, dismissed the petitions, and the state appealed, without having made a motion either for a new trial, or for a separation of the law and facts. We do not think either was necessary. The petition seems to have presented a good cause of action. When the plea of exemption was erroneously sustained, it really ended the case, or, at least, put an end to the possibility of recovery by the plaintiff. The facts shown in proof appear to sustain the state's right to recover. There was no contrariety of testimony. A few pamphlets and reports of officers only were filed; and, when the case was finally dismissed, there was in fact nothing before the court save questions of law. There was no disagreement as to what was shown in the books, though the legal effect of the facts so shown was a subject of difference of opinion. The court passed on nothing save legal questions, and these this court may review in the absence of the motions for a new trial and a separation of the law and facts. Upon a return of the cases, or such of them as will be indicated, the demurrer to the plea of exemption will be sustained, and then the facts of the alleged assessments, notices, etc., may be fully inquired into.

From the records before us, the following appellees appear to have commenced the construction of their roads after September 14, 1886: Owensboro, Falls of Rough & Green River Railroad Company; Louisville & Nashville Railroad Company, (being the Cumberland Valley Branch & Extension, the Middle Division Cumberland & Ohio, known as the Springfield Branch, and the Clarksville & Princeton Division. The last-named division seems exempt for five years after its commencement, on October 31, 1884;) the Burnside & Cumberland River Railroad Company; Hodgenville & Elizabethtown Railway Company; Louisville, Hardinsburg & Western Railroad Company &c.; Louisville, St. Louis & Texas Railway Company; and Kentucky Midland Railway Company,—and the judgments therein are therefore reversed.

The following appellees commenced the construction of their roads while the act was in force, and are therefore entitled to five years' exemption from the date of said commencement, but from the record it appears that the exemption expired, and the state appears entitled to recover for a part of the

time. The petitions were dismissed, and the judgments are reversed for that reason: Ohio Valley Railway Company; Louisville Southern Railroad Company, etc., (No. 180;) Kentucky & Indiana Bridge Company; Ken-see Coal Company.

The following appellees commenced their roads while the act was in force, and are not sued for any year for which they are not exempt, and for that reason the judgments are affirmed as to them: Elkton & Guthrie Railroad Company; Mammoth Cave Railroad Company; Louisville Southern Railroad Co., etc., (No. 175;) and Owensboro & Nashville Railroad Company, and Louisville & Nashville Railroad Company.

The judgments in the cases indicated erroneous are reversed, with instructions to proceed as herein indicated.

PIPER v. GUENTHER et al.

(Court of Appeals of Kentucky. Nov. 4, 1893.)
CONSTITUTIONAL LAW—SPECIAL LAWS—PRACTICE
ACT—DISCONTINUANCE.

1. Const. § 125, which discontinued a certain court, "as constituted and organized" under the constitution of 1850, and created another court to succeed it, did not repeal a special act regulating practice in the discontinued court, as the practice act was not a part of such court, "as constituted and organized."

2. A special act, regulating the practice in a discontinued circuit court held in terms, is not inconsistent with the provision of the new constitution (section 59) that the general assembly shall not pass local or special acts "to regulate the practice of courts of justice; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice in circuit courts held in terms," since such constitutional provision is prospective in its operation, and under it the special act remains in force till the passage of a general law regulating practice in circuit courts held in terms.

Appeal from circuit court, Daviess county.
"To be officially reported."

Action by W. A. Guenther & Sons against John Piper on a promissory note. Judgment for plaintiffs. Defendant appeals. Reversed.

Lucius P. Little and L. Freeman Little, for appellant. Weir & Weir, for appellees.

HAZELRIGG, J. By the provisions of an act of the general assembly entitled "An act to regulate civil proceedings in actions in the Daviess circuit court," the clerk of the court was required to keep an equity trial docket, in addition to the equity docket provided for by general law. It was also provided that no case should stand for trial or judgment unless set down on the trial docket before the first day of the term at which trial or judgment was sought. The clerk was to so set the cause at the instance of any party to the action, or his attorney. The appellees brought this suit in the Daviess circuit court to secure judgment on a purchase-money

note for a town lot, and to enforce their lien thereon. At the January term, 1893, the case was called, and the plaintiffs moved for judgment. The defendant (appellant) objected upon the ground that the case did not stand for trial. It was conceded that the action had not been placed on the equity trial docket, as provided by the special act. The court rendered a judgment in behalf of the appellees, over the objection of the appellant, and also overruled his motion to set the same aside, made on the ground that its rendition was a clerical misprision. The appellant brings the case up, insisting that, by reason of the special act mentioned, the case did not stand for trial or judgment, and that the judgment complained of was rendered prematurely.

The appellees contend that, by virtue of the present constitution, the special act affecting the practice in the Daviess circuit court is no longer in force, and hence the judgment was properly rendered. The learned circuit judge has supported this contention, that the special act has been repealed, by an elaborate and somewhat plausible opinion, the purport of which is that the court to which the act alone applied was created by virtue of the constitution of 1850. This old constitution has been superseded by the new, which, by its 125th section, creates a new circuit court in each county. The Daviess circuit court, to regulate the practice in which the special act in question was passed, is not the Daviess circuit court now in existence, under the new constitution. Moreover, the third provision of the schedule is to the effect that circuit courts, as now constituted and organized by law, shall continue with their respective jurisdiction until the judges of the circuit courts provided for in this constitution shall have been elected and qualified, and shall then cease and determine, and the causes then pending in the first-named courts, which are discontinued by this constitution, shall be transferred, etc.

The fallacy of this argument, it seems to us, lies in the assumption that because the old court, as constituted and organized, is discontinued, the law, whether special or general, regulating the practice, is also discontinued. The "practice acts," so to speak, do not form a part of the old courts, "as constituted and organized," in the meaning of the constitution, and are not, therefore, discontinued simply because the old courts are discontinued. On the contrary, "that no inconvenience may arise from the alterations and amendments made in this constitution," the first clause of the schedule provides "that all laws of this commonwealth in force at the time of the adoption of this constitution, not inconsistent therewith, shall remain in full force until altered or repealed by the general assembly," etc. These various acts regulating practice are "laws of the commonwealth." They are not repealed

simply because the courts to which they relate are discontinued, as constituted and organized theretofore, but their repeal is made to depend on whether they are inconsistent with the new constitution; and whether inconsistent or not is a question not involved in the argument at hand. This phase of the question will be considered further along. The various acts or laws of the commonwealth regulating practice in civil and criminal cases are independent of the organization or makeup of the courts created either by the new or old constitutions. If it were otherwise, then laws regulating the subject of practice, whether general or special, would die with the old courts. The Civil and Criminal Codes are but acts regulating practice in civil and criminal cases. "The provisions of this Code [Civil Code, § 838] shall regulate pleadings and practice in civil cases commenced hereafter in courts which now exist or which may hereafter be created,"—created, of course, under the constitution then in force. Special acts, therefore, regulating practice in the courts under the old constitution, are no more repealed than is the Code of Practice. We think that all these acts survive the old constitution, except such as are inconsistent with it, and, further, that, where they are inconsistent with the constitution, they still survive, provided the provisions of the constitution making them inconsistent require legislation to enforce them.

The only question is, therefore, is the special act under consideration inconsistent with any provision of the constitution which is in force of itself, or is operative without legislation to enforce it? The only provision on the subject relied on to show this inconsistency is that of section 59, providing that the general assembly shall not pass local or special acts "to regulate the jurisdiction, or the practice, or the circuits of courts of justice, or the rights, powers, duties or compensations of the officers thereof; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice of circuit courts held in terms." This is a direction to future legislatures, and a limitation on future special legislation. It contemplates that the practice in circuit courts having stated sessions, as well as those having continuous sessions, shall be made uniform by general law, though the latter may differ from the former, after which it shall not be within the legislative competency to pass special or local acts regulating the practice, jurisdiction, etc., of the circuit courts. The legislature has provided the course of procedure in circuit courts having continuous sessions, (chapter 124, Acts 1891-93, p. 419,) but no general law has as yet been provided for the other circuit courts. Until this shall be done, we think, the special acts regulating the practice in these courts, as well as the general laws on the subject, stand unrepealed, and

are, in fact, expressly continued in force by the first clause of the schedule. The judgment below was prematurely rendered. It is reversed, with directions to set it aside, and for proceedings consistent herewith.

BURCHETT v. DAILEY.

(Court of Appeals of Kentucky. Nov. 2, 1893.)

VENDOR AND PURCHASER—ACTION FOR PRICE—PLEADING.

Where the vendor, in an action for the purchase price of land, tenders a deed, and alleges ability and readiness to make title, the answer of the purchaser, which merely denies that the vendor is able to make a good and sufficient deed, is defective, in that it neither points out a defect in the title, nor makes an averment requiring an exhibition of title.

Appeal from circuit court, Carter county. "Not to be officially reported."

Action by Asa Dailey against Mrs. Burchett to subject land in defendant's possession to the payment of purchase money. Judgment for plaintiff. Defendant appeals. Affirmed.

J. R. Botts and J. H. Burchett, for appellant. J. D. Jones, for appellee.

PRYOR, J. This action below was to subject the land in the possession of the appellant to the payment of the purchase money, tendering a deed, and alleging ability and readiness on the part of the vendor to make title. The answer of the appellant denies the appellee is able to make a good and sufficient deed. No defect in the title is pointed out by the defendant, or any averment made requiring an exhibition of title on the part of his vendor. The answer was defective, and constituted no defense. Judgment affirmed. See *Logan v. Bull*, 78 Ky. 607.

BLAIR et al. v. MATTHEWS et al.

(Court of Appeals of Kentucky. Nov. 2, 1893.)

FRAUDULENT CONVEYANCES—CONVEYANCE TO WIFE—RIGHTS OF CREDITORS.

Where a husband receives money from his wife under an agreement to invest it in land for her benefit, which he does not do, and he afterwards conveys land to a third person in consideration that the grantee pay certain indebtedness of the grantor, and under an agreement that the grantee, when reimbursed for the money paid out on such indebtedness, will convey such land to the wife, the land cannot, as against the wife, be subjected to the payment of a judgment against the husband, though he repaid the grantee the money paid out by the latter for his benefit.

Appeal from the chancery court, Harrison county.

"Not to be officially reported."

Action by J. P. Blair and others against Thomas Matthews and others to subject certain land to the payment of a judgment in favor of plaintiffs against defendant Thomas Matthews. From a judgment for defendants, plaintiffs appeal. Affirmed.

Swinford & Evans and Ward & Dickson, for appellants. W. S. Cason, for appellees.

PRYOR, J. The testimony found in the record conduces to show that Thomas Matthews, being much involved, made an arrangement with his brother, Lewis Matthews, by which the latter was to pay his indebtedness that seems to have been specified in the agreement between them, and in consideration of such payment Thomas conveyed to his brother an interest in some land he had inherited from his father, with the agreement that when Thomas repaid to his brother these sums of money he had paid or was to pay out for him, the land was to be conveyed to Sallie Matthews, the wife of Thomas. The consideration for the conveyance to the wife was the promise made by her husband to invest in land for the wife what money he had received of hers by reason of the marriage, amounting in all to about \$1,500. This promise had never been complied with, and hence the agreement was entered into by which Lewis, the brother, was to convey this land to the wife. A litigation originated between the two brothers as to the payment of this money back to Lewis that had been paid out by him, and resulted in a judgment to the effect that Thomas had refunded to Lewis all the money the latter had paid out but \$85, and when this was paid the judgment recited that Thomas was entitled to a deed. At a subsequent term of the court the judgment was amended so as to have the deed executed to the wife under the agreement with the two brothers. The appellant obtained a judgment against Thomas Matthews after this agreement had been made, with interest from April, 1874, and is seeking to have the land subjected to the payment of this debt. For the reason, as is contended, the labor and money of the husband paid off the debts to Lewis Matthews. It seems to us the agreement between the husband and wife was not tainted by fraud, but, on the contrary, they were endeavoring to pay creditors in order that the transaction would be above suspicion. The suit against Lewis Matthews had been decided, and, although the judgment recited that the husband was entitled to a deed, it is manifest that the final order was properly entered for the protection of the wife, based upon the agreement filed in that suit. The claim of the wife was fully recognized, and the deed should have been made to her. It never was made to the husband, and the amended judgment requiring it made to her was proper. It could not, of course, affect the appellant, who was not a party to the proceeding, or aid the wife, if fraud was shown. It seems to us the equity of the wife is as high as that of the creditor, and based on an indebtedness to her by the husband that justified the agreement on the part of Lewis to con-

vey this land to her. He evidently assumed and paid these debts for her benefit, and to protect her in her rights; and, if the debt had been previously contracted, the assumption by Lewis to pay these debts that the wife might be reimbursed or the contract between her and her husband fully executed was a sufficient consideration although Thomas Matthews after this repaid his brother. The question is, did the husband receive this money from the wife under the agreement to invest it for her benefit? and, this being established, the judgment below was proper. Judgment affirmed.

CAPERTON et al. v. HUMPHREY.

(Court of Appeals of Kentucky. Nov. 2, 1893.)

DEDICATION—ACQUIESCENCE.

Though the partition deeds of land which was platted in anticipation of the extension of a city to such land, expressly provided that a street named in the deeds should not be considered as dedicated to the city or to the public, a dedication of such street could be implied from the use of the street by the partitioners and their vendees, the extension of the street after the city had extended beyond the land, the construction by the city of an expensive bridge where the street crossed a stream, the improvement of the street by the city more than 20 years after the partition, and the failure of the partitioners or their vendees to institute legal proceedings to restrain the construction of the bridge and improvements as trespasses, and their availing themselves of the benefits of the improvements.

Appeal from Louisville chancery court.

"To be officially reported."

Action by Valentine Humphrey against John Caperton and others to enforce a lien for street improvements. Judgment for plaintiff. Defendants appeal. Affirmed.

Humphrey & Davie, for appellants. Lane & Burnett, for appellee.

LEWIS, J. Appellee, Humphrey, a contractor, brought this action to enforce a lien on certain land to pay for improvement of what is called Breckinridge street, between Underhill and Vine streets, done by him under an ordinance of the general council of Louisville. The land assessed to pay for the improvement, and upon which the lien is claimed, is composed of quarter squares between Breckinridge, Caldwell, and Dupuy streets situated north, and between it and Lampton and Vine streets south; and the only issue that seems to be involved or that counsel argue is whether that part of Breckinridge so improved is a public street. It appears that James Guthrie owned and devised a body of land, within boundary of which is the improvement, and also quarter squares, to his daughters Ann A. Caldwell, Sarah J. Smith, and Mary E. Caperton. It further appears that December 30, 1869, the three devisees, their husbands uniting, divided the land, and executed deeds of partition. The

various parcels allotted and conveyed to each partitioner were described and bounded in the deeds by streets and alleys, all those streets mentioned, including Breckinridge, being designated by name, as were other parallel streets north and south of Breckinridge, as well as streets that intersected it. There was also made and recorded with the deeds a map of the entire tract devised, called and recognized in each deed as "Guthrie's South-eastern Enlargement to the City of Louisville." Upon that map is shown not only the relative position of the various streets, alleys, and squares within the boundary of the original tract, but each block or square appears to have been subdivided into lots that are numbered. We therefore think the intention to dedicate Breckinridge, as well as all the other streets referred to, for use of the public, would be manifest but for the following clause, contained in each deed: "But it is distinctly understood and agreed between the parties to these deeds that the calls and descriptions of streets and alleys herein contained, so far as such streets and alleys have not been heretofore opened and established, shall not be construed as between the parties hereto of the one part and the city or the public of the other part to be a dedication of such streets and alleys not heretofore opened or established. But said property is now laid off by squares and blocks bounded by said so-called streets and alleys as shown in the plat herewith recorded, and as herein called for, for the convenience of fair and equal divisions, and in anticipation of the extension of the city to the lands herein described; and as between the parties they shall be severally entitled to use the said spaces called streets and alleys as outlets and easements in the proper use and enjoyment of their several parcels." Although the streets within boundary of the original tract that had previous to the partition been opened and established were not designated in the deeds, we will assume that Breckinridge street was not one of them. But the division was made, and partition deeds executed, in evident anticipation that all the streets and alleys would in time become subject to use of the public; and, besides, it was manifestly understood by the partitioners that a sale and conveyance by any one of them of a lot or parcel of the land would give to the vendee, and, as a necessary consequence, to the public, use of the street or alley upon which such lot or parcel might abut. The improvement of Breckinridge street for which plaintiff in this case seeks payment was made more than 20 years after execution of the deeds of partition, and in the mean time the city had extended to and even beyond the original tract; each one of the partitioners had sold and transferred title and possession of many lots within boundary thereof; cisterns and wells had been made at expense of the city in streets even further out than where the improvement in

question was made; and a bridge over South Beargrass, where Breckinridge street crosses it, had been erected at a cost of \$40,000 to the city, whereby a convenient outlet from lots not before existing was afforded, benefit of which appellants have for several years enjoyed. It is, however, argued by counsel that, inasmuch as during the progress of the improvement appellee was notified by appellants they would not pay or contribute to pay therefor, he is not now entitled to any compensation. But no objection was made to construction of the bridge and approaches to it, nor does it appear that appellants have declined to use either it or the improvement of Breckinridge street, full benefit and enjoyment of both which they and their vendees have and will continue to have. If Breckinridge was not at the time a public street, then the contractor who built the bridge, as well as appellee, who made the improvement, were simply trespassers, and appellants might have by legal proceeding stopped construction of both; and it seems to us good faith required them to do so if they did not intend to abide by and avail themselves of benefit thereof, and thus impliedly, if not directly, dedicate the street. In our opinion, the facts and circumstances of this case are such as to imply a dedication of Breckinridge between Underhill and Vine streets, and to impose upon appellants the duty of paying the improvement. Judgment affirmed.

CITY OF LITTLE ROCK et al. v. WRIGHT et al.

(Supreme Court of Arkansas. Nov. 4, 1893.)

HOMESTEAD — INCUMBRANCE — DEDICATION OF STREET — ACCEPTANCE — ADVERSE POSSESSION.

1. Const. 1868, art. 12, § 2, provides that the homestead of any resident, who is a married man or head of a family, shall not be incumbered while owned by him. *Held*, that a person who laid off his homestead into blocks, lots, and streets, for the purpose of sale, but reserved as his homestead the block on which his residence stood, did not incumber his homestead, in violation of the constitution, by dedicating the streets, as laid out, to the city. *Klenk v. Knoble*, 37 Ark. 298, followed.

2. Land was laid off into blocks and lots, with streets, which were dedicated to the public, and the land was annexed to a city by Act April 28, 1873, which provided that land laid off into lots and blocks shall "be subject to all the power, authority and jurisdiction of the city." *Held*, such act accepted the dedication of streets for the city, as the statutory "power, authority and jurisdiction of the city" extended to the control and supervision of streets.

3. A person who dedicated land to a city for use as streets had the right to use such land for any purpose consistent with the right of the city, until its authorities determined to open the streets, and the fact that the land remained inclosed and obstructed after the dedication, and was used by such person for pasture or the growth of crops, did not show adverse possession, as against the city.

Appeal from Pulaski chancery court; David W. Carroll, Chancellor.

Action by Lucy M. Wright, Sallie L. Wright, Weldon E. Wright, and Ida M. Wright against the city of Little Rock and F. J. H. Rickon to restrain the opening of streets. Permanent injunction granted. Defendants appealed. Reversed.

Morris M. Cohn, City Atty., for appellants. Thos. B. Martin and George L. Basham, for appellees.

BATTLE, J. The city of Little Rock, through its council, by a resolution, on the 26th day of March, 1889, directed its engineer to open Gaines street and Marianna avenue, on the south and west sides of block 3, in Wright's addition to said city. Lucy M. Wright, Sallie L. Wright, Weldon E. Wright, and Ida M. Wright brought this action in the Pulaski chancery court against the city and F. J. H. Rickon, its engineer, to restrain them from carrying the resolution into effect. The court made a temporary order restraining the defendants from enforcing the resolution, and, on final hearing, made the injunction perpetual, and the defendants appealed.

The facts in the case are substantially as follows: "In 1870, Weldon E. Wright owned a tract of land adjoining the city of Little Rock on the south, containing about one hundred acres. The same was at that time, and for many years previous had been, the homestead of Wright and his wife, Lucy M. Wright, and his children, the appellees." On the 5th of February, 1870, Weldon E. laid the same off into blocks, lots, streets, and alleys, made a plat thereof, and called it "Weldon E. Wright's Addition to the City of Little Rock," and executed and attached to the plat a "bill of assurances," his wife joining in the execution thereof. In the bill of assurances, the streets, as shown in the plat, were dedicated to the public use, including Gaines street, on the west, and Marianna avenue, on the south, of block 3, in the addition.

Under the provisions of section 1 of an act of the legislature of April 28, 1873, the addition became a part of the city of Little Rock. At the time the bill of assurances was executed, the dwelling house of Wright was situated on block 3 of the addition, where he then resided with his family, and where he continuously resided with them up to the time of his death, in the spring of 1884, and where his family, appellees, have ever since, continuously, and do at the present day reside. Gaines street, on the west, and Marianna avenue, on the south, of block 3, were, at the time of the filing of the bill of assurances, inclosed under a common fence, and formed a part of the homestead. Two of the houses, constituting a part of the homestead, were then, and are now, on the line of so much of the streets as were inclosed. The parts of the streets so inclosed, and the two houses, were used and

occupied by Weldon E. from the time the bill of assurances was executed until he died, and by appellees from his death to the institution of this action, as a part of the homestead.

Upon this state of facts, appellees contend that the city has no right to use the ground in controversy as streets, for the following reasons:

(1) Because it was a part of the homestead of Weldon E. Wright at the time he attempted to dedicate it to public use, and could not, under the constitution of 1868, which was then in force, be incumbered by streets.

(2) Because the offer to dedicate had never been accepted on the part of the public.

(3) And because they had held adverse possession of it, under claim of title, for the statutory period.

If this contention be true, they were entitled to the relief sought. The rule is, an injunction will not be granted to restrain a mere trespass, because, ordinarily, the party injured has a full and adequate remedy at law. But this rule is not observed in cases of municipal corporations, when they are about to make an effort to take possession of private property "upon the pretense that it has been dedicated as a public street or highway by the owner, when in fact there has been no dedication, or, if it ever occurred, the easement has been lost through nonuser, and abandoned by the city, and by a continuous and adverse possession on the part of the owner of the fee for" the statutory period of limitation. In such cases an injunction should be granted to the owner, to prevent the officers of the corporations from making the attempt, upon the ground that the attempt, if successful, would be an appropriation of the freehold, and a destruction of the value of the land, in the character in which it was enjoyed; also, upon the ground that private persons are unable to contend with the corporations upon equal terms, and for the purpose of quieting the title and possession. *McKibbin v. Ft. Smith*, 35 Ark. 352, 359; *Manchester Cotton Mills v. Town of Manchester*, 25 Grat. 825; 1 High, Inj. (3d Ed.) § 349; 2 High, Inj. §§ 1272, 1273, and cases cited.

It is true that cities of the first class are authorized by an act entitled "An act for the better government of cities of the first class, and to confer enlarged and additional powers on such cities, and to provide in what manner changes may be made in the number of aldermen and wards of such cities," approved March 21, 1885, to prevent or remove encroachments or obstructions upon any of the streets. But it did not confer upon them the authority to tear down and remove the inclosures and houses, and take possession of the lands, of the citizens, for public use. The legislature could not confer such authority, except in accordance with that provision of

the constitution which declares that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." In exercising the power to prevent or remove encroachments or obstructions upon the streets, they should avoid trespassing on the grounds of the citizens.

But is appellees' contention true? Could Wright dedicate any part of his homestead to the public for a street, under the constitution of 1868? It is insisted that he could not, because that constitution declared that "the homestead of any resident of this state, who is a married man or head of a family, shall not be encumbered in any manner while owned by him," except in certain cases not here in question. The reason given for this contention is that a street is an incumbrance, within the meaning of the constitution. If this be true, it does not follow that the dedication for a street was in violation of the constitution then in force, for it was held in *Klenk v. Knoble*, 37 Ark. 298, that the owner of a homestead might, under the constitution of 1868, mortgage such a part of it as was not necessary to the enjoyment of it as a homestead. The court, in that case, in speaking of the constitution of 1868, said: "The constitution does not limit the minimum extent of the lot. The resident may make his homestead as small as he pleases, provided it be not so contracted as to show an intent to evade the law, by making it too small for actual use as a homestead. * * * He was not required, by any policy, to retain forever, as part of his homestead, more of it than he might deem reasonably sufficient, and might determine to hold and use the balance as other property. He might manifest his intention in any sufficient way, without being driven to visible separation by walls. Any facts or circumstances showing a permanent design may be considered. As it was a thing, in itself, which he might properly do, it would show no intent to evade the law to declare it, in a mortgage of the property, so divested of its homestead character, —with this qualification: that the amount retained must appear reasonable and bona fide, and not colorable."

Weldon E. Wright was not prohibited by any law from conveying his homestead, or any part of it. He had the right to do so. For the purpose of selling it for the highest prices he could realize, he laid it off into blocks, lots, and streets. This purpose was clearly legitimate. Having the power to reduce it below the constitutional maximum, he could not have violated the constitution by an effort to do so by legitimate means. Had he been successful in his undertaking, his property would have advanced in value as he sold the lots into which it was divided, and would, probably, have been far more useful and profitable than it would otherwise have been. In this view of the facts, "the amount retained" as a homestead by the

reservation of a block for that purpose was not only bona fide, but reasonable, and comes within the qualification of the right to incumber, as stated in *Klenk v. Knoble*.

Was the offer to dedicate land for streets accepted? The act of the legislature of April 28, 1873, entitled "An act to provide for adding territory to cities of the first class," provided that: "All tracts of land or territory which adjoins or is adjacent or contiguous to a city of the first class, and which is or shall be laid off or subdivided into lots, or blocks, or additions, shall be and the same is hereby declared to be a part of such city, and shall be subject to all the power, authority, jurisdiction, franchises, liabilities and ordinances governing such city; and such territory shall become incorporated with and a part of such city." This was an acceptance of the offer to dedicate. The declaring the tract of land which was laid off into blocks and lots a part of the city made it a part of the city, as laid off. *Moore v. City of Little Rock*, 42 Ark. 68; *City of Demopolis v. Webb*, (Ala.) 6 South. Rep. 408; *City of Des Moines v. Hall*, 24 Iowa, 234, 242, 243; *Requa v. City of Rochester*, 45 N. Y. 129, 131; *Mayor of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547, 560; *Town of Derby v. Alling*, 40 Conn. 410, 434, 435; *Hoboken Land & Imp. Co. v. Mayor, etc.*, 36 N. J. Law, 546; *Elliott's Roads & S.* pp. 116, 117.

The act of April 28, 1873, provided that the land laid off into blocks and lots shall "be subject to all the power, authority, and jurisdiction" of the city. Section 3209, Gantt's Dig., then in force, in defining this "power, authority and jurisdiction," in part, provided that "the city council shall have care, supervision and control of all the public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair, and free from nuisances." So the act, by express words, subjected the land laid off into streets to the power, authority, and jurisdiction conferred on cities by this section, and thereby accepted the offer of Wright to dedicate, and made the land dedicated public streets.

It is true that section 738, Mansf. Dig., which is a re-enactment of section 3210, Gantt's Dig., provides that "no street or alley, which shall hereafter be dedicated to public use by the proprietor of ground in any city, shall be deemed a public street or alley, or to be under the care or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance specially passed for that purpose." But this statute was passed on the 9th of March, 1875, is prospective in its operation, and did not divest the public ways in Wright's addition of their character as streets.

Has the right of the city to the streets in question been lost by nonuser or adverse

holding? What is adverse possession? No possession consistent with the right of the true owner can be adverse to him. In this case the land was dedicated to public use for streets, but it remained inclosed and obstructed after the dedication. The city had the right to postpone the removal of the obstructions and the opening of the streets until such time as its resources permitted, and the public necessities demanded. As the city only acquired the right to use the land as streets, and Weldon E. reserved all other rights, he had the authority to use the land for pasturage, or the growth of crops, or for any other purpose consistent with the right of the city, until the authorities of the city, in the lawful exercise of its power, determined to open the streets. *Henshaw v. Hunting*, 1 Gray, 203; *Bartlett v. Bangor*, 67 Me. 460; *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. Rep. 269; *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. Rep. 417; *Town of Derby v. Alling*, 40 Conn. 410; *Meier v. Railway Co.*, 16 Or. 500, 19 Pac. Rep. 610; *Oswald v. Grenet*, 22 Tex. 94; *Shea v. City of Ottumwa*, 67 Iowa, 30, 24 N. W. Rep. 532.

The city has not lost its right by adverse possession. It is true that R. J. Lea, a witness, testified that Weldon E. Wright, in his lifetime, and appellees since his death, have occupied the land dedicated for the streets in question openly, notoriously, continuously, and adversely, under claim of title to the same, for more than seven years. But he testified as to the acts of ownership, control, and possession done by the claimants, which were such as they had the authority to do, and were consistent with the right of the city. These acts were not sufficient to show adverse possession. The statement of Lea as to the possession being adverse was clearly an expression of an opinion, and is not competent evidence.

It was within the province of the city council of Little Rock to determine when the streets in question should be opened. Mansf. Dig. § 737. It has done so. In the absence of evidence proving the contrary, the presumption is it has not abused its power in so determining. The evidence fails to show such abuse.

The decree of the chancery court is therefore reversed, and appellees' complaint is dismissed.

STATE v. GRIFFIE.

(Supreme Court of Missouri, Division No. 2
Nov. 21, 1893.)

CRIMINAL LAW—APPEAL—REVIEW—PRESUMPTIONS—HARMLESS ERROR—INDICTMENT—DESCRIPTION OF PERSON—IDEM SONANS.

1. Where the record on appeal shows that a motion for a new trial and a motion in arrest of judgment were filed and disposed of the same day, the appellate court will presume that the motion for a new trial was filed first

and disposed of first. Bank v. Bayliss, 41 Mo. 274, followed.

2. On trial of an indictment of "Carney Griffie" for petit larceny, second offense, the record of a previous conviction of "Carney Griffin" for petit larceny is inadmissible in evidence in the absence of an averment in the indictment of the identity of the persons and the difference in the names, as the names are not idem sonans.

3. The exclusion of evidence that a justice of the peace interlined the date of rendition and affixed his official signature to a judgment for petit larceny after the prosecution of an indictment for petit larceny, second offense, was commenced, was harmless error where the portion of the judgment lawfully entered at the proper time was sufficient to show a conviction of petit larceny; since, under Rev. St. 1889, § 6299, an undated and unsigned justice's judgment is not void.

Appeal from circuit court, Lewis county; Ben E. Turner, Judge.

Carney Griffie was convicted of petit larceny, second offense, and appeals. Reversed.

O. C. Clay, for appellant. R. F. Walker, Atty. Gen., and Morton Jourdan, Asst. Atty. Gen., for the State.

GANTT, P. J. The defendant was indicted at a special term of the circuit court of Lewis county held on 21st June, 1893, and convicted, and sentenced to the penitentiary on the following indictment: "The grand jurors for the state of Missouri, impaneled, sworn, and charged to inquire within and for the body of the county of Lewis, in the state of Missouri, upon their oath present and charge that one Carney Griffie, on the 2d day of January, 1893, was charged and convicted of petit larceny before one Walter C. Helms, a justice of the peace of Dickerson township, in Lewis county, Missouri, and sentenced to pay a fine of five dollars and costs. That said Carney Griffie complied with said sentence, and was discharged, and that thereafter, to wit, said Carney Griffie did then and there feloniously steal, take, and carry away one pair of shoes of the value of one dollar and twenty-five cents, of the goods and chattels of one Benjamin Wilson, against the peace and dignity of the state. E. A. Dowell, Prosecuting Attorney." He filed his motions for new trial and in arrest in due time. Both were overruled, and he appeals to this court.

The following statement of the facts is essential to a proper understanding of the errors assigned by the defendant, in his motions for new trial and in arrest:

The state introduced testimony as follows:

Walter C. Helms: "I am one of the justices of the peace within and for Dickerson township, Lewis county, Missouri, and have been four or five years past. Defendant was tried before me on January 2, 1893, the record of which will be found on page 222 of my docket. This is my docket in which the record was made. It will be found on page 222." On cross-examination this witness testified: "I suppose this record was made on my docket the day of trial. Question.

Are you sure this record as it now appears in this docket was written, dated, and signed by you on the day of trial? Answer. Yes, sir; the very day of the trial. Q. Was not the mark known as the 'caret,' written below and after the word 'now,' in the first line of this record, and the words, 'on this 2d day of January, 1893,' in your handwriting, made, written, and interlined in this record since the 14th day of June, 1893?

A. I don't think they were. I think they were written and made the day of the trial.

Q. Did you not sign your name and title, to wit, 'W. C. Helms, J. P.' to this record since the 14th day of June, A. D. 1893. A.

I don't think I did. Q. Is it not a fact, squire, that the interlineation and mark above mentioned, and your name and title, were made and written by you in the presence of the prosecuting attorney on this record since the defendant was arrested, and waived his examination in the present case; that is, the case he is now being tried for? A. I think not." The writing on page 222 of Squire Helms' docket was then introduced, in words and figures as follows: "And now, on this 2d day of January, 1893, at this day comes

E. A. Dowell, prosecuting attorney, and files information against Carney Griffin, charging him with having stole one chicken from Miss Patrie Wallace, of the value of fifty cents; whereupon I issued a warrant against said Carney Griffin, directed to T. W. Wright, constable of Dickerson township, Lewis county, Missouri, commanding him to apprehend and bring said Griffin before me to answer said charge. And now at this day comes said T. W. Wright, with said Carney Griffin, and the said Carney Griffin, being made acquainted with the charge against him, entered a plea of guilty, and was by me fined five dollars and costs; and it was further adjudged by me that he stand committed until said fine and costs were paid, or until otherwise discharged according to law. W. C. Helms, J. P." To the introduction of which the defendant at the time objected, because incompetent, illegal, and insufficient, which objection the court overruled, and defendant excepted. "Jackson Jones: I am the sheriff of Lewis county, Missouri, and have been since general election, 1892; have had charge of all prisoners since January, 1893. Question. State whether defendant was committed to jail on the charge of petit larceny in the month of January, 1893, and whether he complied with the sentence? (The counsel for defendant objected to this as incompetent, and not the best evidence. His objection was overruled, and he duly excepted.) Answer. He was committed in the month of January, '93, served out his time, and was discharged in the month of February, 1893.

Q. Have you talked with him since in jail? If so, state the conversation. A. Yes, sir; since he has been in jail, within the last two weeks, he told me he took the shoes; that they belonged to Ben Wilson; that he took

them from Ben Wilson's premises in Lewis county, Missouri, during the first of June, 1893." T. W. Wright testified: "I am constable of Dickerson township, Lewis county, Missouri. I arrested Carney Griffin. After arresting him, he confessed to me that he stole a pair of shoes in this month belonging to Ben Wilson. He said he got the shoes on Ben Wilson's premises. He showed me the shoes. He was wearing them when I arrested him. Ben Wilson's premises are in Lewis county, Missouri." Ben Wilson: "I am the prosecuting witness. I had a pair of shoes stolen from my premises early in June, 1893, in this county. They were just like the shoes now worn by the defendant. They were worth one and twenty-five hundredths dollars." The state then introduced in evidence the original information against Griffin, upon which it is alleged defendant was convicted before W. C. Helms, J. P., Jan. 2, 1893. Here the plaintiff rested.

The defendant, by his counsel, then offered the following evidence: That on June 14, 1893, after defendant had his preliminary examination herein, he employed C. C. Clay, Esq., as his counsel. That on said 14th day of June, 1893, said counsel superintended and assisted in copying the alleged record of former conviction as found on page 222 of W. C. Helms' docket, introduced in evidence herein. That on said 14th day of June, 1893, when thus copied, the record was not signed by W. C. Helms, J. P., as when introduced; that it was not signed at all; that the words, to wit, "on this 2 day of January, 1893," and the mark and the character known as the "caret" interlined and written after the word "now" and before the word "at" in the first line of said record, were not written or made there, so that said writing as it then read and was written on said June 24, 1893, was in words and figures as follows, to wit: "State of Missouri vs. Carney Griffin. And now at this day comes E. A. Dowell, prosecuting attorney, and files information against Carney Griffin, charging him with having stole one chicken from Miss Patrie Wallace, of the value of fifty cents; whereupon I issued a warrant against said Carney Griffin, directed to T. W. Wright, constable of Dickerson township, Lewis county, Missouri, commanding him to apprehend and bring said Griffin before me to answer said charge. And now at this day comes said T. W. Wright with said Carney Griffin, and the said Carney Griffin, being made acquainted with the charge against him, entered his plea of guilty, and was by me fined five dollars and costs. It is further adjudged by me that he stand committed until said fine and costs were paid, or until otherwise discharged according to law." The defendant offered to further show, to wit, that said writing as written upon said record on said 24th day of June, A. D. 1893, was in the handwriting of the prosecuting attorney of Lewis county, Missouri; that said signature "W. C. Helms, J. P." and

said caret and interlineation in words, to wit: "On this 2 day of January, 1893," were written by said justice, W. C. Helms, with the knowledge and consent of the prosecuting attorney of said Lewis county, Missouri. All of which evidence the court declined to hear, to which action of the court the defendant duly excepted. Thereupon the defendant, by his counsel, moved the court to exclude from the jury as evidence in the case, the writing purporting to be the judgment and record of a former conviction as found on page 222 of the justice's docket, as read and introduced by the state, which motion the court overruled, and defendant excepted. This was all the evidence. The court then instructed as follows: "(1) If the jury shall believe from the evidence in the case that the defendant was on the 2d day of January, 1893, charged and convicted of petit larceny before one W. C. Helms, a justice of the peace of Dickerson township, in Lewis county, Missouri, and sentenced to pay a fine of five dollars, and that he complied with said sentence by serving out a term of imprisonment in the jail of the county, and was discharged, and that thereafter, on or about June 10, 1893, at the county of Lewis, in the state of Missouri, the defendant did then and there steal, take, and carry away one pair of shoes, of the goods and property of one Benjamin Wilson, of the value of about one dollar and twenty-five cents, then in such case it will be the duty of the jury to find the defendant guilty, and assess his punishment at imprisonment in the penitentiary for a term of not less than two or more than five years. (2) In such case the verdict may be in the following form: 'We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at — years imprisonment in the penitentiary.'" To the giving of which instructions 1 and 2 defendant at the time excepted. The defendant asked and the court refused to give the following instruction, to wit: "(1) The court instructs the jury that under the evidence in this case the defendant cannot be properly and legally convicted of a felony as charged in the indictment, and because of the insufficiency of the evidence the jury are instructed to acquit the defendant of the felony,"—on account of the court's refusal to give which the defendant at the time excepted.

The court's instructions: "(1) Before the jury can find the defendant guilty as charged the evidence must show his guilt to the exclusion of every reasonable doubt, and the burden of proving his guilt rests on the state. Defendant is presumed to be innocent. (2) If the jury entertain from the evidence a reasonable doubt of the former conviction of petit larceny or of the shoes from Wilson they should acquit, but the doubt to authorize an acquittal must be reasonable, and arise from the insufficiency of the evidence, and not a mere possibility of innocence,"—to the

giving of which said instructions 1 and 2, the defendant at the time excepted.

1. Preliminary to an inquiry into the points made by defendant, we must determine whether he has waived the grounds in his motion for new trial by filing his motion in arrest before the former was overruled. The attorney general insists he has. In *McComas v. State*, 11 Mo. 116, a motion in arrest was filed, and afterwards the motion for a new trial was filed, and it was held that the motion for new trial came too late; but in *Bank v. Bayliss*, 41 Mo. 274, it was held that, where motions in arrest and for a new trial were both filed on the same day, this court will presume that the motion for new trial was first filed in order of time; the court saying: "By an entry in the record it would appear that the motion in arrest was filed first, and then the motion for a new trial afterwards, on the same day; and both motions were continued to the next term, and were finally disposed of together on the same day. It is true that the motion for a new trial comes first in the logical order of pleading, and when a motion in arrest has been made and overruled it will then be too late to file a motion for new trial afterwards, for the motion in arrest presupposes and admits that the verdict was correct; and so it was held in *McComas v. State*, 11 Mo. 116. But where both motions are filed together, and are disposed of in their logical order, as in this case, we see nothing substantial in the objection." This decision is the last one on this point emanating from this court, so far as we can find, and it has been accepted and followed as authority by the subordinate courts of the state. *Carrington v. Hancock*, 28 Mo. App. 290. See, also, *Jewell v. Blandford*, 7 Dana, 473; *Pope v. Latham*, 1 Ark. 63. It is very easy to see what injustice might follow by changing this rule that has remained unchanged for 25 years. The certainty of the law is its greatest security. The record in this case upon examination shows that the motion for new trial was made, heard, and overruled, and then the motion in arrest was filed and overruled. The fact that both were filed and overruled on the same day does not necessarily show that the motion for new trial was still pending when the motion was filed, and the presumption, we have seen, is against irregularity; but, even if they were pending at the same time, this court will presume the motion for new trial was filed first and disposed of first. The presumption in this case is also in favor of liberty.

2. The first assignment is that the former conviction was not proven. The record of the alleged former conviction purports to be the conviction of Carney "Griffin." There is no averment in the indictment that defendant in this case was by that name proceeded against in that case under the name of

"Griffin," but that his real name is "Griffe." The rule is well established in this state that from identity of name we may presume the identity of person in the first instance, and cast the burden on the other party to rebut it. *State v. Kelsoe*, 76 Mo. 505; *State v. Moore*, 61 Mo. 276; *State v. McGuire*, 87 Mo. 642; *Flournoy v. Warden*, 17 Mo. 435; *Gitt v. Watson*, 18 Mo. 274. But the identity of names must either exist in fact or be "idem sonans," which is said to exist in this state "if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation." *Robson v. Thomas*, 55 Mo. 531; *State v. Havely*, 21 Mo. 498. It would prove utterly futile to attempt to reconcile the various cases on this subject. 16 Amer. & Eng. Enc. Law, 122-126, contains a collection of cases which demonstrate how variant are the opinions of different courts. Applying the rule in this case, however, we think that "Griffin" is not idem sonans with "Griffe." "Matthews" and "Mather" were held not to be in *Robson v. Thomas*, supra; "Miller" and "Millen" not to be in *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. Rep. 44; "Slenson" and "Simonson" not to be in *Simonson v. Dolan*, 21 S. W. Rep. 510; "Griffin" and "Griffith" were held not to be in *Henderson v. Cargill*, 81 Miss. 367. So, also, "Lynes" and "Lyons," (*Lynes v. State*, 5 Port. [Ala.] 240); "McDevro" and "McDero," (*McDevro v. State*, 23 Tex. App. 429, 5 S. W. Rep. 133.) In *State v. Brown*, 22 S. W. Rep. 367, decided at the April term by this division, we held that, where a second conviction is made to depend upon a prior one, nothing less than the judgment of conviction, plainly setting forth the former offense and conviction, would suffice. We do not think the record of the conviction of Griffin, in the absence of any allegation of the identity of the persons in the indictment, was competent against defendant, (1 Greenl. Ev. [14th Ed.] § 375,) and the objection to his competency was sufficient, as it was wholly inadmissible, (*State v. Brown*, supra.) The party convicted in the justice's court not being idem sonans with defendant, that judgment was not prima facie proof that he was the same party, and, there being no allegation in the indictment alleging his identity and averring the difference in the name, the justice's judgment was inadmissible as evidence against him. Inasmuch as the conviction for felony depended upon this judgment, it follows that the conviction for this reason alone must be reversed. Had there been competent proof of the prior conviction, no error would have been committed in showing by the sheriff that the defendant was committed under that judgment, and served his sentence. This parol evidence was not permissible to supply the want of a judgment,

but merely to prove a compliance therewith. It could not, however, dispense with the prerequisite of a valid judgment of conviction.

3. The court erred in rejecting the evidence that tended to prove that, after this prosecution was commenced, the justice of the peace amended his judgment so as to interline the date of its rendition, and affixing his name and official signature to it. *Sweet v. Maupin*, 65 Mo. 65. The justice had no right to change his judgment after it was written, and after the lapse of the time within which it was his duty to enter it upon his docket. Section 4354, Rev. St. 1889. These unauthorized changes, however, would not render void what he had lawfully done at the proper time, nor would his failure to date the judgment and sign it render it void. Section 6299, *Id.* But the courts should discountenance any tampering with the records of courts, upon which the rights of individuals are based. Had the judgment been otherwise admissible, we think, taken altogether, it showed a conviction of larceny, and this objection of defendant was not tenable. The judgment is reversed, and the cause remanded.

BURGESS and SHERWOOD, JJ., concur.

GELATT v. RIDGE.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

REAL-ESTATE AGENT—COMMISSIONS—PLEADING— OBJECTIONS WAIVED.

1. A real estate agent is entitled to his commissions when he procures a purchaser ready, able, and willing to buy on the terms authorized by the principal, and no binding, written contract of sale is required when the principal is in a situation to execute it himself.

2. The fact that the terms of sale made by an agent varied from the terms of his authority is immaterial where the principal ratified the sale as made.

3. A departure of a real-estate agent from the terms of his authority in effecting a sale becomes, on ratification by the principal, a part of the original contract of employment, and the compensation fixed therein controls.

4. In an action by a real-estate agent for commissions, a deed executed by the principal to the purchaser after the commencement of the suit is admissible to show the principal's ratification of the agent's contract.

5. When a real-estate agent has procured a purchaser able, ready, and willing to buy the land on the terms prescribed by the principal, the fact that such purchaser was acting in behalf of another does not affect the agent's right to commissions.

6. An objection to an amended petition as being a departure from the original is waived by pleading over and going to trial without raising the question.

Appeal from circuit court, Jackson county;
John W. Henry, Judge.

Action by J. M. Gelatt against T. S. Ridge for commissions alleged to have been earned by plaintiff as agent in the sale of defend-

ant's land. From a judgment in plaintiff's favor, defendant appeals. *Affirmed.*

The other facts fully appear in the following statement by MACFARLANE, J.:

The action is to recover commission by plaintiff, a real-estate agent, for the sale of land for defendant, under authority contained in the following writing: "Kansas City, Mo., March 14, 1889. I hereby authorize J. M. Gelatt to sell my property at 1116 Main,—24 ft., 3 in.,—for the sum of seventy thousand dollars; thirty thousand of which is to be paid in cash within thirty days of this date, ten thousand of which cash is to be paid within three days from date, and the remainder of my equity, twenty-three thousand dollars, to be paid in six months, with interest at the rate of six per cent. The purchaser of said premises is to pay an incumbrance of seventeen thousand dollars, bearing seven per cent. interest, which is now on said property, and falls due in January, 1890. Should Mr. Gelatt sell said property on the above terms, I am to give him fourteen hundred dollars, and any excess obtained for said property above said price to be his. Thomas S. Ridge. J. M. Gelatt." On the next day, March 15, 1889, plaintiff agreed with J. F. Brady for the purchase of the property upon the terms set forth in the following receipt, which was given at the time: "Received of J. F. Brady five hundred dollars, as earnest money in the purchase of Thomas S. Ridge's property, 1116 Main street, Kansas City, Missouri, at a price of seventy-three thousand dollars; ten thousand dollars of the same to be paid within two days from this date, of which five hundred has been paid, and twenty-five thousand dollars when deed is delivered, and twenty-one thousand six months from date of deed at six per cent., and assume seventeen thousand dollars due January, 1890, with seven per cent. interest from date of deed to said Brady. J. M. Gelatt, Authorized Agent for Thomas S. Ridge." The evidence tended to prove—indeed there is but little conflict on this point—that, immediately after agreeing upon the terms of sale and the execution of this receipt, the parties met defendant, the contract as made was submitted to and approved by him, and it was then arranged for a subsequent meeting, at which a written contract should be prepared and signed, and the balance of the cash payment made. At this first meeting it was disclosed that a tenant occupied a portion of the premises, but the evidence tends to prove that defendant agreed to arrange with him. At the subsequent meeting, held a day or two afterwards, defendant refused to carry out the contract, unless the purchaser would take the property subject to the lease, which he at the time declined to do. That Brady was able, ready, and willing to carry out the contract is unquestioned. After refusal of defendant to execute the contract as made.

the purchaser, John F. Brady, in the name of his brother, M. J. Brady, for whom the purchase was really made, commenced a suit for a specific performance of the contract. Pending this suit, and on June 27, 1889, Brady agreed to assume the lease, and a contract was made in the name of M. J. Brady, according to the terms of the original sale, with this exception as to the lease, and with the exception that the contract recited a consideration of \$72,500, the \$500 cash payment having been retained by plaintiff as part of his commission. The contract provided that defendant should allow Brady for the rents of the premises from April 14, 1889, and the note for the unpaid purchase money should bear date from March 14, 1889, the day of the original sale. The deed and deed of trust executed in pursuance of this contract were made to and by J. F. Brady, were dated June 28, 1889, and recited a consideration of \$73,000. The suit was commenced March 23, 1889, and an amended petition filed in October of the same year. The amended petition charged the authority to sell, and agreement as to the commission as contained in the written contract, a sale on the terms contained in the receipt, a ratification of the sale upon those terms, and the final consummation of the sale by the execution of the deeds in June, 1889. The answer charged that defendant, before the alleged sale, informed plaintiff of the leasehold interest on the property held by another, and instructed him that any sale should be made subject to the lease, and that Brady, the purchaser, refused to take the property subject to the lease. The answer also charged collusion between plaintiff and the purchaser, by which the sale was to be made without reference to the lease, and for which plaintiff was to receive a commission from Brady. There was no evidence to sustain this charge. The answer admitted the execution of the writing giving plaintiff authority to sell, but denied each other allegation of the petition.

At the request of the plaintiff, the court gave the jury this instruction: "If the jury find from the evidence the following facts: (1) That the plaintiff was employed by the defendant to sell the real estate known as '1116 Main Street,' Kansas City, Mo., under the written authority read in evidence, dated March 14, 1889; (2) that plaintiff, acting under his said employment, and without the same being modified, made a contract to sell said property to one Brady, on the terms specified on the written receipt and memorandum read in evidence, dated March 15, 1889, and signed 'J. M. Gelatt, Agent for Thomas S. Ridge;' (3) that plaintiff, after making said contract, brought the parties together; that the terms of the sale were fully explained to defendant, and were agreed to and approved by him, and the action of Gelatt was accepted as a complete performance of his obligation, and the purchaser was

ready, willing, and able to pay; (4) that afterwards the defendant for a time declined to make the deed to Brady until a suit was brought to compel the enforcement of said contract; (5) that afterwards, on or before June 28, 1889, the defendant and Brady settled the controversy by a consummation of the sale at the price and on the terms of the contract negotiated by plaintiff, with certain exceptions as to a certain lease in favor of a tenant then in possession; (6) that the defendant then consummated the sale by the execution of the deed to Brady, which is in evidence, and by taking from him the mortgage or deed of trust, which also is in evidence, and plaintiff has received but \$500 for his services,—then, if you find these facts, the court instructs the jury that they must find for the plaintiff on the first count, and assess his damages at \$3,900, with six per cent. interest from June 28, 1889." At the close of all of the evidence, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused. At the request of the defendant, the court gave the jury two instructions, as follows: "The court instructs the jury that if they believe from the evidence that, after defendant executed to plaintiff the authority in writing to sell defendant's real estate referred to in plaintiff's amended petition, but before plaintiff gave the receipt to J. F. Brady referred to in plaintiff's amended petition, defendant orally informed plaintiff that there was a lease to one Laveine on said real estate, and the purchaser must take the property subject to said lease, and the purchaser refused to purchase subject to said lease, then plaintiff cannot recover. The court instructs the jury that, unless the plaintiff sold defendant's real estate on terms given him by defendant, or procured a customer therefor, ready, willing, and able to purchase defendant's property on such terms, plaintiff cannot recover, unless they shall further find that defendant, after having been fully informed of the variations made by plaintiff on selling said real estate from the instructions given him, approved of these variations, and ratified the contract of sale as made by plaintiff." An instruction declaring the rights of the parties in case plaintiff informed Brady of the lease before the execution of the receipt, asked by defendant, was refused. There was no evidence to authorize the instruction, and its refusal is not insisted upon as error. The judgment was for plaintiff, and defendant appealed.

Hayward & Griffin, for appellant. Pratt, Ferry & Hagerman, for respondent.

MACFARLANE, J., (after stating the facts.)

1. The first objection urged by appellant as ground for reversal is that the receipt, being only signed by the agent in behalf of his principal, could not be enforced by the purchaser, who had not signed it, and is there-

fore not such a sale of the property as was contemplated under the authority given. It is well settled in this state that a real-estate broker performs his duty, and is entitled to his commission, when a purchaser is introduced who is ready, willing, and able to buy on the terms authorized by the principal. The completion of a valid and binding written contract is not required in case the principal is in a situation to execute it himself. It may, and doubtless often does, happen that the purchaser would prefer dealing directly with the owner. So it is held that the agent is entitled to his commission if he is the procuring cause of negotiations which result in the sale, even though the negotiations are conducted and concluded by the principal in person. *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638.

2. It is next contended that there can be no recovery for the reason that the contract made by the agent varied from the terms of his authority, and that this would be the case though the terms of the sale made were more advantageous to the principal than was required under the letter of authority. There is no doubt, as a general principle of law, that an agent must act within the terms of his authority, and a substantial variance therefrom would defeat his right to compensation, though such variance may have been advantageous to his principal. *Nesbitt v. Helser*, 49 Mo. 384. Yet it is equally well settled that, if the principal ratify the contract made by the agent, the substituted terms become a part of the original agreement, and can be enforced as such. *Woods v. Stephens*, 46 Mo. 556, and cases cited. The evidence tends to prove—indeed it is very conclusive—that defendant did fully approve and ratify the terms of sale as made by plaintiff, and, under the instructions, the jury must have so found.

3. The suit was not upon a quantum meruit, as claimed by defendant, but was upon the original contract as made, and supplemented by the ratification and acceptance of defendant. If, as before stated, the departure by the agent from the terms of the authority given him became, upon approval and ratification by the principal, a part of the original contract, the compensation, if fixed therein, should be measured thereunder. *Nesbitt v. Helser*, supra.

4. Objections were made in the introduction in evidence of the deed made by the defendant to Brady, and the deed of trust back to secure a part of the purchase money, which was dated June 28th, and after the commencement of the suit. These were admissible, not as a necessary part of the original cause of action, but as evidence of the ratification of the contract made by plaintiff. They showed that the terms agreed upon were substantially carried out by defendant. A recovery could have been sustained with-

out this evidence, and plaintiff took upon himself an unnecessary burden in making the execution of the contract necessary to a recovery, as was done under his amended petition and the instructions asked and given. This could afford to defendant no just ground of complaint.

5. Though the charge, in the amended petition, of the execution of the deed by defendant in conformity to the terms of the sale made by plaintiff, may have been a departure from the original petition, the fact charged having accrued subsequent to the commencement of the suit, and was also prejudicial to defendant, yet by pleading over and going to trial on the amended petition, no objection having been made thereto, all error on account thereof must be taken as waived. *Scovill v. Glasner*, 79 Mo. 454; *Spurlock v. Railway Co.*, 98 Mo. 537, 6 S. W. Rep. 349.

6. It is insisted, finally, that no sale was made by plaintiff, for the reason that J. F. Brady, to whom the sale purports to have been made, was acting in behalf of his brother, M. J. Brady, for whom the purchase in fact was made. We are unable to see any force in this reason. J. F. Brady showed himself ready, willing, and able to carry out the contract as made, and it could make no difference that he was acting in behalf of another. Defendant testified, also, that in his first interview with plaintiff, after the sale had been made, he was informed that the land was intended for M. J. Brady, and this name was then, without objection, written in the contract. It is true that this contract was not signed by the parties at that time for other reasons, but the one finally executed, on the 27th of June, was in the name of M. J. Brady, though the deed made on the next day conveyed the land to J. F. Brady, the original purchaser. Under his authority, plaintiff was not restricted in his right to sell to any particular person or class of persons. The judgment is affirmed. All concur.

PITKIN et al. v. SHACKLETT.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

APPEAL—MANDATE AND PROCEEDINGS BELOW.

Where the supreme court remands a case, with directions to the lower court to ascertain the amount of certain taxes paid by plaintiff, and to enter judgment in his favor, defendant, who failed to question the legality of the taxes on the first trial, cannot raise that objection on the retrial in the court below.

Appeal from circuit court, Scotland county; Ben. E. Turner, Judge.

Ejectment by E. J. Pitkin and another against Richard Shacklett. From a judgment in plaintiffs' favor, defendant appeals. Affirmed.

John D. Smoot and E. Schofield, for appellant. McKee & Jaynes, for respondents.

MACFARLANE, J. This is a second appeal in this case. The opinion in the former appeal is reported in 106 Mo., on page 574, and 17 S. W. Rep. 641. The judgment was then reversed, and the cause remanded, with directions to the circuit court to enter judgment in favor of plaintiffs for the proper proportion of the amount paid by the purchaser at tax sale for the whole tract, subsequent taxes paid by plaintiff or the purchaser, with penalties and interest, as provided by section 219, p. 1206, Wagner's St. The amount for which the land was sold at tax sale, and the amount of subsequent taxes paid, with dates of payment, appeared in the record. The mandate simply requires a calculation of the penalties and interest required by the statute to be paid, and the proportion thereof chargeable to this land. The court seems to have literally followed the mandate. On the trial, the defendant made objections to the allowance of the amount of taxes paid subsequent to the tax sale, on the ground of some irregularity in the assessment and levy. The court overruled the objection for the reason that, under the mandate of the court, these matters were not open to further inquiry. In this the court did not err. In the former trial the validity of the taxes was not questioned, and their legality was adjudicated under the judgment of this court, and the question could not be reopened. *Stump v. Hornback*, 109 Mo. 277, 18 S. W. Rep. 37; *Hickman v. Link*, (Mo. Sup.) 22 S. W. Rep. 472, and cases cited. Judgment affirmed. All the judges concur.

WELLS v. HARGRAVE.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

STATUTE OF LIMITATIONS—NEW PROMISE.

A letter dated in 1880, stating that the writer had previously purchased land from plaintiff, for which he was to pay \$1,500 in January, 1869, and that "my intentions are true and faithful, but my abilities are rather cramped now, until can sell, or make some money otherwise," is not a direct and unqualified acknowledgment of the debt, or an unconditional promise to pay the same, one of which is required by Rev. St. 1889, § 6793, to take a debt out of the operation of the statute of limitations.

Appeal from circuit court, Putnam county; Andrew Ellison, Judge.

Richard B. Wells filed a claim against the estate of James W. Wells, deceased, of which William Hargrave is administrator. The claim was disallowed in the probate court, and the claimant appealed to the circuit court. From a judgment disallowing the claim, he again appeals. Affirmed.

A. W. Mullins and J. E. Burnham, for appellant. Huston & Parrish, for respondent.

MACFARLANE, J. This suit originated in the probate court of Putnam county, on

a claim presented for allowance September 4, 1890, in which plaintiff charged, in substance, that on October 19, 1863, he sold and conveyed, by attorney, to defendant's intestate, 258 acres of land lying in Putnam county, for the sum of \$1,290, for which he gave his two promissory notes for \$645 each,—one payable January 1, 1868, and the other, January 1, 1869,—both bearing 10 per cent. interest, and also gave back a deed of trust on the land to secure them; that the notes had never been paid; that on the 5th day of September, 1880, deceased wrote to plaintiff, and thereby, in writing, acknowledged and promised to pay the same. The claim was rejected by the probate court, and on an appeal to the circuit court, and a retrial therein, judgment was rendered for defendant, and plaintiff appealed to this court.

Upon the trial in the circuit court, the sale of the land by plaintiff, and the execution of the deed, deed of trust, and notes were proved, dated, respectively, as charged in the claim. Plaintiff then read a letter from deceased to himself, in California, dated September 5, 1880, as follows: "Once more, after a long silence, I again write to you. * * * I received your letter three weeks since, and think I received the other one. I was working at a sell out, kept waiting to see the result, and expected it soon; consequently, neglected to write when I should have wrote, but for no other motive or cause, and hope no harm to come of it. No sale yet, and now don't know as we will make the sale, but not certain. I am holding for \$20 per acre, and offered \$15, but not certain they would stand at that. I am not fully made up my mind what I will do. If I should sell, in that event may visit you, as the trip would soon be made by R. R. I am not going to stop here, if I can do well by going away. I am improving the farm all I can. Makes it better to keep, or better to sell. I am getting things in fair shape to make some money on the farm, if I stay on it, and have health and luck. Will make you a statement of what I got of you in land purchases. The amount was two hundred and ninety acres and seventy-six hundredths (298.76) acres. The price was five dollars per acre, or (\$1,548.05) fifteen hundred and forty-eight dollars and five cents, all to be due January, 1869. This statement I make from recollection, and pretty sure correct, but I hold the original papers, and canceled them all in the Texas trade and trip. My intentions are true and faithful, but my abilities are rather cramped now, until can sell, or make some money otherwise." The testimony of a brother, sister, and brother-in-law of deceased was to the effect that deceased, just before his death, acknowledged to them, verbally, his indebtedness to plaintiff. The evidence showed, further, that on the 18th of May, 1867, plaintiff made to deceased a general power of attorney, and that on the 19th day of April, 1878, under

this power of attorney, he entered satisfaction of the deed of trust. The notes were in possession of deceased at his death, among some other old papers, were marked "Paid," and the name of the maker had been partly torn off. It appeared, also, that in 1878, about the date of the satisfaction of the deed of trust, deceased sold and conveyed this land in exchange for some Texas property, but it was afterwards conveyed back to him. In addition to the 258 acres of land conveyed by plaintiff to deceased in Putnam county, he also conveyed to him 40 acres in Schuyler county.

At request of defendant, the court gave to the jury the following instruction: "(3) The letter purporting to have been written by the deceased, James W. Wells, dated September 5, 1880, and which has been read in evidence by plaintiff, does not constitute a sufficient acknowledgment or promise to pay the notes sued on to take the case out of the statute of limitations." The court refused an instruction asked by plaintiff, declaring the writing sufficient. The defense was that the action was barred by the statute of limitations.

The question for decision is whether the letter read in evidence is a sufficient acknowledgment or promise to remove the bar of the statutes of limitation. The statute provides that "no acknowledgment or promise hereafter made shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this article, or deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable thereby." Rev. St. 1889, § 6793. It is held, in construing this statute, that a written acknowledgment by the debtor, made to the creditor, that he owed the debt, and that it remained unpaid, was sufficient to remove the bar. A promise to pay will be implied. *Elliott v. Leake*, 5 Mo. 209; *Chidsey v. Powell*, 91 Mo. 626, 4 S. W. Rep. 446. The acknowledgment, in order to satisfy the statute, should contain an unqualified and direct admission of a present, subsisting debt. If the acknowledgment is accompanied with conditions or circumstances which repel or rebut the intention to pay, or if the expressions used be vague, equivocal, or ambiguous, leading to no certain or determining conclusion, they will not satisfy the requirements of the statute. *Carr v. Hulburt*, 41 Mo. 267; *Chambers v. Rubey*, 47 Mo. 99; *Kirkbride v. Gash*, 34 Mo. App. 258. A recent writer says: "Thus it will be seen that the admission of the debt will be sufficient, although the exact amount payable is disputed, or remains to be proved. But in all cases the acknowledgment must be in terms so distinct and unqualified that a promise to pay upon request, or at some fixed time, may reasonably be inferred from

it. It must be clear and explicit, and not incumbered with any condition. It is not necessary that the promise should be express, provided the other necessary facts are shown. A clear, distinct, and unequivocal acknowledgment of a debt is sufficient." 2 Wood, Lim. § 68, p. 183.

The part of the letter relied on, which bears on the question in hand, introduces the subject by informing his brother of the subject about which he would make a statement. He says, "Will make a statement of what I got of you in land purchases." He then proceeds as though merely giving requested information of a past transaction. "The amount was 298.76 acres. The price was five dollars per acre, or \$1,548.05, all to be due January, 1869. This statement I make from recollection, and pretty sure correct, but I hold the original papers, and canceled them all in the Texas trade and trip." So far there is nothing said that suggests the acknowledgment of a subsisting debt. It is a mere narration of a past transaction. It does, however, show that the writer had previously purchased from plaintiff land for which he was to pay \$1,548.05 in January, 1869. The writer does not acknowledge that the debt existed at the time of writing the letter. The fact that he held the original papers, which had been canceled, rather implied the satisfaction of the debt. Reading this narrative in connection with the concluding sentence, supposing both to relate to the same subject,—which is not at all clear,—we do not think anything is added to the legal effect of the writing. The words, "my intentions are true and faithful," if intended to refer to the purchase price of the land, previously mentioned, might be construed into a present intention to pay the debt at some future time. We do not think this can be construed into a direct and unqualified admission that he still owed the debt. Had he stopped here, there would have been more doubt. A promise to pay the debt mentioned might be implied. The addition of the words, "but my abilities are rather cramped now, until can sell, or make some money otherwise," very clearly places a condition on any promise implied from the former statements. Taking the whole writing together, we think it is wanting in that direct, unambiguous, and unequivocal character of acknowledgment or promise necessary to satisfy the requirements of the statute. Judgment affirmed. All concur.

STATE v. REED.

(Supreme Court of Missouri, Division No. 2
Nov. 9, 1893.)

MURDER—INSTRUCTIONS.

1. On a prosecution for murder, it is not error for the court to refuse to repeat an instruction that the law presumes defendant innocent, and that the burden of proving his

guilt beyond a reasonable doubt rests on the state.

2. All instructions must be read together, and the failure of the court to include the element of premeditation in one of its instructions defining murder in the first degree is immaterial, where other instructions fully cover the subject.

3. An instruction that defendant is guilty of murder in the first degree if he shot deceased with a manifest design to kill, with a sufficient time to deliberate and to fully form the conscious purpose to kill, and without sufficient cause or extenuation, and that the state must prove the willfulness, deliberation, and malice aforethought, does not dispense with premeditation as an element of the crime, since that is included in the terms "deliberation" and "malice aforethought."

4. Where the only defense to a charge of murder is accidental killing, a refusal to instruct on the law of self-defense is proper.

5. Where the evidence for the state shows the killing to be murder in the first degree, while that of defendant shows it to be purely accidental, a refusal to instruct on murder in the second degree is proper.

Appeal from criminal court, Jackson county; John W. Wofford, Judge.

Martin Reed was convicted of murder in the first degree, and appeals. Affirmed.

J. D. Wendorff, for appellant. R. F. Walker, Atty. Gen., Marcy K. Brown, Pros. Atty., and Morton Jourdan, Asst. Atty. Gen., for the State.

GANTT, P. J. The defendant, Martin Reed, a negro man, was indicted on the 15th of November, 1890, by the grand jury of Jackson county, for the murder of his wife, Hester Reed, on the 16th of September, 1890, at her home, on Fourteenth street, in Kansas City. He has been twice convicted, under this indictment, of murder in the first degree. The trial judge, Hon. H. P. White, awarded him a new trial after the first conviction. The cause was continued, at the instance of the defendant, twice, before he was put upon his first trial, and was continued for him, for one cause and another, at the November term, 1891, the March term, 1892, and the November term, 1892. At the March term, 1893, he was awarded a change of venue from Kansas City to Independence. He was finally placed on his trial at the April term, 1893, and convicted of murder in the first degree, and sentenced to be hung. It is from this last verdict and sentence this appeal is prosecuted.

The testimony tends to prove a most heartless and atrocious murder. It shows that Hester Reed, the murdered woman, had been married to the defendant more than 25 years. During all these years, according to statements of defendant himself, and the uncontradicted evidence in the case, she had made him a most exemplary wife; had borne him a family of seven children; had aided in supporting him and herself; and had assisted in rearing and educating their large family of children. The testimony shows that, not long before the commission of the murder, the defendant had attempted to cut his

wife's throat, and had only been prevented by the interference of a daughter who happened to be present; that he had beaten his wife, and driven her from her home and children, threatening to kill her if she returned; that he then, a short time after driving her from home, left home himself, and his wife, who had been sheltered by a kindly-disposed neighbor, then deemed it safe to return home to her children, and did so, and then applied for a divorce from defendant. When defendant heard of her application for divorce, he was greatly incensed, and threatened that, before she should have a divorce, he would kill her. The murder was committed on Tuesday, about noon. The Sunday before the murder, defendant, who was still staying away from home, went to the house where the wife and children lived; threatened and abused her. The next day, (Monday,) although still suffering from bodily injuries which she had received as the result of a brutal assault by him, the wife had gone out to do some washing to support her family; and, when she was away, defendant again came to the house, searching for her, still abusing and threatening her. On the forenoon of the next day,—it being Tuesday, the day on which the homicide was committed,—he came again to the house, and, finding her at home, renewed his abuse and threats. As soon as he left, that forenoon, the deceased, alarmed for her safety, taking one of their children—a son named Junius—with her, went to the justice of the peace to get out a warrant against defendant, to put him under bonds to keep the peace, returned, and arrived at her home about noon on this day. Defendant heard of this, and became greatly incensed thereat, and immediately went to the place where he had been sleeping, got the pistol with which the murder was committed, and went to the home of his family. The deceased, Hester Reed, had just returned from her mission to the justice of the peace. The rest of the family were down in the basement, eating their dinner. One daughter, almost grown, was away at school. Two of the children, the youngest, were playing in an adjoining room. Another one, Mary McHenry,—a married daughter,—had just left, taking her husband, who was at work, his dinner. The deceased was sitting in the front room, talking with a neighbor woman, Kate Moore, when defendant entered with his pistol in his hand, walked up to the deceased, addressed vile and abusive language to her, exclaiming: "You old bitch! You have served a writ. I will serve a writ on you, and serve it well,"—drew the pistol down upon her, and seized hold of her. She struggled to escape from him, fell upon the floor, and then, while she was lying upon the floor,—upon her right side,—endeavoring to arise, defendant, standing back of and above her, in a line with her body, about four feet from her, fired two shots into her prostrate body,—one entering the left arm

near the shoulder, ranging downward, and coming out between the elbow and forearm; the other shot—the fatal one—entering the back of her left shoulder, and ranging downward and inward, passing through the lung, heart, and liver, and lodging in the walls of the abdomen. The deceased struggled up, and, staggering out of the door on the sidewalk, died almost instantly. Defendant then turned and grappled with the mother of the deceased, who had rushed up the stairway from the basement upon hearing the first shot, and endeavored to shoot her, also; but she struggled from him, escaped into an adjoining room, barred the door, and, jumping from an open window, escaped. Just before she reached the sidewalk she heard another shot. Defendant had gone into the next room, and, placing the pistol to his own breast, had fired, the ball entering close to the heart; and when the policeman entered, a short time after, the defendant was found lying on the floor in the inner room, with a smoking pistol clutched in his hand, unconscious from the loss of blood and the wound in his breast. The defendant had put into execution the threats which he had repeatedly made before, of his intention to kill his wife. He was taken to the city hospital, and from there, afterwards, when sufficiently recovered, to the county jail, at which place, shortly after being confined there, in a conversation with one of the jailers—Andy O'Hare—about the wound in his breast, he remarked, concerning it, "that he came near getting himself with that shot, but hadn't done it, but wished he had succeeded."

The state established the charge of a deliberate murder by proof of threats, and previous attempts to kill; indeed, one rarely encounters, in the history of crime, a homicide characterized by more causeless brutality. The guilt of defendant was overwhelmingly proved by the evidence of disinterested neighbors, both white and black, and by his own children. Over and against this mass of evidence upon the part of the state, the defendant offers nothing except his own unsupported and uncorroborated testimony that his wife came to her death by an accidental discharge of the pistol, in his attempt to wrest it out of her hand. He explains his possession of the pistol at the time by saying that he suspected one Green of taking beer to his house, and that, as he had whipped Green once before, he merely took the pistol along to protect himself in case he should encounter Green there; that he went into the house, and started to go into another room to see if Green was in there, when his wife and Kate Moore—the neighbor who was sitting with her—both took hold of him, without a word having passed between them, and before he had exhibited the pistol, caught him, and undertook to take it from him, and in the struggle she was accidentally shot. The physical facts, as to the course of the

bullets through the body of the dead woman, rendered defendant's account impossible, and corroborated the testimony of defendant's son Junius Reed, who saw both the shots fired, and who testified that they were fired by defendant while deceased lay on her right side, struggling to raise herself from the floor with her right hand, and with the left side of her body towards defendant, and defendant standing back of and over her, in a line with her body, and with the pistol pointed in a manner in which the balls would range downward, exactly as shown by the post mortem examination made by the coroner. Defendant's story was inconsistent, uncorroborated, and utterly improbable, while the testimony of the state, from the lips of defendant's own children, overwhelmingly established a most complete case of murder in the first degree. The errors assigned relate entirely to supposed misdirection in the instructions given, and in refusing others.

1. There was no error in refusing instruction No. 5 prayed by defendant, which informed the jury that the law presumed the defendant innocent of the charge, and that the burden of proving his guilt beyond a reasonable doubt rested upon the state, for the reason that the court gave the same instruction to the jury in the first asked by state, and the third given of its own motion. A useless repetition should always be avoided.

2. The most serious contention of the learned counsel for defendant is in regard to instruction No. 8 given at the instance of the prosecuting attorney. It is in these words: "(8) If the jury believes from the evidence that the defendant willfully—that is, intentionally—used upon Hester Reed, at some vital part, a deadly weapon, as a loaded revolver or pistol, in the absence of qualifying facts, defendant must be presumed to know the effect is likely to be deadly, and, knowing it, must be presumed to intend death, which is the probable and ordinary consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly, or from a bad heart. And if the jury believes that defendant took the life of said Hester Reed by shooting her in a vital part with a revolver or pistol, with a manifest design to use such weapon upon her, and with sufficient time to deliberate, and fully form the conscious purpose to kill, and without sufficient reason or cause or extenuation, then such killing is murder in the first degree; and while it devolves on the state to prove the willfulness, deliberation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and if the jury are satisfied, and can reasonably infer their existence from all the evidence.

they will be warranted in finding defendant guilty of murder in the first degree." The criticism on this instruction is that, by giving it, the criminal court dispensed with premeditation, as an element of murder in the first degree. We do not think the point is well taken, for several reasons: First, the court had already, in the sixth and seventh instructions for the state, immediately preceding this instruction, defined "premeditation" to the jury, and had told the jury, in plain and concise words, that they must find, beyond a reasonable doubt, not only that the killing was done willfully and deliberately, but premeditatedly. This court has often held that all the instructions must be read together, and if, altogether, they constitute a correct charge to the jury, no error is committed, though some one instruction may not cover the whole case. But the instruction is not in itself erroneous. This identical instruction came under review in *State v. Wisdom*, 84 Mo. 177, and was held not to be error, but was supported by *State v. Alexander*, 66 Mo. 148; *State v. Wingo*, 66 Mo. 181; *State v. Curtis*, 70 Mo. 594; *State v. Dickson*, 78 Mo. 438. But, more than this, it is an elemental principle in criminal pleading that the indictment must allege every substantive fact that is necessary to establish the guilt of a defendant. In *State v. Dale*, 108 Mo. 205, 18 S. W. Rep. 976, the indictment omitted the word "premeditatedly," but used both "deliberately" and "malice aforethought." We held the indictment sufficiently charged premeditation, on the ground that the word "deliberately" was a generic term, including "premeditatedly," and because premeditation was also included in the words "malice aforethought." These last words have been held to mean both malice and premeditation. *State v. Thomas*, 78 Mo. 327; *State v. Lowe*, 93 Mo. 547, 5 S. W. Rep. 889.

3. Counsel also insist that the criminal court erred in declaring, in the seventh instruction for the state, that there was no evidence tending to show the existence of any passion caused by any just or lawful provocation, in its definition of "deliberation." Counsel, however, has nowhere indicated where such evidence is to be found in the record. His claim is entirely at variance with the testimony of his client, who claims the killing was purely accidental; and there is not a word in the state's evidence that shows the slightest provocation, by word or deed of the deceased, as a cause for the killing. The instruction was correct and appropriate, under the evidence.

4. There was no error in refusing to instruct in murder in the second degree. The offense was either murder in the first degree, or the defendant was not guilty, because his wife was accidentally shot. The evidence does not tend to show any grade lower than the highest degree of murder, if the state's evidence is to be credited; and, on the other

hand, if the jury believed the defendant, he should have been acquitted, on the theory of an accidental killing.

The jury found against the defendant, and were fully justified in doing so. The defendant has been accorded every facility for making his defense. Two juries have found him guilty, and no error whatever appears in the transcript before us. The judgment is affirmed. All concur.

STATE v. MELTON.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

CRIMINAL LAW—FELONIES—MISDEMEANOR.

An offense that is a felony because it may be punished by imprisonment in the penitentiary is not, by reason of a less punishment being inflicted, reduced to a misdemeanor.

Appeal from circuit court, Newton county; Joseph Cravens, Judge.

Henry Melton was convicted of rape, and appeals. Affirmed.

Jas. H. Pratt, for appellant. R. F. Walker, Atty. Gen., and John T. Sturgis, for the State.

GANTT, P. J. The defendant was tried and convicted of an assault with intent to rape in the circuit court of Newton county, and his punishment assessed at six months in the county jail. He was indicted under section 3490, Rev. St. 1889. His appeal was taken to the St. Louis court of appeals, but that court, not having jurisdiction of "cases of felony," (section 12, art. 6, Const. Mo. 1875, and section 5 of amendment thereto, adopted in November, 1884,) certified the appeal to this court. The crime charged is a felony, as the offense denounced by the statute may be punished by imprisonment in the penitentiary. The fact that less punishment than imprisonment in the penitentiary was assessed in this case does not reduce the offense to a misdemeanor. *State v. Deffenbacher*, 51 Mo. 26; *State v. Green*, 66 Mo. 631; *State v. Clayton*, 100 Mo. 516, 13 S. W. Rep. 819; *State v. Gilmore*, 28 Mo. App. 501.

2. We have fully examined this record, and the brief of counsel for appellant, and we find no complaint in the motion for new trial or elsewhere of the instructions given by the court, nor is it claimed that the court did not fully instruct upon all questions of law. No exceptions to evidence have been saved. Defendant simply asks that we hold that he demonstrated his innocence. In this he evidently overlooks the fact that this is an appellate court, and it is not our province to usurp the functions of the jury. They heard his evidence, and found against him; and, as there was evidence from which they might so find if they believed it, we have no right to interfere on this ground alone. The judgment is affirmed. All concur.

TREZEVANT v. RAINS et al.

(Supreme Court of Texas. June 25, 1892.)

WILLS—EXECUTION—UNDUE INFLUENCE.

Where it is difficult to reconcile the acts and language of those who would take under a will offered for probate with any other conclusion than that it was the result of undue influence exercised by them on testatrix, then too feeble to resist importunity, a verdict sustaining the will will be set aside, and a new trial granted.

On rehearing. Reversed.

For former report, see 19 S. W. Rep. 567.

STAYTON, C. J. This is an appeal from a proceeding probating the will of Mrs. Maria Rains. The probate of the will was contested by the son of a deceased daughter of Mrs. Rains on three grounds. It was claimed that Mrs. Rains had not sufficient mental capacity to make a will at the time the paper was executed, and that in fact the signature to her will was not hers, but that of one of the beneficiaries, who directed and controlled the pen which made the signature, while it was in the powerless hand of the testatrix. It was further contended that the will was the result of undue influence, exercised by the beneficiaries under it upon the testatrix; but the will was admitted to probate on appeal to the district court, and that judgment was affirmed at a former day of this court on report of commission of appeals. The case is now before us on motion for rehearing, and, on a full examination of the entire evidence, we feel constrained to grant the motion, on the ground that the evidence bearing on the question of undue influence was such as to have required the verdict of the jury to be set aside, and a new trial granted. The will was made at a time when the testatrix was expected to die at any hour. Four days before its execution the family physician had announced that fact, and all the family present knew that her death must soon occur. She was as feeble as she could be and live. About three weeks before, she returned from California, where she had been in quest of health, to her home in Galveston, where she had a sister residing, with whom she was on most friendly terms; but that sister was not advised of her return until nearly three weeks had elapsed, during all of which time the testatrix was desperately ill. When she visited the house her reception by the children of the dying woman, who were with her, if there be any faith to be placed in human testimony, was not such as the relationship of the parties and the sorrowful surroundings would ordinarily have secured. Mrs. Burns, a daughter of the testatrix, lived in another town, not remote from Galveston, the residence of her mother, but was not advised of her mother's return and dying condition until after the will was made; and the fact that a brother, who was by the will cut off with one dollar,

although shown to be the favorite son of the testatrix, for whom most liberal provisions had been made in a former will of the mother, by telegram informed Mrs. Burns of her mother's condition, seems to have been the real ground, although some other was given, on which some or all of the three children who under the will would take four-fifths of the estate caused that brother to be arrested and held in prison until the morning of the day on which the mother died. The manner in which Mrs. Burns was received by her brothers and sisters when she reached the house of her mother clearly showed that she was not wanted there by the children who, under the will, would take the greater part of the estate. The three children to whom four-fifths of the estate would pass under the will were with the mother at the time the will was made, and so continued until her death. The mother had not been on friendly terms with one of them, a daughter, for many years. Such was the estrangement that the mother had not permitted the daughter to enter her house for many years. The mother and father had become estranged after a long married life. Litigation arose between them, which perhaps ended in divorce. Those who claimed under the will offered for probate arrayed themselves on the side of the father, and the mother complained bitterly of their conduct. Mrs. Burns was friendly to her mother in that controversy, and the son who was cut off with one dollar, and sent to prison by his brothers and sister, while his mother lay dying, was her steadfast support in all her troubles. Mrs. Rains had expressed an intention at different times to provide in her will for contestant, who was her grandson, and, on account of physical affliction, unable to take care of himself; but to him the will gave nothing. In view of the fact that the case must be tried again, it would not be proper to comment on the evidence, but, acting on the motion before us, it must be stated that the testatrix at the time the will was made was surrounded by the children who would take the greater part of the estate. She was evidently in a condition in which she was likely to be easily influenced. The evidence tends to show the exclusion of the other children and relations of the dying woman was not necessary for her welfare, and there is much evidence tending to show that the course pursued was with intent that the beneficiaries should have control of the testatrix in all respects, with a view to shape her course in accordance with what they deemed their interests. There may have been no undue influence, but such is the difficulty of reconciling the acts and language of those who would take under the paper offered for probate with any other conclusion than that the paper was the result of undue influence exercised by them upon their mother, then too feeble to resist

importance, that justice requires this case to be tried again. Those who seek to take under the paper might possibly have explained many things that cast suspicion on their motives and conduct, but they were silent. The former judgment of this court will be set aside, and judgment now rendered reversing the judgment of the district court, and remanding the cause for another trial. It is so ordered.

HUGHES v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

CRIMINAL LAW—INSTRUCTION ON WEIGHT OF EVIDENCE.

On the trial of a perjury case, an instruction to the jury to convict on the state's case as made by a letter in evidence, in which defendant admitted his guilt, and the evidence of a certain witness, unless it is overcome by other evidence, is on the weight of evidence, and erroneous.

Appeal from district court, Shelby county; S. W. Blount, Special Judge.

Henry Hughes was convicted of perjury, and appeals. Reversed.

Drury Field, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of perjury, and his punishment assessed at five years, from which he appeals. Among the numerous assignments of error it is sufficient to notice but one. Appellant was tried in a justice's court in Shelby county for disturbing an assembly by firing a pistol. Upon the trial he swore he did not fire a pistol, nor have one on his person at the time alluded to. There was only circumstantial evidence of his guilt, and he was acquitted. About a year later—May, 1892—appellant was a witness for the petitioners at the habeas corpus trial of Fayette Harris et al., charged with murder, and upon cross-examination admitted the authorship of a letter shown to him, and that its contents were true. The letter in question was written to one J. M. Roberson, June 6, 1891, just after his acquittal in the justice's court, and gives the details of the whole matter, acknowledging his guilt; stating further: "You know I don't care a G—d— how I swear when I get on the stand," etc. Appellant was indicted for perjury, tried, and convicted, as above stated. In his charge to the jury the court stated that in this case there is no witness who testified directly to the falsity of the statement charged to have been made by appellant in the justice's court; but the letter written by the defendant, admitting the shooting he was charged with in the justice's court, takes the legal position of a witness in the case. "And as to the corroboration necessary of each witness you are instructed

that the testimony of the witness Ed Hughes is sufficiently strong in corroboration of such witness [the letter] to support a conviction of defendant, unless overcome or outweighed by other evidence." There seems to be no question that this was a charge upon the weight of evidence. The jury are told to convict on the state's case as made by the letter and Ed Hughes, unless it is overcome by other evidence. The authenticity and truth of the letter and the veracity of Ed Hughes, and the sufficiency of the two to convict, is declared as a matter of law. Such a charge is forbidden by law. Code Crim. Proc. art. 677; Willson's Crim. St. § 2339; Muely's Case, 31 Tex. Crim. App. 155, 18 S. W. Rep. 411, and 19 S. W. Rep. 915. The judgment is reversed, and cause remanded.

POOL v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS.

1. On a prosecution for assault and battery committed on a boy, while the statements made by him to his father on coming home wounded and crying are admissible as part of the res gestae, his subsequent statements, made to a witness sent for by the father, are not thus admissible.

2. Nor are the boy's acts and conduct in conducting his father and the witness to the scene of the difficulty, in the absence of defendant, and there pointing out the stick with which he claimed the assault was committed, and the tree from which he claimed it had been broken, admissible in evidence against defendant.

Appeal from Morris county court; J. W. Bolin, Judge.

R. P. Pool was convicted of aggravated assault, and appeals. Reversed.

R. L. Henry, Asst. Atty. Gen., for the State.

SIMKINS, J. Appellant was convicted of an aggravated assault and battery, and his fine assessed at \$75, from which he appeals. Conceding, under the peculiar facts of this case, there was no error in overruling appellant's motion for a continuance, the court certainly erred in admitting the testimony of the witness Curlee as to the statements and acts of Charles Meggnisen, the injured boy. While the statements made to the father by the boy coming home wounded and crying were part of the res gestae, the statement subsequently made to Curlee, who was sent for by the father, was not so. Still less were the acts and conduct of the boy in carrying his father and Curlee on the ground, in the absence of appellant, and there pointing out the scene of the difficulty, the stick claimed to be the one he was struck with, and the tree from which he claimed the stick was broken, admissible in evidence against appellant. On a full consideration

of this case, we are not satisfied with the verdict, and the judgment is reversed, and cause remanded.

DEMINT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CRIMINAL LAW—NOTICE OF APPEAL.

Jurisdiction of appeal, in a criminal case, will not be entertained, where no notice of appeal is entered on the minutes of the lower court.

Appeal from Raines county court; W. H. Teague, Judge.

Charley Demint was convicted of a criminal offense, and appeals. Dismissed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appeal in this cause was prosecuted from the justice's court to the county court, in which court the appeal was, on the motion of county attorney, dismissed, for want of a sufficient appeal bond. Examining the record before us, we have failed to discover that notice of appeal was entered of record on the minutes of the county court. Without this prerequisite, this court cannot entertain jurisdiction of the cause. The appeal is therefore dismissed.

BRADSHAW v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

CRIMINAL LAW—MISDEMEANOR—EVIDENCE OF DIFFERENT OFFENSES.

On trial for a misdemeanor, where the information contains but one count, and a witness has given evidence of facts constituting the crime, it is not error to refuse to exclude the testimony of another witness to the commission by defendant of a similar offense at a different time and place from those stated by the former witness, when defendant does not ask that the state be required to elect on which transaction it will rely for conviction; since to exclude such evidence would be to allow defendant to elect on which transaction he would be tried.

Appeal from McLennan county court; W. H. Jenkins, Judge.

George Bradshaw was convicted of playing a game of "craps," and he appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. 1. Appellant was convicted of playing a game of "craps." The affidavit forming the basis of this prosecution contains but one count, and was made by McCain, who testified to facts constituting the offense charged. The witness Skeltin testified to a similar offense, occurring at a different time and place. His evidence was objected to, because not coincident with the

case made by McCain's evidence. Whether an election can be required in misdemeanors, where the information contains but one count, and the evidence adduced shows more than one similar offense, has been the subject of much diversity of opinion. *Street v. State*, 7 Tex. App. 5; 1 Bish. Crim. Proc. § 458 et seq., and notes. Under the view taken of this case, we deem it unnecessary to discuss that question, because the defendant did not ask that the state be required to make an election. When an election is to be had, the rule in this state is that the prosecution, and not the defendant, is authorized to make its selection of the transaction upon which the state will rely for a conviction. He, when authorized, may demand of the state an election, but this cannot be done by objection urged to the evidence sought to be introduced. Such would have been the result of sustaining the objection to Skeltin's testimony.

2. The defendant's special charge was but a reiteration of the objection, above referred to, wherein he requested the jury be confined to McCain's evidence, to the exclusion of Skeltin's testimony, in arriving at their verdict. The court did not err in refusing the charge. The other points suggested we deem without merit. The judgment is affirmed.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

CRIMINAL LAW—ORIGINAL AND APPELLATE JURISDICTION OF COURT.

As the criminal district court of Harris county has appellate jurisdiction, under Rev. St. arts. 1496, 1497, of all criminal cases tried and determined by justices of the peace, its "original and exclusive jurisdiction" cannot extend to the trial of an indictment for a misdemeanor cognizable by the justices' courts.

Appeal from district court, Harris county; E. D. Carvin, Judge.

Bill Davis was convicted of keeping a disorderly house, and appeals. Reversed.

Henry F. Fisher, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was indicted in the criminal district court of Harris county for keeping a disorderly house in violation of article 341 of the Penal Code, as amended by the act of 1889, p. 33. The punishment for this offense is \$200, and it is therefore cognizable by the justices' courts of this state. Const. art. 5, § 19. It is contended that the jurisdiction of said court in this case could only be appellate, and not original, as was exercised. If this proposition is correct, this conviction is erroneous. With reference to its jurisdiction, the Constitution, art. 5, § 1, provides that "the criminal district court of Galveston and Harris counties shall continue with the district, jurisdiction and organiza-

tion now existing by law until otherwise provided by law." This jurisdiction is found, as it appertains to the question here involved, in articles 1496, 1497, of the Revised Statutes. Article 1496 provides that "the criminal district court shall have original and exclusive jurisdiction of all cases of felony and misdemeanor in the counties of Galveston and Harris, of which the district and county courts have original and exclusive jurisdiction under the law." Article 1497 provides that "the said court shall have exclusive appellate jurisdiction over all criminal cases tried and determined by justices of the peace, mayors, and recorders, in said counties of Galveston and Harris, under the same rules and regulations provided by law for appeals from justices of the peace, mayors and recorders, to the county court in criminal cases." In misdemeanors, the jurisdiction of the criminal court, under existing law, is either "original and exclusive," or it is "appellate." In cases where it has "original and exclusive" jurisdiction, it cannot exercise "appellate" jurisdiction. Its appellate jurisdiction is exercised over cases appealed from the justices' courts. Hence, its "original and exclusive" jurisdiction cannot apply to that class of cases. The legislature has not sought to extend such original and exclusive jurisdiction to cases over which the justices' courts have power to try and determine, nor, indeed could it do so, under the provisions of the constitution. *Ex parte Gimochio*, 30 Tex. App. 584, 18 S. W. Rep. 82. The legislature has not sought to confer power, concurrent with justices' courts, upon the criminal court, to try and determine cases of this character, and, until that has been done, such jurisdiction cannot be exercised. The criminal district court was without authority to render judgment in this cause, wherefore, it is reversed, and the cause remanded.

STRINGFELLOW v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

GAMING—INDICTMENT—CRIMINAL LAW—APPEAL—HARMLESS ERROR.

1. An indictment for permitting a game of dice to be played at a storehouse in defendant's control need not allege that defendant knowingly permitted the game to be played.

2. A conviction will not be reversed on appeal for error of the trial court in permitting the state to impeach a witness for defendant who had testified to no fact injurious to the state, where there was no statement of facts showing that defendant was injured thereby, and defendant received the lowest punishment.

Appeal from Morris county court; J. W. Bollin, Judge.

J. J. Stringfellow was convicted of permitting a game of dice to be played at a storehouse under her control, and appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. This is a conviction for permitting a game of dice to be played at a storehouse, the same being under the control of appellant. The indictment is sufficient. It is not necessary for it to allege that the accused knowingly permitted the game or dice to be played. The state had no right to impeach her witness, as was done in this case. Alford had sworn to no fact injurious to the state. The state failed to prove any material fact by this witness. Alford, having testified to no fact injurious to the state, could not be impeached in any manner; but, in the absence of a statement of facts, we cannot determine whether appellant was injured, or whether this matter was harmless. The evidence of guilt may have been absolutely conclusive. Appellant received the lowest punishment. The judgment is affirmed.

SHIELDS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—INSTRUCTIONS.

1. In a prosecution for assault with intent to rape, evidence of the general reputation of prosecutrix for unchastity is admissible.

2. In a prosecution for assault with intent to rape it is error to fail to instruct as to the degree of force which must have been intended by defendant in order to constitute the crime.

3. In a prosecution for assault with intent to rape, where the evidence makes an issue as to whether defendant intended to use force, it is error not to submit to the jury the law of aggravated assault and battery.

Simkins, J., dissenting.

Appeal from district court, Bexar county; G. H. Noonan, Judge.

Dick Shields was convicted of assault with intent to rape, and appeals. Reversed.

Ed Haltom, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Conviction for assault with intent to rape. The prosecutrix testified as follows: "My name is Josephine Taylor. I am married, and was married on and before October 7, 1889. I then had 4 children. The oldest was 7 years old. I live now, and did in October, 1889, in Bexar county, in what is called the 'Posites Settlement.' The neighborhood is tolerably thickly settled. My nearest neighbor is a half or three-quarters of a mile. Myself and children were at home on the night of October 7, 1889. I know the defendant, Dick Shields, [identifies him.] On the night of October 7, 1889, I saw the defendant at my house. The first I saw of him he was standing in my front door. I was in my house in bed, and heard some one push the door, and I said, 'Who is there?'"

This was late in the night; and I had a chair against the door. As I heard some one push the door, I said: 'Who's there? Is that you, Dick?' He said, 'Good evening.' I said, 'Is that you, Dick?' He said, 'Is Joe got any cartridges 44?' I said, 'No; what are you here for?' He said, 'Joe sent me here.' Joe is my husband. I said, 'What is the matter with Joe?' He did not give me any answer till I spoke the third time. He sank down on the bed, and said, 'He [Joe] can't get home to-night.' Joe had gone to San Antonio, and was on the road. I don't know who all went on the road with Joe, but Dick Shields started out with him. Yes, sir; defendant sank down on the bed, and when he said there was nothing the matter with my husband I was excited, and knew he was there for no good purpose. I struck at him with my right hand, and he caught it, and held it tight, and it made my hand ache. He said: 'I have come to-night to see you. I have always loved you. I spoke to you every time, and you do not speak to me.' He said: 'I come to tell you how much I love you, and come to have a good time.' I told him to leave my house. He had taken out a flask of some kind, and said: 'Josie, I want you to drink with me; forgive me.' I said I would not. He said, 'Josie, kiss me, then.' I told him I would not, and told him to get out. He said, 'I am a good mind to kill you, rather than have you tell your husband.' When he told me how much he loved me, and wanted me to kiss him, I told him to go home to his own wife. He said: 'Josie, my wife has fooled me. That baby is not mine.' He said, 'Josie, kiss me.' I said I would not, and he said he would make me kiss him. He put his hand on my thigh and his right knee on the bed. I asked him what he meant. He said, 'I am going to sleep with you here.' I said, 'No,' and I raised up on the pillow, and he grabbed at me, and said, 'I will make you kiss me.' He grabbed a piece out of my dress here, [indicating,] and it hung down. I knocked his hand off, and he said: 'I will make you kiss me. You will not forgive me. You will not promise not to tell Joe.' He then rushed at me, and grabbed me with both hands. I pushed him, and he was drunk enough to stagger. I had only a gown, and picked up a wrapper off the little girl's bed, and run into the side room of the house. I heard his footsteps following me. I opened the room door, and run out on the gallery. I heard him coming out there, and I thought it would not do to leave the house. I then run back in the house at the same door he came in at. I run against the chair at the door that he moved when he pushed it open, and he heard me and come in there. There were some few coals on the fireplace, and I threw some kindling on it to make a light. It was a little dark in the room, not enough light to see clearly. When he first come in the door he

struck a match, and when the match burned he blew it out again. When he came back in the room again I said, 'Dick, do not put your hands on me again, or I shall hurt you.' He picked up a chair and turned it down and sat on it. I said, 'Leave, Dick.' He said he would when I promised not to tell Joe. Then my little girl raised up, and looked at him. When he walked to the door my little girl raised up and looked at him. He said: 'Look at these children. If you tell Joe, I will kill him, and leave these children fatherless. I am under one bond for killing a man, and if you tell him I will kill him before your eyes.' He did not leave then, but left when he got ready. He made no further assault on me. When I run out on the gallery I did not cry out or scream, because I was skeered. There are two doors on the gallery. When I went into the side room I left the house by a door there, and came back in at the door the defendant entered. I was afraid, and did not cry out. The defendant had a pistol. I was afraid he would shoot me. He had it in his hand. I did not see it when I was running from him. I saw it when he first came in. I have known the defendant about 10 years; maybe a little more. He lives in my neighborhood. The defendant there [pointing] is the man. The next morning I saw defendant again. He came to my house, and asked for fire. I told him I had no fire for him. He went right in the house and lit his cigarette. When he got out he asked me if I had made up my mind not to tell Joe. I said I had not made up my mind to anything. The next night I saw the defendant again at my house. He came there to the fence and hollered. I spoke to my husband, and said: 'That's Dick. He said he was coming to kill you.' My husband had returned home about one o'clock in the day after Dick had left there in the morning. I told my husband all about it. When Dick was hollering out there at the fence, I said: 'Don't go out there. That is Dick. He said he was going to kill you.' He then told Dick to leave. This was about 8 or 9 o'clock at night. Defendant came up on the gallery, and kept on hollering: 'Joe! Joe! oh, Joe!' Then he came inside the fence, and up on the gallery. Joe said, 'What do you want?' He said, 'I want to apologize.' Joe went to the door, and opened it just a little bit. I went to my husband, and saw Dick standing with one foot on the gallery. He had his right hand in his coat pocket. Dick said, 'Joe, I have come to tell you something.' I told Joe to tell him he would see him in the morning. He told him, and he went away. About a week after, I made the complaint upon which the defendant was arrested. I did not make the complaint sooner because me and my little girl were sick from being exposed from being run around in my night clothes. This all occurred in Bexar county, Texas. When defendant was at the bed he had his hand on

my thigh, and pressed me until it hurt me. It was not light enough for me to see whether his person was exposed or not. Question. What effort did he make, if any? Answer. He caught me, and was going to kiss me. I got away from him, and he said he was going to make me kiss him, and was going to sleep with me."

Upon the trial, the appellant proposed to prove by several witnesses that the prosecutrix's general reputation for chastity was bad. On objection by the state, the proposed proof was rejected by the court. This was error. If such was the character of the prosecutrix, the presumption is that appellant was aware of it. *Horback v. State*, 43 Tex. 242. What purpose could such proof subserve? Explain the conduct of appellant towards the prosecutrix. Men take liberties with fallen women without intending a rape, while they would not with chaste ladies.

The court omitted to define to the jury what degree of force must be intended by the accused to constitute an assault with intent to ravish. The omission was excepted to at the proper time. Was this required in this character of case? In rape, it is. In assaults to rape, why not? Rape is the carnal knowledge of a woman without her consent, obtained by force. (Neither threats nor fraud are in this case.) What character of force? Such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. In an assault to rape, to be guilty, the accused must make an assault upon the woman. The assault must be accompanied with the specific intention to rape; with the specific intention to have carnal knowledge of the woman; to have carnal knowledge of the woman without her consent; to have carnal knowledge of the woman by force; to have carnal knowledge of the woman without her consent, and by the use of such force as is sufficient to overcome such resistance as the woman should make. We cannot conceive it possible for a man to assault a woman with intent to ravish her without intending to do (to accomplish his purpose) all that which the law requires to be done to constitute rape. This proposition, we think, is evident.

How stand the authorities? In *Rex v. Lloyd*, 7 Car. & P. 318, Patteson, J., in summing up, said: "In order to find the prisoner guilty of an assault with intent to commit rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." See, also, *Reg. v. Wright*, 4 Fost. & F. 967. *Henry, J.*, (in *State v. Priestly*), says: "It must appear from the evidence that the defendant's intention was, if it became necessary, to force a compliance with

his desires at all events, and regardless of any resistance made by his victim;" citing, in support of this position, *Com. v. Merrill*, 14 Gray, 415; *Reynolds v. People*, 41 How. Pr. 179; *Joice v. State*, 53 Ga. 50; *State v. Burgdorf*, 53 Mo. 85; and we will add *Mahoney v. People*, 43 Mich. 39, 4 N. W. Rep. 546; *State v. Hagerman*, 47 Iowa, 151; *Taylor v. State*, 50 Ga. 79. In this state the same rule is announced. *Brown v. State*, 27 Tex. App. 330, 11 S. W. Rep. 412.

Appellant excepted to the charge, because it did not submit to the jury the law of aggravated assault and battery. While the conduct of appellant was reprehensible in the extreme, and the violent and indecent familiarity with the person of the prosecutrix against her will may or may not have been for the purpose of having carnal knowledge of her without her consent, and at all events, whether resisted or not, whether he intended to so accomplish his purpose, being an issue in the case, (made so by the evidence,) it was the duty of the court to submit this issue to the jury by proper instructions. See *Pefferling v. State*, 40 Tex. 486, in which the facts are much stronger against the accused than they are in this case. For the reasons indicated the judgment is reversed, and cause remanded.

SIMKINS, J., dissents.

WESTERN UNION TEL. CO. v. LINN.¹

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

TELEGRAPH COMPANIES — DELAY IN DELIVERING MESSAGE — DAMAGES — LIMITATION OF LIABILITY — INSTRUCTIONS.

1. A telegram stating that "Grace is very low. Can you come, and bring Maud?" is notice to the company of a relationship existing between the addressee and the person whose sickness is announced, and that the object is to afford the addressee an opportunity to attend on his relative in her last sickness, or to be present at the funeral in case of death.

2. Mental pain caused by delay in delivering the message is a proper element of damages; and, in an action by the addressee against the company, an allegation that plaintiff would have taken a train enabling him to be present at the funeral, if the message had been seasonably delivered, is not the statement of a result too remote and contingent to support the action.

3. A stipulation in the printed blank on which a telegram is written, relieving the company from liability for mistakes or delays in the transmission or delivery where the message has not been repeated, is void, in so far as it seeks to relieve the company from liability for its servants' negligence in delaying the delivery of the message.

4. The admission of hearsay evidence is harmless error, where there is competent and uncontradicted evidence on the same subject.

5. In an action against a telegraph company for delay in the delivery of a message announcing the sickness of plaintiff's sister, an instruction to find for plaintiff "such sum, and no more, as the evidence may show will compensate plaintiff for the injury sustained, if any, to his feelings, taking into consideration the

¹ Rehearing pending.

mental pain and suffering, if any, sustained by him because of not being able to attend the funeral," does not assume that plaintiff suffered injury or mental anguish, but leaves that question to the jury.

Appeal from district court, Travis county; James H. Robertson, Judge.

Action by Henry A. Linn against the Western Union Telegraph Company for delay in delivering a telegram. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

This is a suit by the appellee against the appellant for damages for injury to feelings, caused by delay in delivering a message announcing the illness of a sister, the delay preventing him from being present at her funeral. The sister was a Mrs. Grace Valls, and resided at Benavides, Tex. Plaintiff resided at Austin, Tex. The dispatch was sent by another sister, Kate, from Benavides, to plaintiff, at Austin, as follows: "Benavides, Texas, January 25. To H. A. Linn, Austin: Grace is very low. Can you come, and bring Maud? Kate." It was received by defendant, at Austin, on the 25th day of January, 1891, at 6:31 P. M., as shown by the indorsement thereon, and was not delivered until next day, when it was left at plaintiff's place of business a little after 9 o'clock A. M. The evidence tends to show that, by the use of ordinary diligence, the message would have been delivered to plaintiff in time for him to have taken the train, which he would have done, and have reached Benavides before his sister would have been buried. About the time he received the message, but later, he received another, stating that his sister was dead, to which he replied that it came too late, and he could not get there. The regular passenger train from Austin on the International & Great Northern Railroad—upon which he must have traveled—left at 8 A. M., and connected at San Antonio with the Aransas Pass Railroad train for Corpus Christi, at which place the latter would have arrived at 5:55 P. M.; and a passenger train left this place at 6:30 the next morning on the Texas & Mexican National Railroad, and arrived at Benavides at 11:40 A. M. So that, had the message been delivered promptly, plaintiff would have gone by that route, and reached Benavides at 11:40 A. M. on the 27th. Had it been so delivered, he would have dispatched to Benavides that he was coming, and the funeral would have been delayed until his arrival. His sister was buried on the 26th, at 4 P. M., having died the day before. The connections were such that by starting from Austin at night of the day he received the message, the 26th, he could not have reached Benavides earlier than 11:40 A. M. on the 28th, to which time it would not have been permissible to delay the funeral, on account of

the cause of Mrs. Valls' death,—childbirth,—and the condition of the weather. The night train on the International & Great Northern Railroad did not go through to Laredo; and the train from Laredo to Benavides on the Texas & Mexican National Railroad arrived at Benavides at 2:10 P. M. So that, by traveling that route, after he received the dispatch, he could not have reached Benavides earlier than 2:10 P. M. on the 28th. The trial resulted in a verdict and judgment for plaintiff for the sum of \$500, from which defendant has appealed.

Walton, Hill & Walton, for appellant.
Geo. Pendexter, for appellee.

COLLARD, J., (after stating the facts.) The first assignment of error is that the court erred in overruling the general and special exceptions of defendant to the petition, viz. that it sets up no cause of action; that the damages sought are not the direct and natural consequence of the negligence complained of, and are not such as the law will deem to have been contemplated by defendant at the time of contracting to send the message as the probable result of the breach of the contract; that the petition does not show that defendant had notice of the relationship existing between plaintiff and the person named in the message as being very low, or that any relationship existed between them; that the message was to call plaintiff to the sickbed of the person named, and the damages claimed are on account of absence from her funeral; that the object of the message was to have plaintiff present at the sick bed, and the petition shows that such object was impossible,—death having occurred before he could have arrived,—his presence at the burial not being the object of the message, damages for which being a result not contemplated, and too remote as a basis of recovery. And, further, that the petition is insufficient because the cause of action is dependent upon uncertain and independent acts and conduct of plaintiff and others, to wit, that, if said message had been delivered in reasonable time, plaintiff would have sent a telegraphic message to another person that he would start on the morning of the 26th of January; that said message would have been received in time to stay the funeral; that he would have embarked on the train; and that the funeral would have been stayed,—showing that the injury and damages complained of are not proximate, or of certain results, or such as could have been contemplated by the parties, but are too remote, contingent, and uncertain to be recovered. We do not think that there was error in overruling the demurrer and exceptions. Since the case of *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, it has not been doubted that a telegram in the form of the one under consideration is suffi-

cient to give notice to the company of the relationship between the person addressed and the person whose sickness or death is announced; and it has also been settled in this state that such message will put the company upon notice that "its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral, in case of death." *Telegraph Co. v. Moore*, 78 Tex. 66, 12 S. W. Rep. 949; *Same v. Feegles*, 75 Tex. 537, 12 S. W. Rep. 860. Damages for mental pain and disappointment caused by the delay in delivering the message are consequences of the alleged negligence, for which a recovery may be had. *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. Rep. 351; *Loper v. Telegraph Co.*, 70 Tex. 689, 8 S. W. Rep. 600; *Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598; *Rowell v. Telegraph Co.*, 75 Tex. 26, 12 S. W. Rep. 534; *Telegraph Co. v. Richardson*, 79 Tex. 649, 15 S. W. Rep. 689. See *Telegraph Co. v. Carter*, 85 Tex. 580, 22 S. W. Rep. 961, —distinguished from this. The allegations of the petition as to what would have occurred, what others would have done, and that plaintiff would have taken the morning train on the 26th if the message had been promptly delivered, and would have been present at his sister's funeral, were not results too contingent and remote to support the action. Such results were probable, and it was proved that they would have occurred. *Martin v. Telegraph Co.*, 1 Tex. Civ. App. 143, 20 S. W. Rep. 860; *Parks v. Telegraph Co.*, 13 Cal. 422. The material averments of the petition were proven; at least there was testimony sufficient to support the verdict, and plaintiff was entitled to recover.

In the printed form furnished by defendant, upon which the message was written, is the following: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or nondelivery, of any un-repeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." Defendant set up this stipulation as a defense, the message not having been repeated. The court sustained exceptions to the defense, and appellant assigns error. The gist of the action is the negligence of defendant and its servants, thereby failing to deliver the message in time to enable plaintiff to be present at his sister's funeral. The fact that the message was not repeated could not have affected defendant's obligation to deliver it. It was correctly transmitted on the wires. We do not think that defendant could, by such stipulation in its contract, relieve itself from the injurious consequences of its own or its servants' negligence in delaying the delivery of the message. *Telegraph Co. v. Short*, (Ark.) 14 S. W. Rep. 649. In the case cited, such a stip-

ulation was held to be contrary to public policy and void; following the analogy of liability of common carriers, not as to the degree of care, but as to care which the law imposes upon each in the performance of their obligations to the public. This court followed the above case at the last term in the case of *Telegraph Co. v. Lyman*, 22 S. W. Rep. 656, holding that failure to have the message repeated could not relieve the company of its negligence in transmitting or delivering it. *Telegraph Co. v. Neill*, 57 Tex. 283; *Gray*, Com. Tel. § 49. There was no error in sustaining the exceptions.

The court permitted plaintiff, Linn, to testify as to departure and arrival of trains at the time in question on the routes from Austin to Benavides, from information,—what he had heard, and what he had seen published in the papers, published time tables and schedules, though he did not know that they were official. He did not personally know the facts, except as to the arrival and departure of trains on the International & Great Northern Railroad. The evidence was objected to because it was hearsay, and the same objection is insisted on in this court. We do not think it is necessary to decide the question, because there was other uncontradicted testimony showing the facts, and sustaining the allegations of the petition in this respect. A careful examination of the testimony of A. R. Valls and P. J. Lawless shows this. Their testimony upon the point was not contradicted. Defendant also objected to the testimony of Lawless upon the same subject "because it was not shown that he knew the schedule times of running trains on said roads, except the International & Great Northern, and further, because the evidence is based, as between San Antonio and Austin, on schedule, without showing that on the day in question said train ran on time, and because said testimony is hearsay, incompetent, and immaterial." Lawless was ticket agent of the International & Great Northern Railroad at Austin, and had been for years. He testified "that the south-bound train on the International & Great Northern, on the morning of January 26, 1891, left Austin about 8 o'clock A. M. The schedule time for the train to San Antonio is five hours and twenty-five minutes, which should make the connection at San Antonio with the Aransas Pass train to Corpus Christi. The Aransas Pass leaving San Antonio in the morning reaches Corpus Christi at 8:55 P. M., [55 minutes past 8.] The Aransas Pass trains do not make connection at Corpus Christi with the Mexican National Railroad trains. The latter [Mexican National] leave Corpus Christi at 6:30 A. M." He does not state how he gained his information, but simply states the facts. There is nothing in the bill of exceptions taken to his testimony, or the testimony itself, to show that his information was from

hearsay. In such case it could not be held that it was from hearsay, or that he did not personally know the facts stated. We do not know what the sources of his information were, except from the schedule mentioned. They were not developed by cross-examination. The schedule time of the arrival of the train in San Antonio from Austin at the time in question would be evidence of the fact. It was not disputed. Hence, we find no error in admitting the testimony.

It was not error to charge the jury, as the court did, that the message in question was sufficient to have put defendant's agents handling the same upon notice of the relationship between plaintiff and the person designated therein as "Grace," and to give them notice that a failure to deliver the same with reasonable diligence might result in depriving plaintiff of attending her funeral, if she should die. The authorities before cited establish this proposition. The charge was not objectionable as being upon the weight of evidence.

Appellant complains of the fourth paragraph of the court's charge upon the ground "that it assumes the fact of injury to plaintiff's feelings, (or mental anguish,) or so strongly intimates the existence of such fact as to prejudice defendant's contention that no such injury occurred." The paragraph of the charge referred to submits to the jury, for their ascertainment, the facts upon which plaintiff would be entitled to recover, including the alleged failure to deliver the message in time by the use of ordinary care, and then proceeds: "And if they should find * * * that because of such failure the plaintiff was prevented from attending the funeral of his sister, Mrs. Grace Valls, and was thereby injured, the jury will find a verdict for plaintiff for such sum, and no more, as the evidence may show will compensate plaintiff for the injury sustained, if any, to his feelings, taking into consideration the mental pain and suffering, if any, sustained by him because of not being able to attend the funeral of his said sister. But the plaintiff cannot recover for mental anguish suffered because of the death of his sister." In our opinion, the charge does not assume that plaintiff suffered injury or mental anguish on account of not being able to attend the funeral, but leaves the question to the jury. It is not objectionable as stated.

Appellant objects to the fifth paragraph of the court's charge "because, in enumerating the findings under which the verdict should be for the defendant, it omits a failure to find mental anguish, thereby rendering the error in the fourth paragraph of the charge more harmful and prejudicial to defendant." The charge referred to is as follows: "(5) If, on the other hand, the jury find from the evidence that the defendant, in transmitting and delivering said message, used such diligence as a person of ordinary diligence would

have used under like circumstances, and that it could not, by the use of such diligence, have delivered said message to plaintiff in time for plaintiff to have boarded the south-bound train from Austin to San Antonio on the morning of the 26th of January, 1891, then the jury will find for the defendant. Or if the jury find that if said message had been delivered to the plaintiff by defendant in time for him to have gone to Benavides, and attended the funeral, and yet that plaintiff would not have gone to Benavides to attend said funeral, or if he could not have reached said place in time to attend said funeral if said message had been delivered to him by defendant before the departure of said train for San Antonio on the morning of the 26th of January, 1891, then the jury will find for the defendant." The charge was correct and fair. If anything was omitted, upon which the jury may have found for defendant, it should have been presented in a special charge.

The appellant's next assignment is: "(8) The court erred in not granting defendant's motion for a new trial, for the reason that the verdict was against the evidence, in this: That it appeared that it would have been impossible for plaintiff to have arrived in time to attend his sister's funeral; that, although he telegraphed in the morning about 9 A. M., the message did not arrive at Benavides till after 7 the same day, demonstrating the improbability of the funeral being postponed,—showing that, although plaintiff was unheard from, the funeral went forward at the usual time after the death; and also, because the evidence showed that it would not, probably, have been possible to have postponed the funeral until the 27th of January to await plaintiff's arrival; and because of this the judgment should be reversed." The dispatch sent by plaintiff to his brother-in-law, A. R. Valls, in reply to the one announcing the death of plaintiff's sister, was sent at some time after 9 A. M. on the 26th of January, 1891, and was received at Benavides at 7:40, same day. The burial took place on the same day. There was evidence from which the jury may have properly concluded that, if defendant had used proper diligence to deliver the first message to plaintiff, he would have replied that he was coming, in time so that the funeral could have been delayed; and it was also in proof that, upon receipt of such message, the burial would have been delayed until his arrival at Benavides on the 27th, though it would not have been permissible to delay it until he could get there on the 28th. There was such testimony supporting the verdict that we do not feel authorized to set it aside.

In relation to other assignments of error, we may say that the testimony supported the verdict to such an extent that we cannot say that it was not warranted, and should be set aside. The jury may and would have been justified in finding that, if the message

had been delivered with due care, plaintiff could have advised his brother-in-law at Benavides of his coming in time so that the funeral would have been postponed; that he could and would have gone, and would have arrived at Benavides by rail on the 27th, and would have been present at the funeral; and that he suffered as alleged on account of the negligent failure of defendant to deliver the message in due time. We cannot say that the verdict is excessive. We conclude that there is no reversible error in the judgment of the court below, and it is affirmed.

SEIBERT v. RICHARDSON et al.

(Court of Civil Appeals of Texas. Oct. 11, 1893.)

TRESPASS TO TRY TITLE — TITLE TO MAINTAIN — PUBLIC LANDS — ISSUANCE OF DUPLICATE CERTIFICATES—SURVEYS.

1. In trespass to try title to land located in W. county under plaintiff's duplicate land certificate No. 30-185, the land commissioner testified that duplicate No. 108 was located in 1877 in K. county, after having been lost and substituted in 1867 by duplicate No. 29-10, and that the location in W. county was made in 1874 under duplicate No. 30-185, which was issued in 1873 as a substitute for duplicate No. 29-10 which had been lost. *Held*, that such testimony proved the location of duplicate No. 30-185 before that of No. 108, and could not be overcome by a deed to plaintiff which recited that it conveyed land which had been located under a headright land certificate issued in 1841, and substituted in 1857, after loss of the original, by duplicate No. 108, and the following indorsements on duplicate No. 108: "Filed April 18, 1859, by J. M. Donathan. Filed Jan'y. 23, 1862. Filed March 22, A. D. 1876, at 10 A. M. C. M. Hobbill, D. C. M. Co. Re filed July 19, '77. J. J. Gross, Comr."

2. The location of 1877 under duplicate No. 108 could not prejudice the location in 1874 under duplicate No. 30-185, where plaintiff ratified the location of 1874, though made without his knowledge, and had had nothing to do with making the location of 1877, except to protest against the issuance of a patent thereon.

3. The return of field notes with duplicate No. 30-185 to the general land office within 12 months after making a survey, and before the inception of defendant's rights in 1875, furnished prima facie evidence of a valid location, provided the certificate was valid, since no application for the land or entry was necessary before a survey, prior to the passage in 1879 of Rev. St. art. 3895, requiring such application or entry.

4. Though a prior locator who has not secured a patent must show a valid certificate and survey in order to recover, he is only required in the first instance to make a prima facie case, and need not exclude all possible defects of title.

5. The certificate of a publisher accompanying a printed advertisement of the loss of a land certificate stated that the publication was made for 60 days, showed a substantial compliance with the statute except that it was not sworn to, and had been on file since 1873; and the commissioner was satisfied of its truth, as he issued a duplicate land certificate. *Held*, that such certificate was sufficient proof that notice had been given of the loss of the land certificate and the application for a duplicate, as required by Rev. St. art. 3885.

6. Duplicate certificate No. 29-10 was not invalidated, before the issuance of its substi-

tute, by the fact that surveys of locations under it had been forfeited for nonreturn of the certificate.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Trespass to try title by George W. Seibert against R. B. Richardson and others. Judgment for defendants. Plaintiff appeals. Reversed.

Plaintiff claims the premises by virtue of its location and under duplicate certificate No. 30-185 in the name of William Wentworth on September 10, 1874. No. 30-185 was issued in lieu of duplicate No. 29-10. No. 29-10 was issued in lieu of duplicate No. 108. Duplicate No. 108 was issued in lieu of original No. 4, which was issued by the board of land commissioners of Matagorda county. Defendant claims the land in controversy by virtue of its location on November 25, 1875, under certificates Nos. 1-434 and 1-247 in the name of B. S. and F.

The learned judge was of the opinion that an entry or application, as provided in Rev. St. art. 3895, (passed in 1879,) was necessary to show a location in 1874 and 1877.

The following are appellant's assignments of error: (1) "The court erred in holding that duplicate certificate No. 30-185, issued to W. Wentworth, was not located or filed in Wilbarger county, Texas, as shown by his finding of fact No. 6." (2) "The court erred in holding that duplicate certificate No. 108, issued to Wm. Wentworth, was located in Kimble county prior to the location of duplicate certificate No. 30-185 in Wilbarger county, as shown by his finding of fact No. 8 and finding of law No. 4." (3) "The court erred in holding that duplicate certificate No. 108 was located prior to plaintiff's purchase, and that said location exhausted the Wm. Wentworth headright certificate as shown by his finding of law No. 2." (4) "The court erred in holding that duplicate certificate No. 30-185 was void as shown by his findings of law No. 5." (5) "The court erred in not rendering judgment for plaintiff in this: plaintiff showed a valid prior appropriation of the land in controversy by virtue of a valid certificate."

A. H. Carrigan, for appellant. Stephens & Huff, for appellees.

STEPHENS, J. There was error in the court's conclusion that the location in Kimble county under duplicate certificate No. 108 had been made prior to the location in controversy under duplicate certificate No. 30-185. The testimony of the land commissioner was explicit that duplicate 108 had been located in Kimble county May 19, 1877, which was long after this duplicate had been lost, and substituted by duplicate No. 29-10, October 23, 1867; and that the location in Wilbarger county, from which this suit arose, had been made September 10, 1874, under duplicate 30-185, issued, upon proof of

loss of duplicate 29-10, as a substitute therefor, March 7, 1873. The recitals in the deed made in Indiana, October 25, 1858, by David Selbert and wife to appellant, to the effect that they thereby conveyed all their right, title, and interest in the lands lying in the state of Texas that had been located under the headright land certificate of William Wentworth for one-third of a league of land issued by the board of land commissioners of Matagorda county May 8, 1841, substituted September 25, 1857, by duplicate certificate No. 108, upon proof of the loss of the original, together with the following indorsements on duplicate 108: "Filed April 18th, 1859, by J. M. Donathan. Filed Jany. 23rd, 1862. Filed March 2nd, A. D. 1876, at ten o'clock A. M. O. M. Hobbill, D. C. M. Co." "Refiled July 19th, '77. J. J. Gross, Comr."—were not circumstances sufficient we think to overcome the positive testimony of the land commissioner.

There was no evidence that appellant caused the location in Kimble county to be made, but, on the contrary, the evidence tended to show that he had nothing to do with it except to protest through his agent against the issuance of patent thereon. The corrected field notes of this survey recite that it was made for D. N. Terrill, assignee. The patent was afterwards canceled by the land commissioner of his own motion on the ground of the supposed invalidity of the original certificate. Under these circumstances, we think this location should not prejudice appellant's prior location of the land in dispute, which, though made without his personal knowledge, was ratified by him, while the subsequent location was rejected.

There was error also in the conclusion that appellant, plaintiff below, could not recover because he had failed to prove that the land in controversy had been surveyed within 12 months from the date of his entry or application for said land. As this survey was made prior to 1879, the law required no written application to be made. Possession by the surveyor of the certificate was sufficient. The return of the field notes with the duplicate certificate to the general land office within 12 months after the survey was made, and prior to the inception of appellees' rights, furnished sufficient evidence of a location *prima facie* valid, provided the duplicate certificate itself was also valid.

This brings us to the most important question in the case,—whether appellant made out a *prima facie* case of a valid certificate. If he did, the proof relied on to rebut it was not, in our opinion, sufficient to deprive him of a recovery against a subsequent locator. While a prior locator who has not secured a patent to the land must show a valid certificate and survey in order to recover, we understand the rule to be that, like any other plaintiff, he is only required, in the first instance, to

make out a *prima facie* case, and not to exclude all possible defects in his title.

It is not contended that the original Wentworth certificate, or either of the duplicates prior to 30-185 was invalid when issued, but the contention seems to be that 30-185 was not properly issued in compliance with the statutes providing for the issuance of duplicate certificates, and that, if so issued, it was invalid, because that for which it was substituted had been absorbed by prior location. The ground upon which the court held its issuance to be void for want of compliance with the statute on that subject was that there was no proof, as required by art. 3885, Rev. St., that notice had been given of the loss and application for a duplicate. This proof consisted of the certificate of the publisher accompanying a printed advertisement of the loss, etc., to the effect that the publication had been made for 60 days, on file in the land office since about 1872 or 1873, which certificate showed a substantial compliance with the statute, except that it was not sworn to. The commissioner seems to have been satisfied of its truth, as manifested by his issuance of the duplicate. The evident purpose of the statute was to furnish evidence for his action, and if in fact the requisite publication was made,—as we think should be inferred in the absence of a further showing,—the statute was substantially complied with. While this proceeding to substitute is not free from the suspicion that it was conceived in fraud, and consummated through perjury and forgery by a stranger to the title, we are of opinion that the proof did not go far enough to invalidate it on that ground. •

The invalidity, then, must depend upon the alleged absorption of the antecedent duplicate as the result of a previous location. It appears that duplicate 29-10 was located in Fannin and Lamar counties in the year 1860, and the survey forfeited for nonreturn of certificate. It also appears that duplicate 108 was at one time located in Jack county, and the survey forfeited for nonreturn of the certificate by July 29, 1872. It does not appear at whose instance these locations were made. Appellant had no personal knowledge of them, but from time to time had several agents in the state, he being all the time a nonresident. It further appears that no land has ever been patented, except as shown above, by virtue of the original William Wentworth headright or any of its duplicates. No explanation was made of the file marks on duplicate 108. We are of opinion that the surveys forfeited for nonreturn of certificate did not invalidate the certificate itself; that it still had virtue left in it, and is not within the rule which holds a land certificate, when once located and returned to the land office, *functus officio*, unless withdrawn under some express provision of the statute. If during the life of

duplicate 108 it was thus tied to a survey of land by being located and returned to the land office, and afterwards withdrawn without statutory authority, its career was ended, and no further duplicates could be lawfully issued. *Adams v. Railway Co.*, 70 Tex. 267, 7 S. W. Rep. 729; *Von Rosenberg v. Cuellar*, 80 Tex. 256, 16 S. W. Rep. 58. While appellant's title was by no means free from suggestions of infirmity, we have reached the conclusion that it was *prima facie* good, and that to overcome it the proof must do more than raise a suspicion of its invalidity. The judgment will therefore be reversed, and the cause remanded for a new trial.

RUSSELL et ux. v. NALL.

(Court of Civil Appeals of Texas. Jan. 26, 1893.)

JUDGMENT LIEN—UNRECORDED DEED—PRIORITIES.

1. Where a married woman acquires the legal title to land, though it be through conveyance from her husband, she must register her deed, or it, like any unregistered deed from her husband to a stranger, will be void as to subsequent purchasers or creditors without notice. 20 S. W. Rep. 1006, affirmed.

2. Where a judgment creditor acquires a lien on land as against the grantee of a prior unrecorded deed, because he has no notice of such deed, and he purchases the land at sheriff's sale on execution issued on his judgment, his title is paramount to the title of such grantee, though he had notice of such prior deed at the time of his purchase.

On rehearing. Motion overruled.

For report of decision on appeal, see 20 S. W. Rep. 1006. For report of decision on appeal in prior litigation between the same parties, see 15 S. W. Rep. 635.

PLEASANTS, J. We have duly considered appellants' motion for a new hearing, and, if we reform the statement of facts, and exclude certain portions thereof, as appellants insist in their briefs should be done, and if we concede that there was no issue of fraud raised by the pleadings upon the trial of the case in the lower court, and that the appellee is not an innocent purchaser, still we are of the opinion that there is no error in the judgment of affirmance rendered by this court. The evidence shows clearly that the judgment in favor of the appellee against appellant Thomas J. Russell was duly recorded in the office of the county clerk of Jefferson county before the deed from the latter to his wife was registered, and there is no evidence that appellee had notice of such deed, or of any claim to the land by Mrs. Russell, before his judgment was recorded. Under such circumstances, the title of the purchaser at the execution sale, although he then had notice that Mrs. Russell was the owner of the land, must be held paramount to hers, notwithstanding the fact that the premises may have been conveyed to her for a valuable consideration, prior to the recording of the judg-

ment against her husband in favor of appellee. This is so by the operation of the statute, which declares all unregistered deeds of conveyance void as to subsequent purchasers and creditors. *Wallace v. Campbell*, 54 Tex. 90; *Grimes v. Hobson*, 46 Tex. 418; *Borden v. McRae*, Id. 396; *Grace v. Wade*, 45 Tex. 528; *Ayres v. Duprey*, 27 Tex. 593. The conclusion of the court that the premises in controversy were no part of the homestead of appellants, is, we think, fully sustained by the evidence; and, the title of Mrs. Russell being subject to the appellee's judgment lien, it becomes immaterial whether the deed to Mrs. Russell was or was not executed for a valuable consideration, or whether it was or was not executed with the intent to hinder or delay his creditors by the vendor, with the knowledge of such intent by the vendee. The case of *Ross v. Kornrumpf*, 64 Tex. 390, to which appellants refer us in support of their motion, is not in conflict with the cases cited above. *Ross v. Kornrumpf*, like *McKamey v. Thorp*, 61 Tex. 648; *Parker v. Coop*, 60 Tex. 111; *Senter v. Lambeth*, 59 Tex. 260; and *Blankenship v. Douglas*, 26 Tex. 229,—holds that the statutes of registration do not apply to equitable titles such as are derived from resulting trusts, as where land is purchased with the separate funds of the wife, and the deed of conveyance is made to the husband, or when the deed, though made to the wife, does not by its terms show that it is made to her in her separate right. When such is the case, the creditor, by recording his judgment against the husband, acquires a lien against the apparent title of the husband; but such lien may be avoided by the wife upon giving notice of her title to the creditor before sale of the land. But in this case the property in controversy was owned by Thomas J. Russell before his marriage with the appellant Louise H. Russell, and the latter acquired the legal title to the property by direct conveyance from her husband; and her deed, therefore, must be considered as within the operation of the statutes of registration. Where the title is one which rests in equity, as we have seen, it is excepted from the operation of the registration laws, for the very obvious reason that such title, from its very nature, cannot be registered. But where a married woman acquires the legal title to the land, although the title be through conveyance from her husband, she must register her deed; otherwise it, like any unregistered deed from her husband to a stranger, will be void as to subsequent purchasers or creditors without notice.

The appellant Thomas J. Russell has thought proper to assail the honorable court that tried this cause, and to charge that its judgment was inspired by the malice of the judge. The judge of every court, until otherwise determined in the mode prescribed by the law of the land, must be presumed to be incapable of intentional wrong or injustice;

and he must be treated with courtesy and deference by litigants and their counsel. This is essential for the peaceful and orderly administration of justice. We must therefore condemn the conduct of the appellant for the language applied in his brief to the judge of the lower court, and place upon it the seal of reprobation. For similar language applied by counsel in his brief to a judge of the district court, as shown in the case of *Smith v. State*, 5 Tex. 578, proceedings for contempt were instituted both in the district and supreme courts, and in the district court the offending counsel was fined, and his license revoked. For the present, however, we refrain from ordering an attachment for the appellant; but in justice to him who tried the case in the court below we are constrained to say that not one of his conclusions of fact is without some evidence at least to support it; and while it is true that under the pleadings there was no issue of fraud in the case, yet evidence of fraud was admitted, without objection by the appellants, which fully sustained the conclusion of the court that the deed from appellant Thomas J. Russell to his wife was made with the intent to hinder and delay his creditors. The motion is overruled, and a new hearing refused.

PARKER et al. v. ADAMS et al.

(Court of Civil Appeals of Texas. Feb. 15, 1893.)

NEW TRIAL — GRANTING MOTION AS TO SOME DEFENDANTS — EFFECT.

In an action to recover land, judgment was rendered on a verdict in favor of plaintiffs as to part of defendants, and against plaintiffs as to the other defendants. A motion by plaintiffs for a new trial was granted as to part of such successful defendants, and denied as to the others. *Held*, that the judgment on such motion had the effect of granting a new trial as to all the defendants, and left the cause as if there had been no trial.

Error from district court, Dallas county; R. E. Burke, Judge.

Action by John Parker and others against W. A. Adams and others to recover land, in which the appeal was dismissed without any written opinion, because no final judgment had been entered in the trial court. Plaintiffs in error move for rehearing. Motion overruled.

Thos. B. Greenwood and Kearby & McCoy, for plaintiffs in error. T. F. Holloway, for defendants in error.

PER CURIAM. This appeal was heretofore dismissed because the record disclosed that no final judgment had been entered in the court below. A tract of land was sued for, and upon a verdict in favor of plaintiffs as to a portion of the defendants and against plaintiffs as to the rest of the defendants, judgment was rendered in accordance therewith. The motion for a new trial filed by

plaintiffs was overruled as to a portion of the defendants, who recovered a judgment against plaintiffs, and sustained as to the rest of such defendants. Our conclusion is that this had the effect of granting a new trial as to all the defendants, and hence that the cause stands on the docket as if there had been no trial. *Wootters v. Kauffman*, 67 Tex. 488, 3 S. W. Rep. 465. The motion for rehearing will therefore be overruled.

LE DOUX et al. v. JOHNSON et al.¹

(Court of Civil Appeals of Texas. Oct. 18, 1893.)

VENDOR AND PURCHASER — LEASEHOLD ESTATE — POSSESSION BY TENANT — NOTICE OF PURCHASER'S RIGHTS — ATTACHMENT LIEN — FRAUDULENT CONVEYANCE — INSTRUCTION.

1. Where an officer levies on and takes possession of goods belonging to a tenant, in a leased building, but does not levy on the building, and the tenant, while the officer is in possession, conveys his leasehold interest, by unrecorded deed, to a third person, who then leases the building to such officer, subsequent attaching creditors and purchasers of the leasehold are affected with notice of the character of the officer's possession and the rights of his landlord.

2. A leasehold estate is not personal property, but a special estate in land, and an attachment lien obtained in the county court is not lost by failure to have it foreclosed in the judgment therein, since Sayles' Civil St. art. 180a. dispenses with foreclosure of attachment liens on land in such courts, making the mere recital of the issuance of attachment and levy sufficient to preserve the lien.

3. Where the court properly charges that if the grantors of a leasehold interest were in failing circumstances, and made the transfer with intent to defraud their creditors, and their intent was known, or could have been known, to the grantees, the transfer is void, it is misleading to add that "on this question you should find" against the grantees, "although said transfer was made for good and valuable consideration."

Appeal from district court, McLennan county; A. C. Prendergast, Special Judge.

Action of trespass to try title by A. J. Johnson & Co. against E. P. Le Doux, Bert S. Castles, and Clark, Dyer & Bollinger, to recover certain real property, and the rent thereof, on the ground that plaintiffs have a leasehold interest therein. From a judgment for plaintiffs for one-half the leasehold estate and one-half the rents both parties appeal. Reversed on defendants' appeal, and remanded.

The other facts fully appear in the following statement by COLLARD, J.:

This is an action in form of trespass to try title, brought on June 15, 1889, by the appellees, A. J. Johnson & Co., against E. P. Le Doux, Bert S. Castles, and Clark, Dyer & Bollinger, the appellants, for the recovery of 115 feet of land off the E. ½ of lot 2, block 5, in the city of Waco, with the two-story brick house thereon, and for rents; claiming a leasehold estate in the property from the

¹ Rehearing pending.

7th day of May, 1889, to the 1st day of October, 1891. The petition alleges that Le Doux entered and dispossessed plaintiffs, claiming through Clark, Dyer & Bolinger, who set up to the leasehold a claim thereto which is fraudulent and void as against creditors. Defendants answered by plea of not guilty. On June 13, 1890, upon verdict, judgment was rendered for plaintiffs for one-half the leasehold estate and one-half the rents. Both parties appealed and assign errors. Defendants alone filed transcript, and are styled "appellees." Both parties claim from a common source,—the estate of one Cooper, the administratrix having leased the premises to Moser & Son, merchants, from a time anterior to the 4th day of October, 1888, to the 1st of October, 1891, the rents of which are admitted to be \$115 per month, paid to and received by Clark, Dyer & Bolinger, the other defendants being their tenants. Moser & Son were merchants in the city of Waco, Tex.; the senior residing in Brooklyn, N. Y., and the son being the head of a family residing in Waco. They were indebted to various persons, and on the 4th day of October, 1888, some of their creditors attached and distrained their stock of goods on the premises in controversy, the sheriff taking the goods into his possession. The levies by attachments and for rent are as follows: Lilly, Brackett & Co., for \$2,416.16; R. H. Baker, for \$2,299; Sanger Bros., for \$169.70; Sanger Bros., for \$96.63; J. P. Massey, for \$115; L. P. Peck, for \$296.67; Waco State Bank, for \$6,990.88; Annie C. Cooper, administratrix, for rent, \$4,870. Mrs. Cooper distrained for rent, and was represented by Clark, Dyer & Bolinger as her attorneys, who, upon voluntary appearance by Moser & Son, and by their consent, obtained judgment for her on November 30, 1888. They also represented the Waco State Bank and L. P. Peck, and prepared the papers in their attachment suits. The bank held collateral for about \$4,000, in part securing their claim. Lilly, Brackett & Co. and R. H. Baker levied the first attachments, through their attorneys, Robertson & Kincheloe. These first attachments, it seems, precipitated the others, as well as the proceedings for rent. Moser & Son were indebted to other persons, who subsequently attached the goods, as follows: Maroy Bros., attached October 6, 1888, for \$366; Johnson & Co., attached October 6, 1888, for \$754; Stribly & Co., attached October 9, 1888, for \$780; E. Taylor, attached October 11, 1888, for \$243; Charles Howard, attached October 18, 1888, for \$168; John Meler, attached October 18, 1888, for \$621.50. There were other debts outstanding, amounting to near \$6,000. On the 4th of October, after the levies of that date upon the goods, Moser & Son, by written transfer, conveyed to Clark, Dyer & Bolinger the unexpired term of the lease on the house and lot, which at that time had not been levied upon by creditors. Afterwards,

on the 6th day of the same month, plaintiffs, suing in the county court on their debt of \$754, attached the goods subject to previous levies, and also levied on the unexpired lease interest of Moser & Son in the house and lot,—the only levy made thereon,—then in possession of W. T. Harris, sheriff, he having rented the house from Clark, Dyer & Bolinger at \$115 per month, to store the goods attached therein until sold or disposed of. Afterwards plaintiffs obtained judgment in the county court on their claim, reciting the issuance and levy of their attachment on the goods, house, and lot, the leasehold estate, under which execution issued and was levied on the leasehold. Plaintiffs purchased the same at sale by the sheriff for \$250, which was credited on their execution, except \$16.25 in cash paid by their attorney, whereupon the sheriff made deed to them pursuant to the sale on May 9, 1889.

The contest between the parties, as now presented, grows out of the foregoing sale of the leasehold to Clark, Dyer & Bolinger and the levy and sale to plaintiffs. Plaintiffs insist that the transfer to Clark, Dyer & Bolinger was fraudulent as to creditors of Moser & Son, but, if valid and not fraudulent, it could not prevail over the attachment lien which was secured by their levy without notice, actual or constructive, of such transfer; it not being recorded until the 8th day of October, 1888, two days after plaintiffs' levy. The nature of the facts upon the issues involved will appear by reference to the testimony of John L. Dyer, of the firm of Clark, Dyer & Bolinger. He testified: "I am a member of the law firm of Clark, Dyer & Bolinger, defendants in this cause. Some few days prior to the time that Moser & Son were attached, W. H. Moser [the son] came to me, and stated that Messrs. Robertson & Kincheloe, attorneys of Waco, had in their hands claims against Moser & Son in favor of Lilly, Brackett & Co. and R. H. Baker, and he heard that they were threatening to run an attachment on their stock of goods. He requested [me] to go and see them in reference to the matter, as there was but a small part of their claim due, and that he had about \$25,000 or \$26,000 worth of goods on hand, besides two or three thousand dollars in the way of outstanding open accounts and notes, etc., and requested me to see these attorneys, and so inform them, and to apprise them that there was no danger. I did see Gen. Robertson, of said law firm, and told him what Mr. Moser had requested me to do, and informed him that he certainly could be in no danger, and that certainly no ground existed for an attachment in view of the large stock of goods they had and assets on hand. Gen. Robertson at the time said he would see about the matter, and also stated that he thought Moser was owing more than he represented to me that he did owe. Gen. Robertson did not undertake to state that he had information as to how

much they did owe, and I suppose at that time did not in fact know. * * * I returned, and saw Moser, and told him that I did not think any resort would be made to attachment suits against his stock, and I regarded the matter as then settled, so far as any apparent danger existed as to attachment suits. Three or four days afterwards, on the 4th of October, 1888, I learned that Lilly, Brackett & Co. and R. H. Baker, through their counsel, Messrs. Robertson & Kincheloe, had run attachments against the stock of goods belonging to Moser & Son. Shortly after their attachments were run, the Waco State Bank, to whom they were also indebted, came to me, and stated that they wanted to run an attachment for their claim, which amounted to about \$6,300, besides attorney's fees, making about \$6,900. I prepared the attachment papers for the bank. W. W. Seley was cashier, and made affidavit for attachment, and procured the issuance of one against said stock of Moser & Son, which was levied on October 4, 1888. My firm also prepared an attachment for L. P. Peck against Moser & Son for \$296.67, which was also levied on the stock" on the same day, the affidavit being made by Peck. "On the same day, October 4, 1888, our firm being agents for Mrs. Cooper, the owner of the building, and there being two months' rent due, amounting to \$230, we sued out for her a distress warrant against the stock of goods of Moser & Son for rents due and to become due, amounting to \$4,370. The affidavit for distress warrant was made by myself as agent for Mrs. Cooper, and her distress warrant was levied upon said stock of goods on October 4, 1888." After this, "W. H. Moser, one of said firm, came to my office, and claimed that the attachment of Lilly, Brackett & Co. and R. H. Baker, on which his whole stock of goods had been seized, was sued out illegally and wrongfully, and he desired to retain my firm to bring suit for damages against said parties first attaching. I informed him that I had sued out attachments for the Waco State Bank and L. P. Peck and the distress warrant for Mrs. Cooper, and could not represent him in any matters connected with them, and he expressed only a desire to bring suit against the first attachers who precipitated the other attachments, and still desired to employ our firm to bring suit against them, and to advise him generally, and to represent him in all matters that we were not then connected with. * * * I, for my firm, accepted said employment, and, in fixing a fee, told him that I would charge him \$2,500 for the services contemplated. * * * Of the \$2,500, I informed him that we would require a cash payment of \$1,000, and \$1,500 more, as a certain fee, when the litigation was ended. He then informed me that he had no money, but was willing to pay the fee, but could not raise the cash. I then stated to him that Mrs. Cooper, the owner of the leasehold,

had seized the goods in the house subject to the former attachments, which would pay her debt, and that would leave the leasehold interest outstanding in her and paid for, and that I would accept the unexpired leasehold belonging to Moser & Son in full payment and compensation for the services involved in our employment. To this he consented, and entered into the agreement in evidence, transferring the leasehold to my firm. [It is dated October 4, 1888.] I asked him how much he was indebted, and he stated, in the presence of T. C. Tibbs and W. W. Seley, who were present, that he only owed about \$17,000. The question was then asked him by Mr. Tibbs how it was he owed \$17,000 when he had stated to him a little while before that he only owed \$16,000. Moser then stated that since then he had had reference to his books, and had ascertained more definitely the full extent of his indebtedness. I then asked him if he was sure that was the full amount and extent of his indebtedness, and he stated that it was, and that the attachments then run involved the principal indebtedness. Moser at the time was also asked by myself what was the amount, as he estimated it, of the stock of goods belonging to Moser & Son, and he stated, 'About \$26,000.' He was asked what the amount of open accounts and notes was, and he said, 'Something over \$3,000.' I being familiar with the stock of goods myself, in consequence of my connection with it as agent for Mrs. Cooper for the building in which the goods were situated, and also having represented Moser in a settlement between him and his former partner, R. H. Baker, a few months prior to that time, and believing the goods worth more by eight or nine thousand dollars than the indebtedness, took the transfer of the leasehold as a settlement of our fee agreed upon between us at the time. On the afternoon of the next day after this assignment was made to my firm, it having been signed by W. H. Moser & Son and also by W. H. Moser, Martin Moser, the other member of the firm, came to Waco from Brooklyn, N. Y., where he lived, and our employment was discussed with him, and he ratified the same, and then also signed the transfer of the leasehold. After Moser & Son had made the transfer of the leasehold to my firm, early the next morning thereafter, to wit, the 5th day of October, 1888, I went down to the storehouse, and found W. T. Harris, sheriff, in possession of the goods, under the several writs of attachment and distress warrant, and informed him that Moser & Son had transferred the leasehold to Clark, Dyer & Bolinger, and that he must either move the goods out immediately upon which he had levied, or rent the house from said firm. He [Harris] stated that he would have to rent a house somewhere to keep the goods in until sold, and preferred renting from my firm rather than to move, and asked me what the rent would be. I told him \$115-

per month. He agreed to rent the house, and did rent it from us at the rate of \$115 per month, and agreed to pay my firm said sum as rent, and did pay us for the month of October, 1888, and for the time he occupied said storehouse with said goods, the sum of \$115 per month. After I made the rent arrangement with W. T. Harris, sheriff, he agreed to hold it as tenant for Clark, Dyer & Bolinger, and did thereafter occupy and hold it constantly until after the sale of the goods, or until about the early part of November, 1888, as our tenant." The witness also states that he was familiar with the stock of goods, and had particular occasion to examine the same pretty thoroughly a few months before, at the time of the dissolution of Baker & Moser, and made it a point to keep informed in reference to the stock, and says that at the date of the seizure the stock on hand was larger than before, and of the best quality, being a new stock, and, from his knowledge of it, states that on the 4th of October, 1888, it was worth at least \$25,000. When the stock was sold under order of the court, a few months after it was seized, it sold for \$17,856. The witness further testified: "After my firm was employed to bring the suit for damages against Lilly, Brackett & Co. and R. H. Baker, we entered into an investigation of the matter, involving evidence and essential and necessary detail to bring such suit, it being our purpose and intention then to intervene in said suits in the district court. After we had gathered the necessary data, and were preparing for such intervention, and during the progress thereof, owing to charges made by R. H. Baker of an intention to prosecute W. H. Moser on some criminal matter, Moser & Son directed my firm for the present to suspend any further preparation and prosecution of their suits against Lilly, Brackett & Co. and R. H. Baker, they being advised that they could prosecute their claims for damages in independent suits, as well as by intervention. * * * They have not yet notified us not to prosecute their claims, and the time is not yet up whereby their rights will be barred by limitation, and my firm stands ready and willing at any time they may demand us to bring suit, and to prosecute the same according to our original employment. Our original employment contemplated also advice and services to be rendered to them in all other matters in which we were not directly interested, and pursuant to that we have rendered them services in the way of advice, and have given them representation in cases in court in several instances, and under this employment my firm has acted and advised them as their retained counsel. * * * At the time the transfer was taken, I had no knowledge of any indebtedness of Moser & Son, save and except that represented by the attachments and distress warrant sued out on the 4th day of October, prior to taking said transfer, and save as stated by Mo-

ser,—that it did not exceed the sum of \$17,000,—and I never was informed by any person of any indebtedness of a specific character exceeding the amount stated by W. H. Moser." Mrs. Cooper collected her entire rent charge by the levy on the goods. The proceeds of the sale of the goods were exhausted in payment of the debts for which attachments and distress warrant issued on the 4th of October, there being nothing left to pay on plaintiffs' debt or others of subsequent attaching creditors. There is more important testimony in the case, but what has been stated will be sufficient to explain the issues to be disposed of on this appeal.

Clark, Dyer & Bolinger and Rector, Thompson & Rector, for plaintiffs. Robertson & Davis, for defendants.

COLLARD, J., (after stating the facts.) Under the charge of the court below, the jury were authorized to find for plaintiffs if they believed from the evidence that at the time of the levy of their attachment they had no notice of the transfer of the leasehold estate to Clark, Dyer & Bolinger, or knowledge of facts that would put them or their attorney Robertson upon inquiry as to the transfer. In such case, under the charge, the jury could find for plaintiffs for one-half of the rents and leasehold, without regard to questions of fraud, upon the ground that the transfer had not been recorded as required under our statutes of registration. *Grace v. Wade*, 45 Tex. 527; *Wallace v. Campbell*, 54 Tex. 87; *Brown v. Chancellor*, 61 Tex. 444; *Simpson v. Chapman*, 45 Tex. 564; *Catlin v. Bennett*, 47 Tex. 170; *Cavanaugh v. Peterson*, Id. 207; *Linn v. Le Compte*, Id. 442; *Wright v. Lassiter*, 71 Tex. 644, 10 S. W. Rep. 295; *Lewis v. Johnson*, 68 Tex. 448, 4 S. W. Rep. 644; *Rev. St. arts. 4329-4335*. In this connection the court charged the jury that if they should find that, at the time of plaintiffs' levy of attachment, Harris, the sheriff, was in possession of the premises as tenant of Clark, Dyer & Bolinger, in such way as to put Robertson or plaintiffs upon inquiry, which, if followed up, would have led to a knowledge of the transfer, then their verdict upon that issue should be for defendants. "But," the charge proceeds, "if you believe from the evidence that, before such renting to said Harris, he had been in possession of said property by virtue of writs of attachment against Moser & Son, and said Robertson knew this, and that upon such renting there was no such change in said Harris' possession as to indicate to a reasonably prudent man that he was holding possession thereof different from such possession originally taken by him, then you will find for plaintiffs on this issue, although you may believe said Harris had rented and was in possession as Clark, Dyer & Bolinger's tenant." We are of opinion that, under the facts the charge in quotations was erroneous, as

insisted by appellants, and that the general rule that possession by the tenant, if it existed, would be legal notice of the claim of the landlord, would be the law applicable to the facts. Harris had not levied on the house and lot, and he had been in possession as the tenant of Clark, Dyer & Bolinger before the levy of plaintiffs. *Watkins v. Edwards*, 23 Tex. 449; *Hawley v. Bullock*, 29 Tex. 217; *Mainwarring v. Templeman*, 51 Tex. 212. In the last case above cited, the lower court held that a mere attornment of the tenant of the original owner to his vendee, without change in the possession or occupancy, would be constructive notice to creditors of the unrecorded conveyance. On appeal, the supreme court sustained the lower court, upon the ground that under our statute constructive notice is sufficient, while in some states actual notice is required to defeat the want of registration. In *Mullins v. Wimberly*, 50 Tex. 466, it is said: "If it is admitted to be a general rule that the possession of a tenant affects the purchaser with notice of his title, we think the exceptions to it, on sound principles, must be limited to cases where the tenant is knowingly in default in putting this title upon record, or has voluntarily given, to some extent, assistance in misleading the purchaser." In *Eylar v. Eylar*, 60 Tex. 318, the question was discussed more fully than in other cases in this state; and it was there held that a purchaser from a vendee whose deed was duly recorded, the vendor remaining in possession, would not be bound to inquire as to a secret trust or right by which the vendor remained in possession. In such case the purchaser may rely upon the record of the deed from the person in possession,—“the highest source which the law of the land declares shall exist for the determination of title, and the source which the parties have created as the highest evidence of their respective rights.” The case before us is not in its facts at all similar to the one last cited, and the same rule cannot be applied to it. Under the circumstances of Harris' possession, plaintiffs would not be excused from inquiry as to the character of his possession, and for whom it was held. They would be held to know the character of his possession. In so holding, we believe we are following and upholding the rule as laid down by former decisions of our supreme court upon the subject, whatever may be the rule elsewhere. The exception to the rule claimed in this case should not be allowed.

The appellants contend that the court erred in limiting notice to knowledge of facts by Gen. Robertson, attorney for plaintiffs, the evidence showing that he had a partner, Kincheloe. In answer to this, it is sufficient to say that the evidence does not show that Kincheloe knew anything about the transactions, or had any personal connection with them.

The appellants contend that the leasehold

estate levied on by plaintiffs was personal property, and that they lost the attachment lien by failure to have it foreclosed in their judgment rendered in the county court. We cannot agree to this proposition. The question involved is that of title to land,—a special estate in land, cognizable only by the district court. The county court might have foreclosed the lien of the attachment issued out of that court, though it was a lien upon land, (*Hillebrand v. McMahan*, 59 Tex. 450); but the lien was not lost by failure to do so, as the statute in such cases, in the county and justices' courts, dispenses with foreclosure, making the mere recital of the issuance of attachment and levy sufficient to preserve the lien, the sale under execution relating back and vesting title in the purchaser of all title held by defendant in execution at the time of the levy of the writ of attachment, (*Sayles' Civil St. art. 180a.*) Plaintiffs' judgment in the county court complied with the statute, so as to preserve the attachment lien.

It was not error to charge the jury that “if Moser & Son were in falling circumstances, and made the transfer of the leasehold estate to Clark, Dyer & Bolinger intending at the time to hinder, delay, and defraud their creditors, and their intent was known, or could have been known, by Clark, Dyer & Bolinger, or either of them, then said transfer would be void.” The evidence raised the question of fraud in the transfer, and it should have been submitted to the jury. But it was misleading to add the expression: “And on this question you should find for plaintiffs, although said transfer was made for a good and valuable consideration.” It was evidently in the mind of the court that, if such facts as stated existed, the verdict should be for plaintiffs, though the transfer was made for a good and valuable consideration. The charge was at least misleading. The jury may not have construed it as it was intended they should by the court.

The court also instructed the jury: “It is not necessary that Clark, Dyer & Bolinger should have had actual notice of Moser & Son's intent to hinder, delay, or defraud their creditors. [If so,] a knowledge by them, or either of them, of facts sufficient to excite the suspicions of a prudent man, to put him on inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual notice, in contemplation of law. If Clark, Dyer & Bolinger, or either of them, had notice of such facts and circumstances, they are considered either to know the fraudulent intent of Moser & Son, or to purposely omit to make those inquiries which an ordinarily cautious and prudent man in the same situation would make, and in either case they are chargeable with notice.” Ap-

pellants complain of the latter part of the charge,—“or to purposely omit to make those inquiries,” etc.,—upon the ground that “it is not notice to purposely omit to make inquiries, unless the facts are such as to set about an inquiry on the part of the person to be charged with such notice.” The court’s charge is not subject to the criticisms made. It embraces the very conditions appellants contend for as essential to constructive notice. It was not error, as we have before seen, for the court to instruct the jury that the attachment lien of plaintiffs was foreclosed in their judgment in the county court. The recital in the judgment of the issuance of the attachment and its levy upon the property is by the statute made equivalent to foreclosure. It is “sufficient to preserve such lien.” *Sayles’ Civil St. art. 180a.* Appellants’ assignments of error upon this subject cannot be sustained.

The judgment of the court below must be reversed, because of the errors herein pointed out, and it is therefore not necessary to pass upon the appellees’ assignments of error upon the refusal of the court below to render judgment for them for all the property sued for and all the rents, non obstante veredicto. The judgment of the court below is reversed, and the cause remanded.

RICKER v. SCHADT.

(Court of Civil Appeals of Texas. Oct. 26, 1893.)

MECHANIC’S LIEN — ABANDONMENT OF CONTRACT BEFORE COMPLETION—NOTICE—HOMESTEAD.

1. In an action to enforce a mechanic’s lien for material furnished the contractor, and to fix a personal liability on the owner, the petition showed that the contractor abandoned his contract, and that at that time the owner had paid him more than was due him on the contract, so that, when plaintiff gave the owner notice of his claim of lien, the owner owed the contractor nothing. *Held*, that the action could not be maintained.

2. The fact that the last payment to the contractor was made before it was due was immaterial, for, until plaintiff had given notice under the statute, the parties to the contract had the right to make any settlement they chose.

3. An allegation of the petition that the contract was made payable in installments, to protect those who should furnish material, was not sufficient to show a right in plaintiff against the owner, for no contractual obligation was thereby assumed by the owner towards plaintiff.

4. An allegation that, subsequent to the contractor’s abandonment of the work, an agreement was made between plaintiff and other material men, on one part, and defendant owner, on the other, for the completion of the house, and that defendant had broken such agreement, was of no avail, for any cause of action thereon accrued to plaintiff jointly with the others.

5. Plaintiff alleged that after the abandonment of the work defendant owner used in the building certain material furnished by plaintiff to the contractor, and left unused by him. There was no allegation that at the

time notice had been given defendant of plaintiff’s claim, or that at any subsequent time defendant was indebted to the contractor, or that the payment to the contractor by defendant was not sufficient to cover all work done and material furnished by the contractor, or that the lumber appropriated still belonged to plaintiff. *Held*, that plaintiff could not recover, for, aside from the provisions of the mechanic’s lien law, defendant, by use of the lumber belonging to the contractor, incurred no liability to plaintiff.

6. Evidence to show that the value of the work done and the material furnished by the contractor was greater than the amount paid was improperly admitted, there being no allegation of either fact in the pleadings.

7. No lien could be claimed on lots constituting defendant’s homestead, where the contract was not signed by his wife.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by William Schadt against N. H. Ricker to recover personal judgment for the value of certain lumber, and to foreclose a lien. Judgment was entered in favor of plaintiff, and defendant appeals. Reversed.

The other facts fully appear in the following statement by WILLIAMS, J.:

Appellee sued appellant, Ricker, and one Heuss to recover a personal judgment against them for \$816.15, the value of lumber furnished to be used in the construction of a house on certain lots in Galveston belonging to Ricker, and to foreclose a lien for the value of the materials in the house into which they were put, and on the lots upon which it was situated. The petition contained allegations of many facts upon which it was sought to fix upon Ricker a personal liability, and upon his house and lots a lien for the debts sued for. The first paragraph charged sale to Heuss and Ricker jointly. For the articles thus sold, and the prices charged, reference was made to an account or bill of particulars, attached as an exhibit. This was a statement showing sales to Heuss alone, and showing that it had been made out, sworn to, and filed with the county clerk to be recorded, in order to fix a lien upon the property. The affidavit to the account stated that the lumber had been furnished to Heuss, as contractor, for the building of Ricker’s house, to be used in the building, and that it was so used with Ricker’s knowledge and consent. The second paragraph or count charges a verbal contract with Heuss alone, under which the lumber was furnished to the latter to be used in the building, and that it was so used with Ricker’s knowledge and consent, and at his special instance and request, and that Heuss had contracted with Ricker to build the house. Allegations were also made as to the filing of the sworn account against Heuss and the giving of notice to Ricker, as required by law, 10 days before such filing. The indorsement on the account showed that it was filed with the county clerk June 16, 1888. The third count alleged that the material was sold to Heuss at the special instance and request of Ricker,

and repeated substantially the other allegations of the second count. In addition, it stated a contract between Ricker and Heuss, by which Ricker bound himself to pay for the material and construction of the building about \$8,500 in installments, to be paid only upon the certificate of an architect as the work progressed; that the purpose of paying in installments was to furnish and pay for materials as the same were delivered and used, and as a protection to Ricker against liens for the same; that by means of such contract Ricker induced plaintiff to furnish the lumber; that, contrary to his contract, on or about May 1, 1888, Ricker paid to Heuss \$600, without a certificate of the architect, and before work was done that authorized such payment; that upon such payment Heuss abandoned the country, and Ricker took possession of the unfinished building, together with lumber of the value of \$600, furnished to Heuss by plaintiff, and not used by him; that thereupon plaintiff, joined by other material men and workmen, who had claims against the improvement and premises, proposed to Ricker to complete the building in compliance with the contract of the latter with Heuss, for the balance of the price therein agreed upon, still unpaid, viz. about \$6,500, and that Ricker accepted and agreed to such proposition; that plaintiff was at all times ready and willing to carry out such contract, but that Ricker, in violation thereof, employed another person to perform the work, and prevented plaintiff from doing so, to his damage \$2,000. The fourth count charges that, on account of the matters alleged, defendants were liable for the debt of \$816.15, and that the property was subject to a lien therefor. Prayer for judgment for this debt and foreclosure of the lien. A number of exceptions raising the questions discussed were urged to the several counts. All of them were overruled, and the cause was tried by a jury, and a verdict was returned for plaintiff for \$231.61 against both defendants, and judgment was rendered for that sum and foreclosing the lien upon the property. The court in its charge submitted only one question to the jury, as follows: "If you believe from the evidence that any of the lumber specified in the account attached to plaintiff's petition was left by defendant Heuss lying loose about the house or on the lots described in the petition, and that defendant Ricker has not paid Heuss for the lumber so lying loose in and about the building and premises, and that defendant Ricker refused to let Schadt take away such loose lumber, and that Ricker, through his subsequent contractor, had said loose lumber worked up in the construction of the building, then both Heuss and Ricker would be liable to pay Schadt the value of said loose lumber so wrought up in the building; and, if you so believe from the evidence, then the verdict should be for the plaintiff, against

Heuss and Ricker, for the value of said loose lumber, so worked up by Ricker into the building,—I mean the loose lumber actually worked into the building by Ricker, and not the lumber that might have been there, and not worked up in the building." Ricker alone appeals.

Hume & Kleberg, for appellant. Howard Finley, for appellee.

WILLIAMS, J., (after stating the facts.) As the case turned upon one question in the trial below, this appeal might be disposed of by a determination of that alone; but counsel for appellant insists upon a decision of the questions raised by the exceptions, and, in view of future proceedings, it is proper that those points should be settled. Those parts of the petition which charge a sale to Ricker and Heuss jointly are obviously sufficient to show a liability on the part of both, unless they are so contradicted by the exhibit attached, and by the other allegations in the petition, as to destroy their force. If the whole petition be taken together, it becomes apparent that the material was sold to Heuss to be by him used in the building, and that Ricker is to be affected with personal liability, or with a lien on his property, either by a compliance on plaintiff's part with the provisions of the statute regulating the lien asserted, or by Ricker's own subsequent acts. The petition shows that Heuss abandoned the contract about May 1, 1888, and that Ricker had then paid him more than he was entitled to upon the contract, from which the inference is irresistible that, at the subsequent date at which plaintiff alleges he gave Ricker notice of his claim of lien, the latter owed Heuss nothing. Persons who furnish material to the original contractor can only reach the owner or his property through an indebtedness on his part to such original contractor. The lien given to material men exists only where the owner owes the original contractor, or where he has wrongfully paid such contractor after receiving the statutory notice of the claim due for material. Consequently, in order to make out a cause of action in such a case, the petition should show that at the time such notice was given the owner still owed the original contractor, or that he subsequently became indebted to him. This petition does neither, but, by the facts alleged, negatives any supposition that at the time the notice was given, or at any subsequent time, Ricker was indebted to Heuss upon the contract. That the payment of \$600 was made before it was due under the contract is no answer. Until plaintiff had taken the proper proceedings to fix his lien under the statute, the parties to the contract had the right to make such settlements as they chose. So long as notice of claims for material is not given to him, the owner of the property is not bound to take

any notice of them. He cannot know that the material men intend to rely upon his property as their security until they have taken the proper step to establish their right to do so. *Fullenwider v. Longmoor*, 73 Tex. 484, 11 S. W. Rep. 500; *Dudley v. Jones*, 77 Tex. 70, 14 S. W. Rep. 335.

The allegations that the contract was made payable in installments to protect those who should furnish material charged no facts sufficient to show a right growing out of them to plaintiff. No contractual obligation is thereby charged to have been assumed by Ricker to plaintiff. The contract may have increased the opportunities of furnishers of material to secure their debts by compliance with the law; but, if they did not avail themselves of their privilege, the defendant is not responsible. The part of the petition alleging the agreement, subsequent to Heuss' abandonment of the work, between plaintiff and others, on one part, and Ricker, on the other, and the breach thereof by Ricker, was insufficient. If a cause of action arose from its breach, it accrued to the plaintiff jointly with others, and he could not alone maintain an action upon it. No judgment is prayed for the damages alleged to have resulted from breach of the agreement. The facts stated seem to have been put in as having some effect upon plaintiff's claim for the debt, and not as constituting a distinct cause of action. Such facts have no bearing on the cause as stated, and the exceptions should have been sustained to the part of the petition containing them.

All that remains to consider of the petition are the allegations in regard to the conversion by defendant, and use in the building, of material furnished by plaintiff to Heuss, and left unused by him. As we have seen, there is no allegation in the petition that, at the time notice is alleged to have been given to Ricker of plaintiff's claim, or at any subsequent time, Ricker was indebted to Heuss; there is no allegation that the payment to Heuss by Ricker was not sufficient to cover all work done and material furnished by Heuss; there is not even an allegation that the lumber appropriated by Ricker still belonged to plaintiff. The plain inference is that such lumber had been sold and delivered by plaintiff to Heuss. Such being the case, the title passed. Plaintiff then was compelled either to look to Heuss, and to pursue his ordinary remedies against him, or to establish a lien against the building into which the lumber was put, and in that way reach Ricker. By a conversion or use of property, the title to which was in Heuss, Ricker would not, under the common law, incur any liability to plaintiff for such property. Admitting that Ricker did not have title to the property left by Heuss, it is at least equally plain that plaintiff had not. Aside from the provisions of the statutes in favor of mechanics, material men, etc., Rick-

er, by use of the lumber, incurred no liability to plaintiff. Under those provisions, there must have been an indebtedness from Ricker to Heuss at the time the notice was given, or subsequently, in order to reach Ricker either with personal liability, if that could be done at all, or by a lien on his property. There are authorities to the effect that where the original contractor breaks and abandons his contract, one who has furnished material to him cannot have a lien for material furnished. *Malbon v. Birney*, 11 Wis. 112; *Blythe v. Poultney*, 31 Cal. 234. These authorities proceed upon the ground that, inasmuch as the contractor who abandons the contract before completion could not recover on a quantum meruit if he should sue, the contract being entire, the subcontractor, having no greater rights under the contract than the original contractor, could not do so. Without going so far, it is enough to say that no facts appear in this petition which would entitle either Heuss or plaintiff to recover upon the contract between the former and Ricker. Of course, if the allegations of a joint purchase by Heuss and Ricker, or of sales to Heuss at Ricker's instance and request, stood alone, a cause of action would appear; but, confused and contradicted as these averments are by others, they cannot be held sufficient. The exceptions urged to the petition were all good. There was no evidence that lumber was sold to Heuss and Ricker jointly, or was sold at all upon Ricker's request or credit. The contrary was shown by uncontradicted testimony. There was no sufficient proof of a contract between the material men and Ricker that the former might carry out the contract which Heuss had abandoned. The evidence offered to establish such an agreement should have been excluded; and, having been admitted, the charge requested by defendants, intended to render it harmless, should have been given. The court admitted testimony to show the value of the unused material and of the work which Heuss had done, and to show the amount which Ricker had paid Heuss. The purpose of such evidence, it is to be presumed, was to establish the fact that the value of the work done and the material furnished by Heuss was greater than the amount paid, and to thus give rise to the conclusion that Ricker owed Heuss, or that Ricker had not paid Heuss for the unused material. There was no allegation of either fact in the pleadings, and for this reason the evidence was not admissible. But, waiving this objection, would the fact that the work and material put into the house were at the time Heuss abandoned his undertaking worth more than Ricker had paid for them show an indebtedness, under the circumstances, from Ricker to Heuss?

The contract in evidence provided, in substance, that, in case of failure of Heuss to carry it out as agreed on, the owner should

have the right to take possession of the premises, and terminate the contract, and all claim of the contractor should cease; further, that the owner might provide workmen and materials to complete the contract, etc., and only such balance as should remain after completion should be paid to the contractor. It further provided that all materials delivered on the premises were to be considered the property of the proprietor, and were not to be removed without his consent. Under these provisions, it is plain that Heuss, having abandoned the work, had no rights against Ricker at that time. Ricker had to complete the building at a greater cost than that contracted for with Heuss, and did not owe him anything. The evidence was irrelevant, and should have been excluded. Authorities before cited; *Ferguson v. Burk*, 4 E. D. Smith, 760; *Lind v. Braender*, (Com. Pl. N. Y.) 7 N. Y. Supp. 664.

Another reason why no lien can be fixed upon appellant's property is that his contradicted evidence shows that the notice of plaintiff's claim was never given, as required by statute. Still another reason is that the lots constituted his homestead, and the contract was not signed by his wife, as required in such cases. *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. Rep. 1038. The judgment is reversed, and the cause remanded.

MILLS et al. v. BERLA et al. (No. 57.)
(Court of Civil Appeals of Texas. Nov. 8, 1893.)

PRINCIPAL AND AGENT—ESTOPPEL—EVIDENCE—INSTRUCTIONS.

1. If one places another in such a position as to reasonably lead others to believe that he is authorized to do certain acts, he will be bound thereby.

2. Neither express nor ostensible agency can be proved by declarations or acts of the alleged agent unless the alleged principal is connected with them.

3. On the question whether an agent had authority to make a contract which was renounced by his principal, it may be shown that he made similar contracts, before such renunciation, which were carried out by the principal, but not that he made similar contracts subsequent thereto.

4. The owner of a building does not become liable for improvements made under an unauthorized contract with his agent, because he afterwards uses them, if they are of such a character that they cannot be removed.

5. Where the issue is as to whether a person was agent for defendant for the purpose of making a contract which he assumed to make as agent, an instruction that if, in making the contract, he did so as agent for the purpose, defendant is liable, is erroneous; as calculated to withdraw the issue as to the existence of the agency.

Appeal from El Paso county court; J. E. Townsend, Judge.

Action by Berla & Co. against Anson Mills and others. From a judgment for plaintiffs, defendants appeal. Reversed.

T. L. Nugent and M. W. Stanton, for appellants. Leigh Clark, for appellees.

JAMES, C. J. Appellants, in 1889, were owners of the Grand Central Hotel in El Paso, and had caused plans and specifications to be made by George P. King, an architect, for certain improvements thereon. It is conceded that to the extent of such plans and specifications, and the contract made thereunder, George Paul King was their agent and representative. He engaged appellees to do certain plumbing work upon the premises not contracted for in the plans and specifications, during the absence of the owners; and when one of them (Anson G. Mills) returned, and found that King had directed this work to be done on their behalf, he stopped the same, denying that King had any authority to bind them in the premises, and repudiated the arrangement. At this time considerable work had been done by Berla & Co. Afterwards appellant Mills entered into an oral arrangement with Berla & Co. to complete the work they had begun for the price of \$90, and thereupon the latter completed the work, and presented a bill consisting of \$90, and also \$278.84 for the work previously done, and certain other items amounting to \$15.80, which bill was not paid. Appellants contended that they owed the \$90 only; that they had never agreed, and were not bound, to pay anything further,—the appellant Mills testifying that he thought the entire bill was included in the \$90, and that the \$90 was to cover the entire work and materials sued for by Berla & Co. Appellees contended that appellants were bound by the acts of King; that appellants, having accepted and retained the benefits of appellees' labor and material, were estopped to deny their liability; and that the \$90 was only for the completion of the work from the point at which it had been stopped. The plaintiffs, Berla & Co., sued for \$385.14, composed, as nearly as we can arrive at it from the record, of \$278.84, \$90, and three items in an exhibit to plaintiffs' amended original petition for \$1.73, \$6.25, and \$7.80. The verdict was for plaintiffs for the sum of \$385.14, with interest from January 1, 1890.

We do not consider that it would serve any beneficial purpose to discuss all of the 20 assignments of error presented in appellants' brief of 101 pages. After disposing of the exceptions taken to the rulings of the judge on the testimony, and giving our views on the material charges, it is probable that on another trial there will be no cause for the numerous assignments. The court erred in admitting the declaration of the architect King to establish his authority to make the contract with Berla & Co. Agency cannot be proved by the declaration of the alleged agent, unless the principal be in some way connected with the declarations; and of this there was no evidence. The acts of a party

are likewise inadmissible to prove his agency. If agency is established by competent testimony, then the acts and declarations of the agent made in the scope of his agency will be the acts of the principal. The first and second assignments are well taken. *Noel v. Denman*, 76 Tex. 306, 13 S. W. Rep. 318; *Coleman v. Colgate*, 69 Tex. 89, 6 S. W. Rep. 553. Although King may not have been appellants' agent as to the subject-matter of the contract with Berla, yet he was their agent for the principal improvements then being made on the hotel; and the circumstances were such that it was proper for the court to submit to the jury whether or not, in making the contract with Berla, he was acting within the apparent scope of his agency, for, if appellants placed him before the public in such position as to reasonably lead others into the belief that he was authorized to do the act for them, they would be bound, although the authority did not, in fact, exist. We believe the clauses Nos. 1 and 2 of the court's charge state correctly the law on this subject. Declarations of the agent would be as inadmissible to prove this ostensible agency as to prove an express agency. The doctrine is well expressed in *Mechem*, Ag. § 4. See, also, section 84. It would not be proper for us to detail the circumstances tending to show apparent agency in this case, or to comment on the evidence, and it will suffice to say that it was proper to leave the question to the jury; and the charge No. 1 asked by appellants should have been given, in connection with this question of implied authority. One of the circumstances by which agency was sought to be shown was that King made other transactions of a similar character, which were acted upon and carried out by the owners. This testimony was proper in proving agency by showing recognition of the agency by the principal, but it should have been confined to acts of that description occurring prior to the renunciation of the arrangement with Berla. The matter in question was the relation of King to the owners prior to that time, and not subsequently. *Friedlander v. Cornell*, 45 Tex. 585. Charge No. 8, given by the court, we think was objectionable in not being applicable to the facts. It does not appear that the work done by appellees upon the building was of such a character that it could be removed or separated from it. It would not follow that by using the building afterwards, and thereby unavoidably having the benefit of the work and material furnished, the owner would be subject to liability for the value thereof. The principle stated in this charge applies to a case where the owner may or may not accept the benefits, and if he, under such circumstances, avails himself of them, he becomes liable. The third clause of the court's charge was correct. It seemed that some time elapsed after Mills returned to El Paso before he disavowed the contract made by

King with Berla. Whether or not the disaffirmance was, under all the circumstances, made promptly, was a question for the jury. Charge No. 7 was clearly erroneous. The evidence showed without contradiction that King, as agent, made the contract with Berla & Co., and the issue was as to whether or not he was agent for that purpose. In this charge the jury were instructed that if King, in making the contract, did so as the agent of defendants for that purpose, (and that he had done so as agent was not disputed,) the defendants were liable. The charge was calculated to withdraw from the jury the question of the existence of the agency, express and implied, and to direct a verdict for the plaintiffs. There was evidence that would support a verdict for the sum of \$278.84 for work done at the time of disaffirmance, and also for \$90 done afterwards, but we find none sufficient to sustain it for anything more, except interest. It is further contended that there was no evidence to support the verdict against Crosby and wife, either for the \$90 or the \$278.84. The pleadings of defendants admit their liability for the \$90. It was in evidence that King was the agent of Crosby and wife and Mills touching the main contract, and Crosby was equally responsible with Mills for the consequences of any ostensible agency of King growing out of his real agency. Charges Nos. 4 and 5 were properly refused. Charges Nos. 2 and 6 were in their nature proper to be given to the jury. The antagonistic positions of the parties relative to what was the meaning and intention of the \$90 contract (as it existed in parol) rendered instructions of this character proper, if asked. As it follows, from what has been said, that the case will be reversed, we do not stop to examine the charge given, in order to see if the substance of these refused charges is included therein. For the errors pointed out, the judgment is reversed, and the cause remanded.

TERRY et al. v. FRENCH et al.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

PARTIES—MISJOINDER — PLEADING AND PROOF — VARIANCE — JUDGMENT — MISNOMER — SUNDAY CONTRACT—VALIDITY.

1. In an action by several plaintiffs on a contract for the payment of money, the petition stated that the contract was entered into between defendants and all the plaintiffs, and the court found that the contract declared on was proved as alleged. It also found that the contract with defendants was entered into by them and F., one of plaintiffs, and rendered judgment for plaintiffs over a plea by defendants of misjoinder of parties, on which plea it made no special finding. *Held*, that where the facts were such that the court could properly act on the theory that F. was acting for all of plaintiffs in entering into the contract, the findings were not inconsistent.

2. Where, in an action on a contract, the

petition states enough of the terms of the contract to identify it with the one in proof, and the court finds the conditions which impose liability, either as stated in the petition or evidence, there is no material variance, if any, because the proof shows terms and conditions in the contract additional to those pleaded.

3. Where a petition names as plaintiff, among others, "Jane" B., joined by her husband, J. B., a judgment in favor of "Jesse" B., joined by her husband, J. B., and the other plaintiffs named in the petition, is not erroneous.

4. A contract made on Sunday, whereby certain persons agree to cease the contest of a will, in consideration of a certain sum, is not void, since it is not made in the course of a business prohibited on that day by statute.

Appeal from district court, Milam county; John N. Henderson, Judge.

Action by Jake French and others against James Terry and A. D. Terry to enforce an oral contract for the payment of money. From a judgment for plaintiffs, defendants appeal. Affirmed.

The other facts fully appear in the following statement by FISHER, C. J.:

Appellees instituted this suit in Milam county against appellants, James and A. D. Terry, and alleged in their petition that appellants were the sons of M. Terry, deceased, and that after his death they made application for the probate of the will of M. Terry, who had died seized of an estate worth \$40,000, in which he had bequeathed to them his entire estate; and the plaintiffs, who were M. Terry's grandchildren and heirs, had filed a contest against the probate of said will, and, pending the contest, appellants had entered into a contract with appellees, in which they agreed and promised to pay them \$2,500 so soon as said will should be probated, in consideration, among other things, that appellees should withdraw their contest. Appellees did withdraw their contest, and the will was probated, and appellants took possession of the property and money of the estate, found to be of the value of \$47,000. This suit is to recover the said \$2,500 and interest. Appellants pleaded misjoinder of parties, in abatement, general demurrer, general denial, and, in avoidance of said supposed contract, that it was made on Sunday, and was contrary to public policy and the statutes, and void, and that the alleged contract was abandoned, and a new contract entered into, subsequently, in lieu of the one alleged in the petition, whereby appellees were to receive \$1,506, as a claim against the estate, which was then in process of fulfillment, and that this last was to be a final and complete settlement of all claims whatsoever against said estate by appellees. The case below was disposed of by the court without a jury, and judgment was rendered in favor of appellees for the amount sued for. There is no statement of facts in the record, and the case comes here upon the facts as found by the trial court, which we adopt as the findings of fact by this court. The findings of fact are as follows: "(1) As matter of

fact, that defendants, A. D. and James Terry, made a verbal contract, the same declared on by plaintiffs. At the time of the making of said contract, which was on the — day of May, 1889, there was then pending in the county probate court of Milam county an application by A. D. and James Terry to probate the will of their father, M. Terry, deceased. Said will made said parties, A. D. and James Terry, the legatees of his estate, valued at \$47,000. Said will, and the probate thereof, was contested by Jake French, plaintiff, on his behalf and others, children, his brothers and sisters, grandchildren of said M. Terry, and by others, children of said M. Terry by his first wife, the latter being half brothers and sisters of said A. D. and James Terry, and their descendants. Said French heirs claimed that, in a partition of the estate between M. Terry and his first wife, their mother did not receive \$500, to which she was justly entitled, and they claimed that said \$500 was one of the inducements to, and a part of the considerations for, the contract alleged to have been made between Jake French and A. D. and James Terry. (2) That said contract between Jake French and A. D. and James Terry was made on Sunday, the — day of May, 1889, and that, as a part of its terms, Jake French was to have nothing further to do in the contest of said will, was not to make a cost bond in said contest, and that he was to do anything he reasonably could to further a settlement of said contest, as to other contestees, and that on the probate of the will, and when the property of the estate of M. Terry should come into the hands of A. D. and James Terry, they were to pay him \$2,500. That same was not to be made a charge against the estate, but was to be paid by A. D. and James Terry individually. That the terms of said contract were to be kept secret between the parties. (3) That said Jake French, in pursuance of his part of said agreement, informed his counsel that he would not make the bond, and would take no further part in said contest of the will, and that his counsel at that time informed him they would settle the matter for the heirs of M. Terry; that they had a claim against said M. Terry's estate on account of a life interest which said M. Terry had received in money on account of his first wife's estate, which, with interest, amounted to \$1,506; and that if said A. D. and James Terry would agree to allow that claim without contest, after they had qualified as executors or administrators with will annexed of M. Terry's estate, the whole matter could be settled, and the contest would be withdrawn. That said Jake French, in pursuance of an arrangement with A. D. and James Terry, went back, and informed said A. D. and James Terry of the proposition of the attorneys representing contestants, and that A. D. and James Terry agreed to said proposition. Also, that, in that connection, said Jake

French asked them if it was understood that the agreement already entered into between him and said A. D. and James Terry, according to their understanding, still held good, to which they assented; that is, the agreement by which they were to pay him \$2,500. That Jake French carried out his part of said agreement, he not having anything further to do in opposition to the probate of the will. That said will was probated on the — day of June, 1889; the contestees all agreeing to same, and not making any opposition thereto. That afterwards the claim of \$1,506 was properly presented to A. D. and James Terry, administrators of the estate of M. Terry with the will annexed, and that same was allowed by the probate court. That said A. D. and James Terry qualified as administrators on estate of M. Terry on the — day of June, 1889, and at once took possession of the property of said estate. Value of property, about \$47,000; about \$5,000 to \$6,000 thereof being in money; the only debts against said estate being the approved claim of \$1,506."

E. L. Antony, for appellants. T. S. Henderson and Ford & Ford, for appellees.

FISHER, C. J., (after stating the facts.) The first assignment of error complains that the court "erred in overruling and finding against defendants' plea in abatement on account of misjoinder of parties." The court made no special finding upon the plea in abatement, but the general findings of fact and the judgment rendered in favor of all of the plaintiffs were, in effect, a finding and disposition of the question raised by the plea in abatement. The first finding by the court below is to the effect that the "defendants entered into the contract declared on by the plaintiffs." The contract stated in the petition is one entered into between the appellants and all of the appellees, wherein the appellants promised to pay the appellees the sum of \$2,500 upon the probate of the will of M. Terry, if they would withdraw their contest to its probate. The finding of the court is that the contract declared on is found to be proven as alleged; this, in effect, being a finding in favor of the plaintiffs upon the questions presented by the plea in abatement. We believe that the other finding of the court, to the effect that the contract with the appellants was entered into by them and Jake French, one of the appellees, while it may appear to be inconsistent with the finding that the contract was entered into with "all of the plaintiffs as alleged," may be rendered consistent with such finding upon the idea that Jake French was acting, not alone for himself, but for all of the plaintiffs, in making the contract. Looking to the allegations of the petition, and the judgment of the court, we think that the apparent conflict between the findings of

the court upon this branch of the case can be reconciled upon the theory that Jake French was acting for all of the plaintiffs in entering into the engagement with the appellants, and that the court below really viewed the matter in that light.

Appellants' fifth assignment of error complains that the judgment below is erroneous because there is a variance between the contract, as declared on, and the one proven, and found by the court. We think that the variance complained of is not such a one that will affect the judgment, if, in fact, it can be called a variance. The liability of the appellants to pay the sum agreed upon arose when the will was probated. This is the allegation of the petition. The court finds that the amount sued for was, by the contract, not to be made a charge against the estate, but was to be paid by the appellants individually, and that the amount was to be paid when the will was probated, and when the property came into the hands of the appellants. There is a finding to the effect that the property did come into their possession in June, 1889,—prior to the filing of this suit,—and a finding that the will was duly probated. The conditions that impose liability, as stated either by the averments of the petition or by the evidence, are found to exist by the court. If the liability to pay arose when the will was probated, then the court finds that it was probated, and if it arose when the will was probated, and when the estate came into the possession of the appellants, it finds such facts to exist. The petition may not have stated the entire terms of the contract, as shown by the evidence; and if the evidence went further, and established conditions that were not fully pleaded, but were not variant from those that were alleged, we do not think that this would necessarily create a variance between the contract pleaded and that proven. It would be a case, not of a want of description of the contract declared on, but one simply of an imperfect description. The allegation descriptive of the contract is good, as far as it goes; and if it does not include all of the terms of the contract, but enough to identify it with the one in proof, it should not be said that there is a material variance between the contract alleged, and that established by the evidence.

The judgment of the court below is objected to because it is—with the other plaintiffs, naming them—in favor of Jesse Bonner. The judgment in this respect reads: "Jesse Bonner, joined by her husband, James Bonner, do have and recover," etc. The petition describes and mentions "Jane Bonner, joined by her husband, James Bonner," etc. It is apparent that the "Jesse" Bonner mentioned in the judgment is the "Jane" Bonner mentioned in the petition as the wife of James Bonner. So stating her name as "Jesse" in the judgment, instead of "Jane,"

was evidently a clerical error, and a reference to the petition, which is a part of the record, corrects this error. The record can be looked to for this purpose, and the judgment will, in this respect, be read in the light of the record.

The court below found that the contract sued on was entered into on Sunday, and the appellants, for this reason, insist that it is void. This objection is settled against the appellants' contention in the case of *Beham v. Ghlo*, 75 Tex. 91, 12 S. W. Rep. 996. The court in that case held that contracts made upon Sunday, when not in a course of business prohibited upon that day by statutory law, are valid. The judgment of the court below is affirmed.

RAINWATER-BOOGHER HAT CO. et al. v. WEAVER.

(Court of Civil Appeals of Texas. Sept. 4, 1893.)

FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE.

1. A provision in a conveyance of a stock of goods in trust for certain creditors empowering the trustee to sell the goods at retail until the stock shall be so reduced as not to justify further retail sales, and then to sell the remainder in bulk, does not of itself render the instrument void, though the grantor was insolvent, and all his property was conveyed, the property conveyed not being in excess of the amount of the valid debts intended to be secured.

2. Nor does the further provision that attorneys' fees for services rendered in preparing and defending the conveyance shall be secured thereby render the conveyance void, since the grantor had a right to employ counsel for that purpose.

Appeal from district court, Red River county; E. D. McClellan, Judge.

Controversy submitted without action between the Rainwater-Boogher Hat Company and another against John H. Weaver to determine the validity of a conveyance made by defendant. From a judgment finding the conveyance valid, plaintiffs appeal. Affirmed.

Dudley & Moore, for appellants. M. L. Sims and H. D. McDonald, for appellee.

FINLEY, J. This is an agreed case under article 1414 of the Revised Statutes, and the question presented for decision is as to the validity of a conveyance, commonly called "deed of trust," executed by Steinlien & Co. to John H. Weaver, trustee, for the benefit of certain creditors. It is admitted that, at the time the instrument was executed, Steinlien & Co. were largely indebted and insolvent, and that all their property was covered by the conveyance. It is contended by appellants that the instrument contains certain provisions which render it void upon its face. One of the provisions complained of is as follows: "The said John H. Weaver to

take immediate possession and control of the said property, and, after an inventory thereof shall have been taken, the said Weaver is to proceed to sell said property for cash, and reduce into money the choses of action and all evidences of debt hereby conveyed and turned over to him; the goods to be sold at retail or in such other manner as will realize the largest amount of money, and the proceeds received from both sales and collections to be deposited daily with the Red River County Bank, subject to be distributed as hereinafter directed; and, after the stock shall have been so reduced that it will not justify selling at retail, the said Weaver is hereby authorized and empowered to sell the remainder of the goods on hand, either in bulk or in lots, at public auction, for cash, to the highest bidder." It is asserted by appellants that this provision directs the trustee to sell the goods at retail in the regular course of business, and, in effect, prohibits an immediate sale, and contemplates the carrying on of a retail merchandise business for an indefinite period of time; and therefore, by its terms, it hinders and delays appellants (creditors) in the collection of their debts, and that the conveyance is thereby rendered void. We think the construction of the provision contended for is reasonable and correct, but does the legal consequence claimed by appellants necessarily follow? Appellants were not included among the fortunate creditors for whose benefit the conveyance was made, and it does not appear from the instrument itself or otherwise that the property conveyed exceeded in value the amount of the debts intended to be satisfied out of the proceeds from the sale of the property. It does not appear that any of the debts attempted to be secured by the conveyance were fictitious or invalid for any reason, and the only facts presented for consideration in connection with the recitals in the instrument which it is insisted tend to support the proposition that the instrument is void are that Steinlien & Co. were insolvent, and that all their property was embraced in the conveyance. The proposition that an insolvent debtor may convey all his property to satisfy a preferred creditor is so well settled that it needs no argument or citation of authority to support its announcement. These facts alone, then, cannot render fraudulent and void a provision which would be legal in their absence.

The instrument under consideration was a mortgage executed to secure the debts of certain creditors of Steinlien & Co. *Laird v. Weiss*, 85 Tex. 95, 23 S. W. Rep. 864. The trust was accepted by Weaver, the trustee, and the creditors who were beneficiaries under it, and the parties attacking the validity of the mortgage are strangers to it, and could have no possible interest to be affected by the terms of sale provided in the mortgage, unless the property conveyed exceeded in value the valid debts intended to be se-

cured. *Bank v. Marshall*, 1 Tex. Civ. App. 704, 23 S. W. Rep. 246; on writ of error to supreme court, 22 S. W. Rep. 6. This provision in the mortgage is, to say the most of it, but a badge or circumstance of fraud, and does not of itself render the instrument void. In all the cases in our state in which it has been held that similar provisions as to the terms of sale render the mortgage void these additional facts were made to appear, which we think are necessary to the conclusion reached, namely, that the mortgagor was insolvent; that all his property was conveyed; and that the value of the property conveyed was in excess of the amount of the valid debts intended to be secured. *Gallagher v. Goldfrank*, 75 Tex. 562, 12 S. W. Rep. 964; *Gregg v. Cleveland*, 82 Tex. 187, 17 S. W. Rep. 777; *Puckett v. Drug Co.*, (Tex. Civ. App.) 20 S. W. Rep. 1127. The burden is on the party attacking the legality of the conveyance to establish the facts which render it void, and, in the absence of proof as to such facts, the court will presume in favor of the validity of the instrument.

The other provision in the mortgage attacked by appellants is as follows: In naming the debts to be paid out of the proceeds of the property, it provides: "The sum of one thousand dollars due by us to Sims & Wright, as evidenced by our note of even date herewith, and, in the event of litigation, an additional ten per cent. on the amount involved." It was admitted that the \$1,000 was due for "attorneys' fees." In what matter it is not stated, but appellants contend that it may fairly be inferred that it was attorneys' fees for preparing the mortgage. It is claimed by appellants that this provision renders the mortgage void for the reason that it provides a fund for the payment of attorneys, selected by the failing debtors and for their benefit, to deter creditors not provided for from questioning the validity of the instrument. Assuming that the \$1,000 to be paid Sims & Wright was due for attorneys' fees for services rendered in preparing the mortgage, we see no reason why the debt should not be secured by the conveyance. *Steinlien & Co.* had the right to employ counsel for the purpose, and the only questions that could be raised are the bona fides of the debt and the reasonableness of the amount. As to the additional 10 per cent. to be paid, in case of litigation, we do not see that a fraudulent intent is necessarily implied. The trustee, in the absence of this provision, would have had the legal right to employ counsel to defend the trust, and to pay for such services out of the trust fund. Indeed, it would have been his duty to have done so, and we cannot say, as a matter of law, that, because the mortgage made provision for it, it is therefore void. Such provision might have some significance as a circumstance upon an issue of fact as to the fraudulent intent of the mort-

gagor, but it is not in itself a fraud rendering the instrument void. *Baldwin v. Peet*, 22 Tex. 720; *Simon v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. Rep. 710; *Mills v. Pessels*, 55 Fed. Rep. 588. We are of opinion that there is no error in the judgment of the court below, and it is therefore affirmed.

ROBINSON v. McIVER et al.

(Court of Civil Appeals of Texas. Nov. 9, 1893.)

TRESPASS TO TRY TITLE—INSTRUCTION—ASSIGNMENTS OF ERROR.

1. In trespass to try title, the court charged that: "In order for the defendants to recover upon the pleas of ten years' limitation, it is not necessary to prove the payment of taxes upon the land. The mere naked, adverse, and peaceable possession, as defined by the law, for the period of ten years, is sufficient, if established, to authorize a recovery upon the plea of ten years' limitation." Held, that the charge was not erroneous, but only defective, in not defining "adverse possession," and in not stating that the limitation would be interrupted by the filing of the suit, and plaintiff cannot assign error on such defects, in the absence of a request for an instruction curing the same.

2. An assignment of error, that "the court should have granted to the plaintiff below a new trial because the verdict of the jury was contrary to and against the evidence," is too general.

Appeal from district court, San Jacinto county; L. B. Hightower, Judge.

Trespass to try title by Sarah R. Robinson against John McIver and others. From a judgment in favor of defendants Bazoon and Whitten, plaintiff appeals. Affirmed.

John R. Peel, for appellant. G. I. Turnley and G. W. McKellar, for appellees.

GARRETT, C. J. This suit was originally brought by Sarah R. Robinson, the appellant, against John McIver and 15 others, in trespass to try title, to recover the league of land situated in San Jacinto county, granted to James W. Robinson. Appellant sued as the widow and sole heir of the grantee. She recovered judgment on April 28, 1890, against all the defendants except the appellees W. A. Bazoon and J. T. Whitten, in whose favor judgment was rendered on their plea claiming 160 acres of land, each, out of said league, under the statute of limitations of 10 years. Plaintiff appealed from said judgment, and it was reversed, as to said Bazoon and Whitten, by the supreme court, at its Galveston term, 1891. *Robinson v. Bazoon*, 79 Tex. 524, 15 S. W. Rep. 585. The case was tried again in the district court of San Jacinto county on October 28, 1892, upon the issues between the plaintiff and the defendants Bazoon and Whitten, and again resulted in a judgment in favor of said defendants, upon their plea of 10 years' limitation, from which this appeal has been taken.

Only two errors have been assigned by

the appellant, for which it is sought to reverse the judgment of the court below. The first error assigned is upon the giving of the following charge asked by the defendants: "In order for the defendants to recover upon the pleas of ten years' limitation, it is not necessary to prove the payment of any taxes upon the land. The mere naked, adverse, and peaceable possession, as defined by the law, for the period of ten years, is sufficient, if established, to authorize a recovery upon the plea of ten years' limitation." It is contended that "the charge, as given, is not the law, because it does not define 'peaceable possession' as being continuous, and not interrupted by adverse suit before the filing of this suit, on March 28, 1888, and precludes the idea that adverse possession must be an actual and visible appropriation of the land; and because the latter clause thereof directly charges the jury that the mere naked possession, as defined by the law, (without defining it,) for the period of ten years, is sufficient, if established, to authorize recovery upon the plea of ten years' limitation; thus placing prominently before the jury that appellees should recover, provided they had a mere naked possession of the land for ten years, and without stating that the ten years must be before the filing of this suit, on March 28, 1888, and thus giving the jury a latitude, in a special charge, unwarranted in law." The instruction given is not erroneous. It is only defective, at most. An inspection of the charge, as given by the court, will show that the jury were instructed that the limitation must be for 10 years before the filing of the suit, and that they were also especially told that it must be for a period of 10 years before the execution of the acknowledgment of tenancy by the defendants made to McIver in 1883, in accordance with the intimation of the supreme court on the former appeal. Again, as the special charge complained of was only defective in not defining "adverse possession," and in not stating that limitation would be interrupted by the filing of the suit, the plaintiff should have requested an instruction curing the defects pointed out. Failing in this, she cannot have the judgment of the court below, if otherwise correct, reversed on that account, when it could have been cured by an instruction given at her request.

The remaining error assigned is that the court erred in overruling plaintiff's motion for a new trial, upon the several grounds therein set forth. Plaintiff took a bill of exceptions to the order of the court, which is made a part of the assignment; but it does not state the grounds of the motion, nor, indeed, does it contain any other statement than an exception to the action of the court in overruling the motion. She makes the following proposition under said assignment: "The court should have granted to the plaintiff below a new trial because the verdict of the jury was contrary to and against the

evidence." This assignment is much too general, as has been frequently held by our supreme court, to require us to go into an examination of the statement of facts in order to ascertain whether or not there is sufficient evidence to support the verdict of the jury. We have examined the pleadings, and find that they support the judgment of the court, and we discover no fundamental error for which it should be reversed. No error having been made to appear, the judgment of the court below will be affirmed.

KEMP v. WHARTON COUNTY BANK.

(Court of Civil Appeals of Texas. Nov. 9, 1893.)

JUDGE—DISQUALIFICATION BY INTEREST—DISMISSAL.

1. An action in which defendants' property was attached does not involve the validity of an assignment for benefit of creditors made before the attachment was levied, where neither the assignee, nor any person claiming under the assignment, is a party to the action; and therefore a special judge before whom the cause is brought for trial is not disqualified because he drew the assignment, advised the assignee, and was a creditor of defendants, and had accepted under the assignment.

2. Two of several defendants, sued as a partnership, pleaded their right to be sued in the county of their residence, but they did not deny that they were partners of defendant B., and B. did not plead that the action had been brought in the wrong county, as to him. The partnership was denied only as to the fourth defendant. Held that, on sustaining the plea of the first two defendants, the court erred in dismissing the whole case, since plaintiff was entitled to recover against defendant B.

Appeal from district court, Wharton county; John A. Ballowe, Judge.

Action by C. D. Kemp against the Wharton County Bank. The action was dismissed, and plaintiff appeals. Reversed.

G. G. Kelly, for appellant.

WILLIAMS, J. Appellant has filed in this court affidavits for the purpose of showing that the special county judge who tried the case below was disqualified by interest, and by reason of having been counsel in the case. The suit is an action against several persons, who are alleged to be partners in the banking business, and as such conducting their business under the firm name of the Wharton County Bank. An attachment was sued out, and levied upon a safe, as the property of the defendants. The affidavits to which we refer above state that, prior to the attachment of the safe, some of the alleged partners had made an assignment of all of the property of the bank, including the safe, and that this suit involved the validity of the assignment; that the special judge had drawn the assignment, and had counseled and advised the assignee about the execution of his trust; and that, besides, he was a creditor of the bank, in a small amount, and had accepted under the assignment, and was there-

fore interested in sustaining it. Without pausing now to consider whether or not this is a proper method of making the facts appear for the first time in the appellate court, we hold that the judge, under the facts stated, taken in connection with the record, was not disqualified. The suit did not involve the validity of the assignment, or the adjudication of any right under it. Neither the assignee, nor any person claiming under the assignment, was a party. The suit was merely to recover judgment for a debt against the assignors, and a foreclosure against them of the attachment lien on the safe. The title of the assignees, and the rights of all persons claiming under the deed, would remain unaffected by such a judgment. There is not, so far as we can find, a word in the record about the assignment.

The court erred in dismissing the whole case, upon sustaining the plea of the defendants Gillespie and Porter, asserting their right to be sued in the county where they resided. There was no such plea made by Brown, and the judgment recites that both parties appeared. There was no denial of the alleged partnership between Gillespie, Porter, and Brown. The latter being before the court, and there being no denial of the partnership, except as to Hayward, the plaintiff was, under the authority of *Sanger v. Overmiller*, 64 Tex. 57, entitled to judgment against him, and binding his personal estate and the partnership property.

This suffices to dispose of the appeal, and we will not consider the numerous other points made. Reversed and remanded.

MISSOURI PAC. RY. CO. v. KING et al.
(Court of Civil Appeals of Texas. Feb. 22, 1893.)

REQUESTED INSTRUCTIONS—WRITING ON SAME
PIECE OF PAPER.

Under Rev. St. art. 1319, providing that either party may present to the judge, in writing, such instructions as he desires given to the jury, and article 1321, providing that instructions given to the jury may be carried with them in their retirement, the court may refuse to give requested instructions on the ground that the good are written with the bad, on the same piece of paper, so that they cannot be separated; such ground of refusal being stated at the time of the refusal.

On rehearing. Denied.

For former report, see 20 S. W. Rep. 1014.

Head & Dillard and Dillard & Muse, for appellant. M. M. Banks and Sherrill & Austin, for appellees.

STEPHENS, J. The construction placed by appellant upon the conclusions heretofore filed seems to require a fuller statement of the grounds upon which we sustained the

refusal of certain requested instructions, lest the decision should be misleading on a question of practice.

The first charge requested and signed by counsel for appellant contained six paragraphs, numbered as follows: 1, 2, 3, 4, 5, 6. Following the signature of counsel, is this indorsement: "I refuse these charges. Some of them are correct, but, as they are all written on the same sheets of paper,—one closely following the other,—I cannot separate one from the other, and give such as are correct, and refuse the incorrect ones. I think the substance of those which are correct is given in the main charge. E. W. Terhune, Judge." The second charge requested and signed by counsel contained two paragraphs, numbered 7 and 8, and is accompanied with this indorsement: "Refused because both are on one sheet of paper, and, as far as deemed correct, already given." These indorsements seem to have been made when the charges were requested, and amounted to a requirement by the trial court that such as were correct should be presented in such form as that they might be read to the jury, and carried with them in their retirement, without the necessity of culling and copying the good in order to eliminate the bad. We are of opinion that counsel, who are officers of the court, may properly be required to conform to a demand so reasonable. We are not passing upon a case where the ground of refusal is not stated. We hold that, in order to properly comply with articles 1319¹ and 1321² of the Revised Statutes, the requirement of the court in this case was within judicial discretion and reasonable. The same principle was repeated in some of the paragraphs which were correct, and had already been given in the court's charge. In so far as these requested instructions contained correct propositions, we think they were substantially embodied in the main charge. We therefore adhere to the conclusion heretofore announced,—that "the court did not err in refusing to give these instructions, for the reasons stated in connection with his indorsement of refusal." The rehearing will be refused.

HEAD, J., did not sit in this case.

¹ Rev. St. art. 1319, provides: "Either party may present to the judge, in writing, such instructions as he desires to be given to the jury, and the judge may give such instructions, or a part thereof, or he may refuse to give them, as he may see proper, and he shall read to the jury such of them as he may give."

² "Art. 1321. The charge and instructions given to the jury may be carried with them by the jury in their retirement, and an additional charge or instructions may be given them upon any question of law arising in the case, in conformity with the preceding rules, upon the application of the jury therefor in open court."

EASTIN v. FERGUSON.

(Court of Civil Appeals of Texas. Nov. 9, 1893.)

PUBLIC SCHOOL LANDS — SALE TO OTHER THAN SETTLER — RIGHT TO CONTEST VALIDITY—PRE-SUMPTIONS ON APPEAL—RECORD.

1. The fact that public school land was sold to one who was not an actual settler thereon, in violation of Act April 1, 1887, amended April 8, 1889, may be alleged and proved by one claiming such land under a subsequent application to buy while an actual settler thereon, the right to attack such sale not being in the state alone.

2. On appeal from a decision as to whether certain land was detached and isolated from other public land, so as to be salable to persons not actual settlers thereon, as provided by Act April 8, 1889, the record showed that a map was introduced presenting the situation of the land in question with reference to other public lands, but it did not appear what was shown by this map, which was not a part of the record. *Held*, that the map would be presumed to have shown facts sustaining the decision of the lower court.

3. Loose documents found among the papers on appeal, not identified as evidence used in the lower court, cannot be noticed as such.

Appeal from district court, Orange county; W. H. Ford, Judge.

Action by P. F. Eastin against William Ferguson. From a judgment for defendant, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by WILLIAMS, J.:

This is an action of trespass to try title, brought by appellant to recover a section of land designated as "No. 14," in Orange county, located and surveyed as public school land by the Texas & New Orleans Railway Company. Defendant pleaded "not guilty." Both parties claim through purchases from the state, under facts developed in the trial below, as follows: Appellant, without having settled on the section, made application to the commissioner on the 29th day of August, 1892, to purchase it at the price which had been fixed for it, tendering one-fortieth of such price required as the cash payment, and complying with all of the requirements of law, except that as to actual settlement. On the 15th of September, 1892, the commissioner accepted the application, and so notified the plaintiff. On the 3d day of September, 1892, appellee settled with his family upon the section, and made application in due form, with a tender of the requisite cash payment, to purchase the land as an actual settler. The commissioner rejected this application, because of the prior one which had been made by appellant, and tendered back to appellee the money sent up by the latter, which appellee declined to receive. Appellee was a married man, without a home, and entered upon this land in good faith, with the purpose of making it his home. Before either application was made, the land was classed as "dry grazing land," and valued at two dollars per acre. In accepting appellant's proposition, the commis-

sioner treated the section as being isolated and detached from other public lands. Upon this point the statement of facts contains the following reference, which is all that appears in the record relating to the situation of the premises: "The land in controversy is located on the ground as shown by the map of Orange county hereto attached, showing the school lands located by the Texas & New Orleans Railroad Company, which are marked thereon by red cross, thus, 'X,' and said section 14, being designated by two red crosses, thus, 'XX.'" No map is either attached to or set out in the statement, or otherwise referred to in the record. We find among the papers what purports to be a map of Orange county, but there is nothing to identify it as evidence used in the trial below. The record contains no statement of the findings and conclusions of the judge. The judgment was for the defendant.

Perryman, Gillaspie & Bullitt and Gordon Bullitt, for appellant.

WILLIAMS, J., (after stating the facts.) The act of the legislature approved April 1, 1887, and the amendments approved April 8, 1889, regulate the sales of public school lands by the commissioner of the general land office, and all of his authority to make sales of such lands must be derived from the provisions of those statutes. Laws 20th Leg. 1887, pp. 88-91; Laws 21st Leg. pp. 50-53. The first section of the first-named act expressly declares that all such sales shall be made under its provisions. Section 5 of both acts provides that sales shall be made to actual settlers only. Other provisions are introduced to enforce this rule, and to prevent any evasion of it. In neither of the acts is authority given to sell to any person but an actual settler any lands except such as are specified in the latter part of the twenty-second section of the act of 1889, which provides: "And all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos, and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than two dollars per acre, upon such terms as the commissioner of the general land office may prescribe." It is upon this provision that appellant bases his claim that he could lawfully acquire title, by purchase from the state, of the land in controversy, without being a settler. If we are to assume that the section in question was isolated and detached from other public lands, appellant must prevail; and, for the purposes of this case, it may be conceded that the action of the commissioner in classing and treating it as belonging in the category specified by the statute affords presumptive evidence that its situation is such as to authorize the sale. But, against such

presumption, we have the judgment of the court below, which must stand, unless it is affirmatively shown by the record to be wrong. The statement of facts shows that a map of Orange county, representing the situation of the section with reference to other public lands, was used in evidence in the court below. This map is not in the record, nor presented to us in such manner as to enable us to notice it. Loose documents found among the papers cannot be referred to as constituting part of the evidence at the trial. *Stephens v. Bowerman*, 27 Tex. 18. We are not therefore informed as to what facts the map would show. It is evident that it may have shown that the section in question was not detached and isolated from other public lands. If that fact will sustain the judgment, it must be presumed that it was made to appear by the map. *Id.* The question, therefore, as to the proper construction of the terms used in the statute,—in other words, as to what is meant by “isolated and detached lands,”—is not before us. We must assume that this land was clearly outside of the terms of the exception made by the statute if the court below could properly inquire into that question, and if the fact found authorized the judgment.

But appellant contends that in this suit between himself and a claimant, under an application to buy, made subsequent to his own, no inquiry can be made into the validity of the contract made by him with the commissioner of the general land office, acting for the state; and that such contract is binding upon every one except the state, and can only be attacked by the state, through its proper officers. We cannot adopt this view. As we have seen, the law, under which alone authority in the commissioner to make sales can be claimed, carefully excludes the construction that power is intended to be lodged in him to sell to any but actual settlers, unless the land is detached and isolated. There is no language used to indicate an intent to submit the question solely to his discretion. His power is made to depend on the existence of the fact. He cannot by his decision create facts which do not exist, nor clothe himself with a power which does not arise out of the actually existing conditions. The legislature conferred such authority as he possesses in this matter, and could properly define its limits. These cannot be extended by himself. The case of *Nobles v. Cattle Co.*, 69 Tex. 434, 9 S. W. Rep. 448, referred to by appellant, was one in which the lessee of the land sought to avoid a contract of purchase made by an actual settler, on the ground that the settler had perpetrated a fraud by obtaining the land at a reduced price as “dry land,” when in fact it was “watered.” It was held that this, if true, constituted a fraud on the state, which the state alone could take advantage of, and that the contract was valid so long

as the state did not avoid it. But there was the power to make the sale unquestionably vested in the officer. A fraud perpetrated upon an officer of the state, by which he is induced to do an act which he has the power to do, though a wrong or injury to the state result, cannot be avoided by a third party. But an act which an officer has no power to do is binding on no one, and confers no right on him for whose benefit it was performed. This distinction is recognized by all of the authorities. It has been held that a sale by the commissioner, under the act of 1887, to one not an actual settler in good faith, confers no right upon the purchaser, and is no obstacle to the acquisition of title to the same land by one subsequently entering and complying with the law. *Metzler v. Johnson*, 1 Tex. Civ. App. 137, 20 S. W. Rep. 1116. The proposition contended for, it seems to us, is inconsistent with the provisions and the policy of the law under which the commissioner acted. The purpose is plainly manifested to define by the provisions of the law itself what character of lands may be sold, and what classes of persons may purchase. These questions are not left to the discretion of the commissioner, but are settled by the terms of the statute. He may sell, as directed by the law, to actual settlers, all the lands specified, and may sell to no other class of persons any of them except those which are isolated and detached. How lands are situated is a question of fact, and whether their situation brings them within the terms of the statute is a question of law, which the commissioner must determine in making a sale; but they are questions which may be passed upon by others, as well as by that officer. A court, which is the proper tribunal for the determination of controversies of this character, is not to be precluded from ascertaining the facts and applying the law by the action of the commissioner, unless his decision has been made final by the law. Any person possessing the requisite qualifications, finding a section of school land, which is not detached and isolated, has the right, under the statute, to settle upon and purchase it. Of such right he cannot be deprived, we think, by a previous contract made by the commissioner with another, not an actual settler, because such other had no right to buy, and the commissioner no power to sell to him. It is true that when a constitution or law defining the power of such an officer authorizes him to perform an act under conditions, the determination of the existence of which is by such law either expressly or by necessary implication committed to his sole discretion, his decision is binding upon other departments. But ordinarily the courts must declare the law, and must ascertain the facts to which it applies, where this becomes necessary to the enforcements of private rights. *Cooley*, Const. Lim. 51, 55;

Sedg. St. & Const. Law, 329, 330. We are of the opinion that it was competent for the court to admit evidence as to the situation of this land with reference to other public lands, and, if the court found as a fact that the land was not isolated and detached, it was proper to hold that the contract under which appellant claimed was void, and conferred no right upon appellant to oust appellee from possession. The judgment, therefore, is affirmed.

BEAUMONT LUMBER CO. v. BALLARD.¹

(Court of Civil Appeals of Texas. Nov. 9, 1893.)

TRESPASS ON LANDS—DEFENSES—EVIDENCE—PLAINTIFF'S TITLE.

1. Possession of land under the impression that it is a part of the public domain is not adverse.

2. An oral contract by the owner of land for the sale thereof to one not in possession gives the latter no right as against one in actual possession, and is no defense in an action for trespass thereon.

3. In a suit for breaking plaintiff's inclosure and carrying away property for the use of the wrongdoer the latter cannot introduce evidence to show that title was in a third person.

4. In an action for trespass on land in the possession of, but not belonging to, plaintiff, he cannot recover for damage committed on land outside of his inclosure.

Appeal from district court, Orange county; W. H. Ford, Judge.

Action by J. J. Ballard against the Beaumont Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

O'Brien & O'Brien, for appellant. Perryman, Gillaspie & Bullitt and Gordon Bullitt, for appellee.

PLEASANTS, J. The appellee instituted suit against appellant for the recovery of damages for alleged trespass committed upon appellee's land. The petition averred that appellee was on the 15th of October, 1890, the owner, and in possession of, 160 acres of land, part of a tract of 640 acres patented to Samuel J. Whitney, and situated in the southwest corner of said tract; and that on or about said day the appellant unlawfully, and without the consent of appellee, entered upon said lands, and thereupon cut down and carried away timber of the aggregate value of \$4,800, and converted the same to his (appellant's) use, to the damage of appellee, and refused payment to complainant of any part of said damages, though payment had often been demanded. The defendant answered by general demurrer and plea of not guilty and general denial. To this answer plaintiff excepted, but the exceptions of both the defendant and the plaintiff were overruled by the court, and the cause was tried upon the petition, and the pleas of not guilty and general denial. Verdict and judgment were ren-

dered for appellee for \$1,162.22, and from this judgment the defendant, after his motion for new trial had been overruled, appealed to this court.

The court charged the jury as follows: "No. 923. J. J. Ballard v. Beaumont Lumber Co. Gentlemen of the Jury: First. The plaintiff sues the defendant in this action, and seeks to recover damages alleged to have been sustained by an alleged unlawful cutting and removing of pine trees from and off of a tract of land described in plaintiff's petition, and alleged to have been in the possession of the plaintiff. Second. You are instructed that neither plaintiff nor defendant have shown a title in themselves, or either of them, in or to the land described in plaintiff's petition. If the defendant entered upon the land described in plaintiff's petition, and cut and removed the pine timber, or any portion of it, therefrom, and appropriated it to his or its own use, and if the plaintiff, Ballard, either by himself or by a tenant to whom he had rented the same, was in the actual possession of the said land, then the plaintiff, Ballard, would be entitled to recover, and receive at your hands a verdict in his favor for so much money by way of damages as the pine trees or timber so cut and removed therefrom was worth in cash as it stood upon the ground, or as was its cash market value as it stood upon the ground when it was cut and removed, with eight per cent. interest per annum thereon from the date it was so removed to this date; and you are instructed that if you find and believe from the evidence in the case that the defendant, the Beaumont Lumber Company, as alleged in plaintiff's petition, went upon and cut and removed the pine trees, or any of them, off of the land described in plaintiff's petition; and if you are further satisfied and believe from the evidence in the case that the plaintiff was at the time of such cutting and removing, either by himself or his tenant, in the actual possession of the said land, or any part thereof, from which said trees were cut and removed,—then you will find in favor of the plaintiff for the cash market value of the timber or trees so removed, as they stood on the ground before being so removed from that portion of said land, as you may believe from the evidence the plaintiff was so in the actual possession of, with eight per cent. interest thereon from the date of such removal to this date. If you do not believe from the evidence in the case that the defendant cut and removed pine trees or timber from the land described in plaintiff's petition, and that the land from which it was removed was actually occupied by the plaintiff, by himself or by his tenant, then you will let your finding be for the defendant. If Bilbo was actually living upon the land at the time the timber was cut, (if cut and removed by defendant as alleged,) holding for and as the tenant of the plaintiff, Ballard, his occupancy

¹Rehearing pending.

would be the occupancy of Ballard himself. If, however, on the other hand, Bilbo was occupying and holding the premises for himself, and in his own right, at the time the timber was so cut, (if cut by defendant,) and not for and as the agent and tenant of Ballard, then his occupancy was not the occupancy of the plaintiff, Ballard; and in such latter event the plaintiff, Ballard, would not be entitled to recover in this case, and your finding should be for the defendant. If Bilbo bought the improvements upon the land in question, and the plaintiff's claim to such improvements, and moved thereon under such purchase, and was occupying the place as his own, and in his own right, under such purchase, and not in the capacity of a tenant to and of the plaintiff, Ballard, then such occupancy by Bilbo would not be possession by Ballard. All these questions and issues you are to determine from the evidence in the case, and find your verdict accordingly. The evidence having conclusively failed to establish the defendant's plea of *res adjudicata*, you will not consider that issue raised by the pleadings in determining the case. By 'actual possession of the land' is meant that the party claiming such actual possession must be actually residing upon the land, either by himself or some one occupying for him as his agent and tenant. *W. H. Ford, Judge Presiding. Filed Oct. 26th, 1892. C. L. Goodman, Clerk Dist. Ct. Orange Co.* This charge, and the refusal of the court to give the following instruction, asked by the defendant: "The jury are instructed that by the expression 'land in actual possession,' as used in the charge, is meant such land as the plaintiff had within his inclosure, if any, at the time of the alleged cutting of the timber,"—constitute the basis for the first and second assignments of error.

The plaintiff did not pretend to have any title to the land other than such as he may have acquired by his occupation of the premises. He testified that he had occupied and used the land continuously for more than 10 years previous to the cutting of the timber by the defendant. He also testified that during his occupancy he applied to the surveyor of the county to survey the same for him, for the purposes of pre-emption, believing the land to be a portion of the public domain, when he was informed by the surveyor that the land had been patented, and was not subject to location, but how long after he discovered the land was no part of the public domain he remained in possession of it he does not say. To acquire title under the statute of limitations the possession must not only be continuous and exclusive for the prescribed period, but it must be adverse to the rights of the owner. The occupancy must be taken and held under a claim of right, and in hostility to the rights of the owner. So long as the plaintiff labored under the erroneous impression that the

premises were a part of the public domain, his possession was not an adverse possession; and from the evidence we cannot say that the court erred in holding, as it evidently did, that the plaintiff had not established a title by limitation, and in instructing the jury that, unless the plaintiff was in actual possession of the land when the defendant committed the alleged trespass, they must find for the defendant. And we agree with the counsel for the appellant in his proposition that under the charge of the court and the evidence of plaintiff's possession no recovery could be had for any damages committed outside the land under fence, and we think the court erred in refusing to give the requested instruction which explained the meaning of the term "actual possession," as used in the charge. The inclosure embraced from 15 to 20 acres of land, and there were cut within the inclosure from 15 to 20 trees. One's possession of land without title is confined to the land actually occupied by him. Such is the general rule. *Aikin v. Buck*, 1 Wend. 467; *Whitehead v. Foley*, 28 Tex. 268; and *Cantagrel v. Von Lupin*, 58 Tex. 578. Whether there be an exception to this rule, when the person in possession is claiming under the statute of limitation, and he brings suit for trespass before the time in which, under the statute, he may acquire title, has elapsed, need not be decided, as the question of limitation was eliminated by the charge of the court from the case. Nor need we, for the same reason, determine another proposition, presented in the assignment by the appellant, to wit, that the plaintiff could not avail himself of the statute of limitation without special averment of its provisions, and claim of title thereunder. It may be proper, however, to remark that in the opinion delivered in the case of *Mayers v. Paxton*, 78 Tex. 196, 14 S. W. Rep. 508, it is said that the statute of limitations must be pleaded to be available either as a cause of action or a defense.

Appellant's fourth assignment of error is as follows: "The court erred in not permitting defendant to prove by witness George Carroll that defendant had contracted for and agreed to purchase the Whitney survey from the owners thereof prior to the date of the deed subsequently taken by the defendant from said owners, and introduced in evidence herein, and prior to the cutting of timber from said lands, and that the execution and delivery of said deed was delayed by the pretended claim of plaintiff to said land, and in sustaining the objection of plaintiff; (1) that the oral purchase or agreement of purchase of said land by plaintiff from Griffith, before said cutting, and without deed in writing, showed no right in defendant to cut said timber, and was no defense in this cause; (2) and such testimony was irrelevant." An oral agreement by one having the title to land to sell to one not in

possession would give to the other no right as against one in the actual possession of the land and claiming the same, and an entry upon the premises under such an agreement would be a trespass, and the agreement would be of no avail for the defendant in a suit for damages by the person in possession. Possession alone is sufficient to sustain an action of trespass against a wrongdoer. Vide 7 Lawson, Rights, Rem. & Pr. § 3837; and also Linard v. Crossland, 10 Tex. 462, and Duncan v. Spear, 11 Wend. 54, and Davis v. Loftin, 6 Tex. 497. Nor was the proposed evidence admissible to show title in a third person. This is not permissible when a suit is for the recovery of damages for breaking the plaintiff's inclosure, and taking and carrying property therefrom and appropriating it to the use of the wrongdoer. Vide 7 Lawson, Rights, Rem. & Pr. § 3864; Duncan v. Spear, supra; also O'Brien v. Hilburn, 22 Tex. 625.

We deem it unnecessary to consider the other assignments of error. For the error of the court in refusing to instruct the jury as requested by defendant the judgment is reversed, and the cause remanded.

FT. WORTH & D. C. RY. CO. v. BELL.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

MASTER AND SERVANT — INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — NEGLIGENCE OF COEMPLOYEE — EXCESSIVE DAMAGES.

1. The failure of an employe of a railroad company to use a danger signal on a car which he was repairing, as required by the rules of the company, cannot be set up as contributory negligence in an action by such employe against another railroad company for injury caused by the backing of an engine of defendant against the car which was being repaired, when such engine was wrongfully on the tracks of the company which employed plaintiff.

2. In such case it was no defense that a coemploye of the injured person had aided in causing the injury.

3. A verdict against a railroad company for \$1,250, as damages for running over the hand of a laborer, is not excessive.

Appeal from district court, Clay county; George E. Miller, Judge.

Action by W. W. Bell, Jr., against the Ft. Worth & Denver City Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by HEAD, J.:

Conclusions of Fact.

The track of the Missouri, Kansas & Texas Railway Company connects with that of appellant at Henrietta, in Clay county. On July 14, 1891, appellee, while in the employ of the former company, was engaged in repairing one of its cars while standing on one of its side tracks at said place, where appellant's servants in charge of one of its

engines negligently backed against said car, causing it to run over appellee's hand. The negligence of appellant consisted in running against a standing car of the other company without first learning if there was danger in so doing, and also in running against such car with unnecessary violence. It does not appear satisfactorily from the evidence whether appellant had or had not the right to be upon the other company's track where the injury was inflicted upon the business in which it was then engaged, but we think a preponderance of the evidence shows it was wrongfully there. One of the rules of the company for which appellee was working was as follows: "A red signal means danger, and is a signal to stop. It is used at telegraph offices to stop trains for orders; by car inspectors, while engaged in repair or inspection of cars; and for other purposes defined in rules of 'Train Signals.'" And at the time appellee was injured he was at work under the car, and did not have this signal out. The evidence sustains the finding of the jury that appellee was not otherwise guilty of negligence contributing to his injuries. In the court below, verdict and judgment were given appellee, against appellant, for the injuries so received, in the sum of \$1,250, from which this appeal is prosecuted.

Stanley, Spoons & Meek and J. H. Davenport, for appellant. Swan & Swain, for appellee.

HEAD, J., (after stating the facts.) Appellant's first assignment complains of the refusal of the court to charge the jury that appellee's failure to have out the red signal while he was working under the car, as required by the rules of the company by which he was then employed, would preclude him from recovering in this case. We believe there was no error in this. It has frequently been held in this state, as well as others, that failure on the part of the servant to observe a known rule prescribed by the master for the conduct of the business, which results in injury to the servant, will bar an action by the latter against the former to recover therefor. Pilkinton v. Railway Co., 70 Tex. 226, 7 S. W. Rep. 805; Railway Co. v. Wallace, 76 Tex. 636, 13 S. W. Rep. 565; Beach, Contrib. Neg. § 373. This, however, is in actions by the servant against the master who prescribed the rule, and is believed to have no application to a suit by the servant against a stranger. In this case appellee was not the servant of appellant, and bore no contractual relation to it, and we are unable to see upon what principle it can claim exemption under a contract between him and the Missouri, Kansas & Texas company. 2 Thomp. Neg. 1040-1045. No attempt was made to show a contract between appellant and the other company which would have the effect to give the former the

benefit of the regulations made by the latter for the government of its servants. We are therefore of opinion that appellant had no right to have the jury instructed that a violation of this rule by appellee would be negligence as to it, even if it be conceded that the court would be required to give such a charge in a case by the servant against the master. Appellant does not complain of the manner in which the court submitted the questions of negligence on its part and contributory negligence on the part of appellee, except in the failure of himself and coemployees to display the signal as above indicated.

In its fourth and fifth assignments appellant complains of the refusal of the court to charge the jury that appellee assumed the risks resulting from the negligence of his fellow servants. It follows from what we have already said that we do not think either of these assignments well taken. The master, it is true, is not liable to his servant for an injury caused by the negligence of a fellow servant, but we are unable to see what application that principle has to this case. Appellant was not sued as the master of appellee. Even in the case of a master, if his own negligence contributes with the negligence of one of his servants in causing an injury to another, he is liable, (Beach, Contrib. Neg. § 304;) and for much greater reason would it be no defense to a stranger that a coemployee of the injured person had aided him in causing the injury, (Markham v. Navigation Co., 73 Tex. 247, 11 S. W. Rep. 131; Railway Co. v. McWhirter, 77 Tex. 356, 14 S. W. Rep. 26.)

We do not find the verdict for \$1,250 excessive, under the evidence as shown by the record. The judgment will be affirmed.

STATE v. PENDLETON.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

PUBLIC LANDS—SCHOOL LANDS—TITLE OF PURCHASER.

The title of a purchaser of school land, under the act of 1883, who had not fully complied with the act, was cured by subsequent legislation if he became a bona fide settler within six months of the sale, as provided in the act; and the sale dates from the award by the land board, and not from the registration of the application to purchase in the surveyor's office.

Appeal from district court, Hardeman county; G. A. Brown, Judge.

Action by the state of Texas against J. H. Pendleton to cancel a sale of school land. From a judgment for defendant, plaintiff appeals. Affirmed.

Standlee & Green, C. A. Culberson, Atty. Gen., and R. P. De Graffenried, Dist. Atty., for the State. M. M. Hankins and Stephens & Huff, for appellee.

STEPHENS, J. This suit was brought in the name of the state to cancel a sale of section 192 of school land, made to appellee by the land board as dry agricultural land in the year 1885. Though the act of 1883, under which the sale was made, was not fully complied with, all defects in appellee's title were cured by subsequent legislation if he became an actual bona fide settler within the six months, as provided in that act. The application to purchase was registered in the surveyor's office in July, 1885, but the award was not made by the land board till some time in August following. The jury found, under appropriate instructions, that he became an actual bona fide settler within six months of the latter date, and that finding is supported by the evidence. There was no error in the court's declining to submit to the jury that the sale dated from the registration of the application in the surveyor's office. That was but a preliminary step prescribed by the land board, which had to be taken in order to have his application to purchase considered.

The other questions raised are too well settled to require more than a citation of the following authorities: Act 1883, p. 87, § 8; Act 1885, pp. 13, 18; Act 1887, p. 91, § 25; Act 1889, p. 106; Act 1891, p. 131; Stock Co. v. McCarty, 85 Tex. 412, 21 S. W. Rep. 598; Chancey v. State, 84 Tex. 529, 19 S. W. Rep. 706; Taylor v. Burke, 68 Tex. 643, 1 S. W. Rep. 910; State v. Opperman, 74 Tex. 141, 11 S. W. Rep. 1076; Odom v. Woodward, 74 Tex. 45, 11 S. W. Rep. 925. In some of these authorities may be found, also, reasons to support the main conclusion above announced. The judgment will be affirmed.

WICHITA VALLEY MILL & ELEVATOR CO. v. HOBBS.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

TRIAL—IMPROPER ARGUMENT OF COUNSEL.

1. In an action for services in buying wheat for defendant, plaintiff's counsel in argument said, without rebuke, and against objection, that defendant had tried to squeeze the farmers down to the lowest notch on the price, and swindled and cheated them by false weights, and was trying to swindle plaintiff out of his earnings; and that E., defendant's president, was a man whose every thought was how to squeeze the last cent out of the farmers, and should be taught that such practices would not be tolerated by an honest jury. The evidence was conflicting, and E.'s testimony had to be broken down to secure a verdict for plaintiff. The only evidence to support the language was testimony that a witness had heard complaint of short weights. *Held* ground for reversing a judgment for plaintiff.

2. In an action against a corporation, statements by counsel in argument, and without evidence to support them, that defendant had swindled people, etc., were not justified by a statement of defendant's counsel that the whole case was bolstered up by defendant's discharged employees, some of plaintiff's witnesses having in fact been discharged employees.

Appeal from Wichita county court; W. P. Skeen, Judge.

Action by W. H. Hobbs against the Wichita Valley Mill & Elevator Company for services in buying wheat. From a judgment for plaintiff, defendant appeals. Reversed.

Robt. E. Huff, for appellant. C. D. Keyes and E. O. Skeen, for appellee.

HEAD, J. In the court below, during the examination of the witness A. Snuggs, for plaintiff, Robert E. Huff, counsel for defendant, made the following statement, in full hearing of the jury: "This whole case is bolstered up by the discharged employes of the defendant." This was promptly objected to at the time it was made. Afterwards appellant's counsel made use of the same statement in his argument to the jury. A. Snuggs testified: "I have heard some complaint of short weights at defendant's mill; have heard of farmers having their wheat weighed at Hunt's scales down town." Some of the witnesses for plaintiff were in fact discharged employes of defendant. In his closing argument for the plaintiff, his counsel used the following language: "The defendant is a wealthy corporation, and plaintiff a poor, but honest, boy. He has worked hard for them under great obstacles. He has had to buy wheat for them while they were trying to squeeze the farmers down to the lowest notch on the price of wheat, and swindling and cheating them by use of false weights, until the very name of the company has become unsavory in the community. The plaintiff has bought wheat for them in the heat and dirt, and now, after the defendant has been swindling the farmers by its short weights, it now undertakes to swindle the plaintiff out of his hard earnings. Mark Evans, president of the mill company, is a man whose every thought is how to squeeze and grind the last cent out of the farmers of the county, and should be taught that such practices will not be tolerated by an honest jury." This language was promptly excepted to by the defendant, and was allowed to go unrebuked by the court. There was a sharp conflict in the evidence upon the material issues involved, the truth of the testimony of appellant's witness Evans being especially challenged by appellee, and, under these circumstances, we think it quite probable that the verdict was influenced by the highly inflammatory language of counsel above set forth. We regard this language as exceedingly improper, and entirely out of proportion to the provocation given by the remark of appellant's counsel,—that "plaintiff's case was bolstered up by its discharged employes." Neither did the remark of the witness Snuggs—that "I have heard some complaint of short weights at defendant's mill; have heard of farmers

having their wheat weighed at Hunt's scales down town"—furnish any proper basis for this tirade. This witness says he knew nothing of these short weights himself, and his remark as to what he had heard should have been excluded entirely from the jury, and doubtless would have been, had appellant requested it. Not having requested its exclusion, however, appellant could not complain at the failure of the court to do this of its own motion, but it was bad enough to permit this illegal evidence to remain with the jury without having it supplemented tenfold by counsel in his closing argument. The court should have promptly rebuked the use of such language in its inception, without waiting for opposing counsel to object, and especially should this have been done when the objection was interposed. We hesitate long before reversing a judgment solely for the use of improper language by counsel for the successful party in argument to the jury in a case in which we are unable to say the evidence preponderates against the finding; but where, as in this case, to invective is added statements of fact not in evidence, exceedingly damaging to the credit of a witness whose testimony must be broken down to secure a verdict, and which we think probably had the effect, we believe a judgment so obtained should be set aside, and a new trial ordered. *Moss v. Sanger*, 75 Tex. 821, 12 S. W. Rep. 619; *Beville v. Jones*, 74 Tex. 148, 11 S. W. Rep. 1128. The other assignments would involve a discussion of the evidence, which we have thought it best to premit in view of another trial. The judgment of the court below will be reversed, and the cause remanded.

PARKER COUNTY v. JACKSON.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

COUNTY COURT—SPECIAL JUDGE—HIGHWAYS—ALTERATION—DAMAGES—APPEAL.

1. The amended judiciary article of the constitution, (Gen. Laws, 1891, p. 201,) providing that "when the judge of the county court is disqualified in any case pending in the county court the parties interested may by consent appoint a proper person to try said case, or upon their failing to do so, a competent person may be appointed * * * in such manner as may be prescribed by law," does not require legislation to put in force that part which authorizes appointment by consent, and such appointment may be made, instead of transferring the case to the district court.

2. Where a road of the third class through a person's land is changed to one of the second class, the measure of damages is the value of the additional land taken, and the depreciation in value of the remainder caused by the change; and it is error to charge that the jury shall ascertain, as elements of damage, the reasonable cost of erecting fences, and providing facilities for watering stock, that may be rendered necessary by the change, the evidence of such neces-

sity being only admissible to show the lessened value of the land.

3. Where a road is opened through private land, in arriving at the damage to the land, the benefits and injuries which the owner sustains in common with the community generally, and which are not peculiar to the land, should not be considered.

4. Assignments of error copied into appellant's brief, without being supported by propositions or statements as required by the rules, will not be considered.

Appeal from Parker county court; H. S. Moran, Special Judge.

Proceedings by the commissioners' court of Parker county to change a road through the land of John L. Jackson. From the judgment assessing the damages, the county appeals. Reversed.

Howard Martin, Co. Atty., and Stephens & Moseley, for appellant. G. A. McCall, for appellee.

HEAD, J. The commissioners' court of appellant county changed a road through appellee's from one of the third to one of the second class, and this appeal is from a judgment in the county court assessing the damage caused by such change at the sum of \$255.30. The trial in the county court was before a special judge agreed upon by the parties, the regular county judge being disqualified by reason of interest in the subject-matter; and appellant, in its first assignment, challenges the right of the parties to agree upon a special judge in that court, and insists that the case should have been transferred to the district court. The trial was had in January, 1892, at which time the amended judiciary article of the constitution was in force, which provides: "When the judge of the county court is disqualified in any case pending in the county court the parties interested may by consent appoint a proper person to try said case, or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law." Gen. Laws 1891, p. 201. No provision is made by the constitution, as so amended, for the transfer of a case from the county to the district court on account of the disqualification of the judge of the former. We see no necessity for legislation to put in force that part of the constitution above quoted, which authorizes the parties, in such cases, to appoint a judge by consent; and we therefore hold the proceedings in the court below, in this respect, regular.

Upon the measure of damages to which appellee would be entitled by reason of the change in the class of the road through his land, the court gave the following charge: "You will also inquire whether it was rendered necessary, in adapting the inclosed land of plaintiff to the uses and purposes for which it was useful and valuable, to

build and erect any amount of fence on, or along, said second-class road, and also whether, for the purpose of adapting said premises, as changed by said road and fencing, if any, it was necessary to provide additional facilities or tanks for stock water; and, if you find it so necessary, you will then ascertain the just and reasonable cost of erecting good and sufficient fences, as above defined, and also facilities for stock water, as elements of damages to which plaintiff would be entitled." The cost of erecting this additional fencing, and of providing additional facilities for furnishing stock in the divided pasture with water, was proven with much particularity in the introduction of the evidence; and it seems clear that the jury must have understood from this charge that appellee was entitled to recover this cost as a distinct item of damage. This was error. The measure of the damages in this class of cases, as we understand it, is—First, the value of the land taken for the second road, which had not been appropriated for the first; second, the depreciation in value, if any, caused to the remainder of the land of appellee by the change in the class of the road. In arriving at this second item of damage, the parties would have the right to introduce evidence of everything that would tend to affect the value of the land, in the estimation of a proposed purchaser, or that would tend to make it more or less valuable to the present owner, such as the shape in which the tract will be left; the increased amount of fencing, if any, that will be required; the increased expenditures made necessary to provide water; the added facilities, if any, provided for travel to the owner of the land. But this evidence is introduced, not as constituting the measure of damages, but as elements to enable the jury to arrive at the correct measure, which, as above stated, is the lessened value of the tract, if any, caused by these different elements, when all are taken into consideration. Our views upon this question are so clearly stated in 3 Sedg. Dam. § 1163, that we copy at length therefrom, as follows: "The measure of damages must not be confounded with the elements of damage, evidence of which is admitted for the purpose of enabling the jury to apply the rule. * * * The measure of damages in condemnation proceedings, stated in one of its most general forms, is the depreciation in the value of the property, for this is the same as the amount of injury to it. The value is most easily measured by the market, when there is one. Consequently, as we have seen, the rule with which we most commonly meet is the difference between the market value of the property as affected and as unaffected by the improvement, or before the improvement, and as it will be after the improvement is completed. As a general rule, under any head of the law, where the measure of damages is deter-

mined by a difference in market value, it cannot be a matter of any consequence of what elements this is made up, and evidence giving the market value before and after the injury would be quite sufficient. * * * Land, however, has in many cases a very indeterminate market value, especially farming or wild land, such as is involved in perhaps the greater number of condemnation proceedings. Hence, it has become the practice to take evidence, not only directly as to the market value, but as to every element which enters into it, and tends to diminish it. * * * These elements of damage and value are neither the measure of damages, nor are they allowed as specific items of damage. They go to the jury only to throw light on the general question of depreciation. In a recent case in Pennsylvania, (Railway Co. v. McCloskey, 110 Pa. St. 436, 442, 1 Atl. Rep. 555), the supreme court of that state said: 'Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or from increased difficulty of access; the burden of increased fencing; the ordinary danger from accidental fires to the fences, fields, or farm buildings, not resulting from negligence; and, generally, all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property,—are proper matters for consideration; but they are to be considered, in comparison with the advantages, only as they affect the market value of the land. The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm.'" In the case of Railroad Co. v. Day, 22 S. W. Rep. 538, this court expressed its disapprobation of a charge which directed the attention of the jury to certain elements of damage quite similar to those introduced in evidence in this case, although the charge did not authorize the recovery of such damage as specific items. It is scarcely necessary for us to add to what is said above, that, in arriving at the damage to the land, the benefits and injuries which the owner receives and sustains in common with the community generally, and not peculiar to that tract, should not be taken into consideration. Morrow v. Railway Co., 81 Tex. 405, 17 S. W. Rep. 44.

A number of appellant's assignments of error are copied in its brief without being supported by propositions or statements as required by the rules, and will not, therefore, be considered, especially as the case must be reversed for the error above indicated. The judgment of the court below will be reversed, and the cause remanded for a new trial.

STEPHENS, J., disqualified, and not sitting.

GRAY v. THOMPSON et al.
(Court of Civil Appeals of Texas. Nov. 8, 1893.)

TRESPASS TO TRY TITLE—TITLE TO MAINTAIN.

In trespass to try title to school land claimed by plaintiffs by virtue of an assignment from a purchaser from the land board and possession thereof, defendant being a mere trespasser, it is not error to charge the jury to find for plaintiff if she was in actual possession and defendant entered and took possession, but to find for defendant if such possession had been abandoned, thus restricting the issue to that of possession; since, as against a trespasser, prior possession of one claiming under a purchase from the state, whether valid or not, is sufficient ground for ejectment.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action of trespass to try title by E. C. Thompson and others against T. R. Gray. From a judgment for plaintiffs, defendant appeals. Affirmed.

Lucky & Sadler, for appellant. Stephens & Huff, for appellees.

Conclusions of Fact.

STEPHENS, J. Mrs. E. M. Cunningham purchased, through the land board, the section in controversy in the year 1884, under the act of 1883, and actually settled thereon within six months, as provided in that act. She made this purchase and settlement for her own benefit as well as for the benefit of her son and another person; that is, she testified that such was her intention, though there was no contract between them to that effect. After residing on the land a few months, and after making the first payments of principal and interest, by a deed dated 29th day of June, 1885, she assigned her rights to J. A. Dickey. In April, 1888, the husband of appellee Mrs. E. C. Thompson became the purchaser by assignment, and soon thereafter died while on his way to the land. His son, J. M. Thompson, had already gone on the land in right of his father, and continued after his death to hold possession for his mother, making substantial improvements thereon, cultivating the same. After the crop of 1890 had been harvested, and during the temporary absence of J. M. Thompson, appellant took possession of the house and field, and proceeded to cultivate the land in his own right. At this time all interest had been paid on the original purchase, and Mrs. Thompson claimed the possession.

Conclusions of Law.

The court charged the jury to find for plaintiffs, appellees here, if, at the time defendant entered upon and took possession of the land sued for, plaintiff J. M. Thompson was in actual possession of the same as agent and tenant for the plaintiff E. C. Thompson; but to find for defendant if such possession had been abandoned prior to that time, and the land was then

vacant and unoccupied. Under the facts of this case we find no material error in this charge, and hence overrule the first assignment of error, which complains that there was error in restricting the right of recovery to the issue of possession. So long as the state does not complain, a mere interloper should not be heard to litigate the issue of good faith or bad faith on the part of a purchaser and an actual settler on a section of school land. As against such trespasser, the prior possession of one holding under a purchase (whether valid or not) from the state is sufficient ground for ejectment. *Parker v. Railway Co.*, 71 Tex. 132, 8 S. W. Rep. 541. The second error is not well assigned, and hence will not be considered. The third must also be overruled, because, if sufficient in form and material, (which is doubted,) it is not sustained by the record. There being no other assignments, the judgment will be affirmed.

COOK et al. v. COOK et al.

(Court of Civil Appeals of Texas. Nov. 8, 1893.)

JURY TRIAL—WAIVER—DEED—PROOF—CERTIFICATE.

1. It was error for the court to refuse defendants a jury trial on the ground that they had waived their right by failing to call for one when the appearance docket was called for orders, and that the demand came too late after a motion for a continuance had been overruled, it not appearing that any jury was in attendance when the docket was called, and was discharged because of failure to demand a jury trial.

2. Pasch. Dig. arts. 5007, 5008, 5010, did not require the certificate of the officer before whom a deed and power of attorney were proven to state that the witnesses were known to him.

Appeal from district court, Archer county; George E. Miller, Judge.

Action of trespass to try title by M. F. Cook and others against M. V. Cook and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Rector, Thompson & Rector and Grigsby E. Thomas, Jr., for appellants. B. B. Whitton and Walton, Hill & Walton, for appellees.

STEPHENS, J. Appellants M. V. Cook, L. A. Wilson, and M. A. and W. F. Nobles, residents of the state of Georgia, were cited by publication to answer the suit of appellees, brought against them and the other appellants Harrold and East, residents of Archer county, Tex. On appearance day the nonresident appellants, through their attorneys, having previously filed an answer, applied for a continuance, which was refused. They then demanded a jury, which was also refused. These are the principal grounds relied on for a reversal of the judgment. Without determining whether there was

abuse of discretion in refusing the continuance, we are of opinion that the right to a trial by jury had not been waived, and hence should not have been denied. It seems that the appearance docket was first called for orders, and, as no jury demands were made, the court proceeded with the trial docket. When this case was reached,—which was in the forenoon of appearance day,—and the application for continuance overruled, appellants demanded a jury. The case was then passed, at their request, till 1:30 P. M., when appellants renewed their demand for a jury, and offered to pay the jury fee, but the court declined to accede to this demand, and proceeded with the trial without a jury, on the ground, as stated in the bill of exceptions, that they had lost their privilege of demanding a jury by failing to call for one when the appearance docket was called for orders, and that the demand came too late after a motion for a continuance had been overruled. In an amended judgment entry it was recited that the demand was refused "because there was no jury in attendance upon the court, and none had been drawn for any other week of the term, and defendants refused to accept a jury summoned by the sheriff and not drawn by the jury commissioners." It does not appear and is not claimed that any jury was in attendance when the appearance docket was called for orders, and was discharged in consequence of a failure to demand a jury at that time. The record rather favors the inference that the jury had been discharged prior to that day. We fail to see, therefore, how appellees could have been prejudiced, or the business of the court retarded, by failure to make the demand at an earlier hour on that day. *Allen v. Plummer*, 71 Tex. 546, 9 S. W. Rep. 672. They were not required to demand a jury before appearance day, nor at any particular hour on that day. Rev. St. art. 3061. The application for a continuance seems to have been made in good faith, and there was nothing unreasonable in the conclusion apparently entertained by counsel for appellants that it would be granted. It showed the usual, though not the statutory, diligence in such cases. We think appellants had not, by the time and manner of making the demand, under the circumstances, lost the constitutional and statutory right of a trial by a regular jury. This conclusion leads to a reversal of the judgment, and dispenses with the necessity of passing on any other errors assigned by these appellants.

One error assigned by the other appellants seems to merit consideration. The exclusion from the evidence of a certain recorded deed and power of attorney which had been, in October or November, 1871, proved up by subscribing witnesses for registration, on the objection that the certificate of the officer before whom they had been proven failed to

show that the witnesses were known to him, was erroneous. The statute then in force did not require the certificate to state this fact. Pasch. Dig. arts. 5097, 5098, 5010; Sowers v. Peterson, 59 Tex. 216; Watkins v. Hall, 57 Tex. 4; Driscoll v. Morris, 2 Tex. Civ. App. 608, 21 S. W. Rep. 629. The other issues raised need not be passed on. The judgment will be reversed, and the cause remanded for a new trial.

GALVESTON, H. & S. A. RY. CO. v. ARISPE et ux.¹

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

DEATH OF EMPLOYEE—PLEADING—NEGLIGENCE OF VICE PRINCIPAL—EVIDENCE—DAMAGES.

1. In an action for damages for the death of plaintiffs' minor son, an employee on a work train on defendant's road, who was killed in a collision, an allegation that the accident was caused through the negligence of defendant, acting through its superintendent and train dispatcher, was sufficiently specific.

2. Where a division superintendent of a railway sends conflicting telegrams to a work train and a freight train, both directly under his control, and thereby causes a collision, his negligence is the negligence of the corporation, as he is not a fellow servant of an employee on the work train.

3. Secondary evidence of a telegram sent by the train dispatcher, without an affidavit showing its loss, is inadmissible, it having been proved that it was last seen in the hands of a former attorney of the road, who was near enough to be easily accessible by ordinary process of the court.

4. The plaintiff having alleged that the superintendent caused the accident by his negligence, it was proper to refuse an instruction requested by defendant that the evidence showing the death occurred by reason of the negligence of the servants of defendant; and, there being no allegation or proof of gross negligence, the jury should find for defendant.

5. The question as to whether the orders given by the superintendent to the conductors and engineers of the colliding trains were ambiguous and conflicting was for the jury.

6. At the time of the collision defendant's railroad and rolling stock were operated by the S. P. Ry. Co. Several railroads, among them defendant, had combined to expedite the transportation of through freight, and placed the government of the combination under the management of the S. P. Co., which road received the net earnings of the respective lines. The president of the S. P. Co. was defendant's president. *Held*, that the agreement was a partnership, and not a lease.

7. Deceased was a common laborer, 20 years of age, and earning \$1.10 per day. He was in robust health, and his parents were dependent on him for support. *Held*, that a verdict for \$3,000 was not excessive damages.

Appeal from district court, Val Verde county; W. Kelso, Judge.

Action by Jose Arispe and wife against the Galveston, Harrisburg & San Antonio Railway Company to recover damages for the death of plaintiffs' minor son, alleged to have been caused by the negligence of defendant. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

¹ Rehearing pending.

Clark, Fuller & Garner, for appellant. Joseph Jones and H. C. Carter, for appellees.

FLY, J. This is a suit for damages arising from the death of Pedro Arispe, the minor son of appellees, alleged to have resulted from the negligence of the superintendent and train dispatcher of appellant in sending orders to two trains, whereby a collision resulted. We find that the following facts were proved upon the trial of this cause: That the appellees were the parents of Pedro Arispe, an unmarried minor, 20 years of age; that the father was 64 years old, blind, and unable to work; that the mother was 45 years of age, and in fair health; that the son was healthy and robust; that he was working for appellant for about \$30 a month, and was engaged in quarrying rock on the line of defendant's road between Del Rio and Feely; that said son contributed from \$15 to \$20 per month on his salary to the support of his parents, and had done so for four years before his death; that he was dutiful, hard-working, and industrious; that said Pedro Arispe was killed in a collision between the work train on which he and other laborers were riding and a freight train, both belonging to defendant, between Feely station and Devil's River station on defendant's railroad, on December 31, 1886; that the collision occurred with freight train No. 80; that the freight train and work train were both running under orders from W. G. Van Vleck, who was the division superintendent, and had charge of all the trains; that Van Vleck had sent dispatches to the conductors and engineers of the work train and freight train which gave them both the right of way on a single track at the time of the collision; that said work train was on the track a few miles west of Devil's River, with orders to work there until 11:30 A. M., regardless of No. 80; that the freight train was west bound, and had orders not to cross Devil's River and move westward until 11:30 A. M.; that the trains came together a short distance west of Devil's River, and the boy Jose, who was riding on the flat car, was killed; that the order to the work train required it to remain at place of work until 11:30 A. M., and then it was necessary to seek the nearest siding, which was Devil's River station; that under the orders it was the duty of the freight train to remain at Devil's River station until 11:30, and then to move out; that the two trains collided near a curve, shortly after 11:30 A. M.; that the laborers were working at a point $5\frac{1}{4}$ miles west of Devil's River station; that the work train had gone east about $3\frac{1}{4}$ miles when the collision occurred; that the railroad of appellant was being operated by the Southern Pacific, under a partnership agreement between appellant and several other railroad companies; that all the lines were owned by practically the same parties. The

accident arose from the conflict of orders given by the division superintendent.

We are of the opinion that there was no error in the lower court overruling the exceptions to the petition. There was a distinct allegation that the death of the boy was caused through the negligence, not of the fellow servants of the deceased, but through that of appellant, acting through its superintendent and train dispatcher. The question of gross negligence could not in any manner figure in the trial of this cause. The allegations in the petition were sufficient. A corporation cannot act personally, but must act through agents and servants. It requires some person to superintend the building of structures, to see to the employment and discharge of servants, to provide for the comfort and safety of its passengers, customers, and their property, to regulate and control the moving of trains, to protect the property of the corporation, to use due care in the selection and keeping of machinery and appliances, and to use care and prudence in the protection of the employes of the corporation from danger and injury. This can only be done by its agents. The acts of these superintendents and agents invested with high authority are the acts of the corporation within the scope of the business of the corporation, and while so acting their negligence is the negligence of the corporation. The thought we desire to express is forcibly put in a New York case, and we adopt it: "When the directors themselves personally act as such agents, they are the executive or master; their acts are the acts of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all these respects; and though, in the performance of these executive duties, he may be and is a servant of the corporation, he is not, in those respects, a co-servant, a collaborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendent may also labor like other collaborers, he may be in that respect a collaborer, and his negligence as such a collaborer, when acting as a collaborer, may be likened to that of any other; but when, by appointment of the master, he exercises the executive duties of master, as in the employment of servants, in selecting for adoption the machinery, apparatus, tools, structures, appliances, and means suitable and proper for the use of other and subordinate agents, then his acts are the acts of a master, and then the corporation is responsible that he shall act with a reasonable degree of care for the safety, security, and life of other persons in its employ. These executive duties may also be distributed to different

heads of different departments, so that each superintendent, within his sphere, may represent the corporation as master in controlling and directing structures, in selecting machinery and tools. He speaks the language of a master; he issues his orders to his operatives; he is the mouthpiece and interpreter of his master's will." *Brickner v. Railroad Co.*, 2 Lans. 507. The negligence of the division superintendent in sending conflicting telegrams to the two trains directly and completely under his control and management by virtue of the office he held was the negligence of the corporation, as much so as though the owners or directors had sent the messages. *Railway v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214. We hold that Van Vleck was not the fellow servant of deceased, and the orders emanated from him. This view of the case disposes of the first two assignments of error. The allegation is sufficiently specific that the accident occurred by reason of the negligence of the superintendent of appellant, who had the management and control of the trains.

The third assignment submits as error the action of the court in refusing to permit the train dispatcher to testify to the contents of a dispatch sent by him to the telegraph operator at Del Rio, instructing him to hold the work train until the freight train arrived. The bill of exceptions shows that it was a rule of the company that all train orders be written in a book kept for that purpose in the office of the superintendent before sent; that this order was so written before it was sent; that the order was last seen in possession of J. M. Coleman, who had been an attorney for appellant, who lived in Houston; that J. H. Clark wrote to E. P. Hill to get the order; that Hill had replied that he had seen Coleman, and Coleman said he had lost the order. It is quite doubtful which was the original,—the order in the book or the one Coleman may have had; but, however that may be, there was not evidence of loss of the order sufficient to permit secondary evidence of its contents. When the possession of a document, of whose contents secondary evidence is desired to be introduced, is shown to have been in a person who is living and easily accessible by ordinary process of the court trying the case, the affidavit of that person must be obtained showing the loss of the instrument before secondary evidence of the contents of the instrument are admissible. There is neither affidavit of Hill nor Coleman, and the court rightly excluded the testimony. *Dunn v. Choate*, 4 Tex. 14; *Vandergrif v. Piercy*, 59 Tex. 373; *Bray v. Aikin*, 60 Tex. 691.

The court was requested by appellant to instruct the jury that, the evidence showing that the death occurred by reason of the negligence of the agent or servants of appellant, and there being no allegation or proof of gross negligence, the jury should

find for appellant. The allegation was that the superintendent had caused the accident by his negligence, and his negligence was the negligence of the corporation, and the court did not err in refusing to give the charge.

The question as to whether the orders given by the superintendent to the conductors and engineers of the colliding trains were ambiguous, conflicting, and calculated to mislead, was one of fact to be determined by, and it was fairly and fully submitted to, the jury. The question of negligence hinged upon the construction to be placed upon the orders to the trainmen, and it would have been a gross usurpation of the powers of the jury to have given the third special charge asked by appellant. The court, in his able and impartial charge, instructs the jury that the negligence of the superintendent in giving orders to trains under his control would, if proved, be the negligence of the company, and fairly submitted the determination of the question of negligence to the jury, and leaves it to them to pass upon whether the giving of the orders was or was not negligence on the part of appellant, and there was no error in this, as contended by appellant. We can see no error in the charge given by the learned judge, but hold it to be an admirable and correct enunciation of the law applicable to the facts. There was some testimony by two witnesses that tended to show that at the time of the collision the railroad and rolling stock of appellant were in the hands of the Southern Pacific Company, and being operated by said company; that several railroad companies, among the number being the appellant, had entered into a combination to better facilitate the transportation of through freight, and had placed the government and control of a company called the Southern Pacific Company; that each road got the net earnings of its respective line; that the president of the Southern Pacific Company was the president of the appellant company; that the object of the combination was to expedite the carriage of through freight. Appellant claims that this agreement was a lease, the appellees claim it was a partnership, and the court submitted the question to the jury. They held it was a partnership, and we are of the opinion that they were right. *Railway Co. v. Davis*, 23 S. W. Rep. 301, (decided at this term.)

The only other assignment is that the verdict of the jury was excessive. There is no evidence in the record that shows that the jury was influenced by passion or other improper motive. The facts show a clear case of negligence upon the part of appellant, and that by reason of this negligence this young man, just entering upon robust manhood, was deprived of his life, and at the same time his aged father and mother, who were

dependent upon him for a support, were deprived of his care and protection. The jury awarded appellees \$3,000, and though he was but "a common laborer," as he is termed in appellant's brief, and only earning \$1.10 per day, yet, in view of the facts, we cannot hold that the verdict was excessive. In the case of *Railway Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. Rep. 838, it was held that a verdict for \$10,000 for the death of a laborer who was earning \$1.25 per day was not an excessive one, and the case was affirmed. This case was before the supreme court on appeal once before, and was reversed, but the errors indicated did not occur on the second trial. *Railway Co. v. Arispe*, 81 Tex. 517, 17 S. W. Rep. 47. The question of negligence has been fairly presented to the jury, and the testimony shows that the orders given by the superintendent to the trainmen were ambiguous, and calculated to mislead, and we can see no error in the judgment. We are of the opinion that the judgment ought to be affirmed.

GALVESTON, H. & S. A. RY. CO. v. THOMPSON.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

SHIPMENT OF STOCK—NEGLECT OF CARRIER—PLEADING—EVIDENCE.

1. In answer to an action for damages to horses shipped over defendant's railroad, defendant pleaded a written contract requiring, as a condition precedent to plaintiff's recovery, notice, in writing, of his claim, to some officer of defendant, or its nearest station agent, before the stock was removed from its destination. The answer was defective, but no exceptions were taken by plaintiff, and the contract was admitted without objection. The court charged that, under the pleadings, the jury could not consider the contract as a defense. *Held* that, since no objection was urged to the pleading or testimony, the charge was erroneous, but was not prejudicial to defendant, as it did not introduce any testimony to sustain its plea of failure to give notice of damages.

2. The answer was defective, as it failed to allege the name of the agent to whom the notice was to be given, or whether or not he was accessible, or conveniently located at the point of destination.

3. The burden rested on defendant to prove such facts, either by the terms of the contract itself, or by evidence aliunde showing that plaintiff in fact possessed the necessary information.

4. An instruction cannot be complained of by defendant because it confined the alleged negligence in feeding and watering the stock to one station, where the proof showed that the only attempt that was made, and the only opportunity given, to water the stock, was at such station.

5. Whether or not plaintiff, in addition to his verdict for damages, was entitled to the penalty allowed by Rev. St. art. 284, for failure to feed and water horses, was a question of fact for the jury.

Appeal from district court, Medina county; Thomas M. Paschal, Judge.

Action by W. F. Thompson against the Galveston, Houston & San Antonio Railway

Company to recover damages for injuries to horses shipped over defendant's road. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Powell & De Montel, for appellant.

FLY, J. Plaintiff (appellee) sued the appellant for \$800 damages to 27 horses shipped by him from Marfa to San Antonio, alleging that the damage was caused by a failure of defendant to feed and water the stock en route, and asking, in addition to damages, the statutory penalty of from \$5 to \$500 for defendant's failure to feed and water the stock. Defendant pleaded general denial, and specially pleaded a written contract, one of the conditions of which was that, as a condition precedent to plaintiff's right to recover damages for injury to any of said stock, he must give notice, in writing, of his claim therefor, to some officer of the defendant, or its nearest station agent, before the stock was removed from point of destination, etc. The proof shows that the 27 horses were placed on the cars at Marfa on the 27th day of February, 1888, and, after running for 30 hours, reached Del Rio about 6 o'clock P. M. on February 28th; that plaintiff earnestly endeavored to get defendant to place his car near the stock pen, so he could get his horses out, and feed them, but it was not done until about 8 or 9 o'clock at night, and while a violent rain-storm was raging; that 20 of the horses were gotten out, and hay put in the pen for them, but the other 7 would not come out; that, about three hours after the horses were carried to the pens, defendant, over the protest of plaintiff, reloaded the horses, and moved out to San Antonio; that the horses eat the manes and tails of each other, and were badly damaged by the want of food and water; that plaintiff desired to keep the horses over 24 hours at Del Rio, in order to recuperate them, but was not permitted so to do by defendant; that the 20 horses were fed in the pen about 12 o'clock, but were reloaded so quickly thereafter that they could not eat; that it was raining all the time the horses were out; that, in shipping horses from Marfa to San Antonio, it was customary to take them off at Del Rio, and let them rest 12 hours; that the car arrived at San Antonio about 4 P. M. on the 29th of February; that the only attempt made, and the only opportunity given, to feed and water the horses, was at Del Rio; that the horses were on the road from 6 o'clock P. M. on the 27th to 4 o'clock P. M. on the 29th; that the horses were badly injured by the failure to water and feed them; that their market value in San Antonio, in their injured condition, was \$12.50 per head, and, if they had arrived in good condition, their market value would have been \$25 per head. There was no proof

offered on the subject of notice of damages to the stock being given to an officer or agent of defendant.

The trial court, in the first clause of the charge, instructed the jury as follows: "You are instructed that, under the pleadings in this case, you cannot consider the contract referred to, and relied upon as a defense to this suit." Appellant assigns this as error, in withdrawing from the consideration of the jury the contract pleaded; the same being sufficiently set up as a defense, and having been proven and introduced to the jury without objections, and there being no special exceptions by plaintiff to the manner in which said contract was set up as a defense. The plea in this case, setting up the contract, was defective, and subject to demurrer, but no exception was taken, and the contract was admitted without objection. The practice of not excepting to a defective pleading, but waiting until evidence is offered, and then objecting to its admission on the ground that it is not warranted by the pleading, has been strongly animadverted upon by our supreme court, (*Powers v. Caldwell*, 25 Tex. 353;) and the practice of a court, without objection being urged to pleading or testimony, instructing a jury not to regard testimony because the pleadings do not justify it, is perhaps more reprehensible than the other. This would have been reversible error, if defendant had introduced any testimony to sustain its plea of failure to give notice of damages, but it did not do so.

Had there been any exceptions filed to the answer, they should have been sustained, for it fails to allege the name of the agent to whom the notice was to be given, or whether or not he was accessible, or conveniently located at the point of destination, so that plaintiff could have easily reached him. These matters should have been alleged, and then the burden rested upon the defendant to prove them, either by the terms of the contract itself, or by evidence aliunde showing that plaintiff in fact possessed the necessary information. *Railway Co. v. Childers*, (Tex. Civ. App.) 21 S. W. Rep. 76, and *Railway Co. v. Paine*, Id. 78. The supreme and other superior courts of Texas have been very undecided as to whether lack of notice, as required in railroad contracts for the shipment of live stock, should ever preclude a shipper from recovery, and have always refused to lay down a general rule on the subject. *Railway Co. v. Harris*, 67 Tex. 172, 2 S. W. Rep. 574; *Railway Co. v. Fagan*, 72 Tex. 132, 9 S. W. Rep. 749; *Railway Co. v. Adams*, 78 Tex. 374, 14 S. W. Rep. 666. In the latest utterance by the supreme court on the subject, there is no authoritative and decisive ruling on the subject. The court says: "Without determining whether this provision in a contract such as this can, in any case, be en-

forced, we do not think the appellant has brought itself within the rules laid down in those cases that permit such contracts to be enforced, and that recognize their legality. When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject-matter of the contract, and the circumstances and surroundings of the parties. To prove that such conditions in a contract are reasonable, is a burden resting upon the carrier, who must show, by proper pleadings and evidence, the existence of facts that call for an enforcement." *Railway Co. v. Greathouse*, 82 Tex. 111, 17 S. W. Rep. 834. None of the other points in the contract were properly pleaded or supported by proper proof, and the charge could not have injured defendant.

The second, third, and fourth assignments of error criticize the charge because it confines the negligence in feeding and watering to Del Rio; but we cannot see how this could have possibly injured defendant, as the proof showed that the only attempt that was made, and the only opportunity given, to water the horses, was at Del Rio.

There was a verdict for \$270 damages to the horses, and \$25 penalty, under article 284 of the Revised Statutes; and appellant complains that a new trial was not given, and lays particular stress on the testimony failing to justify the verdict for the penalty. This was a question of fact for the jury, and the testimony is sufficient to sustain the verdict. The charge, in allowing the jury to find for the penalty upon a preponderance of the testimony, was perhaps erroneous, as it is held that the infraction of the law from which flows a penalty must be shown by stronger proof than a mere preponderance; but no error is assigned on this point, and we cannot consider it in arriving at an opinion. Even if the duty, under the contract, of feeding and watering the animals, devolved upon plaintiff,—which we do not hold,—the defendant failed to give plaintiff opportunities or facilities for watering them, and was just as liable as though the duty of feeding devolved on the company. We have considered all the errors assigned, and, finding no error, the judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. FUSSELL.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

APPEAL FROM JUSTICE'S COURT—JURISDICTION—REVIEW.

The district court has the power, on appeal from a justice's court, to determine whether a counterclaim set up by defendant was fictitious, and made for the purpose of conferring jurisdiction on the district court, and its de-

termination, in the absence of a statement of facts in the record, is final, and not subject to the revision of the court of civil appeals.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by Albert Fussell against the Galveston, Harrisburg & San Antonio Railway Company to recover damages for the killing of plaintiff's cow through the alleged negligence of defendant. From a judgment of the district court dismissing an appeal from a judgment of a justice's court in favor of plaintiff, defendant appeals. Affirmed.

Blair & Hobbs, for appellant. Geo. C. Altgelt, for appellee.

NEILL, J. Appellee sued appellant in the justice's court for \$19 damages for killing his cow by appellant's engine through the alleged negligence of appellant. The appellant pleaded a general denial, and that the cow, when killed, was a trespasser on its track at a point within the corporate limits of the city of San Antonio, where stock were not permitted to run at large. It also pleaded in reconviction that by reason of plaintiff's negligence the collision between its engine and the animal was unavoidable on its part, and necessarily slackened the speed of the engine and cars of appellant, causing a waste of steam, loss of fuel, and burning out of air pump on engine, and delay in defendant's train in reaching its destination, to its damage in the sum of \$40. Judgment was rendered in the justice's court in favor of appellee for the amount sued for, from which appellant appealed to the district court, where the appeal was, on motion of appellee, dismissed by the court after hearing the evidence, on the ground that the amount in controversy and the judgment rendered were less than \$20, and that appellant's plea in reconviction was fictitious, and made for the purpose of conferring jurisdiction on the district court, from which judgment comes this appeal.

The only error assigned is the action of the court below in dismissing the appeal. There is no statement of facts in the record, and, as suggested by appellee, the district court, having the power to determine the mixed question of law and fact as to whether the counterclaim was fictitious, and made for the purpose of conferring jurisdiction, its determination of the question, in the absence of a statement of facts, is final, and not subject to the revision of this court. The judgment of the district court is affirmed.

BUTLER v. WILSON.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

INSTRUCTIONS—APPEAL—CONFLICT OF EVIDENCE.

1. Refusal to give requested instructions is not error, where their substance is given in the general charge.

2. When there is a conflict of evidence, the court of civil appeals will not disturb the verdict.

Appeal from El Paso county court; J. E. Townsend, Judge.

Action by T. F. Wilson against G. W. Butler for services as interpreter. The action was originally brought in justice court, where plaintiff had a verdict, and defendant appealed to the county court. From a judgment in plaintiff's favor, defendant again appeals. Affirmed.

A. G. Wilcox, for appellant.

FLY, J. Appellee brought suit in a justice court for \$148.50 due him for service or as an interpreter of Spanish into English. He obtained judgment in the justice court for \$99.60, and appellant appealed to the county court, where judgment was rendered in favor of appellee for \$72.30.

Appellant insists only on three of his assignments of error. The first is because the court erred in refusing to give special charges asked by him. All of these charges were, in effect, given in the general charge of the court. The latter part of the third special charge requested is a charge upon the weight of the testimony, and was rightly refused. Appellee sued for the reasonable value of his services, and it was for the jury to pass upon the weight of the evidence; and the testimony, in this case, would have sustained a much larger verdict than they returned. While the appellee did not swear to the exact number of hours that he worked every day, he did show that he was at the service of appellant during the time for which he claims pay, and did all that was required by appellant.

The two remaining assignments relied on by appellant in his brief go to the sufficiency of the testimony to sustain the verdict. Where there is a conflict of testimony, this court will not disturb the verdict; it being the policy of appellate tribunals to sustain verdicts, unless they are unsupported by any evidence. There is, however, in this case, a preponderance of evidence in favor of appellee. There is no error in the judgment, and it is affirmed.

FITZGERALD v. HART.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

DIRECTING VERDICT—CONFLICTING EVIDENCE.

Where, in a suit on a note, defendant alleges fraud and a failure of consideration, and the evidence is somewhat conflicting, it is error for the court to direct a verdict for plaintiff.

Appeal from district court, El Paso county; T. A. Falvey, Judge.

Action by Juan S. Hart against C. C. Fitzgerald to recover on a promissory note. Judgment was entered for plaintiff, and defendant appeals. Reversed.

Leigh Clark and Brack & Neill, for appellant. Davis, Beall & Kemp and Blacker & Clardy, for appellee.

FLY, J. Appellee, as plaintiff below, on the 29th day of June, A. D. 1888, filed his original petition in the district court of El Paso county against C. C. Fitzgerald as maker and J. C. Carrera as indorser of a certain promissory note, which was executed by appellant on the 5th day of January, A. D. 1888, for \$1,250, the suit on which note was numbered 900; and on the 24th day of February he filed his first amended original petition in suit No. 995 in said court against appellant on three promissory notes for \$1,250 each, all executed on the 5th day of January, 1888, by appellant; two payable to the order of J. C. Carrera,—one on the 10th day of September, 1888, one on the 10th day of January, 1889,—and the other payable to the order of Felicia Carrera on the 10th day of January, 1889. The plaintiff in suit No. 990 dismissed as to Carrera, and upon motion of the appellant the two suits were consolidated. An original attachment was also sued out by plaintiff below, and levied upon property of appellant, but no question is raised as to the validity of the attachment proceedings. Defendant, in his answer to plaintiff's petition, alleged that the notes sued on were given as part payment of \$20,000, the purchase money for two leases then owned by J. C. Carrera and G. W. Wood on the Bennet mine, which were assigned by Wood and Carrera to appellant; that at the time of the assignment of said leases and execution of said promissory notes Wood and Carrera falsely and fraudulently represented to defendant that the Bennet mine contained large and valuable deposits of a high grade of silver ore, and that defendant, by pursuing the system of working said mine which had been developed by Carrera, could before the expiration of said leases from said mine pay off and discharge from the output or products of said mine the notes given for the purchase money of said leases as they became due, and in addition thereto realize large profits therefrom; that at the time the notes were executed appellant was ignorant of the nature and character of the mine, and believed, relied upon, and was induced by said false and fraudulent representations of Carrera and Wood to purchase said leases and execute said notes; that such representations were false and fraudulent, and that Wood and Carrera then knew them to be false; that the ore in said mine was a low grade of silver ore; that the mine was difficult and expensive to work, and that it would have been impossible for defendant to have realized during the remainder of the term of the leases transferred the amount of money evidenced by said promissory notes given in consideration of said leases. Appellant, in his said answer, denied upon infor-

mation and belief that the appellee, Juan S. Hart, became the owner and holder of said notes for value before their maturity, and that, if he became the owner of them, it was after he had obtained knowledge of the failure of consideration for which they were given. After the taking of testimony had been concluded in this case in the lower court, the judge instructed the jury to return a verdict for the plaintiff. There was a charge of fraud in this case against the plaintiff and others, as well as a plea of failure of consideration; and, as fraud is usually proved by circumstances, the jury should have been permitted to pass on the weight of the circumstances. The evidence in this case was not of a character to justify the judge in assuming the powers and privileges of a jury. There are circumstances in the case that might well have been permitted to have been placed under the scrutiny of those to whom the law has given the exclusive right to weigh testimony and pass upon the credibility of witnesses. It is unnecessary, if it would not be improper, for us to comment further upon the testimony. Where there is no question of fact to be submitted to a jury it might be proper for a judge to instruct a jury to return a certain verdict, but this case is not in that category. *Supreme Council v. Anderson*, 61 Tex. 301; *Rogers v. Broadnax*, 24 Tex. 542. A case between the same parties, with the same facts and same result, was before our supreme court on the same question, and it was held in that case to have been error in the trial judge to instruct a verdict for plaintiff. *Fitzgerald v. Hart*, (Tex. Sup.) 17 S. W. Rep. 369. For the error indicated the judgment of the lower court is reversed, and the cause remanded.

NEILL, J., disqualified.

ABBEE v. INTERNATIONAL & G. N. R. CO.'S RECEIVERS.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

RECEIVERS—JUDGMENT AGAINST—ENFORCEMENT—WRIT OF RESTITUTION.

1. In an action by a landowner against the receivers of a railroad company for the recovery of land occupied by the roadbed, the court, on rendering judgment in plaintiff's favor, properly declined to award plaintiff a writ of restitution, since any interference with the property would be a contempt of the court appointing the receiver, and plaintiff's proper course is to apply to that court.

2. The appointment of a receiver of a railroad does not pass title to the property, so as to render a judgment against the receiver conclusive against the company; and no writ of restitution should issue, even after the restoration of the property to the company, on a judgment against the receivers, to which the company is not a party.

Appeal from district court, Frio county; R. W. Hudson, Judge.

Trespass to try title by Hiram P. Abbee against the International & Great Northern Railroad Company's receivers. From a judgment in plaintiff's favor, but denying him a writ of restitution, plaintiff appeals. Affirmed.

Mason Maney, for appellant.

JAMES, O. J. The action was one of trespass to try title against the International & Great Northern Railway Company, as represented by its receivers, F. H. Bonner and J. M. Eddy, to recover two strips of ground, 100 feet wide, running across two surveys claimed by the plaintiff, and for damages. The judgment of the court was in favor of the plaintiff, against the receivers, for the strips of land, but without damages, as the same had been waived. The judgment, however, expressly orders that no writ of possession issue upon the judgment. The errors assigned are as follows: (1) That, as only a general denial was pleaded, a recovery of the land entitled plaintiff to the writ. (2) That plaintiff was, at all events, entitled to a writ of possession, to be issued upon the return of the property by the receivers to the railway company.

Conclusions of Fact.

(1) That the action was one against the receivers. (2) That, during the pendency of the suit, the property sued for was in the possession of the receivers, and constituted part of the track and right of way of the railroad under their management.

Conclusions of Law.

A judgment against a receiver cannot be carried into effect, except by consent and direction of the court which has charge of the estate, or unless a statute allows it to be done. While we have a statute which permits suits to be prosecuted against receivers without leave of court, there is none which authorizes any process upon the judgments. On the contrary, articles 1468 and 1469, Sayles' Civil St., provide for the payment of such judgments through the proper court out of funds in the hands of the receiver. It may be doubted if said articles were intended to apply to suits of the character of the one before us, or to any but suits for money. However, no objection is raised to the judgment on that ground, and it may be presumed, if necessary, that the proper leave was given to bring this suit. The principle is elementary that any interference with the possession of property placed in the hands of a receiver is a contempt of the court having control of it. The award of a writ of possession in this instance would have been useless, as no officer could have undertaken to execute it without placing himself in contempt. Therefore, it was proper for the court to withhold the writ, so far as the receivership was concerned. If plaintiff de-

sired possession of his property from the receivers, it is to be presumed that the proper court, upon his application, would have respected said adjudication, and, upon examination of the matter, if it determined that the property was not essential to the business of the road, or purposes of the receivership, would have doubtless ordered its delivery to plaintiff, or, if found to be indispensable, would have directed the receiver to institute proceedings to condemn the same, by which plaintiff's rights would have been duly protected by compensation.

Appellant contends that he was at least entitled to a writ to be issued after the property should be restored to the railway company by the receivers. A complete answer to the position, in our judgment, is that appellant obtained no judgment against the railway company. It was within the power of plaintiff to have joined the railway company as a defendant in this suit, and, with an adjudication of the title against the company, he would have been entitled to the writ, the same to have its effect in the event of a restoration of its property. It may be urged, in this connection, that the suit was against the corporation. But, if this were so, the judgment is clearly against the receivers, only; and, if the corporation should in any way be deemed a party, the judgment is not a final one, and would not support this appeal. We have concluded, in favor of the right of appeal, that the suit was one against the receivers, only. The receivership did not invest the receivers with the title to the company's property. High, Rec. § 302. The court, by means of a receivership, assumed the control and management of its property for the purposes of the receivership, and had power, through appropriate proceedings, to divest the corporation of its title. The case is unlike an assignment made by an insolvent person or corporation, by which the title is expressly conveyed. There exists no such relation between the owner and the receiver which admits of a judgment in respect to the title to property against the latter being res judicata as to the former. Certain classes of judgments have this effect, but it is by force of statute. We conclude, therefore, that a writ of possession granted in connection with the judgment before us against the corporation would, in any event, have been erroneous. The judgment is affirmed.

ELMENDORF v. TEJADA et al.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

BONA FIDE PURCHASER—APPEAL—REVIEW—EVIDENCE.

1. One who executes a deed in ignorance of its contents, and through the fraud of the grantor, is bound by her action, as against an innocent mortgagee, who advanced money to the grantee on the faith of the deed.

2. A verdict of a jury will be set aside on appeal where there is no evidence in the record to sustain it.

Appeal from district court, Wilson county; George McCormick, Judge.

Trespass to try title by Amalia Elmendorf against Susana Banks Tejada and others. From a judgment in defendants' favor, plaintiff appeals. Reversed.

John A. & N. O. Green and Robert B. Green, for appellant. L. S. Lawhon, for appellees.

FLY, J. Appellant brought an action of trespass to try title, against appellees, to a house and lot situated in the town of Floresville, Wilson county, Tex. Appellees answered by a plea of not guilty, and alleged that the deed of trust from one John Henry Daine, through which appellant claimed, was null and void, as the deed from Susana Banks Tejada, who was at that time Susana Banks, and unmarried, and the housekeeper of Daine, was obtained by force, threats, and fraud, and said deed of trust was given to secure a pre-existing debt due appellant; that appellant had full knowledge of the fraud practiced by Daine on appellee Susana Banks, etc. The record fails to show that the debt for which the deed of trust was executed was for a pre-existing debt due Mrs. Elmendorf, but, on the other hand, shows that the debt was contracted at the same time the instrument was executed. The evidence, as set forth in the record, does not bring home to appellant the knowledge of the fraud, if any, on the part of Daine in obtaining the deed from Susana Banks. There is in fact nothing in her testimony, as reported in the statement of facts, that makes out a case of fraud on the part of Daine; but, on the other hand, she swore that he told her that he wanted the deed so that he could raise money on the land. If she voluntarily and freely executed the deed for the purpose of placing the land in the hands of Daine, so that he could go out and borrow money on it, having full knowledge of the facts, she would be bound by her action, as against an innocent creditor, on the faith of the deed given by her. The ignorance as to the character of the instrument or the fraud which brought about its execution must concur with notice, either actual or constructive, on the part of the grantee, if the deed is properly acknowledged and certified to by the officer taking the acknowledgment. *Davis v. Kennedy*, 58 Tex. 516; *Ragland v. Wisrock*, 61 Tex. 301. We are averse to setting aside the verdicts of juries, and will strictly follow the rule established in Texas of never disturbing the verdict of a jury unless it is clearly unsupported by the evidence. In this case we can find no evidence, as it appears from the records, to sustain the verdict, and the case will be reversed. It is unnecessary, if not im-

proper, for us to discuss the evidence in its detail, as it may be quite different on another trial. Because the evidence, as shown in the record, does not support the verdict, the judgment of the lower court is reversed, and the cause remanded.

VOSS v. FEURMANN.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

APPEAL BOND—INSTRUCTIONS—CONTRACT TO TEACH SCHOOL—VARIANCE.

1. The fact that an appeal bond given by plaintiff on appeal from a justice's court is signed by one of the defendants as surety is no ground for dismissing the appeal, since the approval of the bond by the justice determines the sufficiency of the surety.

2. No distinction exists between a suit to recover for services rendered under a contract, and a suit for services arising from breach of the contract, and an instruction seeking to draw the distinction is properly refused.

3. In an action for services under a contract, it is proper for the court, in its instructions to the jury, to assume the existence of the contract, which is in evidence by undisputed testimony.

4. A contract to teach school, which reserves to both parties the right, after the present school year has expired, to terminate the contract by giving three months' notice, "otherwise the foregoing contract will be binding for the ensuing scholastic year," cannot be terminated before the expiration of the first school year by giving the three-months notice.

5. In an action for services, a written contract of employment, signed by only part of the defendants, is admissible in evidence, under an allegation that the contract is in writing, but not stating that it is signed by all the defendants.

Appeal from Guadalupe county court; James Greenwood, Judge.

Action by Max Feurmann against Albert Voss and others for services as school teacher, originally brought in justice's court. There was a judgment in favor of defendants, and plaintiff appealed to the county court. From a judgment in plaintiff's favor, defendant Voss appeals. Affirmed.

Burges & Dibrell, for appellant.

JAMES, C. J. The suit was brought by Max Feurmann in a justice's court against seven defendants (among them, the appellant) to recover \$120.82 for services as a school teacher. Judgment was there rendered that plaintiff take nothing by his suit, and for all costs against him. The appeal bond was signed by two sureties, one being Fritz Schwartzlose, a defendant. On this ground, a motion was interposed in the county court to dismiss the appeal, and we think the motion was properly overruled. The approval of the bond by the justice determined the question of his being a good and sufficient surety.

The second assignment of error complains of a refusal to give a charge asked by defendants. A distinction is sought to be

drawn by appellant between a suit to recover for services rendered under a contract, and a suit for services arising from a breach of the contract,—a distinction we are unable to see. If there were no breach of the contract, no claim for services could exist by reason thereof. The charge asked embodies this idea, and was further erroneous in being contradictory in its terms. It would have instructed the jury that plaintiff does not sue for breach of the contract, and also informs them that plaintiff declares on a written contract for services rendered. This would have misled and confused them.

The pleading of plaintiff consisted of an account filed against defendants (naming them) for services as school teacher for three months, at \$40 per month, with some interest. The citation added these words: "As is evidenced by a written contract in the possession of above-named defendants." The contract introduced in evidence was dated December 11, 1886, and was signed by plaintiff and two other of the defendants, instead of all seven of them; and it evidenced that plaintiff should take charge of a community school for a salary of \$40 per month, besides free dwelling and food for himself, and to perform services as teacher of such school, and concluded with the following clause: "Both parties reserve the right, after the present school year has expired, by giving three months' notice, either to discontinue the school, or to discharge the teacher; otherwise, the foregoing contract will be binding for the ensuing scholastic year." Appellant was one of the witnesses, and testified that plaintiff commenced to teach the school on February 3, 1887. It is not claimed in appellant's brief that there was no evidence sufficient to warrant the verdict, and we cannot be expected to investigate that question.

The third assignment of error complains of the following charge: "The jury are instructed that the contract in this case between plaintiff and defendants is a contract for the scholastic year, and could not be terminated by either party before the expiration of that time, except by giving three months' notice; and if you believe from the evidence that the defendants contracted for the services of plaintiff, as teacher, the plaintiff is entitled to his salary, as teacher, whether he taught or not, if such failure resulted from the neglect or refusal of defendants to provide work for plaintiff, when plaintiff has complied with the requirements of the contract, or offered, in good faith, to do so." At defendants' request, the court gave the following charge, which we must notice in considering the foregoing one: "You are instructed that no one is bound in said contract, except those who have signed the same." The charge last quoted overcomes the objection that the former of said charges is on the weight of evidence, in assuming that

there was a written contract between the parties, and that said charge made all the defendants liable upon the contract. It was proper for the court to assume the existence of the contract, which was in evidence by undisputed testimony, and the charge asked and given declares it to be binding only on those who signed it. It is true, the charge does not inform the jury when the scholastic year began, but this was proper, as the contract did not define when it began, and it should have been left for the jury to determine. The evidence of appellant himself, above quoted, was sufficient to enable the jury, from the acts of the parties, to arrive at what they intended by the words "school year" or "scholastic year."

The construction given by the court of the written contract in evidence was correct, except in the statement that it could not be terminated by either party before the expiration of the scholastic year, except by giving three months' notice. This implied that it could be terminated at any time by giving the notice, when it could only have this effect at the end of the year. Upon the facts of this case, the charge was favorable to the appellant.

The fourth assignment exhibits no error. The charge was correct in everything, except that it authorizes the jury to find for plaintiff a less sum than was stipulated in the contract, and this was also favorable to appellant.

There was no variance presented in this case. The claim filed by Feurmann was for services, not stating whether the value thereof, \$40 per month, was or was not fixed by contract. The citation stated that it was evidenced by written contract. A written contract was produced in evidence, not variant in any manner from what was alleged; not even in the particular that it was not signed by all of the defendants, for it had not been alleged to be signed by all of them. No errors being pointed out by the assignments discussed in the brief of appellant which require a reversal, the judgment is affirmed.

CLAUNCH v. OSBORN.

(Court of Civil Appeals of Texas. Nov. 15, 1898.)

COUNTY COURT — JURISDICTION — DAMAGES — APPEAL — TURNING LIVE STOCK INTO NEIGHBOR'S PASTURES.

1. The fact that the position of a division fence between plaintiff's and defendant's pastures is incidentally inquired into in action for damages caused by defendant's opening the fence, and turning his cattle into plaintiff's pasture, does not deprive the county court of jurisdiction.

2. An agreement between the parties to submit a case without a charge necessarily wives an instruction to separate the findings of actual and exemplary damages, and neither

party can complain of the jury's failure so to do.

3. In an action for turning defendant's live stock into plaintiff's pasture, where there is no evidence as to any damages sustained by plaintiff, except that he "was all tore up about it," and that he would not have consented to defendant's live stock being in his pasture for \$200, a verdict for both actual and exemplary damages cannot be sustained.

4. While an owner of uninclosed land cannot recover damages done by stock ranging over it, yet one who opens a division fence, even on his own land, at a time and under circumstances that would naturally cause his stock to go into his neighbor's pasture, and there remain, is a trespasser, and is liable for the injury that resulted to his neighbor therefrom.

Appeal from Live Oak county court; C. C. Cox, Judge.

Action by Z. H. Osborn against S. J. Claunch for injuries sustained by reason of defendant's stock being turned into plaintiff's pasture. From a judgment in plaintiff's favor, defendant appeals. Reversed.

Fly & Hill and Leonidas C. Hill, for appellant. F. H. Church, for appellee.

JAMES, C. J. Appellant and appellee had adjoining pastures containing stock. There was a fence between them, Osborn claiming to have assisted in building part of it, which he claimed was upon the line, which was denied by appellant. The remainder of the fence was conceded to be on appellant's land, but it appeared that the other fence of Osborn's pasture joined the division fence, and thereby made a complete inclosure for his stock. Osborn brought suit in the county court for damages, actual and exemplary, and alleged, in substance, that appellant had opened the division fence on February 1, 1891, willfully and maliciously, and without giving the six-months notice, and that about 100 head of appellant's horses and cattle were thereby let into plaintiff's pasture, damaging him as follows: (1) He having 14 head of mares in his pasture with a fine jack, he lost 10 mule colts, worth \$20 per head, by reason of a stallion belonging to appellant, which kept the jack from the mares; (2) that the appellant's horses and cattle consumed his grass to such an extent that 50 head of fat beeves which he had in said pasture declined in flesh, and were made not marketable, causing him damage in the sum of \$200; (3) that the pasture of appellant's stock was worth 25 cents per head per month since February 1, 1891, to date,—the amended original petition setting up this, and damages, being filed May 4, 1891, the trial being had November 3, 1891. It was also alleged that defendant threw down the fence unlawfully, willfully, and maliciously, and with intent to injure plaintiff, and exemplary damages were asked in the sum of \$300.

The first assignment of error is without merit, for, although the position of the line between the pastures may have been inci-

dentially inquired into, the suit was not to establish a boundary, and the court had jurisdiction.

The third assignment discloses no error. The parties agreed that the cause should be submitted without any charges. A waiver of all charges necessarily waived an instruction for the jury to separate their findings of actual and exemplary damages. Appellant having contributed to the form of the verdict, as well as the appellee, neither should be heard to complain of it in this respect.

That portion of the amended original petition asking for damages for loss of prospective mule colts should have been stricken out in response to the first special exception, as the same was speculative, and not recoverable.

The other exceptions were not well taken, and the allegations of the amended original petition were sufficient to let in proof of damages to the cattle resulting from reduced flesh, if any, and for pasturage of defendant's stock; and the allegation that the act of defendant was done willfully and maliciously would support exemplary damages also, if the proof should show that the act was attended with circumstances of malice or oppression.

We find upon examination of the statement of facts no evidence concerning the supposititious mule colts, and we find in reference to the damages to his beesves that plaintiff testified that "he sold his cattle in the spring for as much as any person got for theirs," thereby disproving any injury in this respect. As to the pasturage, we ascertain that, although plaintiff alleges it was worth 25 cents per head per month, no one testifies to this. His evidence "that he was all tore up about it," and that he would not have consented for said stock to be in his pasture for \$200, was not evidence of damages to sustain a verdict. There is therefore total want of evidence to sustain a verdict for actual damages, and consequently for exemplary damages. It is not necessary to consider the act of March 17, 1887, entitled "partition fences," as we do not believe it applicable to this case. In this state, while the owner of land cannot recover damages done by stock ranging over his land, (*Davis v. Davis*, 70 Tex. 124, 7 S. W. Rep. 826,) still, if one willfully causes stock to go upon another's land, and to remain there, he makes himself liable for the damages that result. If defendant opened the division fence even upon his own land at a time and under circumstances that would naturally cause his stock to go into his neighbor's pasture, and there remain, he becomes a trespasser, and is liable for the injury that resulted to his neighbor therefrom. This would not be different in principle from a case where he drives his stock upon another's land, and holds them there. It is not proper for us to comment upon the testimony on

this subject, in view of another trial, and with these conclusions we reverse the judgment, and remand the cause.

TEXAS LAND & MORTGAGE CO., Limited, ed, v. WORSHAM et al.¹

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

JUDGMENT—CANCELLATION IN EQUITY.

A vendor's lien was foreclosed, and the judgment assigned. Thereafter the vendor released his lien of record, but the judgment, though in fact paid to the assignee, was not so released. *Held*, that since said judgment was on its face a valid and subsisting lien on the land, requiring extrinsic and parol evidence to defeat it, equity would enjoin execution thereunder, and order its cancellation as a cloud on the title.

Appeal from district court, Gonzales county; George McCormick, Judge.

Suit by the Texas Land & Mortgage Company, Limited, against W. B. Worsham and G. O. Wright, sheriff of Clay county, to enjoin execution sale. Suit dismissed. Plaintiff appeals. Reversed.

Harwood & Harwood and Thos. McNeal, for appellant. Ireland, Burges & Dibrell, for appellees.

Statement of the Case.

NEILL, J. This is a suit brought by appellant to enjoin the appellees W. B. Worsham and G. O. Wright, the sheriff of Clay county, from the sale of lands lying in Clay county under an order of sale issued from the district court of Gonzales county on a judgment rendered in said court on January 9, 1893, in favor of T. M. Harwood against A. L. Butler for \$1,315.17, with a foreclosure of a vendor's lien on said land, and directing it sold in satisfaction of said judgment. The injunction was prayed for upon the ground that the judgment had been satisfied, and that a sale of the land in pursuance of said order would cast a cloud upon appellant's title to the same. The complainant in its bill prayed for a perpetual injunction restraining the sale, and for a cancellation of said judgment. The facts upon which complainant relied for equitable relief will be found in our conclusion of facts. A temporary writ of injunction was granted, which upon a final hearing before the court without a jury, was dissolved, and the case dismissed, from which decree this appeal is prosecuted.

Conclusion of Facts.

From an examination of the statement of facts contained in the record we find the conclusions of facts of the court below correct, and here adopt them as our own. They are as follows, viz.: (1) This suit was brought to restrain the sale of lands lying in Clay county, which had been advertised by the

¹ Rehearing denied.

sheriff of Clay county under an order of sale issued from the district court of Gonzales county on a judgment of said court rendered in the case of T. M. Harwood v. A. L. Butler, January 9, 1886, foreclosing a vendor's lien on said land, directing that the land be sold to satisfy a purchase-money note, which, with interest, amounted at the date of the judgment to the sum of \$1,315.17. The order of sale under which the land was advertised to be sold, and which is here sought to be restrained by injunction, was issued in the name of W. B. Worsham, assignee of T. M. Harwood, on the 26th day of October, 1888. (2) That prior to this, to wit, on April 6, 1886, Harwood had assigned a first order of sale to J. W. T. Gray, receiving therefor the full amount due on his judgment, and transferred the judgment to said Gray on the back of the order of sale, and at the same time executed to Gray a written transfer of the judgment on another sheet of paper. (3) That afterwards, to wit, on September 12, 1888, Gray transferred in writing on the back of the original order of sale, and under the indorsement of Harwood to him, by quitclaim, for a recited valuable consideration, all his right, title, and interest to the judgment in question to W. B. Worsham, the defendant herein, and at the same time executed a formal written transfer of all his right, title, and interest in said judgment on a separate paper, which was acknowledged for record to the said W. B. Worsham. (4) That it was after this transfer that Worsham procured the second order of sale, and had the same placed in the hands of the sheriff, who advertised the land for sale, and was proceeding to execute it when the injunction in this case was granted by Judge Aldridge of the Dallas district, November 27, 1888, and the sale prevented. (5) That the Henrietta National Bank furnished the money to Butler to pay the Harwood judgment, and that Gray was the cashier of that bank, and the transfer of the judgment was made to him as a trustee for the bank. That Butler had procured Worsham to agree verbally to become his surety to the bank for the money advanced by it to pay off said judgment, and that the transfer to Gray was for the purpose of first protecting the bank until the note of Butler was paid, and, secondly, if Worsham paid it, then to protect him in such payment, the note being executed by Butler alone to the bank; Worsham not being present when the transaction took place, but was represented in the transaction by his agent, W. B. Stickney. (6) That W. B. Stickney, Esq., was at the time and all during the transactions connected with this judgment and the settlement of the matters of Butler with the Henrietta Land & Cattle Company and W. B. Worsham the confidential agent and adviser of the parties, and acted for Worsham and Butler at the time the bank loaned the money to pay Harwood.

(7) That from the testimony showing the transactions between Butler, Worsham, the Henrietta Land & Cattle Company, and the Henrietta National Bank, W. B. Worsham, the defendant herein, paid the said bank the money it had loaned the said Butler to pay T. M. Harwood for the judgment when Butler's note became due, May 6, 1886, according to his verbal promise to the bank; and that afterwards Butler, or the Henrietta Land & Cattle Company, of which he was president, and which, after its incorporation, had title to the lands in suit subject to the vendor's liens and judgments, paid back to said Worsham the said money during the multitude of transactions which seem to have taken place between them, and that Wellesley, the agent of the plaintiff, had been so informed by Stickney, the agent of Worsham, and acted upon said information as if it were true in advancing money on said land as security. (8) That the land in question was conveyed by deed from Harwood to Butler, which was regularly recorded in Clay county, in which the vendor's lien was reserved to secure the payment of two notes representing the balance of the purchase money. The first of said notes had been paid by Butler before the suit to foreclose the second had been filed in Gonzales county. And it is further found that at the time of this suit there was nothing of record in Clay county showing that either of the notes mentioned in said deed had been paid, or of the judgment on Gonzales county foreclosing the vendor's lien on the land, based on the nonpayment of the last note, except a release from T. M. Harwood, dated December 8, 1886, recorded December 18, 1886, acknowledging the payment of the notes, and giving to Butler a quitclaim for all his right, title, and interest by virtue of his vendor's lien, in which nothing is said of the judgment in Gonzales. (9) That on March 1, 1884, A. L. Butler conveyed an undivided three-fourths interest in said land in suit to J. H. Butler, W. D. Butler, and B. F. Denson, and on December 3, 1884, the said A. L., J. H., and W. D. Butler and B. F. Denson conveyed the said tracts in suit, in connection with a large body of other lands, owned by them, to the Henrietta Land & Cattle Company, a Texas corporation, of which grantors were the stockholders, and W. D. Butler president, by which transaction the said Henrietta Land & Cattle Company became the owner of the lands in suit, subject to the vendor's lien in favor of Harwood. That on the 30th day of June, 1886, the said Henrietta Land & Cattle Company conveyed the said lands in controversy to C. E. Wellesley, as trustee for the plaintiff, the Texas Land & Mortgage Company, Limited, to secure a loan of \$10,000, which was to be a first lien on the land in suit, and a second lien on other lands already mortgaged to plaintiffs. That afterwards, to wit, on July 1, 1887, the said Henrietta Land & Cattle

Company having made default in payment of said note, sale was made under said trust deed in accordance with its terms, at which sale the Texas Land & Mortgage Company, Limited, became the purchasers of said lands covered by said trust deed, and the trustee executed a deed to the same, which, as was the case in all the other conveyances recited and found in this finding, was immediately after its date filed for record in Clay county, and it, together with the deeds and deed of trust aforesaid, were and are regularly recorded immediately after the date of each. It is further found that the said Texas Land & Mortgage Company, the plaintiff, were in possession of said land when the injunction in this case was sued out, and are now in such possession.

Conclusions of Law.

A sale of land under judicial process, which will confer no title, and the effect of which will be to cloud the title of others, should be enjoined. But no generally accepted test, applicable to all cases, as to what will constitute such a cloud upon title as to authorize the interference for its prevention by a court of equity has ever been established, at least in this state. Elsewhere the test seems to be, where a sale, if made, would create a title under which the purchaser could, in ejectment, recover against the true owner, unless the latter placed his own title in evidence, or by some other means established the invalidity of the purchaser's title, then such is a cloud on the title of the true owner. And in accordance with this test it has been held in other states that if an execution against a person who had once been the owner of the property be levied upon it, and it be no longer liable to levy and sale under such execution, the present owner of the property may, in equity, prevent his title being clouded by such sale. But if the title to be created by a sale is such that its invalidity can be determined from inspection, or that the true owner need offer no evidence to protect himself from it, then it is not a cloud on his title, and the sale will not be enjoined. See note and authorities cited to *Carlin v. Hudson*, 62 Amer. Dec. 521. In *Carlin v. Hudson*, 12 Tex. 202, it was held that an injunction would not be granted to restrain a sale on execution of land which the judgment debtor has conveyed to the party applying for the writ, for the reason that it was not indispensable to secure him in the enjoyment of his property, or preserve his title to it, or to prevent gross and irremediable injustice in respect to such property, and that the proposed sale of the land as the property of complainant's vendor could not operate to dispossess the plaintiff, or deprive him of its enjoyment, or defeat his title, or embarrass him in the prosecution of his legal remedies for any inju-

ry to his title or possession. This decision has ever since been followed by our supreme court. In cases where the property sought to be sold under execution against the husband was a homestead, or had been dedicated as such, our courts have exercised their equitable jurisdiction, at the instance of the wife, and sometimes at the instance of the husband, to restrain the sale upon the ground that it would be a cloud upon title. In such cases, the title to the property at the time of the levy being in the name of the husband, a sale of it under execution against him would apparently vest title in the purchaser at execution sale, and it would require extrinsic evidence under such sale—which is the true principle upon which the equitable jurisdiction of courts of chancery vests—to prevent a cloud from being cast upon title to real property. And it is confined to instances where the proceeding complained of appears to be valid on its face, but is in fact void or invalid for some reason or another which can only be shown by extrinsic evidence. As every person must be presumed to know the law, a proceeding which, upon its face, is not only illegal, but absolutely void, does not constitute a cloud upon the title to real estate against which a court of equity will relieve. And when a valid legal objection appears upon the face of the proceedings through which the adverse party claim any right to the complainant's land, it is not in law such a cloud upon his title as will authorize a court of equity to interfere, for it is well and truly said: "That can never be considered a legal cloud which cannot for a moment obstruct the unaided rays of legal science where they are brought to bear upon the supposed obscurity." It must be borne in mind that a cloud upon one's title is the wrong that equity interposes to prevent. A cloud upon a title, though not apparently so, is always inferior to the title itself, and the holder of the real title can always, in the courts of this state, in an action of trespass to try title, brought either by himself or the party clouding his title, by the introduction of the extrinsic evidence which shows the apparent title to be only a cloud, defeat it, and maintain his right to the property by virtue of the real title. And if the fact that he can thus defeat his adversary claiming under the cloud, and maintain the right to his property by virtue of his title, should be regarded as the test of his right to maintain an action to prevent a cloud being cast upon it, the very test of his right to maintain the action would demonstrate that such right did not exist, and prove that the equitable jurisdiction exercised by courts of chancery to prevent clouds from being cast upon titles does not obtain in this state. Such then, cannot be the test, nor be regarded as such a remedy at law as defeats the right to obtain the equitable

relief. This legal remedy is essentially different, and applies to a different subject. The equitable one is to prevent the cloud from being cast, which, if done, will force the owner of the property to defend his title in an action at law, and compel the introduction on his part of extrinsic evidence to enable him to maintain his defense. Without attempting to lay down a test as to what in this state constitutes cloud upon title, we think it safe to say that an incumbrance valid upon its face, which can only be impeached by proof of extrinsic facts, and the evidence on which the right or superior title of the complainant depends is not of record, nor shown in the papers through which the right depends, is such an incumbrance, and constitutes such a cloud upon title in this state, as will be removed or prevented by a court of equity. In this case there was a record of the deed from T. M. Harwood to A. L. Butler, in Clay county, which showed the reservation of a vendor's lien to secure the notes given for the purchase money of the land. A judgment was rendered by the district court of Gonzales county in January, 1888, against Butler in favor of Harwood for \$1,315.12 on one of said vendor's lien notes, in which judgment the vendor's lien was foreclosed, and the clerk directed to issue an order to sell the land in satisfaction of such judgment, and it was ordered in the judgment that when the officer executing said order sold the land and executed his deed for the same to the purchaser he should put him in possession of it. There was a regular chain of transfers of this judgment from Harwood to the appellee, W. B. Worsham, of which Butler had actual notice, and they were filed with the papers in the case in the office of the district clerk of Gonzales county, and showed that Worsham had authority to control the judgment. The order of sale under which the land was advertised for sale, and which was sought to be restrained by the injunction in this case, was issued upon the judgment by the clerk of the court in the name of W. B. Worsham, assignee of T. M. Harwood. It is hardly necessary to say that, if the sheriff had made the sale in pursuance of said writ, his deed made to the purchaser by virtue of it would have been an incumbrance, valid upon its face, such as would apparently vest the purchaser with title superior to Butler's or his vendee's, and it would have required proof of extrinsic facts to show that the title acquired under such deed was not superior to the title of Butler, or to that held under him. The appellant claimed the property through a regular chain of conveyances from Butler down to it, and the fact that it is superior to such a title as might be acquired by one purchasing the property at a sale made by virtue of the order of sale sought to be enjoined arises from the fact that the judgment upon which

the order issued had been paid off and discharged prior to the issuance of such order. Proof of the payment of the judgment does not appear in any way from the record or papers in the case wherein it was rendered. An examination of such record shows apparently a valid and subsisting judgment, owned and controlled by the appellee Worsham in this cause. The question, then, is, does the record of the release executed by Harwood on December 18, 1886, to A. L. Butler, of the vendor's lien retained in his deed to Butler, show that the title of appellant, acquired through Butler, is superior to such a title as would be acquired by a purchaser under the order of sale sought to be enjoined? This vendor's lien, at the time the release was executed, had merged in the judgment which had been assigned by Harwood to Gray and by Gray to W. B. Worsham, with the full knowledge of Butler, prior to the time the release was executed. The release makes no reference whatever to the judgment, but simply recites the payment of the vendor's lien notes, and shows that it is made in consideration therefor. The presumption arising from said release is that the payment of the notes were made by Butler to Harwood, and no inference can be drawn therefrom that the payment was made to Worsham. If, as a matter of fact, as the presumption is from the release, the payment of the notes had been made by Butler to Harwood, instead of to Worsham, such payment would not operate as a discharge of the judgment, and Worsham would be fully authorized in having an order of sale issued on it, and the property sold in its satisfaction; for by the assignment of a judgment the whole right passes to the assignee, and the defendant becomes the debtor of the assignee, and, after notice to the debtor, the assignee will be protected from all acts of the parties. 2 Freem. Judgm. §§ 425, 426. It is a very serious question in our mind, if the land had been sold by virtue of the order of sale sought to be enjoined, if the purchaser, without other evidence of the discharge of the judgment than what appears from the release of the vendor's lien, would not have acquired a superior title to that of the appellant. If he could be defeated in such title by the appellant it would have to be done by proof of the extrinsic facts and evidence upon which appellant's superior title depends that is not of record nor shown in the papers, through which his superior right depends. This evidence is the payment of the money secured by the judgment to Worsham by Butler or the Henrietta Land & Cattle Company in the multitudinous transactions that occurred between them, and rests entirely upon parol testimony. If for some reason such a payment could not be established, as it was on the trial of this case, in an action between the appellant and a pur-

chaser at the sale sought to be enjoined, such purchaser would prevail in the action, and defeat the superior right of the appellant. Besides the proposed sale, the judgment requiring the officer making it to put the purchaser in possession might "operate to dispossess the complainant, or deprive him of its enjoyment," etc.; thus bringing the case within the rule of *Carlin v. Hudson*, which would entitle it to the injunction. We conclude, therefore, that the court below erred in its conclusion of law in holding that "the plaintiff had such an adequate remedy at law as would prevent it from applying to a court of equity for relief by injunction to restrain the sale." The judgment of the district court is reversed, and judgment here rendered in favor of appellant, perpetuating the injunction, and canceling the judgment of the district court of Gonzales county rendered in favor of *T. M. Harwood v. A. L. Butler*. Reversed and rendered.

FLY, J., having been of counsel, did not sit in this case.

FRANKLIN et al. v. PIPER et al.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

LAND CERTIFICATES—SOLDIERS' CLAIMS—POWER OF ATTORNEY.

1. A power of attorney to recover such land as the donors' deceased brother was "entitled to receive from the Texas government, for services rendered said government as a soldier," cannot include a certificate for a one-third league of land, since certificates for that amount were never issued for military services.

2. A Texas land certificate being personal property, an interest in such a certificate, inherited by a married woman living with her husband in Virginia, when the common law of descent and distribution obtained, vested in the latter, and her joinder in a power of attorney to locate the land was needless.

3. A power of attorney to take all lawful means for the recovery of lands due from the Texas republic for military services of donors' ancestor, to appoint attorneys, and, should donee receive a patent, to sell the land, empowered the donee to appoint a suitable person, a citizen of Texas, attorney in fact to procure and locate the certificates, and pay him for his services in the usual way.

4. The law of descent not having been changed in Texas till March 18, 1848, the land claims of a soldier killed at San Jacinto descended to his brothers and sister of the whole blood, to the exclusion of brothers of the half blood.

5. A deed of all the interest in and to a certain tract which is or may be located to E., deceased, which R. has a power of attorney to locate, "for which services said R. is to receive one-half for locating and perfecting the title," declares an equitable title in R. to one-half of the surveys vested in the grantee in trust for R., and the declaration is equally binding on the grantors as if made in a separate deed.

6. Patents issued in the names of persons who have conveyed their interest in the "tract which is or may be located" to their ancestor, inure to the grantees as *cestuis que trustent*; and, where such grantees have asserted and acted on their equitable title for 30 years without

repudiation by the grantors, their claim is not stale, and is superior to the legal title.

7. One not a party to a suit of trespass to try title may be adjudged a cotenant with the successful parties.

Appeal from district court, Uvalde county; Thomas M. Paschal, Judge.

Trespass to try title by John T. Franklin and others against John M. Piper and others. Judgment for defendants. Plaintiffs appeal. Reversed in part.

J. H. Clark, J. B. Stringer, and A. V. D. Old, for appellants. Chas. J. Gillespie, for appellees.

NEILL, J. This is a suit in the ordinary form of trespass to try title, brought by the appellants on the 12th day of July, 1890, in the district court of Edwards county to recover from the appellee John M. Piper three tracts of land situated in said county, which are described as follows, viz.: "One-third of a league of land patented to the heirs of Elijah B. Franklin on the 3d day of July, 1847, patent No. 458, vol. 5; six hundred and forty acres of land patented to the heirs of Elijah B. Franklin on the 3d day of July, 1847, patent No. 56, vol. 2, certificate No. 1,032; and twelve hundred and eighty acres of land patented to the heirs of Elijah B. Franklin on the 8th day of December, A. D. 1847, certificate No. 9,486, patent No. 247, vol. 4." J. E. Gillespie, M. L. Burton, W. F. Gillespie, David W. Gillespie, and Mary A. Taylor, joined by her husband, Joel M. Taylor, entered an appearance as defendants, and pleaded not guilty and the statutes of limitations of three, five, and ten years. The original defendant, John M. Piper, entered a disclaimer of any interest in the lands, and averred that he was in possession of the same as the tenant of his codefendants. The venue of the case was by agreement changed to the district court of Uvalde county, where the case was tried by the court without a jury, and judgment rendered for the defendants, from which judgment this appeal is prosecuted.

The assignment of errors relate to the construction of a certain power of attorney set out in our conclusions of facts, to the admission of certain letters in evidence, also shown in said conclusions, and to the conclusions of facts and law found by the court below, all of which assignments are passed upon by this court in its conclusions of law.

Conclusions of Fact.

(1) The three tracts of land sued for were patented to the heirs of Elijah B. Franklin on the dates mentioned in the statement of the case.

(2) Elijah B. Franklin was an unmarried man, a soldier in the Texas Revolution, and was killed in the battle of San Jacinto. His father, William Franklin, and his mother, Edith, died before he was killed.

(3) Elijah B. Franklin left surviving him Peter F. Franklin and Mary E. Bailey and William R. Franklin, brothers and sister of the whole blood, and Thomas J. Franklin and Bryant B. Franklin, brothers of the half blood, of Elijah B. Franklin. He had another brother of the half blood, Burrell W. Franklin, who died in Alabama in 1835.

(4) Peter F. Franklin and William R. Franklin, surviving brothers of Elijah B., are plaintiffs in this suit. The plaintiffs John T. Franklin, Nancy E. Williams, Charles O. Campbell, and Martha J. Brown are the heirs at law of Burrell W. Franklin, deceased, and the plaintiffs Amanda F. Williams, Rebecca H. Mullen, Mary B. Lafon, Ann E. Ashworth, Amanda P. Ashworth, Adeline R. Bentley, Cornelia A. Bailey, R. S. Bailey, Edward G. Bailey, Adolphus Bailey, and A. W. Bailey are the heirs at law of Mary E. Bailey, who died in 1847. William G. Bailey, who was the husband of Mary E. Bailey, died in 1847; and Bryant P. Franklin died in 1864, and left no children surviving him.

(4) The land certificate by virtue of which the one-third of a league of land in controversy was located was not issued by the board of land commissioners of Fayette county until the 3d day of February, 1845, and the 1,280 acres of land in controversy was surveyed on the — day of May, 1847, by virtue of land certificate No. 9,486.

(5) On the 22d day of October, 1838, Bryant P. Franklin, William Franklin, Peter F. Franklin, and William G. Bailey executed a power of attorney to Thomas J. Franklin, appointing him their attorney in fact, in which the power granted is in the following language, viz.: "For us and in our names and for our use, for the recovery of a certain tract or parcel of land lying in the state of Texas, which our late brother Elijah B. Franklin is entitled to receive from the Texas government for services rendered said government as a soldier in the army thereof, and who was killed in battle, bravely fighting the enemies of the republic, the number of acres to which our deceased brother is entitled is about 4,000, as we are informed. We do hereby for ourselves, and our heirs, authorize our attorney the said Thos. J. Franklin to take all lawful ways and means for the recovery of said lands; to institute suit, grant receipts and acquittances in our names, but for our use; to appoint one or more attorneys, should he deem it necessary; and, in the event of his receiving a grant or patent for said land, to make sale thereof for the best price he can, and to make the necessary conveyance in our names to the purchaser or purchasers thereof, and grant all receipts, acquittances, and discharges which may be necessary and lawful in the premises, and which we, or either of us, could lawfully make, execute, seal, and deliver were we personally present."

(6) On the 8th day of April, 1839, the following instrument was executed, to wit: "The state of Alabama, Morgan county. Know all men by these presents that we, Bryan P. Franklin, of the county of Notaway, and state of Virginia, (by his attorney in fact, for that purpose created, Thomas J. Franklin,) Peter F. Franklin, and William G. Bailey, and Eliza, his wife, of the county of Lulenburg, by their attorney in fact, Thomas J. Franklin, for this purpose created, and Thomas J. Franklin, of the state and county first above written, for divers good and sufficient reasons thereunto specially moving have, and by these presents do, appoint and constitute Robert A. Gillespie, citizen of the republic of Texas, our true and lawful attorney in fact for us and in our name to apply to the government of said republic, and otherwise as to him may seem fit, for the recovery of certain land lying and being in said republic, which is due on account of the military services of our late brother Elijah B. Franklin, rendered to the said republic, in whose cause he was killed, bravely fighting her enemies. The number of acres of land to which our late brother was entitled is supposed to be about four thousand, and we fully empower our said attorney in fact to grant and execute all receipts or acquittances which may be required, and, in case of recovering the land, to make sale of the same, and for us, and in our names, to execute full and complete titles to the same, and to do and to make everything which may be required, either for the recovery or the disposing of said land, to accept or make any arrangement he may think proper, fully authorize him to sign our names and affix our seals to any manner of instrument necessary in the premises, and deliver the same as though we were personally present, hereby ratifying and confirming all things and acts done or to be done by our said attorney in fact in the premises in as full and ample manner as if we were personally present. In testimony whereof we hereunto sign our names and affix our seal, this the 8th day of April in the year of our Lord 1839,"—which the parties named signed by their attorney in fact, Thomas Franklin.

(7) R. A. Gillespie obtained letters of administration on the estate of E. B. Franklin, deceased, in Fayette county, previous to 1846. After R. A. Gillespie's death, W. F. Gillespie obtained letters of administration de bonis non on said estate. Such administration was obtained for the purpose of procuring patents to lands which E. B. Franklin's heirs were entitled to, or, in case he had assigned them, to the persons entitled thereto. W. F. Gillespie was discharged from said administration, and it was closed upon representations to the probate court that said patents had been obtained.

(8) On the 7th day of October, 1842, the

Following instrument was executed, which shows that the grantors named therein signed it by their attorney in fact, Thomas J. Franklin, viz.: "This indenture, made, and entered into the 7th day of October in the year of our Lord one thousand eight hundred and forty-two, between Thomas J. Franklin of the first part, and William F. Gillespie of the second part, witnesseth that the said Thomas J. Franklin, for and in consideration of sum of one hundred dollars, to him in hand paid, the receipt whereof is hereby acknowledged, hath this day sold unto the said William F. Gillespie all the interest in and to a certain tract or portion of lands which is or may be located to Elijah B. Franklin, deceased, in the republic of Texas, of which R. A. Gillespie has a power of attorney from him, the said Thomas J. Franklin, for himself as well as the power vested in him by the foregoing power of attorney from Bryant P. Franklin, William Franklin, Peter F. Franklin, and William G. Bailey, for his wife, Eliza, formerly Franklin, to locate, for which services said R. A. Gillespie is to receive one-half for locating and perfecting the title, and by these presents doth bargain, alien and enfeoff and convey unto the said W. F. Gillespie, his heirs, executors, administrators, and assigns, all that right, title, claim, and demand in and to the above-described tracts or parcels of land, as well for the above-mentioned brothers and sister as for myself, their heirs, executors, administrators, or assigns, and my heirs, executors, administrators, or assigns, forever warrant and defend against themselves, their heirs and assigns, and against all other claims whatsoever. Given under my hand and seal the day and year above written." This instrument was not properly acknowledged for registration. It was recorded in the records of deeds of Uvalde county on November 13, 1877, and in Edwards county on November 6, 1890. None of the written instruments under which defendants claim the land were ever registered in Edwards county prior to the time this suit was filed.

(9) The defendants, and those under whom they claim title to the land in controversy, have paid taxes on it ever since 1848 up to 1890; but there is no evidence tending to show that any of the plaintiffs or their ancestors were ever informed or knew of the issuance and location of the certificates on the land, or of the power of attorney from Thomas J. Franklin to R. A. Gillespie, or of the deed from said Franklin to W. F. Gillespie, or that the plaintiffs or their ancestors paid taxes on or claimed the land in controversy.

(10) At the time of E. B. Franklin's death, Eliza and William J. Bailey resided in the state of Virginia, in which the common law as to descent and distribution then obtained.

(11) On the 13th of August, 1853, W. F. Gillespie and his wife, M. A. Gillespie, executed to J. H. Gillespie a deed conveying

to him an undivided half interest in the three tracts of land in controversy, describing them by metes and bounds, which deed was not properly acknowledged for registration. This deed was not recorded in Edwards county until after the institution of this suit.

(12) On the 17th of May, 1840, R. A. Gillespie wrote a letter to James H. Gillespie, in which he made the following statement, viz.: "I have received letters of administration on E. B. Franklin's estate, and have procured his bounty and donation land, amounting in all to 2,560 acres. The estate is still entitled to one-third league, but the proper court for issuing such certificate has been annulled, and it cannot be obtained until congress appoints a similar board." R. A. Gillespie, on the 17th of October, 1845, also wrote a letter to J. H. Gillespie, stating that he had located all of "our land claims on the Nueces river, and expect during the fall and winter to have them surveyed." After the death of R. A. Gillespie, his brother W. F. Gillespie wrote a letter, dated March 1, 1847, to J. H. Gillespie, stating that he found among R. A. Gillespie's papers 11 certificates located on the Nueces river, but not surveyed, amounting to 9,352 acres.

(13) The certificates and location of the 1,280-acre and 640-acre surveys, and patents therefor, were procured by R. A. Gillespie under a contract made with him by Thomas J. Franklin, by authority of his power of attorney of October 22, 1836, under which contract the said Gillespie was to receive half of said lands for his services.

(14) The defendants M. L. Burton, J. B. Gillespie, William F. Gillespie, David W. Gillespie, and Mary A. Taylor have all the title that William F. Gillespie or Robert A. Gillespie, or either of them, acquired by the written instruments referred to in these findings of facts.

(15) At the time of the trial defendants claimed that they owned 10 surveys of land lying on the Nueces river, in Edwards county, which includes the three surveys in controversy. The survey of one-third of a league and the 640-acre survey in controversy join each other, and the 1,280-acre survey lies two or three miles from the other two.

(16) The defendants were not in actual exclusive, continuous, visible, and notorious possession, cultivating, using, or enjoying the same, of the lands in controversy for 10 years prior to the time this suit was instituted.

Conclusions of Law.

1. The authority conferred by Bryant P. Franklin and others in their power of attorney to Thomas J. Franklin related only to such land as their deceased brother, Elijah, "was entitled to receive from the government of Texas for services rendered as a soldier in the army of said government." It applied to the 1,200-acre bounty and the 640-acre donation warrants, for the

deceased was entitled to these for his services as such soldier. But it did not affect the one-third league certificate, for he could not have been entitled to it for services as a soldier, for certificates for that quantity of land were never issued by the government of Texas for military services.

2. The land certificates were personal property, and, Mary E. Bailey and her husband being resident citizens of the state of Virginia, where the common law of descent and distribution then obtained, when the right to such certificates descended to her, it passed to her husband by virtue of the laws of said state. Therefore the husband was the proper party to sign the power of attorney, and his wife's signature to it was not necessary. *Hill v. Townsend*, 24 Tex. 581; *Schouler*, Dom. Rel. § 82.

3. The power of attorney of October 23d authorized Thomas J. Franklin to take all lawful means for the recovery of the lands, to appoint attorneys, and, in the event of his receiving a patent, to sell the land. As such power it carried with it as an incident all the powers that were necessary to carry out the powers directly conferred, and as it was necessary, in order to obtain patents, to procure the certificates, and have them located, the authority to contract with a suitable person to procure and locate them, as well as to pay him for his services therefor in the usual manner, was necessarily implied; and the power conferred on R. A. Gillespie by Thomas J. Franklin by the instrument of April 8, 1839, was authorized by his principals in their power of attorney to him.

4. Upon the death of Elijah B. Franklin his estate, under the law then in force in Texas, (the law of descent and distribution not having been changed until March 18, 1848,) passed to his brothers and sister of the whole blood, to the exclusion of his brothers of the half blood; and Thomas J. Franklin, Bryant B. Franklin, and Burrell W. Franklin, being of the half blood, nothing passed to them nor to the children or heirs of either, but the whole estate vested in Peter F. Franklin, William R. Franklin, and Mary E. Bailey, his brothers and sister of the whole blood. *Wardlow v. Miller*, 69 Tex. 398, 6 S. W. Rep. 292.

5. In order to maintain the defense under the 10-years statute of limitations the defendant must prove actual, exclusive, continuous, visible, and notorious possession, distinct and hostile, for the full period of 10 years. The appellee, having failed to prove such possession during that period, cannot defeat such of appellants as inherited the land in controversy from Elijah B. Franklin on that plea.

6. The effect of the deed of the 7th of October, 1842, made by Thomas J. Franklin under his power of attorney, therein referred to, was (1) to vest, when located, in William F. Gillespie all the interest that he and the

grantors in his power had in the 1,280 and 640 acre surveys, which should be located by virtue of warrants issued to Elijah B. Franklin for services as a soldier in the army of Texas. (2) To declare an equitable title in R. A. Gillespie to one-half of said surveys, and to vest the title of the said Gillespie's one-half interest in William F. Gillespie, in trust for said equitable owner. (3) The said declaration, being made by an authorized agent acting within the scope of his authority, was binding on his principals, and, being included in the deed, had the same effect as though it was a separate instrument declaring the trust. (4) Thomas J. Franklin, being of the half blood, had no interest in the one-third league survey, and, it not being included in his power of attorney, no title to any part of it passed by virtue of said deed, and the declaration in the deed which showed R. A. Gillespie's equity in the other two surveys did not affect it. *Bracken v. Jones*, 63 Tex. 184; *Murphy v. Welder*, 58 Tex. 239.

7. When the two surveys were located and patented to the heirs of Elijah B. Franklin the patents inured to the benefit of William F. Gillespie and the heirs of R. A. Gillespie, the patentees holding the land in trust for them; and, such equitable title having been asserted and acted on for 80 years, and the holders of the legal title not having repudiated the trust until this suit was instituted, the appellees' equitable demand was not stale, but could be asserted against, and was superior to, the legal title. *Gibbons v. Bell*, 45 Tex. 423; *Robertson v. Du Bose*, 76 Tex. 10, 13 S. W. Rep. 300.

8. Burrell W. Franklin, being a brother of the half blood of Elijah B. Franklin, inherited nothing from him. Therefore the appellants John T. Franklin, Nancy E. Williams, Charles C. Campbell, and Martin J. Brown, his heirs at law, are not entitled to recover any part of the land in controversy.

9. The evidence otherwise being sufficient to prove that the issuance and location of the certificates were procured and the patents to the lands obtained by R. A. Gillespie, the admission of the letters referred to in our twelfth conclusion of fact, if error, was immaterial.

10. This court having filed its conclusions of facts, it is unnecessary to pass upon the assignments of error relating to the conclusions of fact found by the court below.

In accordance with the foregoing conclusions of fact and of law the judgment of the district court is reversed, and judgment will be here rendered in favor of the appellants Peter J. Franklin, Amanda F. Williams, Rebecca H. Mullen, Mary E. Lafon, Ann E. Ashworth, Amanda P. Ashworth, Adeline R. Bentley, Cornelia A. Bailey, R. S. Bailey, Edward G. Bailey, Adolphus Bailey, A. W. Bailey, and Wm. F. Franklin against the appellees J. E. Gillespie, M. L. Burton, W. F. Gil-

lespie, David W. Gillespie, and Mary A. Taylor, for the one-third league of land in controversy, and in favor of said appellees against the appellants John T. Franklin, Nancy E. Williams, Charles C. Campbell, and Martha J. Brown, and that as to the other two surveys the appellants take nothing by their suit. Reversed and rendered.

LUNS福德 v. CULTON.

(Court of Appeals of Kentucky. Nov. 28, 1893.)

ELECTION—COUNTY OFFICE—CONTEST—REVIEW OF FACTS ON APPEAL—NOTICE OF CONTEST—SUFFICIENCY.

1. Where, in an election contest between the opposing candidates for the office of county judge, on the ground that illegal votes were cast for the contestee, both the contesting board and the court of common pleas decide in favor of the contestant on conflicting evidence, the judgment of such court will not be disturbed on appeal.

2. Though a notice of contest of an election is so indefinite that an objection would lie if made in proper time, it is sufficient if the parties take issue without objection, and try the case.

Appeal from court of common pleas, Jackson county.

"Not to be officially reported."

Proceeding by James N. Culton against James Lunsford to contest the election of defendant to the office of county judge of Jackson county, to which office plaintiff claims to have been legally elected, commenced before the contesting board of such county, and taken by defendant on appeal to the court of common pleas. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. J. Coyle and Wm. H. Holt, for appellant. John L. Scott & Son, for appellee.

PRYOR, J. This controversy is over the office of county judge for the county of Jackson. The appellant, Lunsford, was elected by one vote, as the returns show, having received 660 votes, and his opponent, Culton, the appellee, 659 votes. Culton gave to the appellant, Lunsford, notice that he would contest the election upon the ground that many illegal votes had been cast for him, and, when excluded, would leave him, Culton, with a majority of the legal votes cast. The contesting board, having assembled, after hearing all the testimony pro and con, adjudged that Culton was elected by a majority of 15 votes. Lunsford then appealed to the common pleas court, and that court held that Culton had been elected by a majority of 6 votes; so we have two tribunals of the same county, with the parties and their witnesses before them, or the depositions of those living in the county, with all or the most of whom and their past history both tribunals were doubtless familiar, as well as a knowledge of those whose votes were being contested, deciding in favor of the ap-

pellee; and with testimony conflicting in its character this court would scarcely undertake to say that the two findings were not warranted from the law and the testimony. If the vote of the idiot who was acting and voting through his committee is excluded, and the vote of Sparks changed from Culton to Lunsford, still it would leave a majority for Culton; and when you read the testimony it is perfectly manifest that Culton is entitled to the office. In *Cowan v. Prowse*, 19 S. W. Rep. 407, reported in Kentucky in a case like this, the court said: "As there is evidence conducing to support the finding of facts, we think it should not be disturbed by this court, especially as the finding by the circuit court agrees with that of the contesting board." Take the testimony as to the vote of Coyle, and we think the court acted properly in excluding it from the list of legal voters; and so of others, on both sides, who voted illegally, it will be seen that the testimony warranted the finding, and particularly when that finding is the result of an investigation by two tribunals of the county over which each of these parties propose to preside as county judge. They knew the voters and those entitled to the exercise of this right, and, when confronted by the witnesses adduced by each party, were fully competent to determine the place of residence of the person whose vote had been challenged, and the respective ages of those whose votes had been challenged on account of infancy. The failure to reside in the county, or in certain precincts of the county, and the want of the requisite age to vote, constituted the principal complaints made by the appellee, and objections to votes cast for the appellee made on the same grounds by the appellant; and these tribunals having heard the proof, and made a judgment warranted, and in fact required, by the testimony, this court will not disturb it.

The only objection necessary to be considered is as to the sufficiency of the notice of contest. One of the grounds was that the officers of the election at a named precinct had not been sworn as the law required. This seems to have been abandoned. The second ground: "That a number of illegal votes had been polled for Lunsford against Culton by those not entitled to vote. Said votes were in the town of McKee, in the Horse Lick precinct, in the Coyle precinct, at Cavanaugh, and in the Pond Creek precinct." The names of the illegal voters are not given, or the reasons why their votes were illegal, and it would seem that this statement would scarcely apprise the appellant of the grounds of contest, so that he might be prepared to meet them. The appellant, in his reply to the causes of contest, sets up similar charges, and as indefinite as those made by the appellee. They both go to the county on these issues, and by their testimony in a very short time make the issues sharply defined, by disclosing the

names of those who were illegal voters, and the precincts they voted in. The testimony before the contesting board was not objected to, nor any motion made asking that the notice be made more certain and definite, and it was not until the case reached the circuit court that a motion to quash the notice was made, and no motion was in fact made in that court to make the statement more definite. The proof was all in, or such as made a case for the appellee, and to hold that the notice should be quashed after an issue had been made and the case prepared would be trifling with the contesting board, that had passed without objection on the merits of the controversy. Nor do we understand that a notice of the purpose to contest an election should contain such averments as would be necessary in an action at law; and when a case has been tried on its merits, with both parties before the tribunal empowered to determine the question, this court ought not to inquire as to whether or not the notice was as certain and definite as required in ordinary pleadings, and so the circuit court acted properly in trying the same issue that had been tried by the contesting board. The law required that the officers of an election should be sworn, yet where there has been a fair election the voter will not be deprived of his vote, or the candidate for the office of his election, if the legally-qualified voters have voted for him. A notice of a contest because of illegal votes being cast for the one party or the other, while it should be required to be made more definite, if objection is made in proper time, is sufficient if parties see proper to make an issue without objection, and proceed to investigate the case. The appellee, having received a majority of the legal votes cast, was properly adjudged the right to hold the office of county judge. Judgment affirmed.

RAFFERTY et al. v. BUCKLER.

(Court of Appeals of Kentucky. Nov. 28, 1893.)

FORECLOSURE—PETITION FOR HOMESTEAD—RES JUDICATA.

Where a husband and wife, who had mortgaged land, had a judgment of foreclosure set aside to have a credit for a homestead interest allowed, and the litigation resulted in the exclusion of such credit, and the sale of the land under another judgment of foreclosure, the children of the mortgagors could not subsequently petition for the allowance of such credit.

Appeal from chancery court, Nicholas county.

"Not to be officially reported."

Petition by M. Rafferty and others, as children of mortgagors, against W. T. Buckler, for a homestead interest in the mortgaged lands, which had been sold on foreclosure. Judgment for defendant. Petitioners appeal. Affirmed.

Hanson Kennedy and Kennedy & Son, for appellee.

PRYOR, J. The averments of appellants' petition show that this controversy was ended by a former litigation. Rafferty and wife mortgaged the land in controversy to Buckler to secure a large sum of money, and it is claimed that this sum for which the mortgage was given was entitled to a credit that would reduce the principal, so as to leave the appellants, who are the children of Rafferty, with a homestead in the mortgaged property. Buckler insisted that this credit was applied to removing or satisfying a lien on this land, due one Minor. He filed a petition in equity to foreclose his mortgage, and obtained a judgment for the sale of the property to satisfy his debt, without this credit. Rafferty and wife came in and had the judgment set aside, claiming that this credit should be allowed. The judgment was set aside, and the matter litigated resulting in the exclusion of the credit, and the rendition of another judgment for Buckler's debt and interest. This was a final disposition of the case, and ended the claim as to the homestead. The mortgage was signed and acknowledged by Rafferty and wife, and passed the homestead right, and, when sold under the mortgage, vested the purchaser with title. Judgment affirmed.

HILL v. THIXTON et al.

(Court of Appeals of Kentucky. Feb. 23, 1893.)

NOTES—EXECUTION—FRAUD—ESTOPPEL—CONTEMPORANEOUS AGREEMENT—ACTION BY ASSIGNEE.

Simultaneously with the execution of a note obtained by fraud, a paper was also obtained from the maker, giving assurance that the maker had no offset or defense to the note, and that it would be paid to any assignee. Held that, the two instruments being in effect but a single transaction, and the assurance in the one being the same as in the other, the maker was not estopped to defend against the note in the hands of an assignee. Bennett, C. J., dissenting.

Appeal from circuit court, Daviess county. "To be officially reported."

Action by John Thixton and others against W. H. Hill on a note. From a judgment for plaintiffs, defendant appeals. Reversed.

J. A. Dean, for appellant. Weir, Weir & Walker, for appellees.

HAZELRIGG, J. In the summer of 1888, Hill, the appellant, who was a timid and unlettered man, was visited by a stranger, who induced his assistance towards starting his lightning rod enterprise in the neighborhood by obtaining a promise to let him rod his house, assuring him that it would cost him only four dollars. In a few days some four other strangers appeared, and proceeded to decorate his humble shanty with the most improved lightning conductors known to science. After completing the job, they asked him to sign some papers which they called "recommendations," purporting to

prove to the neighbors the good character of the work. He signed his name to two of these papers. He could not read writing, and could scarcely write his name. They then presented him a note to sign for \$107.10, due in six months. He refused to do so. They became mad, and told him he had to sign it. Angry words passed, threats were made, and finally appellant called on his mother for help. The talk was continued, the men declaring that he must sign the note. They threatened to sell his home in the United States court. To stop the excitement among the men, and prevent a difficulty, he finally signed it. Coleman, a witness who was present, and working for the strangers, and who had come there with them, testifies that he was employed by the lightning rod men. That "Hill refused to sign the note. Mr. Medanich told him he must sign the note. That they employed lawyers by the year, and that a number of suits did not cost them any more than one suit. That they did not sue in these little courts here, but they did all their business in the United States court. Mr. Hill still refused to sign the note, and pretty hot words followed. Mr. Hill seemed to be a very timid man, and they scared him into signing the note by threatening him. These men were very vicious, bulldozing kind of men, and were very dangerous men. That from conversations with the men he learned that the cost of the rod put up for Hill was about \$7.00, and that the profits were about \$100.00 on the job." In June, 1889, the appellees Thixton and Atchison, claiming to be the owners and holders of the note, sued Hill, the appellant, thereon, in the Daviess circuit court. He answered that the note was not his act and deed; that the words, "negotiable and payable at the Bank of Owensboro, Ky.," had been inserted therein after he had put his name to it, and without his knowledge or consent; that it had been procured, in its original form, by fraud, oppression, and intimidation, and he had executed it to save himself from personal violence, and to avoid bodily harm, with which he was threatened. He also alleged that the plaintiffs' assignors were peddlers, and had no license as provided by law. Upon the state of case thus presented, we presume that no court would sanction the enforcement of the contract and collection of the note sued on. As a matter of fact, on the trial, there was no contrariety of testimony, the foregoing facts being established by Hill, the appellant, and Coleman, the employe of the payees of the note, and, while denied in the reply, were not contradicted by proof. But in their reply the appellees rely on the following writings, signed and delivered, as they allege, on the day the note was executed, as an estoppel against any defense to the note sued on, and as precluding a court of justice from relieving this timid, ignorant coun-

tryman from this bold robbery. The writings are as follows:

"Recommendation. To all whom it may concern: This is to certify that J. Medanich & Co., agent of the Franklin Lightning-Rod Co., has erected their copper-covered lightning conductor on my residence, and has done me good work, and given satisfaction in every respect. I take pleasure in recommending them to all in need of rods. July 7th, 1888. [Signed] W. H. Hill."

"To all whom it may concern: This is to certify that a note executed by me to J. Medanich & Co., for one hundred and seven and 10-100 dollars, due in six months, is a bona fide debt against me, and there is no offset, discount, or counterclaim or defense against the same; and the same is good against me for the full amount thereof, and will be paid at maturity to said J. Medanich & Co., or to such persons as they may assign said note to. Given under my hand, this, the 7th day of July, 1888. [Signed] W. H. Hill."

Appellees also attempted to avoid the alleged want of license by filing one granted regularly to Medanich, Shay & Co., (the Co. being Freeman,) alleging that Shay had retired from the firm, and that the business was being conducted by Medanich and Freeman, the surviving members; and this, we think, was a valid license, and not such a transfer as the statute denounces. The appellant alleged that the certificate of recommendation showed on its face that the work had been done by the Franklin Lightning Rod Company, which produced no license, and that the plaintiffs' assignors were only agents. The second certificate was lost, and he alleges want of knowledge or information as to signing it; and that, if he did so, it was procured by fraud, overreaching, and deceit, and with intent to estop him in his defense, of which facts the plaintiffs had notice before they bought the note, and knew also that the transaction and circumstances under which the note originated were suspicious, and sufficient to have put them on inquiry. The trial court properly instructed the jury on the subject of the alteration of the note after its execution and delivery, and as to its procurement by fraud, threats, etc., but expressly modified their instructions by telling the jury to find for the plaintiffs, even if they believed the note to have been materially altered, or had been obtained by fraud, threats, etc., provided they further believed that the plaintiffs bought and became the owners of the note in good faith, relying on the statements contained in the two certificates named above, and provided the defendant had signed the papers. Thus is presented for our consideration the real question in this case, and that is, what effect is to be given the certificate agreeing not to set up any defense? The court below assumed that the note itself, containing an absolute

promise on its face to pay the sum named at its maturity, and importing absolute verity, might be impeached for fraud in its procurement, and yet the certificate executed at the same time, importing nothing more than is certainly and definitely implied in the note, could not be so impeached. If the maker may have been overreached in the execution of the one, why may he not have been in the execution of the other? And if he can impeach one, why may he not the other? The case of *Crabtree v. Atchison*, (decided by this court on October 1, 1892,) 20 S. W. Rep. 260, is relied on by appellees here. In that case it is said that "the writing delivered to the payees of the note, and exhibited to the appellees by the payees to induce them to purchase it, and upon the assurances of which they relied in making the purchase, was equivalent to personal assurances made to the appellees by the appellant, face to face, to induce them to make the purchase, and upon which they relied in making the purchase." That is, that the assurance that he had no defense was a continuing, ever present, and existing truth, asserted "face to face" to "whosoever it might concern," and as such must estop the appellant from denying the truth of such assurance. But was not the absolute promise of the appellant contained in the other writing, executed at the same time, (the note,) agreeing to pay the sum of \$107.10 in six months after date, at the Bank of Commerce of Owensboro, Ky., a continuing and existing promise, and which the payors were at liberty to exhibit to the appellees and the world as an inducement to buy the paper? And why shall the one be said to have the force of a "face to face" assurance that "the same is good against me for the full amount thereof, and will be paid at maturity," any more than the other is a "face to face" assurance that "I will pay the sum of \$107.10," which was the full amount of the note, "in six months," which was at its maturity? In the case of *Crabtree v. Atchison*, *supra*, the answer was not deemed sufficiently explicit to raise the question of fraud in the procurement of the certificate, and the case was reversed on other grounds. The principle announced followed the case of *Wells v. Lewis*, 4 Metc. (Ky.) 269, and no fraud was properly alleged by the defendant as to the obtention of the certificate. We are clear that there is no difference in principle between the assurance given in the note and that given in the certificate. And yet we know that a subsequent "face to face" assurance, given by the maker of a note, that he would pay the amount of it at its maturity, is an estoppel against his assertion of any defense thereto. We conclude, therefore, that, as the promise in the note cannot be given the force of a personal and continual assurance, so cannot that effect be given the other and accompanying paper. They are, in effect, a single transaction, and

are to be considered as if embodied in but a single paper, executed and delivered together; they stand or fall together. What may be used to impeach the one, may be used to impeach the other. There is not an idea or thought expressed in the one paper which is not expressed in the other. In the certificate we have that which is but the extended meaning of the note: "Bona fide debt against me." Certainly the note distinctly imports as much: "No offset, or discount, counterclaim, or defense." Of course not. Says the note, by clear implication: "The same is good against me, and will be paid at maturity." Verily, these assurances are, even in express terms, embraced in the note.

The case of *Wells v. Lewis*, 4 Metc. (Ky.) 269, cited against this view, was where neither the note nor the accompanying paper was attacked for fraud. The consideration alone of the note was sought to be impeached, and its makers, having voluntarily given the certificate that they had no offset, in order to give currency to their paper, would have been guilty of perpetrating a fraud on the innocent holder if defense had been allowed. If the note and its accompanying "letter of credit" were executed voluntarily, and free from imposition and fraud, then recovery should be had; if the note or its certificate of good character were not so obtained, then whatever defense, discount or offset, might have been used against the original obligee, may be used against the assignee. Such is the purport of the statute regulating the assignment of such paper. Moreover, we are by no means certain that the appellees were free from notice sufficient to have put them on inquiry. They had been told by a party from whom they were seeking information as to his solvency that Hill was poor; that his brother was putting up the money with which to buy the little farm; that he was too good a man to be imposed on by lightning rod men, and that there was certainly something wrong about the note. Upon presentation of the note alone of the appellant, importing, as it did, a valid consideration, and containing an express promise to pay, in the usual form, a purchase would have been more in accordance with the usual course of trade than when the holder shows evidence of the necessity of fortifying his property by a suspicious overshoot of virtue. It was a statement on which they had but slim right to rely. It was, indeed, calculated to arouse and excite suspicion. An ordinary and unsuspicious looking promissory note was in bad company when it had to be backed up by such an unusual paper. The majority opinion of the court in *Jaqua v. Montgomery*, 33 Ind. 36, sustains this view. In that case, Gregory, C. J., who delivered one of the opinions, in speaking of such an accompanying paper, says: "It looks too much like the act of the thief in attempting to cover up his

crime." The judgment below is reversed, with directions to allow the case to proceed according to the principles of this opinion.

BENNETT, C. J., (dissenting.) The appellees, as the assignees of J. Medanich & Co., sued the appellant on a note for \$107. To the plea of no consideration, fraud, and duress the appellees replied that they were purchasers of the note for value, and without notice of the matters alleged, and were induced to make the purchase by the representations of the appellant, contained in a writing signed by him, and delivered to Medanich & Co., to be used by them in inducing the sale of the note, and which induced the appellees to purchase it. Said writing represents the debt as being bona fide against the appellant; that "there is no offset, discount, or counterclaim or defense against the same; that the same is good against me for the full amount thereof, and will be paid at maturity to said J. Medanich & Co., or to such persons as they may assign said note to." The appellees relied upon said representations as an estoppel to the defenses indicated, which the lower court sustained, and which the superior court affirmed. It will be seen that the opinion of the majority of the court reverses the lower court and the superior court upon the ground that the estoppel pleaded was not available if J. Medanich & Co. had defrauded the appellant in obtaining the note and writing. That this is the meaning of the opinion, there can be no doubt. In order for the court to reach its conclusion, it found itself compelled, although disclaiming it verbally, to ignore and overrule the cardinal feature of the law of estoppel as expressed by its own repeated decision, to wit: If a person by his false speech or conduct induce another person to act differently from what he would have otherwise acted, such person cannot thereafter deny the truth of his speech or conduct, and show the real truth of the matter, because such showing would be a deception and fraud practiced upon an innocent person. Such person is estopped to deny the truth of his speech or conduct, although he may have been deceived and defrauded into such speech or conduct by other persons, provided the person thus influenced was innocent and ignorant of the fraud of such other persons. So, also, if such person authorizes another person to make certain assurances to another person that certain things are true, and which assurances such person does in good faith act on as true, it is equally well settled that the person authorizing the assurances cannot deny their truth; for to allow him to do so would be a fraud upon the person thus acting upon them. In such case the person authorizing the assurances would not, as against the person acting upon them, be allowed to show that the person whom he authorized to make them in his behalf had obtained the authority by

defrauding him, because the person who acted on the assurance would be, nevertheless, defrauded by the person giving the authority. It seems to be perfectly settled that if two persons are defrauded, and loss must fall upon one or the other, that one that aids in bringing the fraud about must suffer the consequences; the loss must follow him. He, in equity, is the wrongdoer. He has intrusted the authority to another to say to still another or others that he would do so and so in order to induce them to act; and, if such others rely upon that information as true, and act upon it, but it turns out that the person giving the authority was defrauded by the person to whom it was given, he must bear the loss; for to allow the person giving the authority to repudiate the act because the person to whom he gave it defrauded him, would be to allow him to defraud the person who acted in good faith upon the authority given. Therefore, which one of these innocent persons should bear the burden of the fraud? I say it is perfectly well settled that the person giving the authority must bear the burden, because, but for him, the person acting on the authority would not have been defrauded; and he must bear the loss as far as such person is concerned, and look alone to the person that wronged him for redress. It may be that his hope from that source is non-availing, but that fact does not justify him in perpetrating a wrong upon such person whom he has induced to act upon a falsehood and worst his condition. I say that in a case like this it is the fraud practiced by the person upon another that estops him from denying the truth of his assertion, upon the truth of which the other person has been induced to act and change his condition.

The opinion holds that the note and paper giving the assurance that Hill had no offset or defense to the note, and it would be paid to the assignee, were simultaneously executed, and must be regarded as one and the same transaction; and, as the promise contained in the note implied as much as said writing expressed, and as the payor was not cut off from his defense of fraud, etc., in the obtention of the note in the hands of the assignee, so, likewise, he might make the same defense to the simultaneous writing, both being but one transaction, and subject to the same defenses in the hands of the assignee. This view of the case certainly, in effect, overrules the *Crabtree Case*, 20 S. W. Rep. 280, (decided by this court, and marked to be reported, in October last;) for the same written assurances were relied on in that case as in this case, and the pleas of no consideration and fraud made and the plea of estoppel made to said pleas as in this case; and this court—all of the judges concurring—decided that the assurances given in said writing, and which induced the assignee to make the purchase, estopped Crabtree from asserting the truth by showing no considera-

tion and fraud. Say what you please, but I have given the plain, practical meaning of the decision, which is, in effect, overruled. But the court seems unable to see the difference between the note's promise and the promise contained in the agreement. But let us see if there is not a wide and valid difference. A promissory note, by chapter 22, § 6, Gen. St., is subject to all defenses in the hands of an assignee that might be used against the payee; therefore the promise to pay contained in the note is made subject to defenses, etc. But it is undoubtedly the law that the payor may agree and bind himself for a valuable consideration to make no defense as against the payee; and also he may, without the valuable consideration, estop himself from making defenses as against an assignee of the note. Why? Because if he gives assurance to the assignee that the note is not subject to defense, and the assignee is induced to buy it upon the faith of that assurance, the maker would commit a fraud upon him if allowed to deny the truth of the assurance. Therefore, to prevent the fraud, he is estopped to deny it. But the opinion says, if it is a simultaneous agreement it becomes a part of the note, and the rule does not apply. Well, suppose the agreement was contained in the note itself, and the assignee should be induced to purchase it upon the faith of the assurance, would not the maker be estopped to deny it? Why not? The assurance is an agreement, not an essential part of a simple promissory note, but an addition to it. The simple promise by the note to pay is made subject to all defenses in the hands of the assignee that could be made against the payee; and the agreement, although contained in the note, is an addition or collateral to the simple promise, and estops the payor from setting up defenses as against the assignee, because of the fraud that he would practice upon him by so doing. Now, as to the simultaneous agreement not effecting an estoppel, it seems that this court is fully committed the other way. In the case of *Barbaroux v. Barker*, 4 Metc. (Ky.) 47, the appellant and Hollrooke executed to each other their respective promissory notes for preceding indebtedness, agreeing that each might use the note executed to him for the purpose of raising money. Barbaroux, at the time he executed his note, gave to Hollrooke a writing, saying, "You may use my notes anywhere you can," except, etc. To a suit by Hollrooke's assignee on the note executed by Barbaroux, the latter pleaded Hollrooke's note as an offset, but the court held that Barbaroux was estopped from pleading the offset against the assignee, because to allow it would be a "fraud" upon him. In the case of *Smith v. Stone*, 17 B. Mon. 170, 171, the assignee's agent asked the maker of the note, before the assignment, if the note was all right, and he replied that it was, and would be paid at maturity, and upon the faith of which the note was purchased, and it

was held that the maker was estopped from making defense to the note in the hands of the assignee, because it would be a fraud upon him. Now, the two cases in 4 Metc.—one referred to in the opinion—show that the agreements that estopped the makers of the instruments were made simultaneously with the promises, and that the court held such simultaneous agreements to work an estoppel in favor of the assignee; and, without fatiguing the reader with any more citations, I can assure him that there are many more authorities, including this court, to the same effect. But it is said that, inasmuch as the simultaneous writing was obtained by fraud, Mr. Hill is not estopped from defending, although innocent parties were induced by the assurance to buy the note. But it seems to me that this view destroys, in a great measure, the doctrine of estoppel, the controlling and essential feature of which is to prevent fraud by estopping a person whose assurances have been given to induce others to act, and but for which they would not have thus acted, from denying the truth of the assurances. To allow the person giving the assurances to say he was mistaken, or he was defrauded into making them, by a third person, would defeat the very object that equity has in view in estopping him, and strip the doctrine of its beauty; for there is nothing more repulsive to honest and fair dealing than to allow a person to say, it is true, "I, in order to induce you to buy this note at its fair value, agreed with you that it would be subject to no defense in your hands, and it would be promptly paid to you, and, thus induced, you did buy it at its fair value, and without notice of any infirmity; but, as the person to whom I gave the assurance, in order for him to give it to you, obtained the assurance by fraud, I am therefore authorized to defraud you." But, says the other person: "It is well settled that if a loss is to fall upon either of us by reason of the fraud of that other person, it should fall upon you, because you authorized him to give me your assurance, which he did, and by which I was influenced to make the purchase; and I did not know, and had no reason to believe, that he obtained the assurance from you by fraud, but you, nevertheless, gave out the assurance, and caused the fraud to be practiced upon me. You should therefore bear the loss, and not me, who is entirely innocent." "Oh! oh!" says the other, "you forget that the written assurance that I sent you by that person was made simultaneously with said note; therefore I am not estopped to deny it even as against you, an innocent purchaser, deceived and defrauded by the assurances given out by me that it was obtained from me by fraud; but if I had sent it out just an hour or two afterwards, as an independent agreement, you would have had me bound hard and fast, but, as it is, I have got you, old boy. The loss must fall upon you, and I go

scot-free. It is true, I recognize the equity of the rule that if I give out assurances intending you to act on them as true, and you do act on them as true, I cannot thereafter say, so far as you are concerned, they were untrue, if my saying so would affect your rights acquired upon the faith of those assurances, although the assurances were obtained from me by the fraud of the person that gave them to you for me, because it would be a fraud upon you for me to do so. And although I was defrauded by such person into giving the assurances upon which you acted, I should bear the loss, instead of you, because the loss should fall upon the one that caused it; and as I, so far as you are concerned, caused it, I should bear the loss, and not you; but the court has, luckily for me, but wholly unexpected by me, come to my relief, because I happened to execute a note about the same time that I executed the assurances upon which you acted, which was obtained from me by the fraud of another person, and which fraud releases me, and shifts the loss upon you, who had nothing whatever to do with the fraud upon me, but was an innocent party all the way through. Natural justice requires that I should bear the loss, instead of you, because I sent those assurances to you, independently of the simple promise in the note, as an additional inducement to you to buy the note. But law is law, and thus it is recently written; and we are all bound thereby. But here are the *Meta* cases, the *B. Mon.* case, and others, and lastly the *Crabtree* Case, that say the fact that the agreement was made simultaneously with the note makes no difference; that the agreement is not merely a simple promise to pay, and subject to all defenses, but it is a substantive agreement that binds the party, and he is estopped to deny it, if the denial affects the rights of the person acquired upon the faith of the agreement. Yes, yes; that is all true; but you had just as well take leave of the late lamented *Crabtree*, who, in October, 1892, was required to pay out his hard dollars because he was estopped from denying the truth of this same agreement, because the denial would defraud you. But in February, 1893, there was new light turned on by *Indiana*, and I am released from the very same obligation, because the fraud I perpetrated upon you does not estop me from showing that that sweet-scented geranium that I sent to you as the bearer of my assurances, upon which you acted in good faith, acted the rascal with me; and, in order to get even with him, I am privileged, under the sporadic decision of *Indiana*, to act the rascal with you, and mulct you for acting upon the truth of the assurances. You should have known better, you idiot; and for your folly you must bear the loss, not me." "I should have known better? How could I have known better?" "Instinct, instinct, Hal. is a great thing. You should have known better on instinct." But

there is another precedent in favor of the *Indiana* opinion that I came near forgetting. I allude to the celebrated speech of old man *Sixty*, before Judge *Ossell*, of *Henderson*, Ky. He said: "Everybody cheats me, and I cheats everybody; and everybody dot I cheats must submit, because everybody cheats me. Dot is equity for you, sir." But it is stated in the opinion that the *Crabtree* opinion was reversed on "other grounds." Well, it was reversed upon the one ground of error in the lower court as to the order of argument. But it is as true as truth itself that it was in all other respects affirmed, because, the simultaneous writing having induced others to act, Mr. *Crabtree* would have committed a fraud upon them, had he been allowed to deny the truth of the writing.

Rehearing denied.

COMMONWEALTH v. DAY.

(Court of Appeals of Kentucky. Nov. 16, 1893.)
INTOXICATING LIQUORS — FLEMING COUNTY PROHIBITION LAW — CONSTRUCTION OF STATUTE — VALIDITY.

1. The "Fleming County Prohibition Law," §§ 1-3, provide that it shall be unlawful to sell, loan, or traffic in liquors in any quantity whatever, except that the act shall not apply to a resident physician, who in good faith prescribes it as medicine, nor to sales by distilleries in quantities not less than 10 gallons, and then not to be drunk on the premises where sold, nor to those who furnish it to members of their own family, or to invited guests at their own household. Section 4 provides that "any person" violating section 1 shall be fined not less than \$100 or more than \$300. Section 5 provides that any physician who shall furnish such liquors to any person except as a medicine shall be fined \$100. *Held*, that such act does not impose a different penalty on physicians than on other persons for the same offense, and is not, therefore, unconstitutional for such reason; but section 5 is intended to provide a distinct penalty for physicians who prescribe liquors to be used otherwise than as a medicine.

2. Section 6, providing that the procuring or delivery by one person of liquor for another, unless a member of the same family, or invited guests at their own household, "to be drunk as a beverage," shall be deemed a sale under the provisions of section 1, etc., is not a limitation on section 1, and a person who sells, barter, gives, or loans liquors to another, as denounced in section 1, is guilty of a violation of such section, whether the liquor is "to be drunk as a beverage" or not.

3. Section 6 is intended to bring within the provisions of the act all persons who procure from the seller and deliver to the purchaser such liquors, and thus prohibit the importation of liquors into such county.

"To be officially reported."

Supplemental opinion, filed at the request of the attorney general.

For report of former opinion, see 23 S. W. Rep. 193.

HAZELRIGG, J. We are asked by the learned attorney general to extend the opinion in this case, and by a construction of the act in question to settle the law regulating the sale of liquors in Fleming county. The

act provides: "Section 1. That it shall be unlawful for any person to sell, barter, give, loan or traffic in spirituous vinous or malt liquors in any quantity whatever, within the county of Fleming, except as hereinafter provided. Sec. 2. This act shall not apply to the procuring or use of wine for sacramental purposes, or to a regular resident practicing physician, who in good faith prescribes the same as a medicine to his patient or patients, or to a sale from a distillery in the county by the owner thereof or his agent, at any one time in a quantity not less than ten gallons, and then not to be drank on the premises where sold, or premises adjacent thereto. Sec. 3. Nor shall this act or its provisions apply to those who give or furnish spirituous vinous or malt liquors to a member or members of their own family, or their invited guests at their own household. Sec. 4. Any person violating the provisions of the first section of this act shall be fined not less than one hundred nor exceeding three hundred dollars," etc. "Sec. 5. Any physician who shall furnish spirituous, vinous or malt liquors to any person or persons except as a medicine shall be fined one hundred dollars for each offense to be recovered," etc. "Sec. 6. The procuring for or the delivery by one person of liquor to another, unless a member of the same family, or their invited guests at their own household, to be drank as a beverage, shall be deemed a sale under the provisions of the first section of this act, and subject the party procuring or delivering the same to the penalties annexed for a violation of said section." Then follow other sections providing for a vote, and the enforcement of the provisions of the act by the county officers, etc.

It is contended by the appellee (1) that the act is unconstitutional, because it imposes a different penalty on physicians for furnishing liquors than on other persons, but we think that different penalties for the same offense are not intended to be imposed. The letter of the act, it is true, imposes the penalty of \$100 on the physician who shall "furnish" such liquors, and of from \$100 to \$300 on other persons furnishing the same. But it is evident that the offense attempted to be provided against in the fifth section as to physicians is that of prescribing liquors save as a medicine. We do not doubt that if a physician furnishes such liquors to another to be drank as a beverage, he would be punishable under the fourth section, as other persons. He is excepted from the act only when he "in good faith prescribes the same as a medicine." If he prescribes it to be used otherwise than as a medicine, he is punishable under the fifth section.

The appellee insists that the sixth section is a limitation on the first section. That "the procuring for or the delivery by one person of liquors to another * * * to be drank as a beverage," constitutes the selling, bartering, giving, and loaning as designated

in the first section; and such liquors must be so sold, bartered, given, loaned,—that is, procured for and delivered to another to be drank as a beverage,—before there can be an infraction of the law. This contention is not without plausibility; and, if the sixth section is to be regarded as a limitation on the first, and "the procuring for or delivery by one person of liquors to another" is to be regarded as constituting the sale, barter, gift, and loan mentioned in the first section, then, as a chain cannot be stronger than its weakest point, the important modification found in the sixth section, "to be drank as a beverage," must be regarded as qualifying the act of furnishing such liquors as denounced in both the first and sixth sections. Not the distiller alone, therefore, or the merchant, or the grocer, or the druggist may furnish such liquors, but any person may do so, provided they are not furnished "to be drank as a beverage." Of course, if this be the proper construction of the act, it should not argue against its adoption by us that sales of liquors for medicinal purposes, and not to be drank as a beverage, would increase rapidly in that hitherto healthy locality; although it must be admitted that, if the patient may diagnose his own ailment, and the liquor dealer prescribe the remedy, the act would soon permanently fall into a state of "harmless desuetude." But we are convinced such is not the meaning of the language of the act, nor is it in accord with its spirit. The first section stands, without modification or limitation: Whoever sells, barters, gives, loans, or traffics in spirituous, vinous, or malt liquors in any quantity in Fleming county does an unlawful act, unless he is a physician, and prescribes such liquors as a medicine, or a distiller, and sells in the quantity designated by the act, or unless he gives them to his family, or to his invited guest, or furnishes wine for sacramental purposes, or as a druggist fills the prescription of a physician. But, more than this, in addition to, and independent of, such selling, giving, etc., whoever—though he may not sell such liquors or barter, give, loan, or traffic in them—yet whoever procures such liquors for or delivers them to another to be drank as a beverage, whether he be the accommodating stage driver, who, without selling, giving, loaning, or trafficking in such liquors, yet loads his coach down with the "irrepressible jug,"—the unvarying accompaniment of stringent liquor laws,—or be the special messenger sent in his carryall with "orders" to the nearest "wet" town, is guilty under the sixth section of this act. He is a go-between, who sells not, or gives or loans or traffics in such liquors, yet he procures them for, and delivers them to, another, to be used, not as a medicine, but as a beverage; and he it is that the sixth was aimed at. The ambitious purpose of the act as indicated in its sixth section particularly was to prevent absolutely the importation of spirit-

uous, vinous, or malt liquors into the county for use as a beverage. While the act does not make it unlawful for a man to take a drink of such liquors in the county, and, indeed, graciously allows him to give them to his family, and even to his guest, if at his household by his invitation, yet the law provides that no one may procure such liquors for him, or deliver them to him, unless the distiller does so by the quantity. They cannot otherwise be procured for or delivered to him to be used "as a beverage." This seeming restraint on the personal liberty of the citizen is self-imposed, and its constitutionality is maintainable on abundant authority in this and other courts of the country. It is noticeable that while the act permits the physician to prescribe such liquors as a medicine, it nowhere authorizes any one to fill the prescription; but in the Reynolds Case, 89 Ky. 147, 12 S. W. Rep. 132, and 20 S. W. Rep. 167, this court, looking to the reasonable intent, and not the letter, of this act, held that a druggist might fill the prescription of the physician. It was there said that "the settled policy of the state, in the effort to control the liquor traffic, has been to confine the sale in small quantities to druggists and physicians, to be used as a medicine," which is a sufficient answer to the question asked by counsel in this case: "If a druggist may fill a prescription, why may not any other person do so?" It is not the policy of the law, and certainly not in accord with common reason, that the unskilled and nonprofessional *Ol mollel* may decipher the enigmatical prescription of the erudite doctor; and certainly he is not to be intrusted with such enticing responsibility when it comes to filling a prescription for spirituous, vinous, and malt liquors. When we speak of the intent or spirit of the act, we must be understood as meaning the legislative intent. The intention of zealous framers of this act was, no doubt, to confine the furnishing of liquors, as well as its prescription, to the physician. They do not use the term "druggist" in the act, or affect to know even of the existence of the art of the pharmacologist; but to render its arbitrary features tolerable, and to remove constitutional objections, the courts must construe liberally the act as a whole, though we cannot extend its meaning beyond legitimate and reasonable limits. Therefore (1) the distiller cannot fill the physician's prescription; much less could he sell without it; or dispose of his product otherwise than as permitted by the act. (2) No other person than the physician or druggist can sell, barter, give, loan, or traffic in such liquors in any quantity whatever, with or without a prescription, by importation or otherwise. (3) Nor can a person, as agent or servant, or as a "go-between," procure for or deliver to another such liquors, to be used as a beverage, though such person may, with a prescription, prescribed in good faith by a phy-

sician, procure such liquors from the physician or druggist, to be used as a medicine. The sick man need not go after the liquor in person. (4) Each sale or procurement must be accompanied by a distinct prescription, and a person cannot obtain such liquors from the druggist or physician on a prescription indefinite as to quantity, or so general as to cover future deliveries. We think these views substantially cover the case at hand, and the points raised by learned counsel. If some of the features of this act seem harsh or arbitrary, it is to be remembered that "the way to kill a bad law is to enforce it." This construction is directed to be certified as the law of the case.

KANT v. HALL et al.

(Court of Appeals of Kentucky. Nov. 16, 1893.)

ACTION TO QUIET TITLE—WHEN MAINTAINED—EVIDENCE.

In an action by the holder of the perfect legal title of record to 2,700 acres of land to remove a cloud from such title, it appeared that D., the owner of a tract of land including that in dispute, gave to defendants' predecessor in title, C., a bond for title to 350 acres, more or less, in such county; that 31 years afterwards defendants brought an action against the heirs of D., who had previously divested themselves of title by the deeds, duly recorded, under which plaintiff claimed, and obtained a commissioner's deed to the land in dispute, under averments that they had deeds from the heirs of C. for that amount of land; and that plaintiff, who then had title of record, was not made a party to such action. The preponderance of evidence showed that C. never claimed any part of such land. *Held*, that plaintiff was entitled to have such commissioner's deed removed as a cloud on his title, and that a judgment for defendants was erroneous.

Appeal from court of common pleas, Harlan county.

"Not to be officially reported."

Action by Nils G. Kant against A. C. Hall and others to remove a cloud on plaintiff's title to certain land. From a judgment for defendants, plaintiff appeals. Reversed.

Wm. Lindsay, Thos. H. Hines, and J. G. Forester, for appellant. M. J. Holt and Wm. H. Holt, for appellees.

PRYOR, J. This controversy is in relation to the title of a tract of land in the county of Harlan, containing about 2,700 acres. The title asserted by both the appellant and the appellees is claimed to have been derived from and through the original patentee, Boyd Dickinson. The appellees claim under a bond for title executed by one John Dickinson, as the attorney in fact of Boyd Dickinson, to one Absalom Creech, on the 25th of May, in the year 1857. Appellant claims under the will of Boyd Dickinson, dated in the year 1862, by which he devised his land in Harlan county to one James T. Loyd. Loyd sold to one Reamer in February, 1866, and in August, 1867, Reamer conveyed 10,000 acres of this land to one Goulard, by metes and

bounds, and the land in controversy is embraced within this 10,000-acre tract. Boyd Dickinson was the patentee for a much larger body of land, and the 10,000-acre tract is carved out of the original patent. Goulard conveyed the 10,000-acre tract to the Goulard Mining Company in the year 1878, and in the same year the Goulard Company conveyed the tract to one John Tucker, and in May, 1887, Tucker conveyed the land to the appellant, N. G. Kant. The conveyance to Reamer was put to record when executed, and to the various vendees, including the appellant, Kant, the conveyances were properly recorded in the county of Harlan. The appellant, Kant, has exhibited a perfect legal title of record, while the appellees are relying on the bond for title executed in the year 1857, and the deed of the commissioner of the Harlan chancery court executed in a proceeding instituted in that court by the vendees of the heirs of Absalom Creech (the defendants in this action) against the heirs of Boyd Dickinson, in which they sought a decree for a conveyance in accordance with the bond of May, 1857. The present appellant, Kant, who had a title of record, was not made a party to the action in which the commissioner's deed was obtained. The action to obtain the title by virtue of this bond was not instituted until the year 1888, more than 30 years after its execution, and then against parties (the devisees of Boyd Dickinson) who many years prior thereto had divested themselves of title, by conveyances of record in Harlan county, where the land lies. The present appellant, Kant, who holds this record title, is now attempting in the present action to remove the cloud placed upon it by the commissioner's deed to these defendants under the equity action instituted in 1888. That these parties knew of the appellant's title is manifest from the direct proof in the case, as well as from the record evidence of that fact. The bond for title, if properly executed, cannot be deemed or regarded as notice to any purchaser of the claim of Absalom Creech, or those holding under him; and, if any notice exists, it is by reason of the possession of Creech and his heirs and these vendees. The bond for title calls for only 350 acres of land, more or less, and, although this bond was made the basis of recovery against Boyd Dickinson's heirs, a judgment was rendered by which the title is attempted to be passed to 2,700 acres of this land, under averments that deeds had been obtained from the heirs of Absalom Creech, the original owner, for this quantity of land. The preponderance of the testimony, and from those living on and near the land, is that Absalom Creech claimed no part of this Dickinson survey, and even his direct descendants, from whom these appellees or some of them purchased, never knew that Absalom Creech owned this land, or that they sold or had any interest in it. They sold their interest in small tracts of

land, recognized and owned by their father in his lifetime. While the land was not valuable, Absalom Creech's children certainly would have known that he owned this large quantity of land, and have asserted some claim to it. Neither Absalom Creech nor his heirs ever listed or paid the taxes on this land, but, on the contrary, the land was listed and taxes paid by those whose deeds were of record, and in whom the legal title was vested. Absalom Creech, in his lifetime, knew the extent of appellant's claim, or that of those from whom the appellant purchased. The then owners were at his (Creech's) residence for several days, making surveys of this land, and after his death, and since these appellees asserted title, some of them pointed out to the appellant the lines or corners of the survey. The surveyor who made the survey, while at Creech's house, makes a plain statement of what transpired, and leaves no doubt but that Creech was then asserting no claim to this land, and in fact had none. The testimony or rather the character of this witness has been impeached; still he makes a consistent statement of the acts of the parties at that time, and in conformity with what are the real facts of this case, as disclosed by those who lived near this land and are disinterested, and also by members of Creech's own family.

It is said that, this being in the nature of a bill quia timet, possession was necessary to maintain it. We think this action was proper, and, if not, there never was any adverse possession by Creech or by his heirs until this action in the Harlan circuit court was instituted, or about that time; and to permit parties to sue the heirs of the original owner who had long since divested themselves of title, and thus acquire a title adverse to those who have deeds of record from those owning the land, and then deny the relief sought in this case, would be to aid the appellees in their efforts by fraud to obtain title to land that rightfully belongs to the appellant. It is argued the power of attorney did not authorize the sale of this land by Dickinson's brother, conceding the bond passed (if properly executed) the title to this tract of land. We do not deem it necessary to decide this question, as, upon the facts, the relief should have been given. Reversed and remanded, with directions to adjudge the plaintiff entitled to the land in controversy, and to cancel the commissioner's deed in so far as it interferes with the boundary of appellant's land.

REED et al. v. LILLY'S EX'R et al.

(Court of Appeals of Kentucky. Nov. 18, 1893.)

WILL CONTEST—EVIDENCE — REVIEW ON APPEAL
—ERRORS NOT APPARENT.

1. The refusal to allow a witness to answer a question cannot be considered on appeal when it does not appear what appellant desired or

hoped to prove by the answer, or what the answer would have been.

2. On a will contest the propounders may ask a witness in regard to decedent's recognition of his family and friends, or as to any other of the necessary requisites of testamentary capacity, without asking him in regard to all such requisites, including ability to know his heirs at law and relatives, the claims they have on his bounty, and the value of his estate, as well as to make a rational disposition of his property according to a fixed purpose of his own.

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

Proceeding by Celina Reed and others against J. B. Lilly's executor and others to contest a will. From a judgment sustaining the will, contestants appeal. Affirmed.

Simrall, Bodley & Doolan, for appellants.
Francis J. Hagan, for appellees.

HAZELRIGG, J. Dr. J. B. Lilly made his last will, now in contest, in 1880, and died some 3 years thereafter at the age of about 75 years. It is said in the briefs of counsel that the testator provided for an equal distribution of his estate among his only heirs,—three children and two grandchildren. No copy of the instrument is on file, although it seems to have been read to the jury. The contest is made by the grandchildren, and is on the ground that the testator was not mentally competent to make a will. It grows out of the fact that a large sum is charged in the will as advancements to their mother. Frank Lilly appears to be charged with \$4,000 advanced to him, Guy Lilly with \$7,000, Martin Lilly with nothing, and the children of Alice Reed, deceased, with \$16,000, advanced to their father and mother. The verdict of the jury was for the will.

The contestants do not complain of the instructions, which appear to have been entirely correct, but insist that the court erred in not allowing them sufficient latitude in the proof offered by them assailing the correctness of the advancements as charged. They say that Guy was in fact advanced very much more than he is charged with, and that their father and mother were advanced substantially nothing, and therefore that the charge of \$16,000 against them in the will is false. That testimony, showing in a general way the correctness or incorrectness of these alleged charges, was competent, must be admitted, but the inquiry could not be allowed to descend into minute details, to the evident crowding out of the real question in the case, namely, the capacity of the testator to make a testamentary disposition of his estate. There is no instance in the record where proof competent for the purpose of showing the inaccuracy of these charges was excluded from the jury. The first alleged instance is when Guy Lilly was not allowed to answer the

question of the contestants whether or not he paid his father any rent for the drug store property. Having occupied this property of his father's for some time, it was probably the effort of the contestants to show he paid no rent for it, and, upon the presumption that he should have done so, establish that his advance account was too small by the amount of rent he should have paid. This, it must be confessed, is a long way off from the issue of competency or incompetency,—will or no will,—but, if its relevancy be admitted, we are left in the dark as to what the contestants expected the witness to prove by his answer; and it depends entirely on that answer whether or not its exclusion was prejudicial to the contestants. There should have been an avowal of what was expected to be testified to by the witness. This is true also of the complaint that Frank Lilly was not permitted to state whether or not he knew of Guy or his family or his mother doing anything to prevent people from seeing the testator. In view of the great number of people who did see the old gentleman at his house and on the street in 1886, we might readily presume that the witness would have answered that he knew of no such thing as intimated in the question; but we cannot speculate as to what answer he might have made. Certainly we cannot order another trial to ascertain what his answer might be.

The contestants insist that the exclusion of Celina Reed's testimony relating to the testator being lost in his parlor was erroneous, and prejudicial to them. The occurrence was about a year and a half before the witness went to Anchorage to school. She testifies that "the testator was always in the habit of coming down early in the morning and reading the paper. He went in the parlor, and shut the door behind him, and he read the paper quite a while. At the time for breakfast he got up to go out, but could not find the way out of the parlor, and had to wait until some one came to his rescue." On cross-examination she said that all she knew of this incident was what her grandmother told her in her grandfather's presence, and the court thereupon excluded what she had said about the testator being in the parlor. It does not appear what the doctor had to say when his wife told this story on him. We know that the witness was then only some 13 years of age, and we can hardly suppose that the grandmother, in her husband's presence, was seriously detailing to this child evidence of her grandfather's weak-mindedness or mental imbecility. The incident was doubtless tinged with some ludicrous aspect in no way seriously connected with the doctor's mental condition, and was told doubtless as a joke to amuse the child. At any rate, we cannot regard its exclusion as prejudicially affecting the substantial rights of the contestants.

It is contended by the contestants that

the propounders were improperly allowed to ask various witnesses such questions as these: "Did he have mental capacity to know his children and his wife? What was his mental condition at the time that he came to church last? Did he have sufficient mental capacity to know his wife and children and friends or not? Do you know whether he was of sound mind?" The objection urged is that these questions are not sufficiently comprehensive. That a man might know his wife and his children, or have sufficient capacity to know them and his friends, and not have the "ability to know his heirs at law and relatives, and the claims they have on his bounty; to know his estate, its extent and value, and to be able to take a general survey thereof, and make a rational disposition of the same according to a fixed purpose of his own;" and that these latter conditions are the ones prescribed by law as indicative of a testator's competency to make a will, and were in fact prescribed in the instructions in this case. This is all true; but it does not follow that, because the propounders did not choose to ask each witness the general question comprehending all the necessary qualifications on the part of the testator to a valid testamentary disposition of his estate, therefore a question embracing only a part of those qualifications may not be asked. If those offering the paper fail to show all the legal requisites of testamentary capacity, they fail to make out their case; but they do not have to show all the qualifications by all the witnesses, or all the qualifications by any one witness. By getting the parts separately, and putting them together, they may get the whole. From this record it appears that from 35 to 40 of the neighbors and friends of the testator, men who had known him for years,—priests, doctors, officers of the law, members of his family, merchants and lawyers,—testify to his soundness of mind, and many of them detail facts showing undoubted competency at and about the time the will was made. Only a few testify otherwise, and they give us scant reasons for their opinions. The record is free from any prejudicial error. The judgment is right, and must be affirmed.

JOHNSON et al. v. STEVENS et al.

(Court of Appeals of Kentucky. Nov. 18, 1893.)

WILL CONTEST—BURDEN OF PROOF—BILL OF EXCEPTIONS—TIME FOR PREPARING—TERMS OF COURT.

1. In a will contest, the burden is on the propounders to show by a preponderance of evidence that testatrix had testamentary capacity, and on contestants to show by a preponderance of evidence that she was unduly influenced.

2. Civil Code, § 772, declares that the Louisville chancery court has "such control over its judgments, for 60 days, as circuit courts have over their judgments during the term in

which they are rendered." Section 334 provides that "time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court." It is also provided that the Jefferson court of common pleas shall have power over its judgments for the same time as the Louisville chancery court. *Held*, that neither of such courts has power to extend the time for preparing a bill of exceptions beyond 120 days after an order overruling a motion for a new trial.

3. The amendment of Civil Code, § 334, providing that if the judge does not preside, or court is not held, then time shall be given until the next term to prepare the bill, does not apply, when there was nearly a month in said period of 120 days during which court was held.

Appeal from court of common pleas, Jefferson county.

"To be officially reported."

Proceeding by Mary Johnson and others against O. J. Stevens and others to contest a will. From a judgment for defendants, plaintiffs appeal. Affirmed.

Abbott & Rutledge and W. J. Hendrick, for appellants. Humphrey & Davie, for appellees.

HAZELRIGG, J. By the verdict of a jury in the Jefferson court of common pleas, the paper in contest on this appeal was established as the last will and testament of Mrs. Sarah C. Stevens. The motion of the contestants for a new trial having been overruled, they bring the case here for review, alleging that the court erred in admitting incompetent testimony, and in instructing the jury. They also allege that the verdict is contrary to the law and the evidence, and that they ought to have been granted a new trial because of newly-discovered evidence.

Without reviewing the evidence in detail, or discussing the instructions at length, it is sufficient to say (1) that the evidence complained of was competent. The letters of the testatrix were competent to show her feelings towards Mrs. Stivers, and her intimacy with her. In a general way, they bear on her mental capacity and disposition. See *Fuller v. Fuller*, 83 Ky. 351; 1 Greenl. Ev. § 108.

2. The instructions of the court properly present the law of the case. The burden was on the propounders to show by a preponderance of evidence that the testatrix was of testamentary capacity, and on the contestants to show by a preponderance of testimony that she was unduly influenced or coerced, as defined in other instructions. See *Fee v. Taylor*, 83 Ky. 259; *Porschet v. Porschet*, 82 Ky. 93. The other instructions conform to the law as laid down in *Wise v. Foote*, 81 Ky. 15; *Sherley v. Sherley*, Id. 240; and in *Bush v. Lisle*, 89 Ky. 401, 12 S. W. Rep. 762.

3. There is abundant evidence to sustain the finding of the jury. The verdict is not palpably or flagrantly against the weight of the testimony, though there is a conflict between that offered by the one side and that

offered by the other. See *Broadhus v. Broadhus*, 10 Bush, 300; *Fuller v. Fuller*, supra.

4. The alleged newly-discovered evidence is not of a decisive or controlling character. It is doubtful whether it would have had any preponderating influence upon another trial. See *Mercer v. Mercer*, 87 Ky. 21, 7 S. W. Rep. 307. Nor is it at all certain that, by the exercise of reasonable diligence, the contestants could not have learned of the existence of this alleged new testimony before the trial. However, without regard to the errors alleged, the judgment must be affirmed. The motion for a new trial was overruled on June 24, 1889. By appropriate orders, time was given the contestants, until September 30th, to prepare and tender a bill of exceptions. On that day, no bill was tendered, but, over the objection of the propounders, (appellees,) the time was extended to October 14th. Then, on the contestants' motion, time was given them until October 28th. Then it was extended to November 11th, and finally to November 18th, on which day the contestants, for the first time, tendered a bill of exceptions. Time was then given them until November 25th to "complete" the bill, and on their motion this was extended until December 4th, when they "tendered to the court a bill of exceptions, which, being signed and sealed, was filed, and made part of the record." We think a brief examination of the law controlling the practice in this court will show that this bill cannot be regarded as part of the record. The Jefferson court of common pleas has no appearance terms, but it is provided that it "shall be always open." It is further provided that "it shall have the same power, and for the same length of time over its judgments as the chancellor of the Louisville chancery court has over its judgments;" and the latter court has "such control over its judgments, for sixty days, as circuit courts have over their judgments during the term in which they are rendered." Civil Code, § 772. As to any given order or decree, therefore, the period of 60 days from its entry or rendition is to be regarded as a "term," in these courts. At the expiration of 60 days from the entry of the order or decree, the term of court so to speak, as applicable to this order or decree, ceases, because the court loses control over it, just as the judge of a court having stated terms loses control over his orders after the term ceases. The beginning of the second 60 days, therefore, after the entry of a given order, is the beginning of the succeeding term, or the next term, with reference to that order. Now, the law governing the subject of exceptions, and applicable to all the courts, is found in the Civil Code, § 334. It provides that "the party objecting must except when the decision is made; and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be

fixed by the court." An amendment to this section provides that if the judge of said court, for any cause, does not preside, or no court is held, then time until the next term shall be had to perfect and prepare the bill. If the first 60 days after the order overruling the motion of the contestants for a new trial is to be regarded as the term at which such order was entered, and the second 60 days is to be regarded as the succeeding term, then the first term would end 60 days after June 24th, which would be on August 23d, and the second 60 days, or the succeeding term, would end on October 22d. Therefore, the bill tendered for the first time on November 18th, was tendered beyond the succeeding term, or beyond the limit as fixed by law, and hence too late to be considered. We think it will be found that this construction of the acts regulating the practice in these courts has been followed both by this court and the superior court. In *Cavanaugh v. Corckran*, 11 Ky. Law Rep. 855, the bill was tendered 75 days after the motion for a new trial was overruled. It was contended that such bill must be tendered within 60 days from the final order. But the superior court, through Judge Ward, held that "the reason and analogies of the law require that a second sixty days should be allowed, so that the court may, by proper orders, extend the term for filing bills of exceptions for one hundred and twenty days after the motion for a new trial has been overruled." In *Shrader v. Wilhite*, Id. 954, the bill was not signed or filed until 148 days after the new trial was refused. The same court held that "in the Jefferson court of common pleas, and the Louisville law and equity court, time for filing bills of exceptions may be extended for one hundred and twenty days after the order overruling the motion for a new trial, but not beyond that time." Precisely to the same effect was the opinion (Judge Young) in *Oain v. Cain*, 12 Ky. Law Rep. 635, and in *Bannon v. Moran*, Id. 989, 990; the court holding, in each case, that the time for filing a bill of exceptions in the Jefferson court of common pleas, or in the Louisville law and equity court, cannot be extended—no excuse for the delay appearing in the record—beyond 120 days after the order overruling a motion for a new trial. In the case under consideration, some 147 days elapsed from the time of making the order overruling the motion for a new trial until the bill was first tendered. The cases of *Bailey v. Villier*, 6 Bush, 27, and of *Downing v. Bacon*, 7 Bush, 680, recognize the period of 60 days as equivalent to a term of these courts. In *Largest v. Tyler*, (opinion of this court, December 22, 1876,) it was held that by leave of the court, upon proper extensions, a party would have "from two to four months in which to file his bill of exceptions, and certainly no longer time should be demanded or required." The appellants rely on the amendment to section 334 of the Civil Code, providing still

further time for filing bills of exceptions, if the judge who can properly sign the bill does not preside, or no court is held, and say that the summer vacation, consuming some 84 days of the time, should not be counted against them; but court was in session from September 30th, and there yet remained nearly a month of the second 60 days, or "succeeding term," during which the judge did preside, and there was a court held; so that the amendment does not aid the appellants. Its provisions are not applicable to their case. We think the true rule is laid down in the cases decided by the superior court, quoted above. The bill of exceptions must be disregarded; and with the bill out, even if inclined to a different conclusion with the bill in, the judgment below must be affirmed.

LUCAS v. COOPER.

(Court of Appeals of Kentucky. Nov. 18, 1893.)

PARTNERSHIP PROPERTY — WHAT CONSTITUTES — EVIDENCE — CLAIM BY ADMINISTRATOR WITH WILL ANNEXED.

1. Where personalty owned by two persons as partners is divided, though unequally, the one receiving the smaller share cannot, on the death of the other, nine years thereafter, assert a claim to that retained by the latter.

2. Plaintiff and decedent moved on a farm, under a written agreement that they should own it equally. This agreement was afterwards taken by plaintiff from the clerk's office, where it had been left, and placed in the care of decedent, plaintiff being about to move away, and it being thought that the agreement might interfere with a sale of part of the property by decedent in case he needed money for his support. Thereafter decedent repeatedly stated that plaintiff owned half of the property. *Held*, that the land was partnership property.

3. The fact that plaintiff qualified as administrator with the will annexed of decedent does not affect his claim to a part interest in the property standing in decedent's name, the will not having indicated of what decedent's property consisted.

Appeal from court of common pleas, Livingston county.

"Not to be officially reported."

Action by W. H. Lucas against Joseph H. Cooper. From a judgment for defendant, plaintiff appeals. Reversed.

J. C. Hodge, for appellant. J. K. Hendrick and W. D. Greer, for appellee.

HAZELRIGG, J. The question to be determined on this appeal is whether the appellant, as plaintiff in an equitable action for that purpose, has established his right, as a former partner in business with one John Davis, deceased, to one-half of Davis' "Hodge" farm, consisting originally of some 220 acres; and also to one-half the personal estate owned by Davis at his death in 1887. It is sufficient to say, with respect to the personal property, that the fact that Lucas left it as long as the year 1878 to be used, and, if

need be, consumed, by Davis in his support and maintenance, renders it improbable that the former was to have any further interest in it, and especially so as he carried away with him some portion of it, although that portion was comparatively small. The fact that there was a division of the partnership personalty, although not an equal one, must be taken as conclusive against the assertion of any further claim by the appellant to this perishable property after the lapse of so many years. With respect to the partnership real estate, the case is different. The proof is clear that when the appellant and Davis moved to the Hodge farm there was a written agreement to the effect that they were to own it equally. This writing was taken from the clerk's office, where it had been left, and placed in Davis' care, who was afraid it would be in the way of a sale of a portion of the farm should he need the proceeds of the sale for his support after Lucas moved away. The parties had been in business together for 18 years, and Davis' first wife was the aunt of the wife of Lucas, and his second wife was the sister of Lucas. The men trusted each other implicitly. Under ordinary circumstances, the fact that this writing was taken from the office by Lucas, and placed in the hands of Davis, would easily raise the presumption that the intention was to cancel it; but the repeated declarations of Davis after Lucas had moved away, and after this paper had been left with him, to the effect that Lucas was the owner of one-half the farm, is conclusive of the question of ownership. For convenience, merely, the legal title was left in Davis. The land was partnership property beyond a doubt, if the proof is to be believed. The chancellor held the plaintiff not to be entitled, probably because it was thought the plea of limitation or the statute of frauds determined the case against him. We think neither plea affects the question; nor is the claim of appellant to one-half the partnership land affected by the fact that he qualified as the administrator with the will annexed of Davis. The will gave the property of the testator to the widow. It did not attempt to indicate in what his property consisted. We see no reason for disturbing the amount fixed by the judgment of the chancellor as in the hands of Lucas as administrator and due to Mrs. Cooper, but its collection should not be enforced as a lien on the Ray farm. The judgment should direct an equal division of the 220 acres,—old Hodge farm. The 78½ acres sold to Cooper by Davis should be set apart to the appellee, Mrs. Cooper, as that much of her share in the land, and the judgment against the appellant should be enforced against his half of this 220 acres. The judgment is reversed, with directions to enter judgment as indicated herein.

GAMBILL v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 18, 1893.)

CRIMINAL LAW—REVIEW ON APPEAL.

1. Since the supreme court is confined on criminal appeals to the review of errors of law which occurred on the trial, it cannot consider the action of the lower court in refusing a motion for a new trial based on newly-discovered evidence.

2. The verdict of the jury in a criminal case cannot be reviewed on appeal if there is any evidence to sustain it.

Appeal from circuit court, Lawrence county.

"Not to be officially reported."

Nathan O. Gambill was convicted of manslaughter, and appeals. Affirmed.

Alexander Lackey, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. The appellant was indicted and tried for the murder of Hugh Sparkes. His trial resulted in convicting him of the crime of manslaughter, and fixing his confinement in the penitentiary at two years. The court instructed the jury fully and correctly upon the law of murder, manslaughter, and self-defense, and the jury found the appellant guilty of manslaughter. The jury were the sole judges of the facts, and we cannot disturb their judgment in reference to that matter if there was any evidence at all authorizing their judgment, and we think the evidence authorized their verdict. One of the grounds for a new trial is the discovery of new evidence tending to contradict the evidence of the witness for the commonwealth. It is only necessary to state that, the lower court having passed upon that matter, its judgment thereon cannot be reviewed here; for this court is confined in its review of criminal appeals to errors of law occurring on the trial. The judgment is affirmed.

LAPE'S ADM'R v. TAYLOR'S TRUSTEE.

(Court of Appeals of Kentucky. Nov. 18, 1893.)

REMOVAL OF TRUSTEE—COSTS OF CONTEST—SETTLEMENT OF ACCOUNTS.

1. A trustee, who is removed on account of ill health, after having properly performed the duties of the trust, is entitled to a settlement of his accounts at the cost of the trust estate.

2. One who unsuccessfully resists an application for his removal as trustee is liable for the costs of such resistance.

Appeal from chancery court, Campbell county.

"Not to be officially reported."

Action by one Jones against W. H. Lape for the latter's removal as trustee of an estate. Said Lape was removed, and afterwards died, and another trustee was appointed.

For former report, see Lape's Adm'r v. Jones, 15 S. W. Rep. 658.

John S. Ducker, for appellant. Geo. Washington, for appellee.

PRIOR, J. In this case a question of jurisdiction was raised on the motion of appellee's counsel, on the ground that the attorney's fee had been settled, and therefore this court had no jurisdiction over the question of costs. A counter affidavit was also filed, to the effect that no such compromise had been made; and the court must adjudge that the question raised as to the value of the services rendered by the trustee of Taylor is the subject of inquiry here, and, after reading the statements of the witnesses in this regard, we must hold that the amount allowed is reasonable. As to the question of costs, it is apparent the trustee has acted in the best of faith. He managed the trust well, is not in default in any matter, and only resisted his removal on the ground that his health would soon be restored, and this (his bad health) was the cause for the appointment of another trustee. His resistance to the action of the appellees in their effort to remove him subjected him to the payment of certain costs attaching to that branch of the case, and this he should pay, and will not exceed, when properly taxed, \$50. All the other costs, after charging the trustee with the \$50, must be paid from the trust fund.

The appellant was entitled to a settlement of his accounts whether retained or removed, and the trust must be made to pay the expenses of the settlement. If in default, the case would be different. The judgment is reversed on the question of costs and affirmed as to all other exceptions. Remanded, with directions to charge the trustee with \$50 of the costs, and no more.

CRITCHLOW v. BEATTY.

(Court of Appeals of Kentucky. Nov. 18, 1893.)

BOUNDARIES—RECOGNITION—ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE.

1. A boundary line is sufficiently established by evidence that it was plainly marked over 75 years before; that those from whom the parties derived title recognized it as the boundary, and that it was surveyed and recognized by those in possession over 20 years before; though it differs from the original patent in not running to an established point, and is junior in date, and though the surveyor thinks there was a mistake in the survey.

2. Where a party to an action to establish a boundary line claimed title to land by adverse possession within his inclosure for over 15 years, his statements to uninterested persons that he claimed to a certain interior line, and, after a survey, that he intended to move back his fence, do not work an estoppel, but may be introduced in evidence to show an absence of adverse claim of title.

Appeal from circuit court, Grayson county.

"Not to be officially reported."

Action between Beatty and William Critchlow to establish boundary lines. From a

Judgment for Beatty, Critchlow appeals. Affirmed.

J. S. Wortham, for appellant. Wm. H. Holt and G. W. Stone, for appellee.

PRYOR, J. This was a law and facts case, submitted to the court without the intervention of a jury; and, while the weight of the evidence may be on the side of the appellant, we are not disposed to disturb the finding when satisfied there is evidence to support it. The litigation originated from a dispute between neighbors as to the real boundary lines between their adjoining farms. As is usual in such cases, bad feeling on the part of the one neighbor towards the other is sought to be gratified, and the mere right of property a secondary question. As an original proposition, a court or jury might well establish from the proof the line between the Toole tract and the Kerr tract as beginning at the white oak and ending at the two black oaks known as the "Webb Corner;" but a different line, although made after the original survey, may be adopted and established as the real line by the original owners, or by those who were at the time in the possession and the owners. It is shown by Dunn and others that very many years before this trouble originated, Kerr and Mercer, who then owned the respective tracts of land, recognized the line fixed by the court as the true boundary. They were then talking on the subject. That there was a marked line, plain and distinct, made more than three-quarters of a century ago, inclosing the boundary and claim of those under whom the plaintiff claims, is shown by a number of witnesses; and, while this line differs from the original patent, and is junior in date, or does not run to what is established as the Webb corner, it was evidently made by some arrangement between the owners of the two tracts, and with the admission and recognition of this line as the boundary by those from or through whom these parties derived title, it seems to us the court acted properly in establishing the line recognized as such by the owners. These lands were surveyed 20 or more years back by those, or at the instance of those, living on the lands, and the line established or recognized as the line by those in possession; and while the surveyor now thinks there was a mistake in the survey, or that it failed to call for the real corners or follow the true line, it is too late now to correct it. As to another line of this Toole tract it is conceded—and, if not, the proof shows it—that the line fixed by the court is the true boundary; but it is maintained that the appellant has held a part of this land adversely and within his inclosure for more than 15 years, and thus acquired title. If there was no evidence in this case but that of the possession on the part of the appellant of this small strip, it might be held that this being

within his inclosure would establish an adverse holding; but the proof shows the appellant claimed to own to the line as fixed or known as the "Leitch Line," and that when surveyed he said more than once that he intended to move his fence back. While the statement to those who are not interested in the litigation as to the nature of one's claim to land does not work an estoppel, yet it is evidence as to the manner in which the title is held, and may be introduced to show the absence of any claim of right. This evidence the court had before it, and in applying the law to the facts we cannot say erred in the finding. Upon the facts of this case the judge below refused to change a marked line recognized by the owners of the respective tracts (and from whom these litigants derived title) for many years as the true boundary; in the second place, refused to establish a line upon a possession claimed to be adverse, when there was evidence showing that the holding was friendly, and not adverse, and when, by establishing an adverse holding, a part of appellee's survey would have been left within appellant's inclosure. We must concur in the finding below, or at least cannot say the judgment was flagrantly wrong. Judgment affirmed.

BUNGER v. PETTY'S EX'RS.

(Court of Appeals of Kentucky. Nov. 23, 1893.)

HUSBAND AND WIFE—PROPERTY RIGHTS.

Where the husband is insolvent, and the wife is capable of managing her property, executors of her father's estate are justified in paying her distributive share over to her, at her request, and against her husband's protest.

Appeal from circuit court, Larue county.

"Not to be officially reported."

Action by P. G. Bunger against John Petty's executors. From a judgment for defendants, plaintiff appeals. Affirmed.

Jas. Montgomery, for appellant. D. H. Smith, for appellees.

PRYOR, J. The action below was brought by P. G. Bunger against John Petty's executors to recover the distributable share of his wife, Mary Jane Bunger, who was a daughter of the testator, and to surcharge the settlement made by the executors with the Larue county court. The items of the settlement of which any complaint can be made, if any error exists, are so small, not exceeding \$20 or \$30, as would not authorize a reversal, if patent upon the record.

The main question involved, and the one upon which counsel for the appellant relies for a reversal, is, as he insists, the wrongful payment by the executors, to the wife, of her distributable share, instead of paying it to the husband. The executors had paid to the husband \$2,000, obtaining the receipt of both husband and wife; and when ready to pay the balance, (a much larger sum,) they

were notified by the wife not to pay the money to the husband, and required payment made to her, claiming it as her property, and the right to hold it, as against the husband, who was then insolvent, or much involved in debt. The executors notified the husband of their purpose to pay the money to his wife, and did pay it to her, against his protest, and obtained her individual receipt. He now sues for this money, and claims that the executors failed to account for all the moneys they received, or to make an accurate settlement of their accounts, and, particularly, to account for interest collected on demands due the estate. The executors show a fair accounting for the interest, and there is no evidence authorizing this court, or any other court, to say that they received money for which they had not accounted. The wife seems satisfied with the acts of the executors, and is, in this case, claiming that the money was her property, and sustaining the acts of the executors; and, while it is urged that the confidence of the wife in the husband has been destroyed by the acts of the executors and others, we perceive nothing in this case showing bad faith by these personal representatives, and only the desire on their part to protect the wife in the enjoyment of the patrimony left by her father. It was not the husband's property or money, but belonged to the wife; and while the law permitted him to reduce this money to his possession, by a settlement with the executors, the wife had the right to intervene for her own protection, and prevent the husband from becoming the absolute owner of her personalty. It was a case in which the chancellor, if applied to, would have directed this money paid to the wife, or secured to her, in some way, for her support and maintenance. It is not pretended that the wife was not competent to manage the fund, or that she would waste it, to the detriment of herself and husband; but the only complaint is that it was not paid to the husband on his demand, regardless of the claims of the wife. It appears that, after this money had been paid to the wife, the husband obtained from her several thousand dollars of it, but afterwards refunded it, or handed it back to the wife, and, as he says, because she was so much grieved about his having it, he feared, if he refused to hand it back to her, it would injure her health, and says, if the executors had paid it to him in the first instance, no such scene would have been enacted between himself and his wife. It does not matter whether the husband has or not committed acts of estoppel, as against the appellees, as it is apparent the wife was entitled to this money. It was hers, and, when reaching the hands of her husband, would doubtless have been seized by creditors, when no credit had been given the wife for his debts, or the credit of the husband based upon his right to this property upon the death of the wife's father. It was a pay-

ment of the money to the real owner, and, although a feme covert, the circumstances justify the payment, and the wife should be allowed to retain the money, and the executors relieved from all liability to the husband. Judgment below affirmed.

TAYLOR'S TRUSTEE v. ABERT et al.
(Court of Appeals of Kentucky. Nov. 23, 1893.)

TRUSTS—CONSTRUCTION—RIGHTS OF BENEFICIARIES—PARTITION.

1. Decedent, in the place of a will which he had made, and in order that his estate might be wound up in his lifetime, gave a deed of trust empowering the trustee to sell and dispose of a large landed estate for the benefit of his children. The deed provided that, after paying debts, and settling between the children for advancements, the trustee should divide the estate into equal shares, and invest it for, and pay it over to, the children, some of them to be paid their share in money, and others to have their share invested in land, the title to be taken to them for life, remainder in fee to their heirs. The trustee was directed to lay off lots out of a certain tract from time to time as it might seem best. An annual income was to be paid the children until the trust should be settled. *Held*, that the trust was to be executed in a reasonable time, and, 12 years having elapsed without the estate being wound up, the beneficiaries are entitled to partition, those whose share is payable in money having the right to sell the land if they desire, or, when partitioned, if they insist on the land being sold, the chancellor may authorize the trustee to sell their parcel, and pay them over the money.

2. Before such division is ordered, a settlement should be made by the trustee, and, if there are any debts, land should be sold to pay them.

Appeal from chancery court, Campbell county.

"Not to be officially reported."

Suit by Lucy C. Abert and others against James Taylor's trustee, for division of the trust property. From a decree for complainants, defendant appeals. Reversed.

Geo. Washington, C. J. Helm, and Nelson & Desha, for appellant. L. J. Crawford and Follett & Kelley, for appellee.

PRYOR, J. Col. James Taylor, of the city of Newport, executed a deed of trust, by which he empowered the trustee, William H. Lape, to sell and dispose of a large landed estate for the benefit of his, the grantor's, children. Lape has been removed, and W. H. Harton appointed in his stead. When the deed was executed the grantor had five children living, some of whom had children, and those children, or some of them, are now infants. His son James died before the grantor, and his (James') widow and child were provided for by this deed. The grantor had previously made a will, but, desiring his estate wound up and settled in his lifetime, and with that view, executed the deed of trust to Lape, embracing substantially the provisions contained in his will. Two of the grantor's children have

died since the deed was executed, leaving infant children. The value of the land devised will exceed greatly one million of dollars, and perhaps approximate two millions in value. The land (all of it) was charged by this trust deed with the payment of the grantor's debts, including debts for which he was liable as a member of the banking house of James Taylor & Sons. The grantor had made advancements to his children, and the trustee is directed to take this "advance book," and settle the accounts between his children and the children of his son James. When this settlement is made, the trust provides that whatever is coming to Barry and my daughters, "one-half will be paid them in money, and the other half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs forever." "Whatever is coming to my son John will be paid him in money, and that which is coming to my son James' children will be paid to their mother, if they are under age, for the use and benefit of all of them; the mother to have one equal amount with the children." "When the matter of advance is settled, after paying all costs and expenses incident to the management of the estate under this deed of trust, the surplus, or what remains of the sale of real estate, or what may be coming from any other source, will be divided into six equal parts, and invested for and paid over to my children and to the children of my son James and their mother, in the same manner as provided in the accounts of equalization. If at the time the equalization takes place any of my children are dead, no investments will be made for their children, but the amounts coming to them will be paid to them in equal proportions." "The amount coming to my son James' two children will be paid to their mother until their arrival at age, and she is to be paid one-third of this fund for her own use and benefit." The grantor also directs his trustee "to lay off lots out of my Bellevue tract from time to time, as it may be desirable, as additions to the city of Newport; the land adjoining Bellevue to be laid out as the trustee may think best, including the mill bottoms." The grantor also provides an annual income out of the fund to be paid his children until the trust is settled.

Mrs. Lucy C. Abert and others of the children of the grantor instituted this action below, asking a division of the trust property, alleging that the trust had been fully executed, the advance accounts settled, and that no impediment existed in the way of a final partition of this large estate between the parties in interest. The claim for partition is resisted, because the land has not been sold, and no final settlement made by the trustee, or all of the debts of the grantor paid. This deed of trust was executed on the 29th of May in the year 1882, and, while no hasty execution of the trust was expected

or intended by the grantor, it is manifest the conveyance of the property in trust was in substitution of the testator's will, and to enable the grantor to see and know that his estate was being divided and settled during his life. That periodical sales of this large real property became a matter of necessity, and the trustee was invested with ample discretion, by the terms of the trust, to sell when, in his judgment, it was to the interest of the beneficiaries to do so,—in other words, he had a reasonable time to execute this trust; but that he was placed in a position where the trust became perpetual is not warranted by any of its provisions, or sanctioned from any intent or purpose on the part of the grantor to be gathered from either his will or the deed under which this power is claimed. While delay in the execution of the trust, looking to the location and condition of the lands left by the grantor, may have resulted in great benefit to those in interest, still, after the lapse of 12 years and longer, ample time has been given the trustee to wind up this estate. If the lands are constantly increasing in value, there is no reason why the beneficiaries cannot hold these lands as well as the trustee, and by a continuation of this trust the beneficiaries who are entitled to their interests are the mere pensioners of the trust that may not be fully executed until all are gone, and their children left the sole beneficiaries of the grantor's bounty. It is immaterial whether this trust is executed or executory; it ought to have been settled long before this, and the chancellor took the correct view of the question when he authorized this land to be partitioned with some qualification.

It is argued by appellants that this land is valuable and becoming more so from day to day; and, if so, why should not the remainder interest be protected by giving the life tenant and the remainder-man the land itself, instead of selling and reinvesting in other land. To do this a partition becomes necessary and proper. As to the devise in money (made absolute) to the children or the grandchildren, they can sell the land if they desire, or, when partitioned, if they insist upon the land being sold, let the chancellor authorize the trustee to sell their parcel, and pay them over the money. John Taylor, one of the devisees or grantees, is entitled to his in money. Why cannot he sell the land allotted to him? Or, if not willing to do so, let the chancellor direct the trustee to sell it for him. Those who want the money, and not the land, let the trustee sell their parcels, and pay it over to them, if they desire. The infants should have guardians. Before this division is ordered, a settlement should be made with the trustee of his accounts; and, if the estate is still indebted, land should be sold to pay this indebtedness before a partition is had. The substance of the judgment should be to per-

mit those of the heirs who desire it to take the land, instead of the money; and as to the remainder interest created by the grant there is no reason why they should not take this land, instead of directing a sale and investing in other land. The judgment below must be reversed, that a settlement may be had before the division is ordered. Remanded for that purpose.

CARDER et al. v. WEISENBERG.

(Court of Appeals of Kentucky. Nov. 21, 1893.)

FORM OF ACTION—LEGAL OR EQUITABLE—RIGHT TO TRIAL BY JURY.

Plaintiff sued in equity for the price of repairs made by him on defendants' flouring mill, and asked that a lien be declared and enforced on the mill for such price. Defendants admitted the contract under which the work was done, but claimed that it was not properly done, and asked damages. Held that, as the right to a lien depended on the decision of legal issues, it was error to refuse to transfer the case to the common-law docket, to be tried by a jury.

Appeal from court of common pleas, Grant county.

"To be officially reported."

Action by L. B. Welsenburg against Carder & Vallandingham. From a judgment for plaintiff, defendants appeal. Reversed.

Collins & Fenley, W. I. Willis, and C. C. Crane, for appellants. Geo. C. Drane, for appellee.

BENNETT, C. J. The appellee sued the appellants on their contract for the price of repairing and remodeling their flouring mill, and asked that a lien be declared and enforced on the mill for the price. Hence, the suit was brought in equity. The appellants admitted the contract to repair and remodel the mill, but claimed that the work was not done in a workmanlike manner, and a breach of warranty as to the quality of the work, and asked damages in consequence. The appellant, before the trial in equity, moved the court to transfer the legal issues thus formed to the common-law docket, to be tried by jury. The motion was overruled, and the case tried by the court. From that judgment, this appeal was taken.

Did the lower court have a discretion to grant the motion or not, or should it have been granted as a matter of right? It is to be observed that the issues formed were legal ones, and triable by jury, and that the only thing that gave a court of equity jurisdiction of the case is that a lien was sought to be enforced on the mill property for the price of the repairs. No lien could be enforced on the mill property, except to satisfy the unpaid price of the repairs, the right to which was put in issue. That issue was a legal issue triable by jury. Section 12 of the Civil Code provides, in substance, that either party to an equitable action properly brought in equity may, by mo-

tion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial, but either party may require every equitable issue to be disposed of before such transfer. Here, the matter that gave the court jurisdiction was the enforcement of a lien on the mill property to satisfy the price of the improvements; and if there was nothing due on account of the improvements, of course, there was nothing due for a court of equity to enforce. Hence, whether or not there was any sum due for repairing the mill was the legal issue to be tried. The court, in the cases of *Meek v. McCall*, 80 Ky. 375, and *Hill v. Philip's Adm'r*, 87 Ky. 169, 7 S. W. Rep. 917, has construed the twelfth and other similar sections of the Civil Code as follows: That if the equitable right depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case, on motion, should be transferred, as matter of right, to the common-law docket, to be tried by jury. Last-named case. The court has no right to refuse such transfer unless the case be purely equitable, in which case it has discretionary power as to the transfer, and may, at its discretion, obtain the advisory aid of a jury in coming to a correct conclusion upon any question of fact involved in the issues to be tried. The constitution of this state guaranties the right of jury trial. This means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law; but in cases of purely equitable cognizance a trial by jury is not a matter of right, but it is addressed to the discretion of the chancellor. The right of the trial by jury, as secured to the citizen under the constitution of the state, cannot be taken away, or placed at the discretion of the chancellor, by converting a legal right into an equitable one, or by giving the chancellor an exclusive right to try legal issues because there is some equitable right that arises out of the establishment of the legal issues, so as to infringe upon the right of trial by jury. That right must remain inviolate, as a secure constitutional right of the citizen in all trials in which, according to the course of the common law, the right to a trial by jury exists. The judgment is reversed, and the case remanded, with directions to award to the appellants a trial by jury.

GOODIN v. TRUSTEES OF COMMON SCHOOL DIST. NO. 94.

(Court of Appeals of Kentucky. Nov. 23, 1893.)

CONTRACT—SCHOOL BOARD—PERSONAL LIABILITY OF TRUSTEES.

Where a trustee of a common school district agrees to give a person a specified sum to render certain assistance in connection with the erection of a schoolhouse for the district by a contractor, in order to prevent the contractor's sureties from becoming liable to damages, and

it is further agreed that such sum shall be payable when collected from the district, no personal liability is incurred by the trustees of such district.

Appeal from court of common pleas, Whiteley county.

"Not to be officially reported."

Action by James L. Goodin against the trustees of common school district No. 94 on an oral contract for the payment of money. From a judgment for defendants, plaintiff appeals. Affirmed.

K. D. Perkins, for appellant. Crawford & Mason, for appellees.

BENNETT, O. J. The appellant contends that the appellees, as the trustees of the common school district No. 94, employed him and Pennington to build a schoolhouse for said district, and that appellant was to furnish the lumber to build the house, for which the appellees were to pay him \$20 extra. The trustees deny that they contracted with the appellant as alleged, or that they made any agreement with him to furnish the lumber. They say that they had a written contract with Pennington to build said house, and to furnish the lumber, and that he did build it, for which they paid him. One of the trustees said that they became apprehensive that Pennington was using the money that they were advancing him on the contract, not for the purpose of building the house, and in consequence he would fail to complete the building, and his sureties would have to pay damages in consequence of the failure; and, in order to avoid trouble of that kind, he agreed to give appellant \$20 to render some assistance, payable when collected from the district. From what the trustee says, there was no personal liability for this \$20, and, outside of this agreement, we concur with the court below that there was no agreement to pay appellant for lumber or services, nor does it appear that the appellant has taken any steps to collect the \$20 from the district. The judgment is affirmed.

BIGGERSTAFF'S EX'RS v. BIGGERSTAFF'S ADM'R.

(Court of Appeals of Kentucky. Nov. 28, 1893.)
WILLS — REVOCATION BY MARRIAGE — ADMISSION TO PROBATE — WIFE'S RIGHT OF APPEAL.

Where testator's will was executed before his marriage, and made no provision for his wife, and testator and his wife released all their claims in the estates of each other by an antenuptial contract, the wife could not appeal from an order admitting the will to record, on the ground of revocation by the marriage.

Appeal from circuit court, Monroe county.
"To be officially reported."

In the matter of the probate of the will of H. Biggerstaff, deceased. The administrator of Melinda Biggerstaff, his widow, appealed from an order admitting it to record. From

an order denying a motion to dismiss the appeal, the executors of testator appeal. Reversed.

Porter & McQuown and A. W. Scott, for appellants. Sandidge & Sandidge and John G. Craddock, for appellee.

LEWIS, J. April 14, 1860, Hiram Biggerstaff made a will devising to his wife, Susanah, for life, all his property, to be equally divided at her death between his children, except \$500 in money given to each of two grandchildren, America and Martha T. McComas. In 1867, being then a widower, he married Melinda McComas, with whom he lived until his death, in 1889. March 4, 1889, the paper dated April 14, 1860, was, by order of the county court, admitted to record as his last will. But upon appeal by Melinda Biggerstaff, widow, and America McComas and Martha Cloyd, (formerly Martha McComas,) his two grandchildren, judgment of the circuit court was rendered, reversing that order, and directing the county court to reject the paper as a will. However, before the case was submitted for final judgment of the circuit court, America McComas and Martha Cloyd caused an order made, dismissing, as to each of them, the appeal from the county court order; thus leaving as the only appellant David McComas, administrator of Melinda Biggerstaff, who had in the mean time died.

According to a statutory provision, the marriage of Hiram Biggerstaff in 1867 operated as a revocation of his will made in 1860; and America McComas and Martha Cloyd, being his heirs at law, had a right to a reversal of the erroneous order of the county court admitting the paper to record as his true last will. But, if Melinda Biggerstaff had no interest in the estate of her deceased husband, she was not at all affected by the county court order, nor could she, while living, nor her administrator after her death, prosecute an appeal therefrom; and, such being the case, the motion to dismiss the appeal, made after America McComas and Martha Cloyd ceased to be parties, ought to have been sustained. Whether she acquired or had, in virtue of her marriage to Hiram Biggerstaff, any interest in the estate at his death, depends upon the proper construction and meaning of the following contract, which appears to have been duly executed and recorded: "Whereas, Hiram Biggerstaff and Melinda McComas contemplate entering into the holy bonds of matrimony, and for the purpose of living forever in harmony, we do hereby make the following marriage contract, to wit: It is expressly understood and agreed that each party,—that is to say, Hiram Biggerstaff is to hold what property he now has free from the claims of his contemplated wife, now Melinda McComas, and the said Melinda McComas is to have entire and complete control of all property that she

now holds in her own right, free from the claims of said Hiram, and is allowed the privilege of using her separate property in any way she may see fit and proper. It is expressly understood that each party to this contract is to have, enjoy, and use their own property, which they now own, free from the interference of the other, and to have the perfect right to sell, convey, or otherwise dispose of the same as though no marriage had taken place. Hiram Biggerstaff. Melinda McComas. Nov. 27, 1867." According to the language of that contract, it is plain the parties intended the property of each should be free of any marital right or claim of the other while they lived together as husband and wife, and also that neither should, at death of the other, be entitled to allotment or distribution of his or her estate as either curtesy or dower, for exclusion of claim or right on account of the marriage is not, in the terms or meaning of the contract, limited to their lives, but was manifestly intended to continue and apply after death. Indeed, the wife's claim to her husband's property is generally contingent upon his first dying. Though the relative value of their property at time of the marriage does not appear, it is reasonable to assume, in absence of evidence to the contrary, she entered into the contract freely and intelligently, and that complete control of her own property, free of his claims, retained by her under the contract, was a fair consideration for her agreeing he should hold his property free from her claims, and "as though no marriage had taken place." As we construe the contract, Melinda Biggerstaff had no interest whatever in the estate of her deceased husband, and it was consequently error to overrule the motion to dismiss the appeal from the county court order. Wherefore, the judgment of the circuit court is reversed, and cause remanded, with direction to sustain that motion.

CITY OF HELENA v. HORNOR.

(Supreme Court of Arkansas. Nov. 4, 1893.)

LIMITATIONS—ACTION TO RECOVER LANDS—PLEADING.

1. Act Jan. 10, 1857, § 1, limits to two years the right to maintain an "action for the recovery of any lands or for the possession thereof against any person who may hold such lands by virtue of a purchase thereof at a sheriff's or auditor's sale for the nonpayment of taxes, or under an auditor's deed." *Held*, that such statute applies to deeds of the commissioner of state lands, as the name of the officer in charge of the land department has been changed from "auditor" to "commissioner of state lands," while the office and its functions remain the same.

2. A statute of limitations may be pleaded against a municipal corporation. *City of Ft. Smith v. McKibben*, 41 Ark. 45, followed.

3. The term "lands," as used in Act Jan. 10, 1857, § 1, includes "town lots."

Appeal from circuit court, Phillips county; Grant Green, Jr., Judge.

The facts fully appear in the following statement by WOOD, J.:

This is an action of ejectment brought by the city of Helena for certain lots deeded to the city by Edward Fitzgerald in 1873. The answer pleads two years' adverse possession under a tax deed executed by the commissioner of state lands in 1888, conveying the lots in controversy, which lots the state had acquired by a forfeiture and sale for the nonpayment of the taxes of 1885. The deed was in regular form, and made an exhibit to the answer. Demurrer to the answer overruled. Appellant resting, judgment was rendered for appellee, from which an appeal was duly prosecuted. Affirmed.

James P. Clarke, for appellant. John J. & E. C. Hornor, for appellee.

WOOD, J., (after stating the facts as above.) Appellant's counsel presents three questions for our consideration, which we will state in the order disposed of: (1) Does section 1 of "An act entitled an act to quiet land titles in this state," approved January 10, 1857, apply to deeds of the commissioner of state lands? (2) Can the appellee plead this bar against a municipal corporation? (3) Are "town lots" included in the word "lands," used in the act?

1. Section 1 of the act of 1857 is as follows: That no action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sheriff's or auditor's sale, for the nonpayment of taxes, or who may have redeemed the same from the auditor of this state by virtue of act providing for the redemption of lands forfeited to this state for the nonpayment of taxes, or who may hold such land under an auditor's deed, commonly known as a "donation deed," shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the lands in question within two years next before the commencement of such suit or action. What purports to be the above section appears in Mansfield's Digest as section 4475, and is as follows: "No action for the recovery of any lands, or for the possession thereof against any person or persons their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or commissioner of state lands, for the non-payment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of lands forfeited to the state for the non-payment of taxes or who may hold such lands under a donation deed from the state, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seised or possessed of the lands in question within two years next before the commencement

of such suit or action." It will be observed that the digester substituted for the words "sheriff's or auditor's," appearing in the first section above copied, the words "collector or commissioner of state lands," and for the words "redeemed the same from the auditor of this state," the words "purchased the same from the state," and inserted the word "any" before the word "act," and substituted the word "sale" for the word "redemption," and for the words "auditor's deed," the words "donation deed." It is contended that these were material changes, and wholly unauthorized. We do not so regard them. The office of commissioner of state lands was created July 13, 1863, and the landed interest of the state placed under its control. Mansf. Dig. § 4177, note, and section 4183. Section 9, same act, provides: "He shall also have the charge, control and disposition of all lands forfeited, or that may be hereafter forfeited to or purchased by the state for the nonpayment of taxes, and such commissioner shall dispose of such lands as is, or may be provided by law." Mansf. Dig. § 4185. Before that time these functions were performed by the auditor. Sections 151, 155, 159, c. 148, Gould, Dig. The deed of the auditor and of the commissioner of state lands conveyed the same thing, i. e. "all the right, title, interest and claim" of the state to forfeited lands. Sections 163, 164, c. 148, Gould, Dig.; section 667, Mansf. Dig. When the digester, in 1884, came to collate and compare the laws concerning lands forfeited to the state for the nonpayment of taxes, he found that the name of the officer having charge of the land department had been changed, but that the office and its functions remained the same, so that in substituting the words "commissioner of state lands" for "auditor's," where it appears in section 1 of the act of January 10, 1857, he was only doing what the legislature had already done, in effect, when they transferred to him the identical duties, with reference to forfeited lands, which had before been performed by the auditor. A comparison of the statutes would most likely discover the reasons for the other changes mentioned, as made by the distinguished digester, but they are not raised by this contention. The section under consideration has been held to apply to donation deeds executed by the commissioner of state lands, (*Sims v. Cumby*, 53 Ark. 418, 14 S. W. Rep. 623,) although the language of the act is, "who may hold such lands under an auditor's deed, commonly known as a donation deed." The second section of the act has been held as operative in cases where deed of commissioner of state lands was involved. *Douglass v. Flynn*, 43 Ark. 398; *Kelso v. Robertson*, 51 Ark. 397, 11 S. W. Rep. 582; *Sims v. Cumby*, 53 Ark. 423, 14 S. W. Rep. 623. In the case of *Douglass v. Flynn*, supra, this language is used: "The statute is a short one, in four connected sections, re-

ferring to each other, and all applying to the same class of cases. * * * The sections are interlocked, not only by express cross references, but by the constant use of the word 'such.' " Construing the whole act with reference to its title, and all of its sections, there can be no uncertainty as to the subject-matter or the legislative intent. The purpose was to quiet the title of those who held or might hold under a deed from the state for forfeited lands, after two years' adverse possession. The title conveyed was the state's title, not the auditor's or the land commissioner's. They were the mere agents or instrumentalities through whom the sovereign acted. The act applies to the character of the instrument, and not to the name of the particular functionary executing it. When the legislature transferred the duties of the office of auditor, with reference to forfeited lands, to the commissioner of state lands, that, ipso facto, made the provisions of the act of January 10, 1857, apply to deeds executed by said commissioner. The digester, therefore, was not changing, amending, or extending the law, but simply, by apt words, preserving harmony and consistency in statutes *pari materia*, already existing, and arranging the same into a symmetrical system. Sedg. St. & Const. Law, 200, 212, et seq.; *Suth. St. Const.* § 283 et seq.; *Id.* § 289; 1 *Kent. Comm.* 463; *State v. Baltimore & O. Road Co.*, 12 Gill & J. 300.

2. Can the appellee avail himself of the statute bar, as against a municipal corporation? In the case of *City of Ft. Smith v. McKibbin*, 41 Ark. 45, this court held that "municipal corporations, like natural persons, are subject to limitation statutes." Many authorities were cited in that case, and considered by the court, upon what the learned judge who delivered the opinion termed the "vexed question." We will not go over again the "field of conflict," but stand by that decision, as a rule of property affecting municipalities. The subject-matter of a statute of limitations is immaterial. Where a party brings himself fully within its terms, he acquires a good title. This the appellee, by his answer, has done, and hence the demurrer was properly overruled.

3. The term "lands," as used in the act, in our judgment, includes "town lots." Affirmed.

FORDYCE et al. v. NIX.

(Supreme Court of Arkansas. Oct. 23, 1893.)

CARRIERS OF PASSENGERS — FAILURE TO STOP AT PROPER STATION — MEASURE OF DAMAGES — PLEADING — MISJOINDER — INSTRUCTIONS.

1. A complaint alleged that plaintiff and his family were passengers on defendants' railroad; that defendants disregarded their contract of carriage, and refused to stop at their destination; that plaintiff requested the conductor half a mile beyond such destination to stop, and allow them to debark, which he refused to do, using insulting language; and that by violation of the con-

tract, and the insults and mistreatment, he had been damaged \$2,500. Held, that the complaint declared an action in tort, and was not demurrable as joining actions in tort and on contract.

2. Where it appeared that defendants' train did not stop at plaintiff's destination; that the conductor used rough and insulting language to plaintiff in the presence of his family when asked to go back to their destination; that his conduct was such as would have precipitated a fight but for the interference of a passenger; that plaintiff's conduct was quiet and peaceable, — a verdict of \$1,000 was not excessive.

3. A charge that the jury might allow plaintiff punitive damages, "not exceeding the amount sued for," though erroneous, because it might mislead the jury to believe that they would be justified in finding an excessive verdict, was error without prejudice, the jury having assessed the damages at less than half the amount asked for.

Appeal from circuit court, Columbia county; Charles W. Smith, Judge. •

Action by James M. Nix against Fordyce & Swanson, receivers of the St. Louis, Arkansas & Texas Railroad, to recover for injuries sustained through misconduct of defendants' servant. There was judgment for plaintiff, and defendants appeal. Affirmed.

The other facts fully appear in the following statement by WOOD, J.:

Appellee filed his complaint for damages, alleging that he, wife, and two daughters, left Detroit, Tex., to visit relatives and friends at Buckner, Ark., a regular stopping point on appellants' railroad; that they were passengers, having purchased tickets, which conductor received on train; that the company, disregarding its contract of carriage, refused and failed to stop at Buckner, their destination; that appellee requested conductor, half mile beyond the station, to back up train, and allow them to debark, which he refused to do, using profane and insulting language in the presence of appellee and family; that conductor was rough and insulting from time they passed Buckner to Waldo, where they got off; that, by violation of their contract and the insults, outrages, and mistreatment, he had been damaged \$2,500. Appellants demurred for misjoinder, which being overruled, they saved exceptions and answered, denying every allegation except contract of carriage, and charged appellee with contributory negligence. Verdict and judgment for \$1,000. Appeal duly prosecuted.

Bunn & Gaughan and Sam H. West, for appellants. Thornton & Smead, for appellee.

WOOD, J., (after stating the facts.) The contract of carriage, its willful breach, and the insult and injury resultant, damnifying appellee, as he claims, in the sum of \$2,500, as set forth in the complaint, we hold, constituted a tort. Under the reformed procedure, courts regard the substance, rather than the form. "Substantia prior et dignior est forma." As was said by the supreme court of Mississippi in a very similar case: "The character of the action must be deter-

mined by the nature of the grievances, rather than the form of the declaration." Railroad Co. v. Hurst, 38 Miss. 600. But, measured by the most technical rules of pleading, the complaint contains all the necessary allegations for an action ex delicto. Such was evidently the intention of complainant. The facts warranted it, and we so treat it. It follows, considering appellants' demurrer as a motion to strike, which is the proper practice, (Mansf. Dig. §§ 5016, 5017; Organ v. Railroad Co., 51 Ark. 281, 11 S. W. Rep. 96; Riley v. Norman, 39 Ark. 158; Terry v. Rosell, 32 Ark. 495,) that it was properly overruled.

Was the verdict excessive? Since the trial judge, who saw and heard the witnesses, has refused to disturb it, this court, according to a rule long ago established, and supported by the great weight of authority, will not interpose, unless the amount is so flagrantly unjust or unreasonable as to indicate passion, prejudice, corruption, or a failure to appreciate the law and facts presented. Sexton v. Brock, 15 Ark. 345; McClinstock v. Lary, 23 Ark. 215; Bright v. Bostick, 27 Ark. 55; Trieber v. Andrews, 31 Ark. 163; Kelly v. McDonald, 39 Ark. 387; Railway Co. v. Eddy, 42 Ark. 527; Suth. Dam. § 953; Sedg. Dam. § 388. It was peculiarly the province of the jury to weigh the evidence, and gather from the conflict the true state of facts. Viewing the evidence in the strongest light for appellee, (Railway Co. v. Davis, 56 Ark. 51, 19 S. W. Rep. 107,) the jury might have concluded that appellants' train did not stop at all at Buckner; that the name of the station was not called; that the brakeman was asleep, and the conductor intoxicated; that the conductor used profane and insulting language to appellee in the presence of ladies and others; that his conduct almost precipitated a fight, and would have done so but for the interference of a passenger; that, when importuned to go back and let appellee and family off at their destination, he was very rough and insulting; that appellee was quiet and peaceable, his "conduct being that of a gentleman." Railroad companies, as common carriers of passengers, are authorized, and it is their duty, "to do all acts and things necessary to protect passengers from all acts of fraud, imposition, or annoyance." Acts 1889, p. 123. It is made a crime for conductors to become intoxicated while running a train. Mansf. Dig. § 5480. Railroads are required to furnish sufficient accommodations for transporting, and to take, transport, and discharge passengers who have paid their fare, and, upon refusal by the corporation or its agents, they are liable in damages to the party aggrieved. Id. §§ 5475, 5476. The contract they make is one they must make and must perform, differing in that regard from contracts simply "inter partes;" so that a breach on their part grossly negligent or willful is not merely a breach of contract.

but a tort. 2 Sedg. Dam. § 638; Suth. Dam. § 941. Under the obligations imposed by law upon railroads for the protection of passengers from indignities, insults, and injuries, the facts presented by this record make a case for punishment by way of example, (Suth. Dam. § 950; Sedg. Dam. §§ 347, 360; Railroad Co. v. Hurst, 36 Miss. 660; Railroad Co. v. Statham, 42 Miss. 607; Caldwell v. Steamboat Co., 47 N. Y. 282; Graham v. Railroad Co., 66 Mo. 536; Railroad Co. v. Books, 57 Pa. St. 339; Goddard v. Railway Co., 57 Me. 217;) and the verdict was not excessive. The trial court should not have told the jury, however, that if the conduct of appellant was willful, etc., "they may allow him additional vindictive or punitive damages," "not exceeding the amount sued for," the objection being to the words "not exceeding the amount sued for." Verdicts of juries in actions sounding in exemplary damages, while they cannot exceed the amount claimed in the complaint, should nevertheless in each case be reasonable and commensurate with the wrong done, as shown by the evidence adduced. The amount claimed in the complaint is frequently so exorbitant and disproportionate to the facts proven as of itself to suggest prejudice; and to tell the jury in such cases that they might find in any amount not exceeding amount claimed, would be tantamount to saying that they would be justified in finding an excessive verdict. The supreme courts of Georgia and Texas have condemned instructions containing this language. *Bryan v. Acee*, 27 Ga. 87; *Willis v. McNeill*, 57 Tex. 485. It should be said, however, that these were cases between private individuals, and in both the court found that the verdicts were excessive, and that, therefore, the charge of the trial judge might have been prejudicial. In the case before us, the jury having found for less by \$1,500 than the amount claimed, and being amply sustained by the proof, it appears they were not misled, nor appellants prejudiced by the instructions. Affirmed.

BUNN, O. J., did not sit, being disqualified by reason of being of counsel.

HENNEGAR et al. v. SEYMOUR et al.
(Supreme Court of Tennessee. Oct. 31, 1893.)
EJECTMENT—TITLE—STATE GRANTS—UNSURVEYED
LANDS—EVIDENCE.

1. In ejectment, plaintiffs claimed a strip of land along the Indian boundary line in the Ocoee land district, under a grant from the state made pursuant to an act of the legislature authorizing the entry and grant of all unsurveyed land in such district. Previous to such act, the state had caused surveys to be made of the lands in such district, and in the Hiwassee district, adjoining, after they were granted to the state, and purchased from the Cherokee Indians by the United States; the evident purpose of the legislature being to survey all the land in each of such districts up to the Indian boundary line, as manifested by the surveys

and plats in the land offices of such districts. Abutting landowners recognize that they hold up to a common dividing line, and that there is no strip of unsurveyed land along the Indian boundary line extending across the state, in Ocoee district. Defendants hold under a chain of title from the state, by numerous grants. Held, that plaintiffs must establish that there was such a vacant, unoccupied, and unsurveyed strip of land by evidence that is clear and convincing.

2. In such case, plaintiffs' claim was supported by the evidence of a surveyor of only five years' experience, and of no experience in the mountainous region where the land in dispute is situated, while defendants' claim, that there was no such unsurveyed land, was sustained by the evidence of four intelligent engineers, of many years' standing, and much experience in surveying in such locality, and in locating old lines, including the Indian boundary line in question. It also appeared that portions of the land in dispute have been in defendants' possession, inclosed and cultivated, for periods ranging from 7 to 40 years. Held, that plaintiffs failed to sustain their claim by clear and convincing proof, and that judgment for defendants was proper.

Appeal from chancery court, Polk county; T. M. McConnell, Chancellor.

Action of ejectment by H. B. Hennegar and others against Charles Seymour and others. From a judgment dismissing the bill, plaintiffs appeal. Affirmed.

T. E. H. McCroskey, for appellant Hennegar. Chas. Seymour, for appellees.

WILKES, J. This is an action of ejectment to recover a tract of land alleged to be located in Monroe and Polk counties. Complainants claim as the heirs of Francis W. Lea, who, in his lifetime, July, 7, 1858, obtained a grant for it from the state of Tennessee. On the trial of the cause in the court below, the chancellor held that complainants had failed to sustain the allegations of their bill, and dismissed the same; and they have appealed, and assigned as error the finding of the chancellor against their contention. The facts of the case, so far as they need to be stated, are as follows:

Prior to 1819, the United States government bought of the Cherokee Indians all their claim to the lands embraced in what was known as the "Hiwassee Land District;" having previously ceded the same to the state of Tennessee, subject to this Indian claim. After this purchase was made, the state of Tennessee appointed commissioners to lay off the district into ranges, townships, sections, and fractions of sections. In June, 1819, some disagreement having arisen with the Indians in regard to the boundary line of the district, R. Houston and James McIntosh, on the part of the United States, and "Squire" and "Crow," on the part of the Cherokee tribe of Indians, were appointed commissioners to resurvey and re-mark the line, which they proceeded to do, and on the 12th day of June, 1819, they agreed upon and signed their report at the forks of the Montague and Cause rivers. The Cherokees owned a section of country adjoining

the Hiwassee purchase, lying south and east of it, which became known as the "Ocoee District." This was also purchased at a later date, and in 1836 the state of Tennessee directed a survey of this district into ranges, townships, sections, and fractions of sections. The line between the two districts ran in a direction north, 18° west, from the beginning corner on the bank of the Hiwassee river, and the township lines were intended to close upon it, but could not do so at right angles, and the consequence was a great number of fractional sections and quarters were formed. Maps and surveys were filed in each district, showing the township sections and fractional divisions and lines, but the lengths of the fractional lines abutting on the boundary line were not given, but only the fractional areas.

On the 25th of February, 1854, the state of Tennessee passed an act authorizing the entry and grant of all unsurveyed lands in the Ocoee district, and in 1859 Francis W. Lea obtained a grant under this act for 8,270 acres of land. Complainants claim as his heirs, and their contention is that there is a strip of unsurveyed land lying between the Hiwassee and Ocoee districts, on the Ocoee side of the Indian boundary line. Defendants also hold under a chain of title from the state of Tennessee, by numerous grants. Their contention is that there is no unsurveyed, or vacant, unsectionized lands, between the two districts, but that the lines of the sections and fractional sections of surveyed lands in the two districts approach each other until they meet upon a common line, which is the original boundary line of 1819; and, second, that, as to a large portion of the land embraced in complainants' grant, the grant is void, because the land was, at the time the grant was issued, in the actual adverse possession and occupation of defendants and their predecessors, under older grants.

Complainants caused the lines called for by their grant to be run out by actual survey, using, in making the survey, not only the calls in complainants' grants, but also the calls of the fractional sections abutting on the district lines on both the Hiwassee and Ocoee sides, as obtained from their respective land offices; and upon completing such survey the surveyor came to the conclusion that there was an area of 3,610 acres of land not covered by defendants' title, or any other, and not sectionized, but laying like a gore between the two districts, and it is this strip or gore which complainants claim, disclaiming all right to any land covered by the calls of defendants' title papers as lying in the sectionized portion of the Ocoee district, and disclaiming all right to any lands in the Hiwassee district. It will thus be seen that the controversy narrows itself down to the question whether there is any vacant or unsectionized lands

in the Ocoee district abutting on this Indian boundary line.

Defendants have also caused surveys to be made of the locality, and various tests to be applied; and the contention of each party is liberally illustrated by handsome maps covering all the territory, and fully sustaining the opposite contentions, and in each case showing the utter impossibility of the correctness of the opposing theory, from the standpoint taken.

The accuracy and competency of the surveyors is called in question. It is said that the defendants' surveyors are not experts; that they did not locate the Indian boundary line, nor attempt to do so, and that their testimony and conclusion are based upon the laws fixing the boundaries of the two districts, rather than upon any actual surveys and personal observations. On the other hand, it is shown that complainants' surveyor is incompetent; that he has had an experience of only five years in Georgia, and none in the mountains of East Tennessee; that he guessed at his beginning corner, and, in attempting to follow the Indian boundary line of 1819, he placed the variation of the compass needle on the wrong side of the meridian line; that he professed to find landmarks of the old line run in 1819 upon trees in a locality where it is shown the forest trees had been cleared away, and the land cultivated, for more than 20 years, and which had since been covered with a second or under growth for 30 years; that he also professed to find marked trees in other localities where it appeared that land had been cleared and in cultivation for 40 years. Upon an inspection of the title papers of the contesting parties, and a comparison of their maps, and the statements of the surveyors explaining the same, we are of opinion that complainants have failed to show satisfactorily that there is any vacant or unsectionized lands in the Ocoee district, bordering on this Indian line between the two districts covered by their grant. The testimony of Thomas, their surveyor, is wholly overthrown by that of Waring, Muller, Deakins, and McGuffey, the surveyors of defendants. These latter gentlemen appear to be competent, intelligent, experienced surveyors and engineers, of many years' standing and practice in their profession, with much experience in surveying mountain and other lands in the locality, and in locating old lines, including this Indian boundary line, which had been located by them in many places in the native forest after reaching Starr's mountain. Each of these surveyors states that from actual measurements and personal observations, and experiments with various fractional and sectional lines, it is impossible that there should be a vacant gore or strip between the two districts. They explain that while there is an apparent shortage in some of the frac-

tional lines, and that others are too long, so as to cause, at some places, an interlap of the lines from the two districts, there is no discrepancy of any consequence at any place, and no more than would naturally and does usually result in surveys over rough mountains, and especially in the early history and settlement of the country; that while there is some confusion between lines and boundaries caused by the hasty and careless manner in which early surveys were made, there is no such discrepancy as cannot be cured and explained by the rules observed in establishing calls for old lines and natural objects; that the greatest difference observed did not exceed 40 poles in a line 6 miles in length, over very rough, mountainous grounds, while in other cases there were some lines that fell short small amounts.

It also appears that a part of the land covered by complainants' title papers has been in defendants' possession, under inclosure and in cultivation, for over 40 years, and other portions for more than 7 years, constituting what is known as the "Savannah Farm," which lies partly in each district, crossing the Indian boundary line, and lying on both sides of the Hiwassee river. The principal conflict seems to arise between a grant to Charles Seymour for 4,000 acres, made in 1874, and the calls of complainants' grant. Seymour, soon after obtaining his grant, conveyed the land to defendants, and they have been holding the same adversely, and in actual possession, ever since, as to considerable portions of the area embraced. In view of the evident purpose of the legislature to sectionize all the lands in each of these districts up to the Indian boundary line, and the surveys and plats to carry this purpose into effect, as manifested in the surveys and plats in the land offices of the two districts, and in view of the recognition by abutting land-owners that they hold up to a common dividing line, and that there is no hiatus or gore left unsurveyed and unsectionized, we would not be disposed to adjudge that there was an unoccupied and vacant strip of land along the Indian boundary line, which extends across the state, as the dividing line between the two districts, unless the evidence was very plain and convincing. The act of 1854, under which this grant was obtained, is, at most, only a legislative recognition that there may be lands left vacant in the Ocoee district, but not an adjudication that there are such vacant or unsectionized lands.

Upon a careful examination of the entire case, we are convinced that complainants have failed to sustain their contention that there is a vacant gore of land between the two districts, a portion of which is covered by their grant, and the judgment of the court below is affirmed, with costs, and the bill dismissed.

BOYER et al. v. STATE.

(Supreme Court of Tennessee. Sept. 28, 1893.)

FORGERY—INSTRUCTIONS—PROVINCE OF JURY.

On a trial for forgery, an instruction that if the jury believe certain circumstances to have been clearly shown, such circumstances strongly indicate the commission of the crime charged, is fatally erroneous, in that the jury are directed what weight they shall give the evidence in making up their verdict.

Appeal from circuit court, Cocke county; W. R. Hicks, Judge.

David W. Boyer and Rufus Holt were convicted of forgery, and appeal. Reversed.

McSween & Mims, Jones & Gorrell, and W. H. Jones, for appellants. G. W. Pickle, Atty. Gen., and W. R. Turner, for the State.

CALDWELL, J. D. W. Boyer and Rufus Holt were jointly indicted in the circuit court of Cocke county for the alleged forgery of a deed, whereby David Boyer seemed to convey a valuable tract of land to his son, the said D. W. Boyer. They were jointly tried and convicted, and have appealed in error.

The deed in question bears date November 18, 1891, and the signature of David Boyer was proven before the county court clerk on the 1st day of December, 1891, by Rufus Holt and L. H. Holt. David Boyer, the assumed vendor, disappeared from his home upon the land described on the 22d of November, 1891, between the date and the probate of the deed, and was never thereafter seen alive by any of the witnesses in the case. His dead body, or what his widow and several other witnesses think was his dead body, was found in a cave near his home, and upon the land conveyed, some time in the month of March, 1892. Several witnesses, claiming to be acquainted with the signature of David Boyer, testified that his name upon a deed to his son was not in his handwriting; and some were of opinion that it was written by the defendant D. W. Boyer. Between the time of the disappearance of David Boyer and the discovery of the dead body in the cave, defendant D. W. Boyer told numerous persons that he had bought his father's land, and that his father had left the country. The widow of David Boyer testified, among other things, that on the day after he was last seen by her, their son, the defendant D. W. Boyer said to her that his father "was going to leave the country," and asked her "to fix him up some clothes and something to eat;" that she complied with that request, putting some clothing and food in a black valise; that the said D. W. Boyer went away from home that afternoon, and returned the next day, saying he had taken his father to a town in an adjoining county, whence he had gone "west," promising to write back to them "if he did any good out" there; that she thought the valise and

its contents found in the cave with the dead body were the same that she had put up for her husband at the suggestion of their son. Many other facts and circumstances tending to fix the charge of forgery upon D. W. Boyer, and implicating defendant Rufus Holt therein, were disclosed in the testimony before the jury; but they need not be detailed in this opinion. Enough of the testimony has been stated to illustrate a controlling question of law arising upon the charge of the trial judge to the jury trying the case. After instructing the jury with substantial accuracy as to the general features of the case, the court further said: "If you find it to be clearly shown that David Boyer was killed, and thrown into a cave on his own farm, where he lay for over three months; that during that time the defendant D. W. Boyer repeatedly stated that he had purchased the farm from his father; that the said defendant, after his father was killed, notified his mother that his father was going to leave the country, and induced her to make arrangements for his departure; that he, the said defendant, then went away from home, saying to his mother that he was going to take his father to Morristown, in an adjoining county, for his departure from the country, and, after returning, said that he had so taken his father; and if you further find as a fact that the defendant D. W. Boyer had the deed probated before the discovery of his father's body, you are then told that these are circumstances which strongly indicate both the killing and the forgery of the paper or deed." That instruction is fatally erroneous. By it the court invades the exclusive province of the jury, and tells them the effect of certain testimony, what weight they shall give it in making up their verdict. The court had no right to say that the enumerated circumstances, if established by the proof, strongly indicated the forgery of the deed. The weight to be given those circumstances was a matter for the determination of the jury alone. *Jones v. Iron Co.*, 14 Lea, 157; *Deihl v. Ottenville*, Id. 191; *Cantrell v. Railway Co.*, 90 Tenn. 644, 18 S. W. Rep. 271. "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. art. 6, § 9; *Pank v. Harris*, 2 Humph. 311; *Ivey v. Hodges*, 4 Humph. 154; *Kirtland v. Montgomery*, 1 Swan, 452. The instruction quoted above is a charge with respect to matters of fact. It is an imperative direction to the jury as to the effect of certain evidence. It is not a mere statement of the testimony and declaration of the law applicable to it. As a matter of fact the trial judge may have been right in the position that the facts enumerated by him strongly indicated that the deed had been forged, but that was a conclusion of fact purely, which he was not authorized to state to the jury, and which they alone could rightfully draw.

The law does not fix the weight that shall be given to such facts; no presumption of guilt, as a matter of law, arises from them; hence their effect cannot be stated as a legal result. In a prosecution for larceny the court may properly tell the jury that recent possession by the defendant of the stolen articles, if unexplained, "is a strong circumstance tending to show" him to be guilty of the larceny. *Poe v. State*, 10 Lea, 679; *Wilcox v. State*, 3 Heisk. 118; *Hughes v. State*, 8 Humph. 75. But that instruction is allowable in such a case alone upon the ground that recent possession of stolen goods, when unexplained, raises a legal presumption of guilt on the part of the person in whose possession the goods are found. Such an instruction in such a case is therefore but a declaration of the law applicable to the facts shown, and not a charge with respect to matters of fact. Reverse and remand.

GUY v. FISHER & BURNETT LUMBER CO.

(Supreme Court of Tennessee. Sept. 28, 1893.)

RAS JUDICATA.

In an action by a father for the loss of his son's services because of personal injuries alleged to have been sustained while employed by defendant, the court found that the son was not injured while in the service of defendant. *Held*, that such finding is not admissible to prove the same defense in an action by the son against the same defendant to recover for such personal injuries.

Appeal from circuit court, Anderson county; W. R. Hicks, Judge.

Action for personal injuries by Charles Guy, by his next friend, against the Fisher & Burnett Lumber Company. Defendant had judgment, and plaintiff appeals, and assigns error. Reversed.

W. L. Welcker and J. A. Fowler, for appellant. C. J. Sawyer, W. A. Henderson, and Leon Jourolman, for appellee.

CALDWELL, J. Alexander Guy, as next friend of Charles Guy, brought this action against the Fisher & Burnett Lumber Company to recover damages for personal injuries alleged to have been negligently inflicted upon the said Charles Guy by the defendant while he was in its employment as a laborer at its mill. Trial before court and jury resulted in verdict and judgment for the defendant, and plaintiff appealed in error.

Charles Guy, for whose benefit this action is prosecuted, was a minor, 13 years of age, at the time he received the injuries complained of in the declaration, and he is still a minor, under the age of 21 years. Soon after the injuries were inflicted, the father of Charles Guy brought suit against the Fisher & Burnett Lumber Company, in his own right, to recover damages resulting to him from loss of services, etc. That

suit was successfully defended in the circuit court and in this court. In affirming the judgment of the circuit court in that case, this court adjudged that one Hugh Bailey, who had engaged the services of Charles Guy, was an independent contractor, and that the defendant was, for that reason, not responsible for the injuries sued for. One defense made before the jury in the present action was, that Charles Guy was not in the employment of the defendant, but in the services of Hugh Bailey, an alleged independent contractor, at the time the injuries complained of were received. In support of that defense, the defendant was permitted, over the objection of the plaintiff, to produce in evidence a copy of the judgment of this court in the former case. Upon no ground was that judgment competent or admissible as evidence in this case. It would have been competent and admissible as a matter of estoppel on a plea of *res adjudicata*, in an action between the same parties, and about the same subject-matter, but it was not so in this case. For the error indicated, the judgment is reversed, and the case remanded for a new trial. On another trial, inaccuracies in the charge of the court upon the subject of independent contractor may be corrected by following the definition given, and principles laid down, in the case of *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. Rep. 691.

CHADWELL et al. v. CHADWELL et al.
(Supreme Court of Tennessee. Sept. 19, 1893.)

BOUNDARIES—RECOGNITION—ESTOPPEL.

The purchaser of land desiring it to be surveyed, and then conveyed to him by metes and bounds, the son of an adjoining landowner was employed to make the survey. During the survey the seller and this adjoining landowner differed as to the running of a certain line, but finally the latter prevailed, and he himself marked the line through the woods. The deed was made by such line, and it was recognized as the boundary for 13 years by such adjoining landowner. *Held*, that his heirs were estopped to deny that the line so marked and recognized was the true boundary line.

Appeal from chancery court, Campbell county; Henry R. Gibson, Chancellor.

Bill by William Chadwell and others against John B. Chadwell and others for the partition of a tract of land which belonged to Duff Chadwell, deceased. A supplemental bill was also filed to establish the ownership and true boundaries of the tract as against the Big Creek Gap Coal & Iron Company. Supplemental bill dismissed. Complainants appeal. Affirmed.

Ph. Schlosshan, J. A. Fowler, and Mr. Agee, for appellants. W. A. Henderson and Leon Jourolman, for appellees.

WILKES, J. The controversy in this case involves the ownership and true boundaries

of a tract of land in Campbell county. The land is embraced within what is known in the record as the "Alvis Kincaid 5,000-Acre Survey." Prior to February 24, 1862, Kincaid, for a consideration of \$12, conveyed to Sterling Rutherford a portion of this 5,000-acre tract, by the following boundaries: "Beginning on the top of Peter Huddleston's ridge, where the Buck Gravelly line crosses the same; then, with the top of the Log mountain, a northeast course, to Cooper's line; thence, with Cooper's line, crossing Davis creek, to Gravelly's line, on the side of Brushy mountain; thence, with Gravelly's line, to the beginning,—containing 100 acres, more or less." On the 15th of March, 1868, Rutherford conveyed to Clepper a portion of this tract by general boundaries, as follows: "Beginning on top of Peter Huddleston's ridge, where Buck Gravelly's line crosses the same; thence, with the top of Log mountain, to a locust and oak, near a gap in the Log mountain; thence in a northwest course, crossing Davis creek to a chestnut and black gum, on the bank of the creek; thence a northwest course, to the Gravelly line, on the side of Brushy mountain; thence, with Gravelly's line, to the beginning,—containing 25 acres, more or less." This tract contains by actual survey 350 acres. On the 15th of March, 1871, Rutherford conveyed to I. R. Dew the remainder of the tract which had been conveyed to him by Kincaid, lying east of that portion deeded to Clepper, and the metes and bounds are set out in this conveyance. In October, 1871, Dew conveyed the same land to William Allen, and Allen conveyed the same to the Big Creek Gap Coal & Iron Company on the 14th of March, 1880. In the mean time, 5th September, 1870, Kincaid conveyed to Duff Chadwell all of the 5,000-acre tract that he had not previously conveyed to Rutherford, or other parties. The contest arises over the lands now claimed by the Big Creek Gap Coal & Iron Company, and turns upon the question whether these lands are included in the boundaries of the land conveyed to Rutherford, or whether they are a part of the residue of the 5,000-acre tract which passed under the conveyance to Duff Chadwell.

The chancellor held (1) that the lands belonged to the company; (2) that the calls of the deed from Kincaid to Rutherford ran with the top of Log mountain, in a northeasterly direction, as indicated on a map filed in the record, and not in a northwest direction, as contended by complainants, and these calls include the lands in controversy; (3) that Duff Chadwell and Rutherford agreed upon and fixed a line running from the beginning corner north 45 east 700 poles, as the boundary line of the Rutherford tract, and that Chadwell recognized this line as correct for a long number of years, and that it has been so recognized by complainants until recently, before the bringing of this

suit, and that complainants are now estopped to dispute the line thus established; (4) that complainants had wholly failed to show any actual enclosure, and adverse possession of any of the lands in controversy. Complainants' bill, so far as it raised the question of the title to this land, was dismissed, and complainants have appealed and assigned errors.

The first error assigned raises the question as to what is meant by the first call in the Rutherford deed, to wit, "running thence, with the top of Log mountain, a northeast course, to Cooper's line," etc. There is no dispute about the exact location of the beginning corner, but complainants insist that the line runs from this beginning corner, along the top of Huddleston's ridge, to what they term "Log Mountain Proper;" thence, with the top of Log mountain proper, to Cooper's line; and that this carries the line at first in a northeast direction, but afterwards in a northwest direction. It is conceded that the line thus run would embrace an area of about 450 acres, instead of 100, as the Rutherford deed calls for, and, thus run, would be virtually the same as the calls of the deed to Clepper. Defendant insists, on the contrary, that the line continues in a northeast direction until it strikes Cooper's line, at a different point, and it is shown that the area contained in the line thus run would be about 1,000 to 1,200 acres. In corroboration of their contention, complainants insist that, by the description given in the Rutherford deed, the land lies on Davis creek, and that, if the boundaries are as claimed by defendant, then the lands lie on Hog Creek branch and Patty Murray branch, two streams of considerable importance, and too well known to be overlooked in the description of the land; but defendants insist that these two branches are but tributaries of Davis creek, and there is no misdescription or confusion in the location calls. The main contention arises over what is "Log Mountain." Complainants' claim is that it is a ridge which runs down in a northwesterly direction to Davis creek, according to the calls of the Clepper deed; while defendants say that this is only a spur of Log mountain, and that the mountain proper runs in a northeast direction from the beginning corner. By either contention, Peter Huddleston's ridge is a part or section of Log mountain, and the beginning corner is agreed upon, and not in dispute. The chancellor held that the line ran northeast along the top of the mountain, as insisted by defendants, and not northwest, along the spur, as contended by complainants; and, while there is some contradiction and uncertainty in the testimony, we are of opinion he was correct in so holding.

The second error assigned is to the holding of the court that Duff Chadwell, the ancestor of complainants, and through whom

they derive title by descent, agreed with Rutherford upon a conventional line, and established the same in 1871, and afterwards recognized the same. We think the evidence is quite plain that when Rutherford was offering this land for sale to Dew, in 1871, it was done in the presence of Duff Chadwell, and that he indicated its location by pointing in the direction of the lands in dispute, and that Chadwell not only did not raise any question, but agreed to and conceded its correctness. Dew, however, desired to have the lands surveyed, and conveyed to him by metes and bounds, and thereupon John B. Chadwell, son of Duff Chadwell, and one of the principal complainants in this cause, was employed to survey the lands and ascertain the boundaries. John B. Chadwell, it seems, was deputy county surveyor at the time, and was selected in preference over the county surveyor to do the work by the several parties interested. He made the survey. Both Rutherford and Duff Chadwell were present, and a controversy arose between them over the direction of the first line; Rutherford insisting that it should run in a southeasterly direction, but on the top of Log mountain, while Chadwell insisted that, inasmuch as the call was northeast, it should be run north, 45 east, which would make a straight line, sometimes running with the top and sometimes on the side of the mountain, near the top. Chadwell prevailed in his contention, and the line was run north, 45 east, and Duff Chadwell, for a great portion, if not the entire length, of the line, marked it plainly through the woods with a hatchet, in his own hands. The line of the survey was thus fixed and marked, and by it the deed was made from Rutherford to Dew, and from Dew to Allen, and from Allen to the Big Creek Gap Coal & Iron Company; and for 13 years Duff Chadwell recognized it as the boundary, and recognized the land as the land of Allen. We think from the proof that complainants, up to within a short time of the filing of this bill, also recognized this as the correct or established line. This line having been established by Chadwell himself, against the contention of Rutherford, and Dew having bought with reference to it, complainants, as the heirs of Chadwell, are now estopped to deny it. *Spears v. Walker*, 1 Head, 166; *Merriwether v. Larmon*, 3 Sneed, 447; and other cases in accord.

We do not think the contention of complainants that any portion of the land claimed by the Big Creek Gap Coal & Iron Company was adversely held by them, or any one else, as against the Rutherford and Dew title, is sustained by the record. We conclude that there is no error in the decree of the chancellor; and the supplemental bill, which raises the question of title as to this land, is dismissed, at complainants' cost, and

the cause is remanded to the court below, for such further proceedings under the original partition bill as the parties desire to take with reference to the lands other than those decreed to the Big Creek Gap Coal & Iron Company.

**FIRST NAT. BANK OF MORRISTOWN
et al. v. MAYOR, ETC., OF MORRISTOWN et al.**

(Supreme Court of Tennessee. Sept. 23, 1893.)

**TAXATION—ONE THOUSAND DOLLAR EXEMPTION—
TO WHOM ALLOWED—MARRIED WOMAN—NON-
RESIDENT.**

1. Under Const. 1870, art. 2, § 28, which provides that the legislature shall except from taxation \$1,000 worth of personal property in the hands of "each taxpayer," a married woman is entitled to such exemption, though her husband is entitled to, and has been allowed, the same exemption; such exemption being to the taxpayer, and not to the family.

2. Where the situs of such taxpayer's personal property is within the limits of a certain municipal corporation, she is entitled to such exemption, though she resides without the corporation, unless it has been allowed to her elsewhere, on other taxable personal property.

Appeal from chancery court, Hamblen county; John K. Shields, Chancellor.

Bill by the First National Bank of Morristown and others against the mayor and aldermen of Morristown and others to restrain the collection of certain taxes alleged to have been illegally assessed by defendants on the shares of stock in such bank. From an order overruling a demurrer to the bill, defendants appeal. Affirmed and remanded.

Wm. McFarland, for appellants. John K. Shields and W. K. Mountcastle, for appellees.

CAIDWELL, J. The bill in this cause was filed by the First National Bank of Morristown and certain of its stockholders against the mayor and aldermen of Morristown and its tax collector to restrain the collection of certain taxes alleged to have been illegally assessed by the said municipality upon the shares of stock in said bank. The defendants demurred to the bill. Their demurrer was overruled, and, by special leave of the chancellor, they have appealed to this court.

Complainants allege, in substance, that the First National Bank of Morristown is a national banking corporation organized and doing business as a national bank under the laws of the United States, with its situs within the corporate limits of the town of Morristown, in the county of Hamblen and state of Tennessee; that its capital stock, of \$75,000, is divided into equal shares of \$100 each, for which certificates have been issued to different owners according to their respective interests; that among the numerous owners and holders of stock certificates are several married women, living with husbands; that some of the stockholders reside

within the corporate limits of Morristown, some without those limits, but in Hamblen county, and others in other counties of this state. Complainants further allege, in substance, that the mayor and aldermen of the town of Morristown, by ordinance, and its tax assessor, by actual assessment made, had declared all of said bank stock subject to municipal taxation for the year 1893, and wrongfully refused any exemption whatever to married women owning parts of said stock, whether residing within or without the corporate limits of said town, and to other stockholders residing without said corporate limits, though expressly requested to do so, and notwithstanding the fact that none of such persons had anywhere claimed or been allowed any exemption from municipal taxation on other personal property. Complainants alleged, finally, that \$1,000 of the stock belonging to each of said owners should have been exempted from taxation under the law, and that the assessment in question, so far as made upon the first \$1,000 of the stock of each owner, was illegal and void; that, having paid all the rest of the taxes assessed against them, the stockholders are entitled to have the collection of the illegal part restrained by injunction. The prayer for relief is appropriate to the facts alleged.

The principal grounds of demurrer are, in substance, as follows: (1) That there is no exemption from taxation to the wife where \$1,000 worth of personal property has been exempted to the husband, two exemptions not being allowed to the same family; (2) that the exemption claimed can be granted to no one, "except against taxes assessed by the government where the party resides." The demurrer was properly overruled. One requirement of the revenue section of our constitution is that the legislature shall except from taxation "one thousand dollars' worth of personal property in the hands of each taxpayer." Const. 1870, art. 2, § 28. In obedience to that requirement, the legislature has, from time to time, in each general assessment act, expressly declared the exemption. For the statute in force when the assessment here complained of was made, see Acts 1891, (Ex. Sess.) c. 26, § 1, subsec. 6. Every citizen, whether married woman or other person, who owns personal property in the state, otherwise subject to taxation, falls directly within the constitutional and statutory provision, and is entitled to the exemption contemplated. The exemption is to "each taxpayer," not to each head of a family, nor to each person residing within the particular town or county in which the assessment may be made. No citizen answering the designation of "taxpayer" is excluded from the exemption. "Each taxpayer," without exception, is entitled to its benefit; that is, each citizen owning taxable personal property is entitled to the exemption. The citizen owning the

property, and to whom it may be rightfully assessed, is the taxpayer, and as such is the person for whose benefit the exemption is provided, whether that person be a married or unmarried woman, a resident of the particular town or county in which the assessment is made, or of some other part of the state. The citizen's ownership of personal property otherwise subject to taxation is the criterion by which his or her right to the exemption is to be determined; and, wheresoever the property is taxable, there the owner should be allowed the exemption, unless it has been allowed elsewhere on other taxable personality. The exemption is from state, county, and municipal taxation,—from all alike. Neither state, county, nor municipality can exercise the taxing power against the owner of personal property without at the same time allowing him the constitutional exemption. The language of the constitution is so clear and mandatory as to admit of neither doubt nor evasion. Affirm and remand for answer.

FORTUNE et al. v. KILLEBREW.

(Supreme Court of Texas. Nov. 23, 1893.)

ARBITRATION AND AWARD—VALIDITY—SUBMISSION BY GUARDIAN.

1. A guardian has no power to make a submission to arbitration for his wards when he is interested adversely to them in the subject-matter of the arbitration.

2. A testator having divided his estate equally among his children, portions thereof were set apart to some of the devisees in partial satisfaction of their interests. Thereafter the devisees and legatees, together with the executor, who had a claim against the estate, agreed "to submit to arbitration all matters in dispute between them, or either of them," and the executor, and to "determine the amount received by each legatee, and the amount that each is now entitled to out of the estate." *Held*, that as the submission involved a controversy between the devisees and legatees themselves, as well as between them and the executor, if the submission was invalid as to any of them it was invalid as to all. 21 S. W. Rep. 986, reversed.

3. Since the agreement for submission gave the arbitrators authority only to ascertain the share which each devisee or legatee was entitled to receive, and the amount to be charged on each share in favor of the executor, the arbitrators had no power to award land belonging to the estate to the executor in part payment of the debt due him. 21 S. W. Rep. 986, reversed.

4. Since the power conferred upon the district court to enter a judgment upon an award in a case not pending before it is purely statutory, and the award is void if there be no agreement binding on all parties to the submission, or necessary parties do not join therein, or if the arbitrators determine matters not submitted, or fail to determine those that are submitted, a judgment entered on such award is also void. 21 S. W. Rep. 986, reversed.

5. Such judgment is not rendered valid by the fact that the parties failed to object to its rendition. 21 S. W. Rep. 986, reversed.

Error from court of civil appeals of the third supreme judicial district.

Action by Yeoland Fortune and others

against William Killebrew to recover real estate. The court of civil appeals affirmed a judgment for defendant, and plaintiffs bring error. Reversed.

Goodrich & Clarkson and L. C. Alexander, for plaintiffs in error. J. A. Martin and Clark & Bolinger, for defendant in error.

GAINES, J. This suit was brought by the plaintiffs in error against the defendant in error to recover a tract of land consisting of about 240 acres. The land in controversy was a part of the estate of John A. Fortune, Sr., who died in the year 1863, having made his will, in which one C. V. Fortune and the defendant, William Killebrew, were nominated as executors. The will was duly probated, and the executors qualified. After making some special legacies, the will provided that the testator's estate should be divided among his children, certain of them being charged in partition with certain advances made to them during the testator's lifetime. One of the executors, C. V. Fortune, died in the year 1870, after which the defendant, Killebrew, had the sole management of the estate. The plaintiffs in error are the widow and children of John A. Fortune, Jr., who was a son of John A. Fortune, Sr., and one of his devisees. In the year 1866, the executors made a partial partition of the estate, and in that partition there was set apart to John A. Fortune, Jr., a tract of land consisting of 425 acres, which embraces the land in controversy. In the year 1876 a judgment was rendered against William Killebrew, as executor and in his individual capacity, for the sum of \$6,511.33. The foundation of this judgment was a note executed by the testator, with William Killebrew as his surety. By virtue of an execution issued on this judgment, a tract of land consisting of 2,934 acres was levied upon and sold as the property of the estate of the testator, and at the sale Killebrew became the purchaser, and received the sheriff's deed. This tract of land embraced the lands which had been set apart to John A. Fortune, Jr., and other devisees in the partition. Subsequently, during the lifetime of John A. Fortune, Jr., the executor Killebrew, and the devisees and legatees under the will of John A. Fortune, Sr., entered into a written agreement to submit certain matters in controversy between them to arbitration, and stipulated that the award of the arbitrators should be final, and should be made the judgment of the court. The arbitrators, having made an award, subsequently amended it; and, as amended, it was made the judgment of the district court of Falls county. The award and judgment recognized the title of John A. Fortune, Jr., to the tract of land originally set apart to him in partition; but charged it with the payment of the sum of \$3,431.24 in favor of the executor. John A. Fortune afterwards died intestate, leaving the plain-

tiffs in error as his sole heirs. In their petition they alleged that the award and judgment were void, but upon the trial the district court held them valid and conclusive against the claims, and gave judgment for the defendant. The court of civil appeals were substantially of the same opinion, and affirmed the judgment of the trial court.

There were several grounds upon which the award was claimed to be invalid. Among others, it was insisted, and it is still urged, that it was not binding because the agreement for submission was not signed by the proper parties. Two of the devisees were married women, and the agreement purports to be signed by their husbands for them; for example, "Wm. McComb, for M. A. McComb." Also, William Killebrew signed for himself and as guardian of his minor children. These minors were heirs of Killebrew's deceased wife, who was a daughter of John A. Fortune, Sr., and a devisee under his will. Their interest and that of their father, the executor, were antagonistic. It may be gravely doubted whether the husband, without special authority from the wife, can submit questions affecting title to her separate property to arbitration. Whether a guardian had the power to submit a matter in dispute concerning his ward's estate at the time the agreement in this case was executed is a question we need not discuss. The Revised Statutes confer the power, but at the date of the agreement they had not gone into effect. Rev. St. art. 55. But it is clear that Killebrew was not authorized to make a submission for his wards, because their interests were adverse. But whether or not that should avoid the award as between the executor and John A. Fortune, Jr., is a different question. By the contract of submission, the parties undertake to bind themselves "to submit to arbitration all matters in dispute between them, or either of them, and William Killebrew, executor," etc. This warrants a determination of their several controversies, and upon first blush it would seem that the controversies were severable, and that an award as between John A. Fortune, Jr., and William Killebrew should be held valid, although void as between the executor and other parties. But the will of John A. Fortune, after making certain special bequests, and charging John A. Fortune, Jr., with an advancement of \$5,000, provided that all the residue of his estate should be equally divided among his children. When the agreement for submission was entered into, there had been a partial partition of the property, or, rather, portions had been set apart to some of the devisees, as a partial satisfaction of their several interests. The agreement authorized the arbitrators to "determine the amount received by each legatee, and the amount that each is now entitled to out of the estate," etc. It is apparent that

the portions already received were unequal. What each devisee was entitled to receive out of the residue of the estate could only be ascertained by determining what each had already received; and this not only because the more each had received the less such devisee was entitled to receive, but also because the more that had already been set apart to each, the more the others were entitled to have set apart to them. It follows that each of the devisees was interested in the question how much each other had received, and that the submission involved, not only a controversy between himself and the executor, but also controversies as between themselves. No agreement—no judgment—as between one and the executor would bind the others, and no final disposition of the matters in dispute could be made without a definite determination of all the matters in controversy growing out of the settlement and partition of the estate. To effect such determination was the evident purpose of the agreement, and we are of opinion that, unless all were bound by it, none were bound. If the children of William Killebrew had signed for themselves, being minors, the award would have been voidable at their election. Whether a party *sui juris* could have avoided it is a question upon which the authorities are not entirely in accord. But they did not sign, and, as we have seen, their father, having an adverse interest, had no authority to sign for them, as their guardian. They were intended to be made parties to the proceedings, and were necessary parties to the controversy, under the terms of the agreement for submission; and, since they are not bound by the award, we are of opinion that it should have no effect.

But there is another serious objection to the award, and to the judgment that was rendered upon it. The paragraphs of the agreement for submission, which define the powers of the arbitrators, read as follows: "First. That the parties plaintiff and defendant aforesaid hereby agree and bind themselves to submit to arbitration all matters of dispute and controversy between them, and either of them, and William Killebrew, executor of the last will and testament of John A. Fortune, deceased, relating to the administration and distribution of said estate among the distributees thereof. We also agree to submit to arbitration the right of the heirs of C. V. Fortune to hold certain tracts of land lying in Jack and Palo Pinto counties, and described in bond for title made by J. A. to C. V. Fortune, December 17, 1857, said tract of land claimed of them by the executor as property belonging to the estate of John A. Fortune, Sr., deceased. Second. It is further agreed that said arbitrators shall in all things be governed by the will of John A. Fortune, deceased, and said arbitrators shall find and determine the

amount received by each legatee, and the amount that each is now entitled to out of the estate, and shall ascertain and determine what sum each share is chargeable and incumbered with, for expenses of execution, in payment of debts and expenses of administration; and the executor shall, as soon as convenient, with the aid of such others as the parties may select, partition and allot to said legatees, or their heirs, the portion of said estate found for them by said arbitrators, on the payment by such legatee or distributee of such sums, if any, as the arbitrators assess against such legatee's share. And it is further agreed that the land purchased by said William Killebrew at the execution sale in favor of F. S. Stockdale, administrator of Peyton B. Bytle, deceased, shall be treated as other property of said estate." Now, it is apparent from these provisions in the agreement that the authority of the arbitrators was limited to the ascertainment of the share which each devisee or legatee was entitled to receive out of the property, and the determination of the amount to be charged upon such share in favor of the executor. It is also clear that both in the original and in the amended award the arbitrators have exceeded their authority. Although the agreement declared that the land bought by the executor at execution sale should be treated as other property of the estate, the arbitrators attempt to award to William Killebrew a portion of this land, as well as other lands belonging to the estate of the testator. This was evidently intended as a payment pro tanto of the debt found due by the estate to the executor. But a transfer to him of land or other property in payment of his debt the arbitrators had no power to award. An award in excess of the authority of the arbitrators is void, unless the matter in excess is such as may be disregarded, and a valid award be left standing. But in this case the arbitrators have not only attempted to award what they had no power to award, but they have also failed to find what they were empowered to determine.

This brings us to the question of the validity of the judgment entered upon the award, and that resolves itself into the further question whether, by the return of the award into the district court, that court acquired such jurisdiction over the subject-matter, as that the judgment, even if erroneous, would be merely voidable, and not void. The jurisdiction of the district court is confined to certain classes of cases enumerated in the constitution, but it is nevertheless a "court of general jurisdiction," in the sense in which those words are used when it is said that every intendment must be indulged in favor of the regularity of a judgment of a court of general jurisdiction. But the

conferred upon that court to enter a

judgment upon an award in a case not pending before it is purely statutory. It is not a proceeding according to the course of the common law. It is neither a suit at law nor a case in equity. There is nothing for the court to hear and determine except the incidental questions which may grow out of the award itself; that is to say, whether or not the arbitrators have impartially discharged their duty under the powers conferred upon them by the submission, and in the manner pointed out by the statute. So far as the merits of the original controversy are concerned, the duty of the court is ministerial, rather than judicial; that is, it is merely to enter judgment in accordance with a legal and proper award. In cases in which an extraordinary power of this character—a power simply to enter judgment in a case not brought before it by petition, complaint, or writ, in accordance with the essential principles of the common law, and upon the finding of a distinct tribunal of the parties' own selection—is conferred by statute upon a court of general jurisdiction, we are of the opinion that the jurisdiction should be treated as special; that the statutory authority should be substantially pursued, and that if that authority be exceeded, the judgment entered upon the award should be held void. The power of the court, under the statute, to enter the judgment, originates in the agreement to submit to arbitration, and is confined to the authority to enter the judgment upon the issues submitted, and in accordance with the terms of the submission. If there be no agreement binding upon all parties to the submission, and especially if there be necessary parties to a suit to determine the issues who do not join in the submission, or if the arbitrators fail to determine the issues, and attempt to decide matters not submitted to their determination, the award is void; and, as we think, any judgment entered upon it must necessarily fall with it.

But it is urged that, because the judgment entry recites that the parties came by their attorneys, and that the amended award was made "by and with the consent of the parties thereto," the judgment should be held valid, as a judgment by consent. This last recital may mean that the parties consented that the award should be referred back, and not that amended award was entered by consent. It is not recited that the parties consented to the judgment. It is true that it does not appear that any objection to it was interposed. If the reference to arbitrators had been made in a suit pending in court, and, all parties being present in court, a judgment had been entered on that award, without objection from any source, it would have been conclusive, however erroneous. Then the court has jurisdiction of the persons and the subject-matter, and, in order for a party before the court to avail himself

of any error in its ruling, he must except, in order to get the benefit even of an appeal. But when the court has no jurisdiction, and is without power to enter any judgment upon the pretended award, save an order of dismissal of the proceedings, we think a different rule should prevail. The court being without jurisdiction to render a judgment upon the award, the failure of parties to object to that judgment could not give it validity. The trial courts gave judgment for the defendant in error upon the ground of the conclusiveness of the judgment. While the findings of the courts show many of the items of account between the executor and the estate, and may indicate that he was not chargeable with assets sufficient to pay off the judgment in favor of Stockdale, as administrator, there is no distinct determination of the question. Therefore, for the error in holding that the plaintiffs were estopped by the judgment, we feel constrained to reverse the judgment, and remand the cause. It is therefore ordered that the judgment of the district court and of the court of civil appeals be reversed, and that the cause be remanded for a new trial.

HARRIS et al. v. SHAFER.

(Supreme Court of Texas. Nov. 16, 1893.)

ADMINISTRATOR'S SALE—CONFIRMATION—DEED.

An order confirming an administrator's sale of 1,800 acres of a certain league and labor of land, and directing a deed to be made to the purchaser for the 1,800 acres, "it being the upper part of the survey," and a deed made in pursuance thereof, in which the land is described as "being the upper part of the league and labor of land granted to the heirs of Mary Bird, situated on the waters of Pecan bayou, in Travis," are void for uncertainty of description of the land.

Error from court of civil appeals of third supreme judicial district.

Action of trespass to try title by Henry Shafer against John W. Harris and S. J. Siddall. Defendant Harris died before trial, and his wife, Annie P. Harris, and their children, and the husbands of two of the daughters, were made parties. There was a judgment in the court of civil appeals (21 S. W. Rep. 110) reversing a judgment for plaintiff, and he brings error. Reversed.

R. W. Stayton and Lane & Mayfield, for plaintiff in error. Goodwin & Cleveland and Fisher & Townes, for defendants in error.

BROWN, J. Plaintiff in error brought suit in the district court of Brown county to recover from defendants in error a league and labor of land granted by patent to the heirs of Mary Bird. Plaintiffs proved their title under the patentee, and defendants set up an outstanding title in J. H. Herndon, with which they in no wise connected themselves. From the findings of fact made by the court of civil appeals, it appears that Mary Bird

died in the year 1840, and in 1845 an attempt was made by James Craft to administer upon her estate. He was appointed administrator in the probate court of Fort Bend county, but he did not qualify as such. At the July term, 1847, Daniel Shipman applied to said court, and was appointed administrator of the said estate. No inventory was returned, nor any order made in said estate, until about the February term, 1855, when Shipman filed an inventory, showing that the land in controversy was the only property belonging to the estate, which inventory was approved by the court. The land was patented to the heirs of Mary Bird in 1852. On the 22d day of March, 1855, Shipman, as administrator, applied to the probate court for an order to sell 1,800 acres of the land, stating that he had, as administrator, on the 7th day of October, 1847, made a contract in writing with John H. Herndon and James Shipman for locating the head-right certificate of Mary Bird, for which they were to receive \$200, in payment for which they were to receive one-third of the land, the usual fee for such services, and that Herndon and Shipman had complied with the contract. On the 31st day of March, 1855, the probate court of Fort Bend county ordered the sale of 1,800 acres of said land, reciting that the 1,535 acres should be sold to perfect the title of said Shipman and Herndon, and that it was agreed upon that 1,535 acres was to be deeded to Herndon, and that 265 acres was to be sold to pay costs of court. On the 25th of June, 1855, M. M. Battle, as agent of the administrator Shipman, made a report to the said court of the sale of the land, 266 acres sold to Herndon for \$69.16, to pay costs, and 1,534 acres sold to Herndon for \$300; and this was sold to "effect" title to J. H. Herndon and J. R. Shipman for locating. The report was sworn to by Battle as agent for Shipman. At the June term, 1855, the court confirmed the sale so made, and ordered deed made to Herndon for the 1,800 acres of land, "it being the upper part of the survey." The administrator made a deed to Herndon for the entire 1,800 acres of land, described as "being the upper part of the league and labor of land granted to the heirs of Mary Bird, situated on the waters of Pecan bayou, in Travis." Judgment was rendered for the plaintiff in error, Shafer, in the district court, which, upon appeal, was reversed by the court of civil appeals, and remanded for a new trial. 21 S. W. Rep. 110. The case is before this court on writ of error.

Plaintiff in error seeks a reversal of the judgment of the court of civil appeals upon the following grounds: (1) That the administration of Shipman upon the estate of Mary Bird was void, because it appears from the record that there were no debts against the estate; (2) that the sale to Herndon was void, because the administrator had no authority to make a contract with Herndon and

Shipman to give a part of the land for locating the certificate, and the court had no jurisdiction to order the sale to perfect the title under such a contract; (3) that the sale to Herndon was void for want of any sufficient description of the land sold. The view taken of the last point renders it unnecessary to decide upon the first two. We hold that the description given in the order of confirmation and in the deed is wholly insufficient, and in fact is no description, furnishing no means by which the land intended to be conveyed can be located at any particular place in the survey. The sale is therefore void. In the case of *Wofford v. McKinna*, 23 Tex. 45, the description was: "2,500 acres, to commence at the beginning corner, and taken in a square, if it will admit of it." From the field notes of the survey the court held that the land could not be taken in a square at the point designated, and said: "From its terms, it is uncertain in what form the land is to be taken. Neither the owner of the land, the party in possession, nor the court can know, from the face of the deed, what are the boundaries of the claim. The deed is void for uncertainty in the description of the premises, unless it can be aided by matter extrinsic of itself." *Wooters v. Arledge*, 54 Tex. 397. Putting the sale upon the same basis as if between private parties, there is still nothing in the record to aid the description given in the order of confirmation and deed. The words "the upper part of the survey" can mean nothing but the higher part of the survey, which could only have reference to the elevation of its surface, and would be as indefinite as the language attempted to be interpreted. The upper or higher part may be at either end or side, or it may be in the center of the survey. From the field notes of the original survey, it appears that the beginning corner is on Pecan bayou, and runs thence up the bayou, with its meanders, to a stake; thence south, 5 west, 10,168 varas, a stake and mound; thence south, 45 east, 2,550 varas, to a stake and mound; thence north, 45 east, 9,842 varas, to the beginning. If we assume that upper part referred to the highest point on the bayou, the survey could not be located there for want of space to contain so large a tract; or if it be admitted that this was intended as the beginning corner, and that the survey should be located in a square, it cannot be done on account of the shape of the original survey at that point. But we think that the language could not be interpreted to mean either of these, and, as applied, is meaningless. If the court were to render judgment for the defendants for 1,800 acres to be taken out of the "upper part of the survey," and for plaintiff for the remainder, a partition would be necessary. When the court appointed commissioners to partition the land, they would be in a dilemma as to the place at which defendants' land should be set aside; and if the commission-

ers should settle upon what they believed to be the upper part, and reported to the court, how could the judge tell whether the instructions had been obeyed or not? As was said in *Wofford v. McKinna*, *supra*, neither the parties to the suit, the commissioners to partition, nor the court, could, from the description given, know the boundaries to the claim. The judgment of the court of civil appeals is reversed, and the judgment of the district court is affirmed, and it is ordered that the plaintiff in error recover of and from the defendants in error and their sureties on their appeal bond all cost incurred in this court, the court of civil appeals, and in the district court.

HERNDON v. CAMPBELL

(Supreme Court of Texas. Nov. 16, 1893.)

PRACTICE IN CIVIL CASES — EXPUNGING IMPERTINENT MATTER—NOTICE TO PARTY.

1. Where the petition of a plaintiff in the district court states a good cause of action, but also contains matter so impertinent or scandalous as to amount to a contempt, the court may expunge the objectionable matter, but cannot strike the petition from the files. 23 S. W. Rep. 558, reversed.

2. In such case, plaintiff should be given notice of motions or exceptions seeking to expunge the impertinent matter, in the manner provided by rule 21, relating to practice in the district and county courts. 23 S. W. Rep. 553, reversed.

Certified questions from court of civil appeals of the first supreme judicial district.

Action by W. S. Herndon against T. M. Campbell, as receiver. Plaintiff moved to vacate an order striking his petition from the file, and to reinstate his action. Overruled. Question certified to supreme court. Reversed.

B. B. Cain and J. M. Herndon, for appellant.

STAYTON, C. J. The following questions are certified by the court of civil appeals: (1) "Where the petition of a plaintiff in the district court states a good cause of action upon its face, but contains also matter which is impertinent and personal, and reflects upon the judge of said court, to the extent that it amounts to a contempt, has such court, in term time, the power to strike such petition from the files of the court, or can it only expunge the objectionable matter?" (2) "If such district court has the power to strike such petition from the files, can such action be taken ex parte, as soon as such objectionable matter is brought to its attention, and without notice to the plaintiff?"

From the papers sent up with the questions propounded, and referred to for the better understanding of the matter, it appears that the defendant, by motion to strike from the file the petition containing the objectionable language, brought to the

notice of the court the language deemed objectionable, and the motion further prayed that plaintiff and his attorney be cited to show cause why they should not be committed for contempt. No notice of that motion seems to have been given when the court directed the petition to be stricken from the files, and returned to the plaintiff; and it was then further ordered that plaintiff and his attorney should be cited to appear, and show cause why they should not be punished as for contempt because of the filing of the petition. After this, plaintiff appeared, and moved the court to vacate the order striking his petition from the file, and to reinstate his action, but this motion was overruled.

The action of the court operated as a dismissal of plaintiff's action, and this the court had no lawful power to do, even though the language used in the petition was slanderous, or even such as would authorize the court to punish the plaintiff and his counsel for contempt committed in its use in the pleading. It is evident that the court did not intend to punish the plaintiff or his counsel for contempt by striking the petition from the files, for the order through which that was done shows that the question of contempt, as well as the punishment to be inflicted, were left open to be determined after notice to plaintiff and his counsel. Whether the course pursued by the court was proper, does not depend on the character of the language used in the petition; nor does the fact that its use would have justified the court in punishing as for contempt both plaintiff and his counsel affect the question submitted. Many cases have arisen in which irrelevant papers, on motion, were directed to be stricken from the file, but no case is remembered in which, unless by consent, a pleading stating a cause of action or defense was stricken from the file because it contained impertinent or even scandalous language. The only lawful course, in such cases, is to expunge the objectionable matter. "Upon the production of an order allowing exceptions for scandal, it is the duty of the officer having the custody or charge of the pleading or other matter to expunge such parts thereof as the court has held to be scandalous; and when he has done so he usually writes a memorandum in the margin of the document, opposite to the expunged passage, to the effect that the same has been expunged, pursuant to order, adding its date, and signs the memorandum." Daniels, Ch. Pr. 354. The same course is pursued in courts of equity of the United States. Equity rule 26. Thus is blotted out the scandalous matter, and the purpose of the law accomplished as fully as it would be by striking the pleading from the file; and so without depriving the offending party of any legal right, or relieving him from liability to punishment for

contempt. Under the English practice, exceptions on account of impertinence or scandal must be in writing, filed, and of this notice given, as provided by orders or rules of court. Daniels, Ch. Pr. 352; Bradstock v. Whatley, 6 Beav. 61. Under the rules of practice governing courts of equity of the United States, no order will be made refusing any pleading or other matter for scandal or impertinence, unless the exception be taken in writing signed by counsel, pointing out the matter deemed scandalous or impertinent, which must be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. Equity rule 27. Such filing operates as notice in such cases, under equity rule 4. Notice of motions or exceptions seeking to have scandalous matter expunged is important to the party against whom this is sought, and should be given, but this may be given as provided in rule 21, relating to practice in the district and county courts.

WARD et al. v. WHITE, County Judge.
(Supreme Court of Texas. Nov. 16, 1893.)

CRIMINAL LAW—FELONY PUNISHED BY FINE—
HIRING OUT.

The Penal Code declares that every offense punishable by death or imprisonment in the penitentiary, either absolutely or alternatively, is a felony. Seduction is punished by imprisonment in the penitentiary or by fine. Rev. St. art. 3602, provides that any one convicted of a misdemeanor or petty offense may be hired out to liquidate his fine and costs. *Held*, that one convicted of seduction, and punished by fine, could not be so hired out.

Certified question from court of civil appeals of first supreme judicial district.

Appeal by L. E. Ward and others.

Olivers & McNutt, for appellants. W. A. McDowell, for appellee.

STAYTON, C. J. The question submitted for decision is: "Can one who is imprisoned under a conviction on a charge of seduction, which is a felony, and whose punishment is assessed at a pecuniary fine, be hired out for the purpose of collecting the fine, as is provided under the articles of Revised Statutes above cited, [Rev. St. art. 3602, et seq.] where the offense is a misdemeanor?" The statute provides that "any person who may be convicted of a misdemeanor or petty offense, and who shall be committed to jail in default of the payment of the fine and costs adjudged against him, may be hired out to any individual, company or corporation until the money received from his hire is sufficient to liquidate such fine and costs in full." Rev. St. art. 3602. This article was amended by the act of March 1, 1887. (Gen. Laws, p. 11,) but no change was made that has any bearing on the question re-

ferred. The statute authorizes the hiring only where a person has been convicted "of a misdemeanor or petty offense," and a hiring not authorized by statute is illegal. The Penal Code declares that "every offense which is punishable by death or imprisonment in the penitentiary, either absolutely or as an alternative, is a felony; every other offense is misdemeanor." Pen. Code, art. 54. It further declares that "an offense which a justice of the peace, or the mayor or other officer of a town or city, may try and punish, is called a 'petty offense.'" Id. art. 56. The punishment prescribed for the crime of seduction is "imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding five thousand dollars." Id. art. 814. Seduction, then, is a felony, notwithstanding, as an alternative punishment, a pecuniary fine may be imposed. Such being the grade of that offense, the law does not permit a person convicted thereof to be hired in order to raise money to satisfy the fine and costs, as does it in cases of convictions for misdemeanors or petty offenses. It may be that no good reason exists why a person convicted even of a felony, when the punishment assessed is only a pecuniary fine, should not be hired, as is authorized when the conviction is of a misdemeanor or petty offense; but that is a matter for the consideration of the legislature, and, until hiring in such a case is permitted by statute, no person against whom a pecuniary fine has been assessed as punishment for a felony can lawfully be hired to raise money to pay the fine and costs. The statute provides a different method of collecting fines and costs, which may be pursued without reference to the grade of offense, and, through this, pecuniary fines imposed in cases of felony may be collected. Code Civil Proc. arts. 807-813.

PREWITT v. DAY.

(Supreme Court of Texas. Nov. 16, 1893.)

APPEAL BOND—WORDS AND PHRASES—"APPELLATE COURT."

Act April 13, 1892, requires supersedeas bonds to be conditioned that appellant, in case the judgment of the supreme court or court of civil appeals be against him, shall perform such judgment, and pay all damages awarded thereby; and cost bonds that appellant shall pay all costs accrued in the court below, and which may accrue in the court of civil appeals and supreme court. An appeal bond obligated appellant, in case the judgment of "the appellate court" should be against him, to perform its judgment, and pay damages and costs accrued in the court below, or which might accrue in "the appellate court." *Held*, that the phrase "appellate court" sufficiently described whatever court might give final judgment in the case.

Certified question from court of civil appeals of the first supreme judicial district.

Appeal by F. P. Prewitt against T. P. Day. On motion for affirmance on certifi-

cate. Certified question from the court of civil appeals.

STAYTON, C. J. Appellant executed an appeal bond conditioned "that the said F. P. Prewitt [appellant] shall prosecute his appeal with effect, and, in case the judgment of the appellate court shall be against him, that he shall perform its judgment, sentence, or decree, and pay all such damages as said court may award against him; and further conditioned that the said F. P. Prewitt shall prosecute his appeal with effect, and shall pay all costs which have accrued in the court below, [the county court,] or which may accrue in the appellate court in said cause;" and a court of civil appeals certifies the question whether, on a bond so conditioned, affirmance on certificate may be made. The bond has the conditions required for supersedeas and cost bonds by the laws in force prior to the act of April 13, 1892; but by that act it was provided that supersedeas bonds should be "conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and in case the judgment of the supreme court or the court of civil appeals shall be against him he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him." It provides that a cost bond shall be "conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect and shall pay all the costs which have accrued in the court below and which may accrue in the court of civil appeals and in the supreme court." Gen. Laws 1892, p. 44. If there had been no change in the phraseology of the statute, it would not be contended that the bond was insufficient, because it was conditioned as both supersedeas and cost bonds were required to be; for both bonds might be given. Bonds in which the conditions required in supersedeas bonds were in part only inserted, while some of the conditions required in cost bonds were also inserted, were held bad, because they were not conditioned as either class of bonds was required to be. We understand the question propounded to be: Is a bond which does not bind the obligor in terms to perform the judgment "of the supreme court or the court of civil appeals," or to pay all costs "which may accrue in the court of civil appeals and the supreme court," sufficient to authorize a judgment of affirmance on certificate? We are of opinion that the words "appellate court," used in the bond, apply to the court of civil appeals and to this court as fully as though the words of the statute had been inserted, and that the bond binds its makers to perform any judgment, sentence, or decree, and to pay such damages as either of said courts may award as the final judgment on appeal, and that it binds them to pay all costs that may ac-

crue and be adjudged against them by either of the appellate courts rendering final judgment on appeal. "Appellate court" means either court into which the judgment may be taken for revision, and will embrace the court of civil appeals and the supreme court. It is the ultimate judgment of an appellate court that an appellant must obligate himself to perform, and it is the damages to be awarded by the court rendering such a judgment that he and sureties must obligate themselves to pay. If such a judgment be rendered by a court of civil appeals, that is the "appellate court" whose judgment he must perform, and whose award of damages he must pay; but, if the ultimate judgment be by the supreme court, then it is the "appellate court" whose judgment he must perform and award, satisfy; and the certainty of the obligation is just as complete by the use of words "appellate court" as would it be were the words of the statute inserted in the bond. The same is true when the bond is only to secure costs, for an appellant would not be liable for costs accruing in a court of civil appeals, if on writ of error the judgments of that court and of the trial court had been reversed, and the cause remanded, or judgment rendered in his favor; and a bond which secures the costs to be adjudged in the appellate court last exercising jurisdiction in the particular case is sufficient, and that court may be properly described as the "appellate court." We think the conditions of the bond sufficient to authorize affirmance on certificate.

BUSK v. LOWRIE et al.

(Supreme Court of Texas. Nov. 16, 1893.)

HOMESTEAD DONATION LAWS—COMPLIANCE—ACTUAL SETTLEMENT—WHAT CONSTITUTES—SETTLEMENT AFTER APPLICATION FOR SURVEY—EFFECT.

1. Rev. St. tit. 79, c. 9, (entitled "Homestead Donations,") arts. 3939, 3940, require each person who desires to acquire a homestead to present to the county surveyor his application in writing, containing, *inter alia*, a statement under oath that he has actually settled on the land he claims, and that the application shall be made at the time of settlement, or within 30 days thereafter. *Held* that, to entitle a person to a homestead, he must make an actual settlement, which must precede his application.

2. Where a man, with his wife, goes on vacant land, and makes slight improvements thereon, which are completed by the middle of the day, and on the following day makes application to the surveyor, as required by statute, but does not return to or move his family on the land until three or four months afterwards, there is no "actual settlement" on the land before the application is made, and the application and survey made pursuant thereto are void. 22 S. W. Rep. 414, reversed.

3. Where no application for survey is made by such claimant after he actually settles on the land, he acquires no rights to or interest in it, since such acts of settlement cannot relate back to the time of making a false statement, and make good that which was not true when made.

Error from court of civil appeals of third supreme judicial district.

Action of trespass to try title by W. G. Busk against W. R. Lowrie and W. H. Cornelius. There was a judgment by the court of civil appeals, (22 S. W. Rep. 414,) affirming a judgment entered on the verdict of a jury in favor of defendants, and plaintiff brings error. Reversed.

Ledbetter & Randolph and Fisher & Townes, for plaintiff in error. T. H. Strong and Sims & Snodgrass, for defendants in error.

BROWN, J. Starkweather had a body of land inclosed in Coleman county as a pasture, which embraced the lands in controversy, with a fence running east and west so as to divide it into two pastures. He sold to appellant that portion of the land lying north of the fence in 1886. Starkweather did not know that the land in controversy was vacant when he inclosed it, neither did Busk know that fact when he purchased it. There was, however, a vacancy of 234 acres between two surveys inside the inclosure. Busk discovered in 1886 that the land was vacant, and located a certificate upon it, but the commissioner of the general land office held the location void, as it did not embrace more than 640 acres, and was within an organized county. In 1889 the surveyor of Coleman county wrote to the general land office, inquiring if the land was vacant. On the 17th day of August of that year the chief clerk of the general land office replied to the surveyor, informing him that the land was vacant. On the 28th day of October, 1889, Lowrie and Cornelius were each the head of a family, and neither had a homestead; and on that day Cornelius took his wife with him, and Lowrie, without any member of his family, went upon the land in controversy, and each of them performed the following acts, respectively: Lowrie smoothed off the ground, and made rock pillars for a house, in which he intended to live, cleared some brush off about an acre of land, and trimmed up some shade trees. He intended to move his family upon the land as soon as he gathered his crop. He accomplished all that he did on the land by the hour of noon that day, and left. The next day he made the affidavit required by law, and made application to the surveyor to survey the land for him under the homestead donation law. He did not return to the land until the 20th day of January, 1890, when, with his family, he returned, and brought with him some lumber, beginning the construction of his house. He built the house, fenced about 50 acres with a barbed-wire fence, and put about 16 acres in cultivation, and has continued to live on the land since that time. His oath and application were filed in the general land office in November, 1889. Cornelius, at the

time that he and Lowrie first went on the land, built of surface rock a wall about 3 feet high and 15 feet long, as a protection for his stock, and finished his work by the middle of the day. On the next day,—the 29th day of October, 1889,—he made oath as required by law, and filed it with his application to the surveyor to survey the land under the homestead donation law. His application was not sent to the general land office until March 30, 1890. He did not return to the land again until some time in February, 1890, when he got out some stone pillars, and about the last of February or the first of March he hauled some lumber on the ground, and built a house, and completed it, and moved his family into it during the month of March. His wife had been sick, which prevented him from moving some time prior thereto. On the 10th day of March, 1890, Busk applied for the purchase of the land, under the act of 1889 and 1887, known as the "Scrap Law;" and on the 20th day of that month the surveyor of Coleman county surveyed the land for all the parties, first surveying it into two tracts,—one of 180 acres for Lowrie, and one of 74 acres for Cornelius,—and then he surveyed the whole for Busk. All of the field notes were returned to the general land office in due time, and in the following June the commissioner of the general land office issued patent to Busk for the land, he having paid for it, and all fees. Lowrie and Cornelius paid all fees charged against them, or arranged with the surveyor to his satisfaction. Appellant sued the appellees in the district court of Coleman county for the land, and upon a trial judgment was rendered for the appellees, Lowrie and Cornelius, from which Busk appealed. The court of civil appeals affirmed the judgment of the district court, and the case is before this court on writ of error.

We do not regard it as material to determine whether Busk had a preference right to purchase the land or not. He had a right to purchase, which was equal to the right of appellees to acquire the land as a homestead donation, up to the time that their rights attached under the law. The patent issued by the state to Busk invested him with the legal title to the land, and he should recover, unless the rights of appellees attached before the 10th day of March, 1890,—the day on which Busk made his application to purchase the land. Appellees claim the land under title 79, c. 9, Rev. St., entitled "Homestead Donations." Article 3039 requires each person entitled and who desires to acquire a homestead under the provisions of that chapter to present to the surveyor of the county his application in writing, containing, among other things, a statement under oath that he has actually settled upon the land which he claims. Article 3040 requires the application to be made at the time

of settlement, or within 30 days thereafter. From this it is plain that there must be actual settlement, and that such settlement must precede the application. The pre-emption laws of this state have always—or at least generally—required actual settlement on the lands sought to be pre-empted, and cases construing those laws are in point as authority in this case. In *Cravens v. Brooke*, 17 Tex. 274, the court, in speaking of the settlement required under the pre-emption law, said: "The only condition which the law imposes, is that of settlement and improvement on vacant land. The acts of the applicant are alone the subject of inquiry. Was the land vacant, and has it been settled and improved? and not what the settler thought or imagined or supposed about the title, or whether he imagined it vacant or otherwise." In *Burleson v. Durham*, 46 Tex. 160, the question was as to whether or not the claimant was an actual settler, and the court said: "But the actual settler intended by the statute must reside on the land, or occupy preparatory to and with the bona fide intention of residing thereon." See, also, *Turner v. Ferguson*, 58 Tex. 10. In *Thomas v. Porter*, 57 Tex. 59, the party claiming the homestead was a tenant, as was Lowrie in this case, and, with one of his sons, went upon the land, and remained there until he provided a house for his family, when he removed the family to the land. The court, upon the question of occupancy, said: "From the fact that he took possession of the land, removed his family to it a short time afterwards, and remained upon it permanently, the most rational presumption is that he took possession for the purpose of making it his home, and that it became his home from the time that he so took possession." The making of the application did not give right to the land, nor would the failure to make the application within the time prescribed deprive the actual settler of the right to complete and perfect his claim, as against persons who acquired no right in the land before the application was filed. *Gammage v. Powell*, 61 Tex. 630. The survey of the land, however, could not be made until the application was filed, and, if made without such application, would be void. *Miller v. Moss*, 65 Tex. 179.

The language of the statute was used by the legislature for a definite purpose, which was to secure real, bona fide settlers upon the land. The word "actually" is used in the sense of being a real, and not a constructive or virtual, settlement. The courts of this state have so construed the same language used in the pre-emption laws. The question is, did the appellees make a real settlement upon the land before they made application for its survey? This cannot be seriously claimed by any one. It is evident that the purpose was not to settle

upon the land at the time, but to reserve it for future settlement. The learned judge who delivered the opinion of the court of civil appeals said: "The object and purpose of the law was to secure homes to heads of families who would become actual settlers upon the public domain," etc. The statute does not so read. Its purpose was to secure homes to such heads of families as had become actual settlers upon the public domain, and required the applicant to swear that he had actually settled, and not that he would settle upon the land in the future. This is not a case analogous to the acquisition of a homestead exemption. The head of the family owning land may designate it as a homestead by such acts as clearly indicate his intention to use it as such, but in a case of this character the title is to be acquired under a statutory requirement, of actual settlement, which is a condition precedent. The difference between the two classes of cases is made more manifest by article 3950, Rev. St., which prescribes the cases in which a temporary absence from the land will not forfeit the homestead claim. Articles 3944, 3945, Rev. St., sustain the construction here given to the law by the requirements that proof must be made that the applicant has resided upon, occupied, and improved the land for three consecutive years from the date of the application, before a patent can issue upon such claim. The law deals with the acts of the party, and not his intentions without such acts, and in order to acquire the right the law must be complied with. If it is harsh, it is nevertheless the law, and the courts cannot change it. It is clear that the acts of appellees performed before the filing of the applications did not constitute actual settlement, and gave no right to them.

The only remaining question is, did the acts of settlement done afterwards—that is, in January by Lowrie, and in February or March by Cornelius—confer upon them a superior right to that of Busk? We believe that, if the appellees had made application for the land after the acts done subsequent to the application,—that is, had followed up such acts with an application as required by law,—they would have secured their homestead claims. Especially is this true as to Lowrie. But surely the acts of settlement could not relate back to the time of filing a false statement, and make good that which was not true when made. The law says that the affidavit must be made at the time or after the filing of an application. The court has held that survey without application is void, and, as there was no application containing an affidavit of the settlement really made, the only actual settlement and the surveys made for appellees were void, and conferred no rights upon them. The judgments of the courts of civil appeals and of the district court are reversed, and this cause remanded to the district court for further trial.

GABERT v. OLCOTT.

(Supreme Court of Texas. Nov. 16, 1893.)

DEED TO CATHOLIC BISHOP—TITLE—AUTHORITY OF BISHOP TO CONVEY—PRESUMPTION—TRUSTS.

1. A deed to a bishop of the Roman Catholic Church for the benefit of the church, "and to his successors and assigns forever," vests a fee-simple title in such bishop, in trust for the church, in the absence of any conditions subsequent, either expressed or implied. 22 S. W. Rep. 286, affirmed.

2. Conditions subsequent will not be implied from the fact that the consideration for the deed was merely nominal, where it does not appear that the use of the property for the purpose specified in the deed was a matter specially advantageous to the grantor.

3. Where such grantor was a railroad company, which afterwards executed a general mortgage on all its property, the title of such bishop or his grantee to the premises described in such deed was in no way affected by such mortgage, and a subsequent foreclosure and sale of the company's assets.

4. Where a bishop of the Roman Catholic Church conveys land to which he holds the fee-simple title in trust for the church, it will be presumed, in the absence of evidence to the contrary, that such conveyance was made by authority.

5. Where a bishop of the Roman Catholic Church is invested with the legal title to land in trust for the benefit of the church, he can convey it through an attorney in fact.

6. After a railroad company had voluntarily conveyed town lots to a bishop of the Roman Catholic Church, for the benefit of the church, by a deed which vested in him the fee-simple title, it executed a general mortgage on all its property, which was subsequently foreclosed. Afterwards, the bishop conveyed the fee-simple title to such lots to the purchaser at the foreclosure sale, by a deed which recited that the consideration was that "whereas, said property never having been used for the purpose for which it was donated, nor is there any purpose to so use the same, nor is there any hope to do so in the near future, this conveyance is made to restore said property to its rightful owner, and to cancel said conveyance so made by it to" such bishop. Held, that the grantee's title was not in trust for the benefit of such railroad company. 22 S. W. Rep. 286, reversed.

Error from court of civil appeals of first supreme judicial district.

Trespass to try title by F. P. Olcott against P. A. Smith and M. Gabert. There was a judgment in the court of civil appeals (22 S. W. Rep. 286) reversing a judgment in favor of plaintiff against Gabert, and he brings error. Reversed.

T. D. Cobbs, for plaintiff in error. H. H. Boone, for defendant in error.

GAINES, J. This suit was brought in the district court of Grimes county by the plaintiff in error to recover of defendant in error and one Smith two certain lots in the city of Navasota. In the district court, Smith entered a disclaimer, and the plaintiff obtained a judgment against the other defendant. The latter having appealed, the court of civil appeals reversed the judgment of the district court, and rendered a judgment in his favor. Both parties claim title through the Houston & Texas Central

Railroad Company as the common source. On the 13th day of February, 1872, that corporation conveyed the lots in controversy to C. M. Dubois, bishop of Galveston, "for the benefit of the Roman Catholic Church." On the 1st day of April, 1881, the Houston & Texas Central Railroad Company executed to the Farmers' Loan & Trust Company a mortgage upon its property to secure a certain bonded indebtedness. In the description of the property conveyed by the instrument was embraced, among other things, "all and singular, all town lots, acquired by gift, purchase, or otherwise, now owned, or that may be hereafter owned, on the line of railway now owned and operated by this company." In 1885 a suit was instituted in the United States circuit court for the eastern district of Texas to foreclose the mortgages upon the property of the railroad company, and receivers were appointed to take charge of the mortgaged effects. In that proceeding a decree of foreclosure was entered on the 4th day of May, 1888, and a sale was ordered. The sale was made in pursuance of the decree, and the plaintiff in error became the purchaser of the mortgaged property. On January 18, 1889, a deed was made to him as such purchaser. On the 30th day of May, 1889, N. A. Gallagher, bishop of the Roman Catholic Church of Galveston, and as attorney in fact of C. M. Dubois, conveyed the lots to the plaintiff. In 1890 the lots were levied upon and sold by the sheriff of Grimes county as the property of the Houston & Texas Central Railroad Company, by virtue of an execution issued against it, and at the sale they were purchased by defendant, to whom the officer executed his deed in due form. The evidence shows that, although a building for church purposes was placed upon the lots, it was never accepted by the Catholic Church, and that prospect for using the lots for the purposes of a church was entirely abandoned.

The first question arises upon the effect of the deed from the railroad company to Bishop Dubois. That conveyance purports to be in consideration of the sum of five dollars, and grants the property to C. M. Dubois, bishop of Galveston, and his successors in office, for the use of the Roman Catholic Church. The habendum clause is as follows: "To have and to hold, all and singular, the premises above mentioned, unto the said C. M. Dubois, bishop of Galveston, for the use aforesaid, and to his successors and assigns forever." We are of the opinion that the grantee took under the deed a fee-simple title in trust for the benefit of the church, whose officer he was. There are no conditions subsequent expressed, and, although they may be implied, they are not favored in law. It may be that the consideration expressed should be deemed nominal, and that the conveyance should be treated as voluntary, and it is true that a condition will be more readily implied in a deed of that character than

in one which rests upon a valuable consideration. Yet the rule is well recognized that the mere declaration of the uses to which the granted premises are to be applied do not ordinarily import a condition. Where the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional, than when, as in this case, the use is for the benefit of a special class of persons, or of the public at large. In this case it does not appear that the maintenance of a church upon the lots was a matter specially advantageous to the railroad company who made the grant. Upon these propositions the authorities are numerous, and in substantial accord. They are ably reviewed in *Farnham v. Thompson*, 34 Minn. 331, 21 N. W. Rep. 9,—a case directly in point,—and in the note to the report of the same case in 57 Amer. Rep., on page 63. There the words, "for the purpose of erecting a church thereon, only," followed the description of the property in the deed. Notwithstanding the word "only" excluded the idea that the property could be used for any other purpose, it was held not to create a condition. In the deed before us, the use of the word "assigns" in the habendum indicates that it was contemplated that the trustee should have power to sell the lots, and thus to divert them to a purpose other than that primarily intended.

The Houston & Texas Central Railroad Company having conveyed its entire interest in the lots, it follows that the mortgages upon its property subsequently executed, and the sale of all of its assets in pursuance of a decree foreclosing such mortgages, did not in any manner affect the title. Consequently, the plaintiff in error acquired no right to the property in controversy by reason of his purchase at that sale. Whether he have such title as enables him to maintain this action depends upon the validity and effect of the deed from Dubois, by attorney in fact, to him. In *Blanco v. Alsbury*, 63 Tex. 490, a similar deed executed by Bishop Dubois came up for consideration, and it was held that he had power to execute the conveyance. In that case, however, the lots had been conveyed to him "for the purpose of erecting thereon a Roman Catholic church, * * * or to be exchanged for, or used in the purchase of, other property * * * for said purpose." The lots were conveyed in settlement of the balance of a debt for erecting a church edifice on other property. In this case the conveyance of the bishop seems to recognize that the purpose of the deed to him could not be carried out, and to be intended to convey the property to the person who, in the opinion of the grantor, was entitled to its use. The cases are not parallel. Yet in the case last cited it is said: "It is a matter of historical and common knowledge that the form of government

in the Roman Catholic Church is an episcopacy, in which the diocesan bishops possess enlarged powers respecting the temporal as well as the spiritual affairs of the church in their respective dioceses." But, whatever the powers of the incumbents of the sees of the Roman Catholic Church may be,—a question upon which we have no direct evidence,—we are of the opinion that it should not be lightly assumed that the bishop, in conveying the lots to the plaintiff in error, acted without authority. "The presumption is that public officers do as the law and their duty require them." Lawson, Pres. Ev. 53. And the same rule prevails as to the authority and acts of private officers. Id. 60; Bank v. Dandridge, 12 Wheat. 64. The members of the Roman Catholic communion are found in every part of the Christian world, and their interests, temporal and spiritual, are looked after by a well-disciplined hierarchy, consisting of functionaries of successive grades, whose respective powers are accurately defined, and, among themselves, well understood. In such a case, in the absence of proof to the contrary, the presumption that everything has been rightfully done ought to apply with peculiar force. We therefore conclude that Bishop Dubois was authorized to make the deed to the plaintiff, through which he claims title to the lots in controversy. Being invested with the legal title, he could convey through an attorney; and it may be that, without such authority, Gallagher, as coadjutor bishop, had the power to make the conveyance. A coadjutor bishop is one who is appointed to perform the functions of a regular bishop who is old and infirm. See word in Century Dict. In the deed, Gallagher is also styled "administrator bishop," and we think it is to be inferred that he was charged, as the coadjutor of Dubois, with the administration of the affairs of the see. Bishop Dubois held the legal title to the lots in trust, and it was, at all events, competent for him to convey that title by attorney. Telford v. Barney, 1 G. Greene, 591; May v. Frazee, 4 Litt. 391; Blight v. Schenck, 10 Pa. St. 285. The plaintiff, therefore, took the legal title under the conveyance; and, if it should be held that the equitable title did not pass by the deed, still it is his right to recover against the defendant in this suit, unless the latter has connected himself with the outstanding equity.

So far, we are in accord with the court of civil appeals, and our conclusions are strengthened by their opinion. But in their final conclusion,—that, by virtue of the deed from Dubois, the plaintiff in error took the legal title in trust for the benefit of the Houston & Texas Central Railway Company,—we cannot concur. That deed is an ordinary deed conveying the fee-simple title, but, after a clause of special warranty, it contains the following recital: "The consideration of said conveyance is that hereto-

fore the Houston & Texas Central Railway Company, aforesaid, a corporation organized under the laws of the state of Texas, did convey said property to Rt. Rev. C. M. Dubois, bishop of Galveston, and his successors, for church purposes,—that is to say, for the benefit of the Roman Catholic Church; and whereas, said property never having been used for the purpose for which it was donated, nor is there any purpose to so use the same, nor is there any hope to do so in the near future, this conveyance is made to restore said property to its rightful owner, and to cancel said conveyance so made by it to the said Rt. Rev. C. M. Dubois, bishop of the Roman Catholic Church aforesaid." Now, while this recital shows the motive which prompted the conveyance, it does not operate to destroy what otherwise would be the effect of the deed. As we have seen, after the Houston & Texas Central Railway Company made its conveyance to Dubois, it had no title to the property, and no claim upon it which possessed any of the attributes of a legal or equitable demand. There was no legal obligation resting upon the authorities of the Catholic Church to reconvey the lots to any one. Whatever duty in the premises was incumbent upon them was purely of a moral nature. When the bishop undertook to restore the property to its rightful owner, the effects of the railroad company had been sold under a decree of a court, and the plaintiff in error had become the purchaser. It was a "sold-out" corporation. In order to discharge the duty which conscience dictated, it became necessary, under the circumstances, for him to determine whether the lots should rightfully belong to the original corporation, his grantor, or to the purchaser of its assets under the foreclosure sale. This is not a legal question, because there was no legal right involved; and however it may have been determined, or to whomsoever the conveyance may have been made, neither party could have been injured, and neither could have had any right, in law, to complain. Therefore, we fail to see upon what principle it can be held that Olcott, by his deed from Dubois, took the legal title in trust for the railway company. A luminous text writer, in classifying trusts, uses the following language: "Trusts are divided in reference to their creation into express trusts, implied trusts, resulting trusts, and constructive trusts. Express trusts are also called 'direct trusts.' They are generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust. Hence, they are called 'direct trusts,' in contradistinction to those trusts that are implied, presumed, or construed by law to arise out of the transactions of the parties. * * * Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was

the purpose or intention of the parties to create a trust. Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money. A constructive trust is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself. Courts construe this to be an advantage for the cestui que trust, or a constructive trust." 1 Perry, Trusts, § 24 et seq. There is no direct trust declared in the deed. There can be no resulting trust, because nothing of value was paid for the conveyance. The plaintiff cannot be held a constructive trustee, because the railroad company had no legal or equitable claim upon the property, to be injuriously affected by the transaction. Nor are there any words in the conveyance from which it is to be inferred that it was the intention of the grantor to create a trust. The meaning of the recital in the instrument in reference to the consideration, viewed in connection with the granting clause, is that the grantor conveyed the property to the grantee because he was the rightful owner. It does not mean that it was conveyed in trust for the rightful owner, and although the recital expresses the purpose to be to restore the granted premises to the rightful owner, and to cancel the original conveyance, it is quite clear that it was not intended that the railroad company should take the beneficial interest in the property. For the reasons given, we are of opinion that the judgment of the court of civil appeals ought to be reversed, and the judgment of the district court affirmed, and it is so ordered.

OWENS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25, 1893.)

CRIMINAL LAW—APPEAL—DISMISSAL—ESCAPE OF DEFENDANT.

Where the affidavits on motion to dismiss an appeal because of defendant's escape from jail after his conviction show that, after getting out of the jail, defendant fled, and hid himself in a place about 400 yards from the jail, and that he was pursued and captured by the constable, and brought back to the jail, after being out about 30 minutes, there is a sufficient showing of an escape.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Will Owens was convicted of assault with intent to murder, and appeals. The state moved to dismiss the appeal because of defendant's escape after his conviction. Motion sustained.

The affidavits in support of the motion were as follows:

"Before the undersigned authority, on this day, came A. W. Walden, who, upon oath,

says that during and pending the appeal of said above-entitled case, and after his conviction and sentence for the crime of assault with intent to murder, and on the 2d day of July, 1893, Will Owens broke jail, and escaped from the Wise county jail. I was on the public square of Decatur, Texas, and about 50 yards from the jail, when I learned the prisoners had broken jail, and were escaping. I went to the livery stable, and got my horse, and as I got my horse I saw a man, about $\frac{1}{4}$ of a mile off, turn the corner of the street, and parties told me it was Will Owens. I hastened on after him, but, after he turned the corner of the street, he was out of my sight until he was captured. At the residence where he turned the corner of the street, I asked a lady which way he went, and she told me he went into a ravine outside of the residence part of town. I went on in the direction she said he went, and about $\frac{1}{4}$ of a mile from where he turned the corner, and a little over $\frac{1}{2}$ a mile from the jail, as above stated, I found him hid in about an acre patch of corn, which was taller than a man's head. I am constable of this precinct. I brought him back, and placed him in the jail. He was out of jail about half an hour. * * *

"I, J. L. Rucker, sheriff of Wise county, Texas, respectfully represent that at the May term of the district court of Wise county, Texas, in a certain cause wherein the state of Texas was plaintiff, and Will Owens was defendant, charged with the crime of assault with the intent to murder, the defendant, Will Owens, was convicted, and his punishment assessed at two years' confinement in the penitentiary; that, after said conviction and sentence of Will Owens on said charge at said term of court, the defendant was by an order of commitment by J. W. Patterson, dist. judge of 43d judicial dist., remanded into the hands of J. L. Rucker, sheriff as aforesaid, to be by him safely kept to await the result of the appeal taken by the defendant, Will Owens, to the court of criminal appeals in this case; that heretofore, to wit, on the 2d day of July, 1893, the defendant made his escape from custody of the said J. L. Rucker, sheriff as aforesaid, while he was so legally held in the county jail of Wise county, Texas, to await the result of his appeal as aforesaid, and the defendant, Will Owens, was recaptured on said 2d day of July, 1893, but did not voluntarily return. * * *

Defendant's affidavits in opposition to the motion were as follows:

"I, John W. Wassen, do swear that on the day when Will Owens got out of jail, I was living with my family in the county jail where Will Owens was confined, and, when the alarm was given that the prisoners had broke jail, I was in front of Wakefield's saloon, $1\frac{1}{2}$ blocks from the jail. I ran to the jail, and went through it, and round back on the square; and then some

one told me Will Owens had gone into Cameron's lumber yard, about 100 yards from the jail, and looked around awhile, and was told that he had gone south, and I ran south, and met A. W. Walden and Walter Satterwhite coming back with Will. They told me they caught him in a little corn patch about 400 yards from the jail. It was about 30 minutes from the time the alarm was sounded. I have been living in the jail ever since,—most of the time as jailer,—and defendant has not tried to escape since then. Where I met the officers coming back with defendant was about 200 yards from the jail. Mr. A. W. Walden and Mr. Walter Satterwhite, the officers who caught Will Owens, are not in town to-day. * * *

"Before me, the undersigned authority, this day personally came Miss Josie Wassen, who says, upon oath, that she was living with her mother, in the county jail of Wise county, Texas, when some of the prisoners confined therein broke jail and escaped; that Will Owens was among the number that escaped, but that he was not gone longer than 30 minutes when he was returned by Mr. A. W. Walden, constable precinct No. 1, Wise county; that the said Will Owens has been in jail here since then, and has never given us any other trouble since. * * *

"Now comes J. L. Rucker, sheriff of Wise county, Texas, who says, upon oath, that he was sheriff of Wise county, Texas, at the time Will Owens escaped; that he was not in the city of Decatur on the day of the escape; that Will Owens was in jail when he left Decatur, and was still in jail when he returned, being under a commitment from the district court,—he being under conviction for assault to murder; that the defendant, Will Owens, has not given me any trouble since then. There were several others who escaped at same time, all much older than defendant. Defendant is about 17 years old. I don't know whether I have reported the escape, or not. If I did do so, it was on the information of my jailer, and not from my personal knowledge. * * *

"Before me, the undersigned authority, this day personally appeared H. M. Foster, who, after being by me duly sworn, says, upon oath, that he was in Decatur when the alarm was given that the prisoners had broke jail. My horse was hitched behind the store buildings on west side of public square in Decatur, and I went at once, and got on my horse, and rode down to Woodward's stable, about 200 feet from the jail; and I saw defendant, Will Owens, down Bent avenue, about 100 yards from me. About that time, Mr. A. W. Walden, constable of precinct No. 1, Wise Co., came along, and got on my horse, and pursued defendant, who ran south; and in a short time Walden came to the jail with defendant, and placed him in jail. When Walden

got on my horse, and started after defendant, the defendant was in sight, going down the street. * * *

McMurray & Gose and R. F. Spencer, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Motion to dismiss appeal because of the escape of the appellant. Appellant, in answer to the motion to dismiss, denies the escape, and supports his denial by several affidavits. When we examine these affidavits, and compare them with that made by the constable, A. W. Walden, we find no material conflict with reference to the facts sworn to by each. We have compared the facts bearing upon the motion in this case very carefully with the facts in the Loyd Case, 19 Tex. App. 151, relied on by appellant, and find them not at all similar. After giving the propositions of law stated in the Loyd Case a close examination, and applying them to the facts of this case, we are of opinion that in this case there was an escape. Motion sustained. The facts will be reported.

NIVETH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1893.)

Appeal from Titus county court; H. T. Rhea, Judge.

Leon Niveth was convicted of theft, and appeals. Reversed.

R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Conviction of theft of a watch under article 742a, Pen. Code, (Laws 1877, p. 14.) The evidence, with the testimony of Louis Niveth (the father of appellant) eliminated, leaves the case in great doubt as to whether appellant fraudulently converted the watch to his own use. When considered in the light of his testimony, there was no criminal conversion. We are of opinion that the evidence does not support the conviction. Judgment reversed, and cause remanded.

McDANIEL v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1893.)

LOCAL OPTION ELECTION—PUBLICATION OF RESULT—INSTRUCTIONS.

Where, after publishing an order declaring the result of a local option election for three successive weeks, further publication is stopped by a temporary injunction, and after the order is dissolved the order is published for another week, such publication is not a publication for "four successive weeks," within Rev. St. art. 3234, requiring the court to have published for "four, successive weeks" the order declaring the result of the election. Per Simkins, J., dissenting.

Dissenting opinion. For report of majority opinion, see 21 S. W. Rep. 684.

SIMKINS, J., (dissenting.) I cannot concur in the opinion of the majority. The local option law requires the result of the election to be published for four successive weeks in the county newspaper. Rev. St. art. 3234. The result of the local option law in Rockwall county was published for three successive weeks in the Rockwall News. At the end of the third week, to wit, September 30, 1892, the district judge granted a temporary injunction restraining the further publication of the order. After a lapse of six weeks, to wit, November 17th, the injunction was dissolved, and the order declaring the result was again published one week longer, completing the four weeks required. The question in the case is, has there been a publication for four successive weeks of the order of the court declaring the result, as required by article 3234? If I understand the argument of the assistant attorney general, adopted as the opinion of the majority, the six weeks in which the publication was restrained by injunction of the district court are not to be computed, but the statute is held complied with, and the order was deemed published for four successive weeks, although six weeks elapsed between the third and fourth week, (1) because the case is like the cases of limitation, in which the time of litigation or absence is not computed; (2) that appellant in this case enjoined, and cannot take advantage of his own wrong. How such reasoning applies to the question at issue, I am at a loss to determine. As between private litigants to pending litigation, when one sues out an injunction against the enforcement of a claim, he cannot set up the limitation that, by his own act, has intervened pending the injunction. This, however, is not the enforcement of a claim or cause of action, but the adoption of a public law. The question here is, has the local option law become of force in Rockwall county by compliance with the local option statute, requiring a publication of the order declaring the result of the election for four successive weeks? If the law is of force, it is because it has been legally adopted and legally published, and it must be in force, not only against the one who enjoined it, but all other persons living within the local option district. It is not now an open question, in this court, that the various steps required in the adoption of a local option law must be substantially complied with, and it will not be denied that the order declaring the result is a necessary step. It is the promulgation of the law. The statute declares it must be done by publication for "four successive weeks." There can be no misunderstanding of the words. We have no right to take from or add to the statute. If, from any cause, the publication is interfered with, it must be begun again, until the

law is complied with. But it is insisted that this construction may enable parties opposed to the law to sue out repeated injunctions, and prevent successive publications, and thereby nullify the law. Such a condition of things cannot legally exist, and, if it could, I could not hold that a publication of four weeks, scattered by injunctions over a period, say, of over a year, was "four successive weeks."

The difficulty in the case does not lie in the law itself, but in the interference with it. It is certainly difficult to understand upon what ground an injunction can issue, as in this case, against the publication of the order declaring the result. If the law was void by reason of any mistake, failure, or fraud in any of the prior steps necessary for its adoption, a publication of the result could have added no force or efficiency, whereas, if all the prior steps were valid, the court, by enjoining the publication, lends the power and process of the court to thwart the will of the public. It should not be forgotten that a plain and equitable remedy is provided in the law itself. Under article 3239a of the Revised Civil Statutes, ample provision is made for the contest of the result of the election, and the grounds set forth upon which the contest must be made. This contest must be filed upon the expiration of the 30 days during which the publication is carried on. Now, when the contest is filed, there can be no possible necessity for an injunction, for the law cannot be enforced, because the period of the required publication has not elapsed, and when it has been completed the contest is then pending, which, ipso facto, suspends the operation of the law, for, if found, on contest, not to be legally adopted, a new election is ordered. I am therefore of the opinion that the law cannot be legally nullified by district judges interfering with the publication of the order. That it may be done illegally is no reason why I should disregard the requirement of the statute, and hold that the four successive weeks need not be successive when there is illegal judicial interference. I think the rehearing should be granted upon this question. I cannot concur in the points decided.

MEYER v. HALE et al.¹

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

SECONDARY EVIDENCE — ANCIENT DOCUMENTS — TRESPASS TO THE TITLE — POWERS OF ATTORNEY.

1. Evidence by the land commissioner as to the contents of an archive on file in his office is not admissible, but the proper method of proving such a paper is either by a certified copy or by a certificate from the commissioner stating its contents.

2. To render admissible evidence of a written transfer of land made to a person long since deceased, it is not necessary to show a search among the papers of such deceased, or inquiry of his heirs or administrator, where

¹ Rehearing pending.

the paper is last traced into the custody of a nonresident of the state.

3. The presumption that a document over 30 years old was executed by the person whose name is signed to it, applies even though the document has been lost, where witnesses who have seen it testify that it appears to be regular on its face.

4. In trespass to try title defendants cannot defeat recovery by showing an outstanding title with which they do not connect, unless such title is the superior legal title; and, where the evidence leaves it uncertain whether the outstanding title is legal or equitable, a judgment for defendant will be reversed.

5. A power of attorney authorizing the agent to investigate and by suit or other legal manner recover any lands to which the principals are or can become entitled, and sell the same by sufficient deed, empowers the agent to convey any land to which the principals apparently have title, and does not restrict his authority to convey merely the principals' chance or right in the land; and hence a bona fide purchaser for value from such attorney takes a valid title as against one claiming under a prior unrecorded conveyance of the ancestor of the principals, of which conveyance both the principals and the purchaser were ignorant.

Appeal from district court, Llano county; E. L. Rector, Special Judge.

Trespass to try title by G. A. Meyer against William H. Hale and others. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Slater & McLean, for appellant. H. M. Holmes and Ward & Faulk, for appellees.

FISHER, C. J. This is an action of trespass to try title by appellant, Meyer, against the appellees, to recover survey No. 228, in the name of H. Berleth, situated in Llano county. The case below was tried before the court, and judgment rendered in favor of the appellees, defendants below. The land in controversy was patented to S. B. Hurlbut, assignee of H. Berleth, June 15, 1857. The appellant holds under a deed with general covenants of warranty executed by League to him, conveying the land in controversy. League held under a warranty deed executed by J. R. Coryell as agent of the heirs of Hurlbut. The Hurlbut heirs executed to Coryell a power of attorney, dated December, 1885, authorizing him to sell the land, and execute therefor a deed. The appellees, the defendants below, offered evidence tending to show a transfer of the land to Jacob De Cordova by S. B. Hurlbut in 1854; also a deed executed by De Cordova to H. F. Fisher, conveying the land in controversy, dated October 31, 1854. The transfer from Hurlbut to De Cordova, which was, it seems, in writing, was not produced upon the trial, but its contents were shown by witnesses who had examined and read it. The evidence of these witnesses shows that it was dated in 1854, and purported to be signed and executed by S. B. Hurlbut. These transfers were offered by the appellees in order to show an outstanding title. They did not connect themselves with these convey-

ances. The evidence shows that Hurlbut and De Cordova are long since dead.

There was no error in the ruling of the court admitting the evidence tending to show the existence of the transfer from S. B. Hurlbut to Jacob De Cordova, and the evidence of the witnesses as to its contents. We believe that the evidence before the court tending to show the loss of the original transfer and the diligence used to find and discover it was sufficient in order to permit the introduction of secondary evidence of its contents. We also think that the evidence of Land Commissioner Hall was admissible, except where he undertakes to state what appears from the face of a paper, an archive on file in his office. We think the paper, with the indorsement upon it, about which he testified, is an archive or record in the land office, of which either a certified copy could be obtained or a certificate could be procured from the commissioner stating the facts contained in said record, either of which would be admissible as original evidence. Sayles' Civil St. arts. 2252, 2253. The evidence of the commissioner was not admissible to prove a matter of fact shown by the records of his office. *Bass v. Mitchell*, 22 Tex. 285. It was not necessary to search the papers of De Cordova, or make any inquiry of his heirs or his administrator, for the lost transfer, because the evidence uncontradictedly traces it from their possession. The transfer, when last seen, as shown by the evidence of witness Robertson, was when he turned it over to Ben Lower, of Kansas City. Witness Holmes in his affidavit states that he made inquiry and search in Kansas City after he received information from Robertson that he had delivered the transfer to parties there. The only weak part in all of this evidence showing the effort to procure the original transfer is that the testimony of Ben Lower is not obtained, nor is it expressly shown that inquiry was directly made of him for the missing transfer, although witness Holmes, in his affidavit of loss, states that he made inquiry at Kansas City, the place of residence, it seems, of Ben Lower. It may be from this fairly inferred that he inquired of Lower for the transfer. But, however this may be, it is fairly shown by the evidence of Robertson that the transfer was delivered to Lower at Kansas City; it is last traced to his custody. This evidence places the transfer in another state, beyond the jurisdiction and control of any process that may issue from our domestic courts, and beyond the control of the parties to this suit. Lower is not a party to this suit. In such circumstances as these, secondary evidence of the contents of the transfer was admissible.

The transfer executed by Hurlbut to De Cordova, which was not produced, was shown, by the evidence of witnesses who had seen it, to be regular upon its face, and

was obtained, as the evidence shows, from the possession of the administrator of the estate of De Cordova, the grantee in the transfer. It purported to be signed and executed by S. B. Hurlbut in 1854. The court below held that the evidence was sufficient to establish the contents of the instrument as a transfer, and also held that, it appearing to be over 30 years of age, the law will presume that it was executed and signed by the party whose name appears to it, and that such presumption dispensed with proof of its execution by Hurlbut. We think this finding was correct. *Ammons v. Dwyer*, 78 Tex. 640, 15 S. W. Rep. 1049.

The court below found that the title shown to Henry F. Fisher from De Cordova and Hurlbut was a superior outstanding title to that of the plaintiff; and also found that the power of attorney executed by the heirs of Hurlbut to Coryell did not authorize him to sell the land, but only the interest of the heirs therein. The effect of this latter finding is that the power of attorney did not authorize Coryell to execute such an instrument conveying the land under which the vendee could claim protection as an innocent purchaser. The correctness of both of these findings is challenged by the appellant. The appellant insists that the title from Hurlbut to De Cordova is simply an equitable title, and, as the defendants did not connect themselves with it, it cannot be set up as an outstanding title. The law is well settled that the outstanding title, with which the defendants do not connect, in order to defeat a recovery by the plaintiff, must be the superior outstanding legal title. The evidence upon this branch of the case is not certain. We cannot tell what was the character of the instrument executed by Hurlbut to De Cordova, or the nature of the estate created by it, and whether or not the land at the time the conveyance was executed was located and surveyed. The patent was issued some years after the time stated by the witnesses and found by the court as the date of the transfer. Some of them speak of the instrument as a transfer of the certificate, and others speak of it as a transfer of the certificate, and also the land. There is no fact stated in the record that tends to show whether the land was or was not located at the date of the transfer. The supreme court, in the case of *Abernathy v. Stone*, 81 Tex. 431, 16 S. W. Rep. 1102, have drawn the distinction and shown the difference between titles legal and equitable, such as are now under discussion. There it is held that a transfer of the certificate by the grantee, before location, simply creates an equitable title, and the issuance of the patent in the name of the original grantee does not by estoppel enlarge this title to one that is legal. *Howard v. Stubblefield*, (Tex. Sup.) 14 S. W. Rep. 1044. If the land is surveyed when the transfer of the certificate is executed, the legal title results to

the vendee upon the issuance of the patent, although it be issued in the name of the original grantee of the certificate. We cannot determine from the evidence the character of title created by the conveyance to De Cordova, and we make the uncertainty of the evidence in this respect one of the grounds for the reversal of the judgment.

The appellant next contends that he is an innocent purchaser of the land from League for value, without any notice, actual or constructive, of the existence of the transfer from Hurlbut to De Cordova, and that the power of attorney to Coryell authorized him to execute a valid deed conveying the land. The evidence shows that plaintiff, at the time he acquired his deed to the land, paid therefor a valuable consideration, and at that time he had no notice of the transfer executed by Hurlbut to De Cordova. The court finds, in its eighth conclusion of law, that the plaintiff had neither actual nor constructive notice at the time of his purchase of the outstanding title set up by the defendants. The transfer to De Cordova was not recorded when the appellant purchased. In view of this finding, it is evident that the court found against the plaintiff on this issue, because it did not consider that the power of attorney executed by the heirs of Hurlbut to Coryell authorized more than a conveyance of their interest or chance of title in the land, and, as their ancestor had parted with their interest, they had nothing to convey, and a purchaser from Coryell would purchase with a risk of the title being good. The deeds from Coryell to League and from League to appellant both convey the land, and are sufficient in form to protect each as an innocent purchaser, provided the other facts exist that entitle them to the right. The empowering clause in said power of attorney is as follows: "To investigate and discover, and by suit or other legal manner recover, any and all lands in the state of Texas to which we are or can become entitled, and the same, or any part thereof, by sufficient deeds in our names, sell upon such terms and conditions as to him, our said attorney, may seem prudent and good: provided, however, and it is so expressly enjoined, that our said agent and attorney, said Coryell, shall not create, cause, or incur any fee, cost, charge, or liability against us, or either of us, in the execution of this power, but all such costs, fees, and other liabilities and charges of whatsoever nature or kind, incidental to or growing under this power, he, the said Coryell, shall, at his own sole cost and risk, advance and pay." The power conferred upon the agent under this instrument is entirely different from and broader than that conferred by the instrument before the court in the case of *Hazlett v. Harwood*, (Tex. Sup.) 16 S. W. Rep. 310. Here the agent is permitted to investigate and discover and by suit or any other legal manner recover any and all lands in the state of

Texas to which the heirs are or can become entitled, and the same by sufficient deeds sell, etc. Here land is discovered by the agent to which these heirs are apparently entitled, and no claim is shown in any one else, nor is it known, nor can it be known by reasonable diligence, that their ancestor has parted with his title. If the heirs had directly, by a deed conveying the land, sold to League or the appellant without any notice to either of them of the prior transfer by their ancestor, either could have been protected as innocent purchasers, although the heirs in fact owned no interest in the land. The apparent title, under such circumstances, would be lodged in the heirs, and one purchasing from them, without notice of the previous transfer by their ancestor, would be protected as an innocent purchaser. *Holmes v. Johns*, 56 Tex. 48; *Zimpelman v. Robb*, 53 Tex. 280. The power in the instrument, so far as authorizing the agent to convey, except as to the creating of charges against the heirs, is equal to any authority or power that the heirs themselves could exercise in the matter. What they could do, or what their power was in the matter, they could confer upon their agent. It seems, in effect, to confer all the power that they may have or could exercise in the matter, except the agent is not authorized to create any liability or charge against them. A party purchasing under such an instrument as this power of attorney, when the apparent title is in the persons who execute it, may well assume that it is land that falls within the terms and meaning of the instrument. This instrument clearly authorizes the agent to sell the land, not only their chance or title to it. *Richardson v. Levi*, 67 Tex. 361, 3 S. W. Rep. 444; *Barnard v. Blum*, 69 Tex. 609, 7 S. W. Rep. 98. It is unnecessary for us to determine whether or not the power of attorney authorized the agent to create and execute a covenant of warranty binding upon his principals, because if the authority did not exist, it could only affect that part of the deed, and would not defeat the instrument as a conveyance of the land. 69 Tex. 612, 7 S. W. Rep. 98. As held in *Richardson v. Levi*, supra, the covenant of warranty is not essential to the instrument in order to give it effect as a conveyance. And, as said by the court in *Sydnor v. Roberts*, 13 Tex. 616, there is a marked distinction between that which confers the power to do a certain act and the rules which direct and regulate the mode of its exercise. If the former be wanting, the act done is a nullity; but, if the latter be not strictly pursued, the acts done, if they may be avoided at all, can only be by those who may have the right to avoid them.

On the issue of innocent purchaser, we would be disposed to reverse and render judgment in favor of the appellant, if it was not the uncertainty in the evidence as to re-

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lationship between Coryell and the plaintiff in effecting the purchase from League. There are some expressions in the testimony of the plaintiff that may convey the idea that Coryell was his agent in purchasing from League. We do not mean to say that the evidence establishes this fact, but simply hold that in this respect it is uncertain for whom Coryell was acting in the sale between League and appellant. Coryell did not testify, and it is not shown, that he did not have notice of the transfer to De Cordova. If he was agent of appellant in the purchase of the land, and had notice of such transfer, it would be in law notice to his principal.

We cannot at this time, in view of the uncertainty of the character of title conveyed by Hurlbut to De Cordova, determine the issue of stale demand raised by appellant's eighth assignment of error. If the transfer conveys the legal title, of course stale demand would not be an issue in another trial. If it conveys the equitable title, we leave the trial court to determine, upon hearing of all the evidence, whether, under the facts of the case, the claim is stale. We leave this question open. The judgment of the court below is reversed, and the cause remanded.

MEYER v. MILLER et al.¹

(Court of Civil Appeals of Texas. Nov. 22, 1898.)

BONA FIDE PURCHASER—POSSESSION—DESCENT AND DISTRIBUTION.

1. Possession of land by strangers is not notice to a purchaser from the record owner of an outstanding title in another, with whom the occupants show no privity.

2. Proof that a person is granddaughter of a decedent is not sufficient to show that she is entitled to inherit his real estate.

Appeal from district court, Llano county; E. L. Rector, Special Judge.

Trespass to try title by G. H. Meyer against W. A. H. Miller and others. From a judgment in defendants' favor, plaintiff appeals. Reversed.

Slator & McLean, for appellant.

FISHER, C. J. Most of the questions involved in this appeal have been passed upon in the case of *Meyer v. Hale*, 23 S. W. Rep. 990, (this day decided.) The same difficulty exists in this case as the one referred to in determining the character and the nature of the title conveyed by the transfer from Hurlbut to De Cordova. It was in connection with a deed executed by De Cordova to John Andrews, set up in the court below by the defendants as an outstanding title. The court held it to be an outstanding superior title to that of the plaintiff. In view of the uncertainty of the evidence justifying this finding, the judgment below will be reversed, and the cause remanded.

¹ Rehearing pending.

The questions raised in appellant's fourth assignment of error will not probably occur upon another trial, as the appellees will doubtless amend their answer, and set up the facts that show their possession in good faith. The answer, in this respect, should state the facts upon which the defendant relies as showing his possession in good faith. A special demurrer questioning it for this reason should be sustained.

As the case will be reversed, we will not pass upon the findings of the court as to the issue of improvements, and the character of the possession by Scott, and its effect as notice to League or the appellant, except that we will discuss it to this extent: The appellant does not in this case by his brief raise the same issue of innocent purchaser as was raised in the case of *Meyer v. Hale*. It seems that League, under whom the appellant claims by warranty deed, and who purchased from Coryell by a deed that conveyed the land as agent of the Hurlbut heirs, was informed by Coryell, at the time of his purchase, of some claim by the defendants under the transfer executed by Hurlbut to De Cordova. Of course, if League had notice of the transfer, the appellant could not claim any right as an innocent purchaser through the purchase by League. The appellant did not testify in the case, and it is not shown that he did not have notice of the existence of the transfer. The evidence does not show that the defendants were connected in any manner with the transfer to De Cordova, and their possession, we think, could not be notice of any claim or title with which they are not connected. The possession by them would not be notice of an outstanding title in another with whom they show no privity.

Mrs. Bettie McFarland is probably shown to be the granddaughter of John D. Andrews, the person to whom De Cordova conveyed; but this does not show that she is the heir entitled to inherit the estate of Andrews. The evidence upon her right in this respect did not go far enough. It was not shown that she was entitled to any part of the estate of John D. Andrews. The appellees who were in possession claim under her.

No question is raised in this case, nor was any raised in the case of *Meyer v. Hale*, as to upon whom rests the burden of proof on the issue of innocent purchase by the appellant without notice of the transfer to De Cordova.

Although it may be important to observe the rule of evidence in this respect, when the trial court determines the character of title created by the transfer to De Cordova, we will not discuss it,—except to refer to the following authorities,—as no question is raised concerning it. *Cameron v. Romele*, 53 Tex. 241; *Barnes v. Jamison*, 24 Tex. 362; *Johnson v. Newman*, 43 Tex. 642; *Hill v. Moore*, 62 Tex. 612; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. Rep. 380, and 5 S. W. Rep.

87; *Goode v. Jasper*, 71 Tex. 51, 9 S. W. Rep. 132; *Montgomery v. Noyes*, 73 Tex. 207, 11 S. W. Rep. 138. The first three of these cases cited decide upon whom the burden shall rest in a combat between the legal and equitable titles. The other cases cited show that the heirs of the patentee hold the legal title. If the contest is between two legal titles, we think that the burden rests upon the junior purchaser to prove the facts tending to show him an innocent purchaser. The judgment of the court below is reversed, and the cause remanded.

GRANT v. COLLINS.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

APPEAL BOND—TO WHOM MADE PAYABLE—VALIDITY.

In a suit to foreclose a mortgage, it appeared that the land had been conveyed by the original mortgagor, and the title had successively passed to each of several defendants, each one of whom had, in turn, assumed payment of the mortgage. G., in whom the title last rested, pleaded over against his grantor, asking that his purchase be canceled for fraud. A demurrer to this answer was sustained, and judgment rendered against defendants for the amount of the mortgage, and making each of defendants liable to his predecessor in title for such part thereof as the latter should be compelled to pay. G. appealed, assigning as error the sustaining of the demurrer to his answer. *Held*, that his appeal bond should be made payable to the other defendants, as well as to plaintiff, since they all were interested adversely to him.

Appeal from district court, Wichita county: George E. Miller, Judge.

Action by C. F. Collins against L. C. Grant and others to foreclose a mortgage. From a judgment for plaintiff, defendant Grant appeals. Dismissed.

Ashby James, for appellant.

HEAD, J. Appellee, as plaintiff in the court below, sued A. Newby, W. W. Flood, William McGregor, George A. Giddings, L. C. Grant, R. M. Moore, and J. P. Boyd, as defendants, and alleged that said Newby, on the 31st day of January, 1890, executed to said Flood his note for \$350, for part of the purchase price of lot 12 in block 177 of the town of Wichita Falls; that thereafter the said Newby conveyed said lot to said McGregor and Giddings, in part consideration of which they assumed and agreed to pay the note aforesaid; that thereafter the said McGregor and Giddings conveyed a part of said lot to said Grant, in part consideration of which he assumed and agreed to pay said note; that said Moore and Boyd claim a part of said lot; that said Flood had indorsed said note to plaintiff, who is still the owner thereof. The defendant Grant answered, denying plaintiff's allegations, and pleading over against his vendors, McGregor and Giddings, and asked that the trade be

tween them be canceled, because, as a part of said trade, they had promised to, and falsely represented that they would, within 12 months, erect upon that part of the lot not sold to appellant a two-story brick business house, which they had placed it out of their power to do by selling that part of the lot to other parties. A general demurrer was sustained to this part of appellant's answer, and judgment was rendered in favor of appellee against Newby, Flood, McGregor, Giddings, and Grant for the amount of the note, and against all of the defendants, foreclosing the vendor's lien on the entire lot; in favor of Moore and Boyd, requiring Grant's part of the lot to be first sold; in favor of McGregor and Giddings over against Grant for such part of the judgment as they may be compelled to pay; in favor of Newby over against Grant, McGregor, and Giddings, for such part of the judgment as he may be compelled to pay; and in favor of Flood over against Grant, McGregor, Giddings, and Newby, for such part of the judgment as he may be compelled to pay. Grant, alone, has attempted to appeal from this judgment, and has only made his appeal bond payable to the plaintiff, Collins. His most important assignment of error, however, relates to the action of the court in sustaining the general demurrer to his answer, seeking to have a cancellation of the deed to him from McGregor and Giddings. We think it quite too clear for argument that we have no jurisdiction of this appeal. The appeal bond should have been made payable to each of the parties to the judgment who were interested adversely to appellant, and it is plain that not only the plaintiff, but each of the other defendants, had such an interest. The bond is so wholly insufficient, in this case, that we must take notice of it, and dismiss the appeal, although no motion has been made by the adverse parties to this effect, and no brief has been filed in their behalf. *Young v. Russell*, 60 Tex. 684; *Meade v. Bartlett*, 77 Tex. 366, 14 S. W. Rep. 388; *Wright v. Bank*, 2 Tex. Civ. App. 97, 20 S. W. Rep. 879. The appeal is dismissed.

CREECH et al. v. DAVIDSON.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

TRESPASS TO TRY TITLE — PURCHASE FROM STATE — DEFICIENCY.

Plaintiff purchased from the state the east half of a certain surveyed section, and one of the defendants purchased the west half. It afterwards appeared that all of the east half, except 67 acres, was covered by a prior survey. The land commissioner had no knowledge of the conflict, and all parties thought each purchaser had a full half section. *Held*, that as plaintiff never intended to buy, and the state did not intend to sell him, any part of the west half of the section, he could not recover

from the defendants any portion thereof to make up the deficiency in the east half.

Appeal from district court, Fisher county; William Kennedy, Judge.

Trespass to try title by A. M. Davidson against Larkin Creech and M. B. White. Judgment for plaintiff. Defendants appeal. Reversed.

Beall, Ragland & Beall, for appellants. Thurmond & Yantis, for appellee.

STEPHENS, J. According to the original work of the Houston & Texas Central Railway Company in laying off block No. 2 in Fisher county, section 114 contained 640 acres. This work was done on the ground, and the northwest corner of this section was well established. It does not appear that any of the other corners or lines were marked. The course and distance called for gave a full section. In 1887, appellee purchased from the state the east half of the section, as thus constructed; and in 1889, appellant Creech, the west half. It was afterwards discovered that all of the east half, except about 67 acres, was covered by the John Chumney survey, located and patented long prior to the survey in question. In making these sales, the commissioner of the land office, as well as the purchasers, had no knowledge of the conflict, but believed the section to be full. The purchasers made their respective settlements and improvements on this theory. Upon discovering the shortage in the east half, appellee sued for and recovered 126 acres of the west half. Hence, this appeal. The case is without controverted issues of fact.

Our conclusion from the statement of facts, and the court's finding of fact, which we approve, is that the first purchaser from the state did not intend to buy, and that the state's officers did not intend to sell him, any part of the west half of said section, as originally laid off, and as understood to be bounded at the date of said sale. It follows from this conclusion, we think, that he was not entitled to recover from appellants any part of said west half. It is very clear that if appellee had made this survey, and located a certificate on its east half, he could not have claimed any part of the west half under such location, upon discovering a conflict with an older survey. Having selected, and undertaken to appropriate by purchase from the state, land as previously surveyed for another, he is in no better position than if he had originally laid off the land himself. The fact that a vendor does not have title to all the land intended to be sold does not authorize the purchaser to claim other land of the vendor, not the subject of the bargain and sale. In buying the 320 acres, the east half of a section as actually laid off on the ground, at a specified price per acre, appellee fixed his western boundary as definitely, in

the minds of the contracting parties, as if the dividing line had been run on the ground. As in all other controversies about boundary, the intention of the parties, as gathered from the language of their contract, and other proper sources, is controlling. *Arnold v. Cauble*, 49 Tex. 327; *Koenigheim v. Miles*, 67 Tex. 122, 2 S. W. Rep. 81. The act of 1887, under which these purchases were both made, conditioned the right to purchase this class of school land—agricultural—on actual settlement. *Hitson v. Glascock*, 21 S. W. Rep. 710, 2 Tex. Civ. App. 617. Such settlement, when once made, and followed by a purchase, could not be floated so as to include land not intended, at the date of such settlement and purchase, to be covered thereby. The intention to occupy the very land entered upon was an essential part of the settlement. If, through conflict of boundary and consequent mistake, less land was appropriated than appellee applied for, the law provided a remedy; and the land commissioner, in this case, offered to cancel the sale, and restore that part of the purchase money, with interest, already paid. When appellant Creech settled upon the west half, it was entirely vacant, and not even claimed by appellee, and by his settlement and purchase he acquired the superior right thereto. We conclude that it would be neither legal nor equitable to permit appellee's recovery to stand. The judgment will consequently be reversed, and here rendered for appellants.

WORLEY v. McINTIRE et al.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

STATEMENT ON APPEAL—SETTLEMENT AND SIGNING.

1.1 *Sayles' Civil St. art. 1379a*, provides that when a statement of facts is filed after time, and the party filing it shows that he used due diligence to obtain the judge's approval and signature and to file it in time, and that the delay resulted from causes beyond his control, the court shall allow said statement as part of the record. *Held*, that an affidavit that the statement was before adjournment presented to the judge, who agreed to approve and file it, but failed to do so, showed no sufficient diligence on the part of appellant, nor any reversible error of the judge, since appellant could have compelled him by mandamus to settle and sign the statement. *Osborne v. Prather*, 18 S. W. Rep. 613, 83 Tex. 208, followed.

2. An order refusing a new trial for newly-discovered evidence cannot be reviewed in the absence of a statement of facts to show the importance of such evidence.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by Julia F. McIntire and husband against S. T. Worley on promissory notes, and to foreclose a vendor's lien. Judgment for plaintiffs. Defendant appeals. Affirmed.

A. M. Green, for appellant. Potter, Potter & Giddings, for appellees.

HEAD, J. The statement of facts was stricken from the record by the supreme court before the case was transferred to us because it did not have the approval of the trial judge, and we are now asked to reverse the judgment upon a showing by affidavit that the statement of facts agreed to by the parties was presented by appellant to the judge before the adjournment of the term, who agreed to approve and file it, but neglected to do so, whereby, it is claimed, appellant has been deprived thereof without fault on his part. Since the passage of the act of 1887 (1 *Sayles' Civil St. art. 1379a*) this is not sufficient to require a reversal. *Osborne v. Prather*, 83 Tex. 208, 18 S. W. Rep. 613. The only other assignments relate to the action of the court in refusing appellant's motion for a new trial based upon alleged newly-discovered evidence. These cannot be considered in the absence of a statement of facts to enable us to judge of its importance. The judgment of the court below must therefore be affirmed.

ELLIS et al. v. ELLIS et al.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

DEEDS—EXECUTION—UNDUE INFLUENCE—RATIFICATION—PLEADING—ISSUES—INSTRUCTIONS.

1. After the execution of a deed to his wife, and her subsequent death, the grantor, as guardian of her children, treated the land as theirs; asked lawyers if the deed was sufficient to give them title, stating that, if it was not, he wanted to make it so. *Held* that, even if the deed was obtained by undue influence, there was a ratification of it.

2. The evidence being such that it must have been found that there was a ratification of the deed, the admission of improper evidence to this effect was harmless error.

3. In an action to set aside a deed on the ground of undue influence, plaintiffs are not entitled to have an instruction on the question of whether the deed was in fact a will,—for the reason that the grantee gave the grantor a life lease,—and, as such, invalid, no such issue having been raised by the pleadings.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by John Ellis and others against Rossa D. Ellis and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

Bell & Green, for appellants. M. B. Templeton and Potter, Potter & Giddings, for appellees.

HEAD, J. Conclusions of fact: On the 3d day of July, 1890, appellants, children and heirs of Roswell Ellis, deceased, by his first wife, instituted this suit against Rossa D. Ellis and Theodore Ellis, children of said Roswell Ellis, deceased, by his third wife, and their guardian, Samuel Hillburn, to set aside and cancel a deed executed by the said Roswell Ellis, deceased, to his third wife, Rebecca Ellis, on the 28th of Novem-

ber, 1885, conveying to said Rebecca about 1,900 acres of land in Cooke county, Tex., upon the ground that the said Rebecca had obtained said deed from her husband by means of fraud and undue influence. Appellees (defendants below) pleaded general denial, and that, after the death of the mother of the minor defendants, their father, when all pretense of undue influence had been removed, in the most solemn manner, often and repeatedly recognized and ratified said deed as valid. The evidence was sufficient to sustain the verdict in favor of appellees, both upon the ground that the deed was not originally voidable for fraud and undue influence in its procurement, and, if so voidable originally, it was ratified and confirmed by the grantor, with full knowledge, after such influence was removed.

It will be seen from our conclusions of fact that we are of opinion the evidence was sufficient to sustain the verdict, if based upon a finding that the deed in question was not procured by fraud and undue influence practiced and exerted by the mother of appellees upon her husband, their father. Roswell Ellis seems to have been a man of good business judgment, and, although there may have been considerable disparity between his age and that of his wife, the grantee in the deed, we see nothing in the record that would justify us in overruling a finding of the jury that this did not give her such influence over him as would invalidate his acts in making suitable provision for her, and his minor children through her, although done at her urgent solicitation. His other children seem already to have attained mature age, and we see nothing in the evidence to require a finding that Mr. Ellis' judgment was overreached when he made this deed.

But, if we be mistaken in these conclusions, we think the undisputed evidence of ratification by Roswell Ellis after the death of his wife was such as to require a finding in favor of appellees, even though the jury had been of opinion that he could have avoided the deed, had he desired to do so. It is not denied that he repeatedly spoke to the witness Samuel Hilburn, who seems to have been a particular friend, about having made this deed, both before and after the death of his wife, and at no time expressed dissatisfaction therewith. After the death of his wife, he, as guardian of appellees, filed an inventory of their estate, under oath, in which the land in controversy was included, and which they only claimed under the deed to their mother. Also, after the death of his wife, he had two conversations with an attorney in reference to said deed, in each of which he asked him if it was good, and sufficient to pass title to appellees, and said he wanted them to have the land, and if the deed was not sufficient he wanted it made sufficient, as he was afraid his older children would try to take the land away

from them. This evidence was undisputed, and there is nothing in the record to show that, at any time after the execution of the deed, Ellis ever manifested a desire to revoke it. Under these circumstances, he must be held to have ratified it, and the jury must have so found, regardless of their opinion as to the manner in which it was originally obtained.

In addition to what is said above, one of the appellees, Rossa D. Ellis, was permitted to testify, over the objection of appellants, that after the death of her mother her father brought the deed to her, and said "it was the deed to her land, and to take care of it, and to have her uncle Sam Hilburn, at Waxahachie, to see if it was a good deed." We think the court erred in admitting this evidence, (*Parks v. Caudle*, 58 Tex. 216;) but, as said above, the verdict must have been the same without it, and the error is therefore no ground for reversal.

Appellants also objected to the witness Sam Hilburn being permitted to testify to the statements made to him by the deceased, upon the ground that the witness was a party to the suit, as guardian of the other appellees. This evidence was not as "to any statement by or transaction with his wards," and we think was properly admitted; but, even if his testimony be excluded, we think the verdict must have been the same, and we therefore would not reverse the judgment. *Tucker v. Smith*, 68 Tex. 473, 3 S. W. Rep. 671; *Pridgen v. Hill*, 12 Tex. 374.

The instrument in question was, in form, a deed purporting to take effect at once, and convey an estate in fee simple, and the grantee on the same day executed to the grantor a lease to the same land during his life; and appellants requested the court to charge the jury that, in law, this only amounted to a will by the grantor, and would be invalid as such, the devisee having died before the testator. We think there was no error in refusing this charge—First, because no such issue was made by the pleading; and, second, because there was at least such doubt as to the nature of the transaction as to require the submission of this question to the jury. *Ferguson v. Ferguson*, 27 Tex. 339. We do not mean by this to decide that there was sufficient doubt as to whether this instrument was a deed or will to have entitled appellants, under proper pleading, to have this question submitted to the jury, but only that, at most, this was all they could have asked. *Hart v. Rust*, 46 Tex. 556.

Appellees object to our considering the assignments touching the rulings of the court upon the admission of the testimony of the witnesses Hilburn and Rossa Ellis, because it is claimed the bills of exception were not filed within 10 days after the rendition of the judgment. They, were, however, presented within 10 days after the overruling of the motion for a new trial, which was in

time. *Railway v. Joachimi*, 58 Tex. 452. The judgment of the court below will be, in all things, affirmed.

GRANT et al. v. ENNIS et al.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

NEGOTIABLE INSTRUMENTS — ACTION ON NOTE — PROOF OF OWNERSHIP — VENDOR'S LIEN — INDEFINITE DESCRIPTION — PAROL EVIDENCE TO CURE.

1. A note, payable to plaintiff or order, and indorsed in blank, and in plaintiff's possession, is prima facie evidence of her ownership; and a further indorsement on such note from one bank to another for collection tends to corroborate such ownership.

2. An indefinite description of land on the face of a vendor's lien note may be cured by parol evidence.

Appeal from district court, Wichita county; George E. Miller, Judge.

Action by M. L. Ennis and John E. Ennis against H. Plumb, W. M. McGregor, A. S. James, and L. O. Grant on promissory vendor's lien notes, and for foreclosure of the vendor's lien. Judgment against defendants Plumb and McGregor for the debt and against all defendants for foreclosure of the lien. Defendants Grant and James excepted, and appeal. Affirmed.

Appellants' assignments of error were as follows: "(1) The court erred in rendering judgment in favor of plaintiffs against defendants for the note, interest, and attorney's fees, and for foreclosure of vendor's lien as prayed for, because said note shows by its indorsements that M. L. Ennis, the payee, has parted with the title to same, and the evidence fails to show anywhere that she is the legal owner of said note, and is entitled to recover upon the same. (2) The court erred in rendering judgment foreclosing vendor's lien as prayed for in plaintiff's petition, because the notes here sued on fail to show that the land for which they were given is situated in Wichita county, and further fails to describe said land with sufficient certainty to support any judgment of foreclosure whatever."

Ashby S. James, for appellants.

STEPHENS, J. The material allegations of plaintiff's petition were sustained by the evidence; the suit being on two promissory notes, and to foreclose the vendor's lien. The notes were payable to plaintiff or order, and were indorsed by her in blank. When produced by her, and offered in evidence, they made a prima facie case of ownership, the same as if they had been payable to bearer. The further indorsement on one of them by the Chicago bank to the Texas bank for collection tended rather to corroborate than to disprove the ownership as alleged. *Johnson v. Mitchell*, 50 Tex. 212, etc., loc. cit.; 2 Daniel, Neg. Inst. § 1198; *Dugan v.*

U. S., 8 Wheat. 172. The indefinite description of the land in the face of the note was cured by oral testimony. These conclusions dispose of the assignments of error; and lead to an affirmance of the judgment.

WESTERN UNION TEL. CO. v. EVANS.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

TELEGRAPH COMPANIES — CONTRACT TO DELIVER MESSAGE — DELAY — DAMAGES.

1. The addressee of a telegram, in anticipation of its receipt, informed the receiving agent that he expected a message from his father, calling his mother and himself to the bedside of a sick brother; and the agent agreed to deliver the message to a person residing near the telegraph office, who was to take it to the addressee. *Held*, that the agreement of the agent was within the scope of his authority, and constituted a part of the contract with the telegraph company for transmission and delivery.

2. In an action by the sender against the telegraph company for delay in delivering the message, the company was not injured by an instruction making its liability depend on delivery, vel non, to the agreed person, without reference to the extent of diligence exerted to effect such delivery, where the testimony showed no effort whatever by the company to comply with agreement.

3. The injury to the feelings of plaintiff's wife, who was prevented by the delay from reaching her son before his death, was a proper element of damages, as she was one of the beneficiaries of the telegram, and plaintiff sent it, acting for his wife and sons, and informed the sending agent of the relationship of the parties, and of the urgency of the message.

4. In such case a verdict for \$2,500 damages will not be set aside as excessive.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by W. A. Evans against the Western Union Telegraph Company for delay in the delivery of a telegram. Judgment for plaintiff. Defendant appeals. Affirmed.

Field & Homan and Stanley, Spoons & Meek, for appellant.

TARLTON, C. J. This case has heretofore been before us on appeal. A judgment in favor of the appellee was then reversed on the ground, solely, of excessiveness. A second trial resulted in a judgment reduced from \$5,000, recovered on the former hearing, to \$2,500. The cause is now considered as an advanced case, on suggestion of delay. The opinion disposing of the former appeal will be found on page 298, 1 Tex. Civ. App. and on page 286, 21 S. W. Rep. We adopt the statement of the nature of the suit, as there made. We also adopt the conclusions of fact there found. Additional conclusions of fact, which may be appropriated, will be stated in connection with a discussion of the assignments of error to which they apply.

Appellant first complains of the eighth subdivision of the court's charge, as follows: "(8) If you believe from the evidence that

plaintiff's wife and the said A. C. Evans, or either of them, prior to the sending of said message, had an agreement and understanding with defendant's agent and operator at Mt. Vernon that said agent should deliver said telegram, when it arrived at Mt. Vernon, to Mrs. N. E. Foster, and if you further believe that, at the time of said agreement and understanding with said Mt. Vernon agent, the said agent was informed of the object, purpose, and importance of said message, and of the relationship existing between said parties, and if you further believe that said Mrs. N. E. Foster promised and agreed with plaintiff's wife and A. C. Evans, or with either of them, to deliver said message to said A. C. Evans when it should be delivered to her, and if you further believe that defendant's agent at Mt. Vernon did not deliver said message to said N. E. Foster, and if you further believe that, if said message had been delivered to said Mrs. N. E. Foster, she could and would have delivered the same to said A. C. Evans in time for plaintiff's wife to have reached the bedside of said Luther Evans before his death, and if you further find that, by reason of the failure of defendant's agent at Mt. Vernon to deliver said message to Mrs. Foster, plaintiff's wife was deprived of the opportunity and privilege of reaching the said Luther, and seeing him before he died, then, in addition to the amount of money paid for the transmission and delivery of said message, plaintiff would be entitled to recover such additional sum, if any, as the evidence may show would be a fair and just compensation for the mental pain and anguish suffered by plaintiff's said wife, if she did so suffer, on account of her failure to reach the said Luther before he died." The foregoing instruction is founded upon allegations in the plaintiff's petition, supported by evidence which the jury were authorized to believe, and which we conclude they did believe, to the effect that, in anticipation of the message in question, and with knowledge of the sickness of Luther Evans, and of the relationship of the several parties, and of the extent to which the movements of the mother, Mary C. Evans, and of the brother, A. C. Evans, depended upon the prompt delivery of the telegram, the agent of the company at Mt. Vernon agreed with A. C. Evans that upon receipt of the message he would promptly deliver it to Mrs. Foster, who resided in close proximity to the defendant's office. It was further alleged and proved that this agreement was not complied with, and hence the delay complained of. This agreement which the agent at Mt. Vernon had with A. C. Evans, a beneficiary in the message sent from Gainesville, must, we think, be considered a part of the contract entered into with the company with reference to the transmission and delivery of the telegram. The agreement is relied upon in the petition

as a ground of recovery. The defendant, in its pleadings, does not assail it as being without consideration, nor do we think it thus assailable. The agreement giving shape and direction to the manner of delivery at Mt. Vernon only facilitated the task of the company in effecting the delivery at this point, in accordance with the very terms of the message. We see no substantial reason excluding such an agreement from the scope of the authority of the agent at Mt. Vernon. If there be error in the instruction complained of, it is in that portion thereof making the liability of the defendant to depend upon the delivery, *vel non*, to Mrs. Foster, without reference to the extent of diligence exerted to effect such delivery. Under the evidence, however, we do not think that this hypothetical error could possibly have injured the appellant, because, conceding the fact of the agreement to deliver to Mrs. Foster, (and this issue is, in a preceding sentence of the criticised paragraph, properly submitted to the jury,) the testimony fails to disclose any effort whatever by the appellant to comply with the agreement. *Shumard v. Johnson*, 66 Tex. 71, 17 S. W. Rep. 398.

Appellant again complains that "the court erred in that portion of its charge wherein it submitted, as an element of damage, the injury to the feelings of plaintiff's wife, because the message, on its face, did not show that plaintiff had a wife, nor was there notice outside of the message of that fact, or that it was in contemplation of the defendant, at the time it received said message for transmission, that the feelings of plaintiff's wife would be in any way injured by a failure to deliver said message." The allegations of the plaintiff's petition, supported by evidence, show, in effect, not only that A. C. Evans and Mary C. Evans were the beneficiaries in the message declared upon, but that, in sending the message, W. A. Evans was acting as the agent of A. C. Evans, his son, and of his wife, Mary C. Evans, mother of A. C. Evans and of the sick son, Luther Evans, and that the relationship of the parties, and the urgent importance of the telegram, were expressly called to the attention of the company's agent at Gainesville. The language of the message was itself sufficient to challenge the attention of the company to its purpose and scope. The complaint is without merit. *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857; *Telegraph Co. v. Jones*, 81 Tex. 271, 16 S. W. Rep. 1006; *Telegraph Co. v. Carter*, 85 Tex. 580, 22 S. W. Rep. 961.

We overrule appellant's final assignment of error, complaining that "the verdict of the jury is excessive in amount, and more in the nature of punishment than compensation for the actual injury done the plaintiff." The doctrine that mental anguish, in the absence of physical pain or pecuniary loss, can be

considered as an element of actual damages, in cases of this character, is too thoroughly fixed in the jurisprudence of this state to justify its disturbance by this court. Nor are we prepared to agree with appellant's counsel that the record is void of evidence indicating indifference on the part of the company's employees with reference to the delivery of the message in question. The delivery was delayed for more than 24 hours, and this in spite of the fact, evidently,—and, under the testimony, reasonably found by the jury,—that great circumspection had been exerted by the plaintiff to avoid delay.

The line of demarcation is so shadowy between the minimum of excessiveness and the maximum of compensation, in verdicts of the kind here involved, that we decline to adopt the suggestion of the appellee that this appeal is prosecuted solely for delay. The judgment is affirmed.

SKEETERS v. SLATER MILLING CO.
(Court of Civil Appeals of Texas. Nov. 16, 1893.)

SALE BY AGENT—AUTHORITY—INTENT OF PARTIES.

1. Where cotton is left with an agent to be sold at the highest market price upon approval by the principal, a sale by the agent without the principal's consent conveys no title.

2. The acts alone of parties will not constitute a sale of personalty without the minds of the parties met, the one in an agreement to buy and the other to sell.

Appeal from district court, Nacogdoches county; James T. Polley, Judge.

Attachment by the Slater Milling Company against W. T. Skeeters. W. L. Skeeters claimed the cotton levied on by sale from defendant. Judgment for plaintiff. Claimant appeals. Reversed.

J. H. Truit and E. C. Branch, for appellant. Jennings, Lewis & Matthews, for appellee.

WILLIAMS, J. Appellee brought suit in the district court of Nacogdoches county against W. T. Skeeters, and sued out a writ of attachment, which was levied on 11 bales of cotton, the subject of this controversy. Appellant made claim to the cotton by making the affidavit and bond as required by the statute, and from the judgment against him in the trial of the right of the property that followed he prosecuted this appeal. Appellee, the plaintiff in attachment in the issues rendered, claimed both that at the date of the levy the property was his own, and also that it belonged to W. T. Skeeters, the defendant in attachment, and was subject to the levy. Appellant alleged title in himself. The question was raised in the court below, and is presented in this appeal, whether or not the plaintiff in the attachment in this proceeding could claim that the title to the

property was in itself, having attached it as the property of W. T. Skeeters, and alleging at the same time that it belonged to him. Inasmuch as, in our opinion, the evidence did not show a title in the plaintiff, we deem it unnecessary to decide this point. After carefully considering the evidence, we are constrained to hold that there was no sale of the cotton to the appellee prior to that to appellant and Daughtie by W. T. Skeeters, under which appellant claims, and that the court erred in holding that there had been such a sale. As we construe the transaction between W. T. Skeeters and Daughtie, it does not appear that there was an intention on the one part to sell to the other at that time, nor on the other to buy. This is evidenced by the facts that Daughtie was only permitted to realize upon the cotton by a future sale, and could not appropriate it in any other way; that he was empowered to sell only for the highest market price that could be obtained in Nacogdoches, and could not sell at any time, nor for any price, until he had consulted Skeeters. These facts are certainly inconsistent with the idea that the title passed to the plaintiff through the act of Daughtie as its agent, for they clearly evince the intent of the parties that absolute title and control should not pass out of Skeeters until a sale consented to by him had been made upon the market. A further circumstance in support of this view is that, when Skeeters proposed to sell to him, Daughtie declined to buy, and then the arrangement was made upon which appellee relied as a sale. The court below held that the facts shown constituted a sale, whether the parties intended it as such or not. In order to constitute a complete sale, the minds of the parties must have met in agreement on the one part to sell and on the other to buy. The intent that the title should pass must be gathered from the express agreement of the parties or from their acts. If there was no such meeting of the minds, there was no sale. A subsequent statement by one of the parties that he did not intend to sell, when the acts of both at the time of the alleged sale were such as to meet the tests applied by the law to determine whether or not the title had passed, would not control. But unless at the time the sale is claimed to have taken place the minds of the parties assented to it, there could be no sale, and, if the court meant to hold otherwise, its judgment was based upon an erroneous conception of the law. But the court found that the alleged sale by W. T. Skeeters to his father and sister, under which appellant claims, was fraudulent as to creditors, and, if this is true, appellee's attachment lien is, of course, superior to the claim of appellant. We are not satisfied with the evidence adduced to prove the fraud. There are some suspicious circumstances, but they are not inconsistent with the account of the

transactions given by the otherwise uncontradicted statements of appellant and of W. T. Skeeters. Without commenting upon them, the judgment will be reversed, and the cause remanded for another trial.

TEXAS & N. O. RY. CO. v. SKINNER.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

INJURY TO MINOR SERVANT—VOLUNTARY SERVICES—APPEAL.

1. Plaintiff's son, a minor, was employed by defendant railway company, with plaintiff's consent. While on a train with a message, at the request of the defendant's yard foreman, he attempted to uncouple a car, and was injured. He was under no obligation to obey the foreman. *Held*, that he was a mere volunteer, and could not recover.

2. Plaintiff sued defendant in her own right and as next friend of her minor son. Judgment was rendered for plaintiff as to the cause of action in her own right and for defendant as to the cause of action of the minor. Defendant appealed, filing a bond payable to plaintiff alone. Plaintiff filed no bond, and gave no notice of appeal. *Held*, that there was no appeal from the judgment as to the son.

Appeal from district court, Jefferson county; W. H. Ford, Judge.

Action by Sarah E. Skinner for herself and as next friend of her minor son against the Texas & New Orleans Railway Company to recover for personal injuries to him. A judgment was rendered for plaintiff as to the cause of action in her own right, and for defendant as to the cause of action in behalf of her son. Defendant appeals. Reversed.

O'Brien & O'Brien, for appellant. Greer & Greer, for appellee.

GARRETT, C. J. The appellee sued the appellant in her own right and as next friend of her minor son, Johnny Williamson, to recover damages for personal injuries received by the latter while helping to switch appellant's cars on its track at Beaumont. The son, who was about 17 years of age at the time of the injury, was, with the consent of his mother, in the employment of the defendant as call boy in its yard office, and his duties were to deliver messages from the operator's office to the freight office, roundhouse, and yard master, to call train crews, and to clear up the office. He sometimes had to get on a train to deliver messages, but had nothing else to do with them, or duties about them. He was hurt under the following circumstances: On August —, 1891, he was told by the operator to go down town for some ink and the mail. There was a switch engine and some freight cars standing ready to go down town, and the boy got on one of the cars. One Hodges was foreman of the yard, and in charge of the switch crew. When the train got near the freight depot, in order to switch off a car by the method known as "kicking," the foreman

told Williamson to pull the coupling pin, and when the latter did so the foreman signaled the engineer, and in taking up the slack Williamson was thrown off the car and hurt. There was no testimony to show that Hodges had the authority to employ servants. Williamson testified that he had been cautioned about riding on the trains, but was not told not to do so; that he was told he could do so by the station master and operator; but both of them testified that he was instructed not to do so. Hodges, the foreman, did not forbid him from getting on the train, and did not tell him to get off. His mother did not consent to his acting as a switchman. Upon the trial the court practically charged the jury to find for the plaintiff for damages in her own right if the boy went upon the train without the authority of his mother, and was injured in the manner stated; and the jury was further instructed, to return a verdict in favor of the defendant upon the claim for damages in behalf of the son. We do not deem it necessary to take up the appellant's several assignments of error, for they sufficiently raise the questions that we shall pass upon. The minor, Johnny Williamson, was employed as call boy in defendant's telegraph office at Beaumont with the consent of his mother, but, as she testified, she did not give her consent that he should be employed as a switchman; and if he was in fact at the time of the injury employed by the defendant as a switchman, the plaintiff ought to recover, because it would be a dangerous employment, and he was injured while engaged in the discharge of the duty of a switchman. *Railway Co. v. Brick*, 83 Tex. 526, 18 S. W. Rep. 947. We do not think, however, that the facts show that at the time of the injury Williamson was in the employment of the defendant as a switchman. He was casually upon the train, and did not go upon it for the purpose of acting as switchman, but only to ride down town. Hodges had no authority to employ him as switchman, or to require him to uncouple the cars. As shown by his own testimony, he knew that Hodges had no such authority, and that he was not obliged to obey him. Having got on the train merely to go down town, and having voluntarily performed a duty which devolved upon another of defendant's servants, although done at the request of the foreman of the yard, it cannot be held that Williamson was employed by the defendant in another and more dangerous service. Nor does this case come within the rule announced in *Eason's Case*, 65 Tex. 577. When Williamson uncoupled the cars he was not engaged in the performance of a service forwarding his own private interest. It is true that the defendant would owe some duty to even a trespasser on its train, but when Williamson undertook to perform the service which he did he became a volunteer, and, as such, a fellow servant with the

foreman and engineer, and the plaintiff cannot recover for injury caused by negligence on their part. As we understand it, the only theory upon which the plaintiff's judgment could be sustained on this appeal would be the one that the minor was employed by the defendant as a switchman; and as we do not think they show either an employment or an authority on the part of Hodges to employ, there is error in the judgment. We have discussed the other views of the case upon the assumption that the issue of negligence was submitted to the jury, but this was not done, and the judgment would have to be reversed, even if the facts should appear to bring the case within either of the other rules contended for.

Appellee has made a cross assignment of error, in which she seeks to review the judgment against her as next friend of her minor son. She did not except to the judgment, gave no notice of appeal, and filed no appeal bond; and the appeal bond filed in this case is made payable to her alone. We are of the opinion that there is no appeal from the judgment against her as next friend. The judgment of the court below will be reversed, and the cause remanded as to the appellee, Sarah E. Skinner, but the judgment against her as next friend of the minor, Johnny Williamson, will not be disturbed.

WOMACK v. SLADE.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

APPEAL—SERVICE OF CITATION IN ERROR.

Under Rev. St. art. 1395, requiring service of a citation in error to be made by delivering a true copy of the writ to defendant personally, which service shall be stated in the return, a return that the writ was served by delivering a true copy to the defendant is insufficient.

Error from district court, Panola county; W. J. Graham, Judge.

Action between E. F. Womack and Andy Slade, Jr. From a judgment, Womack brings error. Stricken from the docket.

H. N. Nelson and T. P. Young, for plaintiff in error.

WILLIAMS, J. The return of the officer upon the citation in error states that the writ was executed by delivering to the defendant a true copy of it. The statute requires that the service be made by delivering to the defendant in person a true copy of the writ, and that the return shall state how the service was made. Rev. St. art. 1395. Until it affirmatively appears that there has been legal service upon the defendant in error, this court cannot take cognizance of the cause. Such returns upon original citations have often been held insufficient, and the same rules apply here. *Batey v. Dibrell*, 28

Tex. 178, and authorities there cited. The case will be stricken from the docket until there has been proper service.

CASWELL et al. v. GREER et al.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

APPEAL—DEFECTIVE RECORD—EXCUSE—CORRECTION.

The fact that appellants were pressed for time, after getting the transcript, to get it filed within the required time, and did not discover the absence of the judge's certificate of approval of the statement of facts, though they examined it carefully, is not a sufficient excuse for failure to have the omission corrected and the record complete before the cause was submitted on appeal, where it was not submitted until about eight months after the transcript was filed.

On rehearing. Motion overruled.

For report of decision on appeal, see 23 S. W. Rep. 331.

WILLIAMS, J. In the decision of this case the statement of facts was ignored, because there was no certificate of approval by the trial judge attached to it. Appellants have made a motion for a rehearing, showing that there is a certificate to the statement of facts in the district court which was inadvertently omitted by the clerk in making the transcript, and have asked for a certiorari to perfect the record. It has long been the rule that the parties to an appeal must see that the record is complete before the cause has been submitted, and the court, after it has decided the cause, will not allow it to be reopened in order to bring up matter that should have been embraced in the transcript. *Ross v. McGowen*, 58 Tex. 608; *Railway Co. v. Scott*, 78 Tex. 360, 14 S. W. Rep. 791; *McMickle v. Bank*, (Tex. Civ. App.) 23 S. W. Rep. 428. The excuse offered by appellants for their failure to comply with this rule is insufficient. The substance of it is that they were pressed for time, after getting the transcript, to get it filed in this court within the time in which they were required to file it; and that, though they examined it carefully, they did not discover the omission of the judge's certificate. A complete answer to this, without looking further, is that the cause was not submitted for about eight months after the transcript was filed, during all of which time it was within the power of both parties to examine and perfect the record. If a sufficient excuse could be given for such an omission after the decision of the cause, appellants have not done so, and the motion is overruled.

GULF, C. & S. F. RY. CO. v. KOSKA et al.
(Court of Civil Appeals of Texas. Nov. 16, 1893.)

APPEAL—HARMLESS ERROR—REVERSAL.

Where, in an action against a railroad company for killing plaintiffs' mule, it appears

that the mule was struck by defendant's engine at a place where the track should have been, but was not, fenced, a judgment for plaintiff will not be reversed on account of errors committed on the trial, since no other judgment could have been rendered than was rendered.

Appeal from Austin county court; S. R. Blake, Judge.

Action by J. L. Koska & Son against the Gulf, Colorado & Santa Fe Railway Company to recover damages for the killing of a mule by a train on defendant's railroad at a place where defendant's track should have been fenced. A judgment for plaintiffs was affirmed without a written opinion, and defendant moves for a rehearing. Motion overruled.

J. W. Terry and Chas. K. Lee, for appellant. Bell & Shelburne and Davidson & Minor, for appellees.

GARRETT, C. J. We affirmed the judgment of the court below in this case without a written opinion, because we thought that upon the record no other judgment should have been rendered, and, there being a pressure of business upon the court, we deemed it unnecessary to write out our decision of the different questions presented. The charge of the court was erroneous in the respects complained of, and Koska's evidence as to the promises of Craig was inadmissible; and, as counsel for the motion contends, the judgment should be reversed, unless the evidence showing that the defendant was liable, because its track was not fenced, is undisputed. No reason is shown why the track should not have been fenced up to the crossing at the depot between the two crossings. Dr. Schenck testified in substance as to the accident that the mule was killed between 10 and 12 o'clock at night. He was in his office, about 200 feet west of and nearly opposite the depot, and heard a train coming south at a very rapid speed; so fast that it caused him to raise up and look through one of the windows. When the train reached the depot, he heard it make three or four very quick whistles, as though it was trying to scare something off the track. It seemed to increase its speed just after the whistle was blown, and did not stop. Just after it passed the depot, witness heard a noise there, which sounded like an animal kicking or struggling, and next morning early he went to the depot, and found that it was plaintiff's mule that had been struck by a train, lying near the depot. The place where the mule was killed is a crossing adjoining the depot platform. Schenck's evidence that the public necessity required it to be left open, referred only to the crossing. He stated that public necessity did not require the track and right of way to be left open between the crossings. John Wilks testified that he lived about 60 yards from the depot. He saw the train pass through Kenny, going at a very rapid rate, and heard it whistle

two or three times near the depot where the mule was killed. He went next morning, and saw the mule, and saw evidence that it had been dragged on the track about eight steps above the crossing at the depot platform. John Stennett saw the mule the next morning after it was killed. It was against the platform. He saw evidence where the mule had been dragged on the track, which showed that it had been struck 8 or 10 yards north of the crossing at the depot. J. Rotkarock was the engineer on the engine pulling the train that killed the mule. He said the mule ran from the left side of the train to the front of the engine about 30 feet from the engine. He gave the stock alarm, and endeavored to stop the train. He saw the mule before striking it, about time sufficient for the engine to run 30 feet. He only saw the animal as it was getting on the track in front of the engine. Dr. Schenck's statement that the mule was killed at the crossing, and Stennett's that the mule was lying against the depot platform, are not in conflict with the evidence of Whitten and Stennett, showing that the mule was struck about 8 or 10 yards north of the crossing. There is nothing to show that the defendant should be relieved of its duty to fence its track north of the depot crossing; on the contrary, it affirmatively appears that there was no reason why it should not have been fenced. It appearing by undisputed testimony that the mule was struck by the train or engine at a place where the track should have been fenced, the errors committed on the trial below became immaterial because no other verdict should have been rendered upon the evidence. The motion for rehearing will therefore be overruled.

FRANKLIN v. CAMPBELL et al.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

TRESPASS TO TRY TITLE—ALLOWANCE FOR IMPROVEMENTS.

In trespass to try title, defendant may be allowed for improvements made by him while a possessor in good faith, he having held a deed from the tax collector purporting to convey the land for taxes due by the unknown owner.

Appeal from district court, Llano county; W. M. Allison, Judge.

Trespass to try title by Alexander Campbell and others against Percy Franklin. Judgment for plaintiffs, with allowance to defendant for improvements. Defendant appeals, and plaintiffs file assignments of cross errors. Affirmed.

The other facts fully appear in the following statement by KEY, J.:

Plaintiffs sued appellant, defendant below. August 22, 1889, in district court of Llano county, in trespass to try title for a third of a league of land in said county, granted to James Campbell as a headright, and pat-

ented to James Campbell on July 3, 1847. They claim title as heirs of James Campbell. They alleged the value of the use and occupation of the land to be \$500 annually, and asked judgment for that sum from January 1, 1888, the alleged time of eviction. Defendant answered by plea in abatement that plaintiffs claimed as heirs of James Campbell, and that administration was pending on his estate; not guilty; and statute of limitation of five years, and improvements in good faith. Plaintiffs, by supplemental petition, denied the pendency of administration, and that James Campbell's estate was unsettled. Defendant's plea in abatement was overruled, to which he excepted. After trial on the merits, judgment was rendered in favor of plaintiffs for the land and in favor of defendant for \$829.40 for his improvements; that being their value after deducting the value of the use and occupation for a period from two years before suit to date of judgment. Defendant assigned errors and appeals. Plaintiffs filed cross assignments of errors.

Miller & Lauderdale, for plaintiffs. Harwood & Harwood, for defendant.

Conclusions of Fact.

KEY, J., (after stating the facts.) 1. The land in question was granted and patented by the state of Texas to James Campbell on July 3, 1847. (2) James Campbell, the grantee in the patent above referred to, was killed by the Indians in 1840 or 1841, and the plaintiffs in this suit are his only heirs. (3) Administration was opened on said Campbell's estate in Gonzales county, where he resided at the time of his death; but said administration had been closed long before, and was not pending when, this suit was brought. (4) The judgment appealed from contains the findings of the court below on the defendant's claim for the value of improvements, except that it does not specifically find that he was a possessor in good faith when he made the improvements. However, the judgment rendered involves such a finding, and we cannot say that it is not supported by testimony. We adopt the findings embraced in the judgment.

Conclusions of Law.

1. The administration on James Campbell's estate having terminated before this suit was begun, the court below correctly overruled appellant's plea in abatement.

2. Appellees having shown that they were the heirs of the James Campbell, to whom the land was patented, and there being no evidence to show that Campbell ever parted with his title to the land, the judgment awarding it to appellees is correct.

3. Appellees' cross assignment cannot be sustained. The finding of the trial court that appellant was a possessor in good faith when he made his improvements is not without

testimony to support it. The case cited in 69 Tex. 614, 7 S. W. Rep. 486,—*Parish v. Jackson*,—is not entirely similar. In that case the defendant's grantor had no pretense of title from any one who ever owned the land. In this case appellant's grantor held a deed from the tax collector, purporting to convey the land for taxes due thereon by the unknown owner. We find no error assigned, and affirm the judgment.

RIO GRANDE R. CO. v. CROSS et al.
(Court of Civil Appeals of Texas. Nov. 30.
1893.)

Additional findings of fact.

For opinion, see 23 S. W. Rep. 529.

GARRETT, C. J. In response to the motion of appellant for additional findings of fact in this case and companion cases Nos. 315 and 316, (23 S. W. Rep. 531,) we find that the deed of trust or mortgage mentioned and in evidence contained the provisions set out in the second section thereof as the same appears in the record, and is referred to as a part of our findings; also that the bills of lading were executed as set forth in the record, and the same are referred to as a part of the findings of the court. The clerk will copy the foregoing references, and attach them to this supplemental finding of fact.

Second Clause Deed of Trust.

"In case default shall be made of any interest, or any of the aforesaid bonds issued according to the tenor thereof, or in any requirement to be done or kept by the Rio Grande Company, and if such default continue for the period of six months, it shall be lawful for the said trustees, or the survivor of them, or their or his successors, personally or by their or his attorneys or agents, to enter into or upon all and singular the premises hereby conveyed or intended so to be, and each and every part thereof, and to have, hold, and use the same, operating by their or his superintendents, managers, receivers, or servants, or other attorneys or agents of the said railway, and conducting the business thereof, and making from time to time all repairs and replacements, and such useful alterations, additions, and improvements thereto, as may seem to them or him to be judicious, and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same or of every part thereof, and, after deducting the expenses of operating the said railway and conducting its business, and all of the said repairs, replacements, additions, alterations, and improvements, and all payments which may be made for taxes or assessments prior to the lien of these presents upon the same premises, or any part thereof, as well as a just compensation for their or his own serv-

ices, to apply the moneys arising as aforesaid to the payment of interest in the order in which such interest shall have become due or shall become due ratably to the persons entitled thereto, and, after paying all interest which shall have become due, to apply the same to the satisfaction of the principal of the aforesaid bonds which may be at that time due and payable, ratably, and without discrimination or preference, and, after the said interest and principal so in default shall have been duly paid, then the trustees shall restore the possession of the railway, its franchises and appurtenances to the said Rio Grande Railway Company and its successors: provided, that if at the time the said trustees, by reason of such default, shall take possession of and enter into the premises hereby conveyed or intended so to be, the yearly tolls, freights, incomes, rents, issues, and profits of such railway shall not exceed the yearly expenses, costs, outlays, repairs, replacements, alterations, additions, and improvements and other disbursements of operating said railway, then, and in that case, it shall be lawful for the said trustees, or the survivor of them, or their or his successors, personally or by their or his attorneys or agents, to proceed to sell for cash all and singular the premises hereby conveyed or intended so to be, at public vendue, at Brownsville, aforesaid, by giving sixty days' notice of the time and place of sale by insertion once per week in a daily newspaper of large circulation in the said city of New York, and in some newspaper, if any, in the said city of Brownsville, and by conforming in all other respects to the statutes of the state of Texas regulating the sale of real estate under execution."

Bill of Lading.

"Through Bill Lading via Rio Grande Railroad and Morgan's Line Steamers and Morgan's Louisiana & Texas R. R. Brownsville to New Orleans, with Liberty to Tranship at Galveston. Brownsville to New Orleans. Shipped, in apparent good condition, by J. S. & M. H. Cross, on the Rio Grande Railroad, (to be lightered by steam or sail lighters from Point Isabel to ship's side at Brazos, Santiago,) for delivery to the Morgan Line, now lying at the port of Brazos, Santiago, and bound for Morgan City, La., or New Orleans, La., via Texas port or ports, the following articles, being marked and numbered as below, to be carried by the said steamer to the port of New Orleans, or to the port of Morgan City; thence by Morgan's Louisiana and Texas Railroad to the port of New Orleans, as the agents may determine, (with liberty to lighter, to cross all bars, to call at any port or ports for whatever purpose, to sail with or without pilots, and to tow and assist vessels in all situations,) the following articles, being marked and numbered as below, to be conveyed upon said steamship direct, or transhipped, as

aforesaid, unto the port of New Orleans, in like good order and condition, (the acts of God, the country's enemies, fire at sea or in port, accidents to or from machinery, boilers, or steam, restraint of government, pirates, robbers, or thieves, collisions at sea or in port, and all and every danger of the seas, river, and steam navigation of whatever nature or kind soever excepted; and neither the ships nor owners thereof being liable for loss from any of the causes above excepted,) and to be there delivered within reach of the steamship's tackles unto Wells, Fargo & Co.'s Express, Morgan City, La., or to his or their assigns, upon the payment by him or them of the steamship's freight, in the currency as entered in the margin hereof, with primage and average accustomed, from Brazos, Santiago, to New Orleans, at the rate of

	1st Class.	2nd Class.	3d Class.	4th Class.	Special.
Rates in cents per hundred lbs.					

"It is expressly stipulated that the articles named in this bill of lading shall be at the risk of the owner or consignee thereof as soon as delivered from the tackles of the steamer in the aforesaid port of New Orleans; and they shall be received by the consignee thereof, package by package, as so delivered, and, if not taken away without delay, they may (at the option of the steamer's agent) be sent to store, permitted to lay where landed, or returned to the port of shipment, at the expense and risk of the aforesaid owner, shipper, or consignee. The collector of the port is hereby authorized to grant a general order for its discharge immediately after the entry of the steamship at the customhouse. And it is further expressly stipulated that, in case any claim shall arise against the steamship or owners thereof for any loss or damage occurring to said merchandise while on the voyage from Brazos, Santiago, to New Orleans, such claim, in all such cases to be based upon the value of the articles at the port of shipment upon the date of shipment, shall be preferred at the office of the agent of the steamship at New Orleans within three days after the merchandise shall have been delivered, and, in case such claim, whatever it may be, shall not be preferred within the time at the place designated, such loss or damage shall be deemed to be waived, and the steamship and the owners thereof shall be discharged therefrom. And it is further expressly stipulated that in case the steamship shall be detained by quarantine at any of the ports, and there discharge the articles named in the bill of lading, that all risk and liability to the steamship or the owners thereof shall

cease, and the obligation of the steamship under this bill of lading be deemed to have been fully accomplished, when the articles shall have been delivered from the tackles of the steamship; and all risks and expenses incurred thereafter shall be on account of the owner, shipper, or consignee. And it is further expressly stipulated that the steamship, and the owners thereof, shall not be liable for loss or damage from leakage, rust, heat, breakage, or natural decay of goods, or damages to the packages from said causes, or for unavoidable exposure to the weather, and that the steamship and the owners thereof shall not be responsible for gold, silver, precious stones, or metals, jewelry, or treasure of any kind, unless bills of lading in which the value of the articles stated are signed therefor, weights, contents, and value unknown. The acceptance hereof recognizes this as the contract binding both carrier and shipper. In witness whereof the agent of said steamship hath signed 4 bills of lading, all of this tenor and date, one whereof being accomplished the others to stand void.

Marks and Numbers.

Garner & Co.
N. Y.

Brownsville, Texas,
Jany. 19, 1891.

Articles.

(1) One box, sealed, and said to contain silver coin valued at twelve hundred and thirty dollars (\$1,230.00) U. S. Cy. Insured for same amount from Brazos, Santiago, to Morgan City, under open policy of Morgan's La. and Tex. R. R. & S. S. Co. Wm. B. Kingsley, Agent."

Insurance..... 4.61
Freight from Brazos 6.15
Primage..... .30
Payable in.....11.06

The bills of lading for each of the other three articles (viz. five bags, sealed, and said to contain silver coin, valued at \$4,100 United States currency; one package, sealed, and said to contain gold coin valued at \$500 United States currency; and four bags, sealed, and said to contain silver coin valued at \$3,230 United States currency) are in the same words as the above.

LIPSCOMB v. PARKER.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

APPEAL—REVIEW—EVIDENCE.

In an action for money alleged to have been deposited with defendant, plaintiff testified that he left it with defendant for safe-keeping merely; that it belonged to him as guardian of his minor children, and that defendant knew this fact, and had refused to pay the money over to plaintiff on demand. Defendant testified that the money had been left with him to be used in the business of an association of which he was manager, and which had since become insolvent. *Held*, that a finding by the trial court in plaintiff's favor would not be disturbed on appeal, where it further appeared that no credit had ever been given

plaintiff for such sum on the books of the association.

Appeal from district court, Robertson county; O. D. Cannon, Judge.

Action by J. W. Parker against S. J. Lipscomb for money alleged to have been deposited by plaintiff with defendant. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Simmons & Crawford, for appellant. James D. Gann, for appellee.

FISHER, C. J. Appellee, Parker, recovered a judgment against the appellant, Lipscomb, for the sum of \$196.62. The assignments of error attack this judgment because the evidence did not warrant it. The appellee's case consists of a deposit made by him with appellant, Lipscomb, of a sum of money, to be held by Lipscomb subject to the call of appellee. Appellant denies this in part, and says that the money left with him by the appellee was not deposited with him personally, but was left with him simply as agent for the Franklin Co-operative Association as a general deposit, and that the association had authority to use the money, and it was used by the association, and that it, and not the appellant, is liable to appellee. The evidence in the record coming from the appellee is as follows: "I am the plaintiff in this case. I knew S. J. Lipscomb, the defendant, in 1889, and for some years prior thereto. Mr. Lipscomb was manager of the Franklin Co-operative Association, doing business in Franklin. Some time in the fall of 1888 or spring of 1889 I left with Mr. Lipscomb, for safe-keeping, a note for \$250.00. When it matured it had accumulated \$25.00, making in all \$275.00. The note was made payable to me as guardian for my minor children. Their names were all mentioned in the body of the note. I was guardian of my minor children, appointed by the county court of Robertson county, and the note above mentioned was given by Tobe Johnson, of Fort Worth, Texas, in part payment of the purchase money of a tract of land that I had sold him as guardian of the estate of my minor children. I had sold the land for \$800.00, had received \$300.00 cash, and two notes for \$250.00 each, payable in one and two years, with ten per cent. interest. I paid out the \$300.00 to the heirs who were of age, and took their receipts, and I turned the notes and receipts over to S. J. Lipscomb, to be put in his iron safe, for safe-keeping, because I had confidence in him, and he was my bondsman. When I collected the second note I paid it out to two of the heirs, who had become of age, and took their receipts, and to the older heirs, and took their receipts, and had Lipscomb place them with the other papers. When the second note became due, I called on S. J. Lipscomb for it, and he told me he had already sent it off for collec-

tion. I thought strange of this, as I had not authorized him to sign my name, and next time I came to town he told me the money had come, and he had placed it in Decherd's Bank. I told him to get it, as I wished to pay Mr. Moore, one of the heirs. He went and got the money, and handed me \$108.00, the amount then due the heirs, and told me, as Mr. Moore was indebted to the association, that he preferred I would settle with him somewhere else, as, if he was settled with there, it might look like it was done with the purpose to collect the debt. I took the money, and went to Mr. Kellogg's, and paid Mr. Moore \$33.00, his share, and took his receipt. I left the balance of \$167.00 with Mr. Lipscomb in the safe. I did not want to take the money home with me, and so left it with him for safe-keeping, and told him to give me a receipt for it, which he did. [Receipt was here exhibited to witness.] That is the receipt Mr. Lipscomb gave to me, and it shows Mr. Lipscomb collected \$275.00, and paid me \$108.00, and that at the date of the receipt he owed me \$167.00 on this deposit, and he owes me this \$167.00 now. I have frequently asked him for this money, and he always told me he would see that I got it. I might have asked him for this money one or two months after the date of the receipt. I am not certain as to the time. I did not place this note with Mr. Lipscomb to be used in the business of the association; neither did I authorize Mr. Lipscomb to collect the note; and when I left the money with him it was for safe-keeping, he being my bondsman, and not to be used in the business. Lipscomb knew that this money belonged to minor children, and that I had no authority to lend it. Some time in January, 1889, I had assisted the association, and turned over to Mr. Lipscomb \$50 in cash, to be used in the business; and I also turned over to him a note on John Drennan for \$201.90. I let him (Mr. Lipscomb) have the Drennan note to put in the bank as collateral to borrow money to be used in the business. I told Lipscomb then not to cash that note, but to place it as collateral; but as soon as I had indorsed said note and delivered it to him, he cashed it. He gave me a receipt for the Drennan note." Plaintiff here read in evidence the receipt of the Drennan note, which was as follows: "Rec'd of J. W. Parker fifty dollars cash and one note on J. H. Drennan, of Calvert, for \$325.50, int. 10 per cent. from Feb. 14, 1888, due Jan. 1, 1889, with credit on back \$123.10. Bal. 201.90 for deposit. S. J. Lipscomb, Agt. F. C. A." "I simply left the money with Mr. Lipscomb. Don't know whether you call it a general or special deposit. I left it there for safe-keeping, and told him to give me a receipt, which he did. I did not read the receipt, because my eyes were bad, and I had not read a receipt for ten

years on account of my eyes, and, in addition, I then had confidence in Lipscomb. Mr. Lipscomb had no authority from me to use the money. It was to be paid back to me whenever I demanded it. I do not know when I first demanded it. It might have been one month or two months after I left it there, or it might have been longer. I know I demanded it in April, 1890, when the association suspended. He always told me that he would see that I got it. He told me that when crowded by creditors he always went to the safe and got any money he found there. I did not care what money I got back, so I got good money back. I am a stockholder in the Franklin Co-operative Association, and in 1889 and 1890 was also one of the directors. I do not know whether the association is solvent or not; there are enough good claims on the books when collected, to pay all the debts. The bulk of the stockholders are solvent men, but they are only bound to the amount of their stock, and they will lose all their stock. Mr. Lipscomb had no authority from the board of directors to receive money on deposit, and issue deposit slips, nor to negotiate and hypothecate notes as manager of the Franklin Co-operative Association; and, if he used the money that I left there in paying the debts of the association, he acted without any authority. I did not read the receipt. My eyes were bad, and I had confidence in Lipscomb, and had not read a receipt for ten years. I have known Mr. Lipscomb a long time, and had the utmost confidence in him up to that time. Mr. Lipscomb gave me the receipt on June 4, 1889, and it was on that day that I settled with Mr. Moore." Plaintiff next read in evidence the deposit slip, to wit: "Rec'd, Franklin, Texas, May 10, 1889, of J. W. Parker, the sum of \$275.00 on deposit, less \$33.00 pd. J. M. Moore, \$75.00 pd. J. W. Parker for heirs. Total pd., \$108.00. Balance due to this date, \$167.00. June 4, 1889. Signed, S. J. Lipscomb, Agt. F. C. A." "The \$201.40 note S. J. Lipscomb testified about in his deposition is a different note entirely from the \$250.00 note given to me as guardian for my minor children. The note he testifies about in his deposition is the Drennan note for \$201.40. I let him have it to use in the business. I also let him have another \$50.00 note and \$50.00 cash to be used in the business. At the time I left the \$167.00 with him on deposit, the store owed me, and, I suppose, owes me yet. I have never been able to get a settlement with them. This \$167.00 was never placed to my credit on the books. I also put in the store four 55-gallon barrels of syrup, for which I have never had any credit. As I stated before, I just left this \$167.00 with S. J. Lipscomb in the iron safe for safe-keeping, as I preferred not to carry it home. S. J. Lipscomb was on my bond as guardian, and knew that the \$167.00

belonged to my wards, and that he had no right to use it anyway, and I had no idea at that time that he would use it."

G. R. Dunn testified for plaintiff: "I am an expert bookkeeper. Have had considerable experience in keeping books. I examined the ledger of the Franklin Co-operative Association to see whether J. W. Parker was ever given credit for the \$167.00 left on deposit with S. J. Lipcomb, and found he was not given credit with the \$167.00; but he was given credit with the \$201.40 Drennan note. I consider the ledger the proper place to look for this credit. The ledger was loosely kept. I did not examine any other books. I considered the ledger the proper place to look for this entry. I examined said J. W. Parker's account carefully, and he is not credited with the \$167.00."

This testimony, in most of its material features, is contradicted by the evidence of the appellant. The trial court had the right to determine the credibility of the witnesses and the weight that should be given their testimony. It has resolved this right in favor of giving credence to the case made by the evidence of appellee; and, in view of this fact, we cannot disturb that judgment, as we think the evidence of Parker amply sustains it. If he is to be believed, the appellant was personally liable for the amount received. The judgment of the court below is affirmed.

CITY OF LLANO v. LLANO COUNTY.

(Court of Civil Appeals of Texas. Nov. 10, 1893.)

MUNICIPAL CORPORATIONS—ABATEMENT OF NUISANCES—DEDICATION.

1. A municipal corporation, being a governmental agency intrusted with the care and superintendence of the highways and public squares within its boundaries, may sue a county to enjoin it from maintaining a nuisance on one of the city's public squares.

2. A dedication by a county of a public square in a city for the use of the public, with a right reserved in the county to use it for courthouse purposes, gives the county no right to erect thereon a jail and a cesspool, and the city has the right to abate such use of the square by the county as a purpresture and public nuisance.

3. A dedication of land by a county to the public use as a public square will not fail because the city for whose benefit it was intended was not in existence at the time of the dedication, since the city, on springing into existence as a municipal corporation, is by operation of law invested with the control for the use of the public, of all highways and public grounds within the corporate limits, subject to such reserved rights as may exist in favor of the county.

Appeal from district court, Llano county; W. M. Allison, Judge.

Action by the city of Llano against Llano county to abate a nuisance. A demurrer to the petition was sustained, and plaintiff appeals. Reversed.

Chas. L. Lauderdale and R. H. Connerly, City Atty., for appellant. W. C. Linden, Co. Atty., for appellee.

FISHER, C. J. This is an action by the city of Llano against the county of Llano to abate and remove the county jail and the cesspool in connection therewith from the public square of the city of Llano, they being an obstruction on said public square in the nature of a purpresture and public nuisance; and also an abatement of the cesspool as a nuisance, resulting from its improper construction, whereby noxious gases arising from human faeces deposited therein are dangerous and deleterious to the public health of the citizens of said city. The court below sustained a general demurrer to the petition, and also a special demurrer to the effect that it does not appear that the city of Llano has "such an interest in the subject-matter of said suit as would entitle it to any relief." The city of Llano declining to amend, its suit was dismissed, and judgment rendered that appellee, the county of Llano, "go hence with its costs." From this judgment the appellant appeals.

The petition, in effect, alleges that in the year 1858 the county of Llano, owning the survey upon which the city of Llano was located, caused the survey to be surveyed and divided into lots, blocks, and streets and one public square, and that at said time the said county did dedicate to the public and to public use the said streets and said public square, and that said public square was to be used as a public square, and as a site for a courthouse. It is also alleged that lots and blocks were thereafter sold with reference to said streets and public square, and that many individuals became the purchasers thereof, and that said dedication was accepted by the public; that said public square is situated in the most densely populated portion of said city. Then follow these averments: "About the year 1863, defendant did wrongfully and unlawfully cause to be constructed and erected upon said public square a common jail, which jail constituted no part of the courthouse, and in connection with said jail did then cause to be constructed a cesspool. Thereafter defendant did use, and now continues to use, and to wrongfully and unlawfully maintain, said common jail for the reception and incarceration of criminals, and said cesspool for the reception and deposit and retention of human defecations, offal, and other effete and noxious matter. The construction and maintenance of said jail upon said public square constitutes in itself a use of said public square inconsistent with, and in violation of, said dedication, and the same is an unlawful encroachment upon and obstruction of said public square. That the manner of construction and use of said cesspool is in itself a use of said public square

inconsistent with and violative of said dedication. Said cesspool is improperly constructed, and is used by defendant, and defendant threatens to and will, unless restrained, continue to use said cesspool, for the reception and retention of human excrement, offal, and other noxious and effete matter, and is, by reason of such construction and use, dangerous and deleterious to the public health, and is a common and public nuisance, situated in the most densely populated portion of the city of Llano. That plaintiff has often requested defendant to remove said cesspool and jail, but so to do it has refused, and still refuses." The petition concludes with a prayer asking for an abatement and removal of said nuisances, and for a mandatory injunction against the county judge and the commissioners' court of said county requiring said jail and cesspool to be removed.

From the manner in which the case is here presented and treated by the parties we are led to the conclusion that the court below sustained the demurrers principally for the reason that the appellant, the city of Llano, could not maintain this action, and was not entitled to invoke the remedy asked. The record is silent as to the reasons that influenced the action of the court upon the demurrers. The petition alleges that the city of Llano is duly incorporated as a city by virtue of the laws of this state. We understand from this allegation that the city of Llano is incorporated, not by a special charter granted by the legislature, but under the general laws of this state that provide for and regulate the incorporation of cities. This brings us to the consideration of the question: Can the city maintain its action in the form as stated, and is it a proper party to ask relief against the alleged purpresture and nuisance? There are several provisions of the statutory law regulating the powers and duties of a city government that show that the city can sue and be sued, and that give it control of its streets and public grounds, and authorize it to remove obstructions therefrom, and to abate nuisances that affect the public health. Sayles' Civil St. arts. 342, 375, 379, 382, 403, 404, 408, 468, 472, 514, 521. Whatever may have been, or is now, the construction placed upon the common law by some courts, to the effect that public nuisances that are solely injurious to the general public can only be abated at the instance of the sovereign, either by indictment or equitable remedy invoked by its law officers to that end, must yield to a policy that has grown into a principle of law in most of the states of the Union, to the effect that the state, in its sovereign capacity, has delegated its authority in this respect to those municipal corporations that are acting as city governments by authority from the state. The control of these internal matters that affect directly the public interest of the city or of its inhabitants as a

part of the general public is left to the governing bodies of the city. The highways and public grounds within the limits of the city are held in trust by it in its municipal capacity for the benefit of the public, to the end that they may be enjoyed and used by the public in the manner authorized by law. When this trust is interfered with, or right invaded, so as to affect the general public in their enjoyment and use of this easement, it is not only proper, but right, that the city should take the proper steps to restore the property to that condition that will prevent its full and unrestricted use and enjoyment by the public. Although the obstruction or invasion complained of may at common law or by reason of some act prohibited by ordinance create and constitute a nuisance *per se*, and though the city may have the power to abate without judicial ascertainment, the right also exists as a cumulative remedy in the city, by a suit seeking to abate the nuisance and to cause the removal of the obstruction. The right of the city to invoke the remedy insisted on in this case, and to resort to the courts for the protection of the interests of the public in property of which they had the right to its enjoyment and use, has been permitted in many instances. In *Trustees v. Cowen*, 4 Paige, 511, the defendant erected a building partly in the street and public square. The town brought suit by injunction to restrain the erection, and abate it as a nuisance. The court held that the city could maintain the suit, and said: "The corporation is the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of the bill." In *Mayor, etc., v. Bolt*, 5 Ves. 129, the court of chancery in England granted an injunction upon application of the corporation of the city of London to prevent a nuisance by which the lives of the citizens would be endangered. In *Hutchinson Tp. v. Milk*, 44 Minn. 536, 47 N. W. Rep. 255, the town brought suit to enjoin the erection and maintenance of an obstruction to a public highway, and to recover damages for the expenses in attempting to abate the nuisance. It was insisted that the nuisance was only abatable by indictment or by suit at the instance of the state through its attorney general. The court held that the remedy invoked by the city was proper, and in disposing of the question said: "A city corporation is a governmental agency, to which is intrusted the care and superintendence of highways within its boundaries, and of removing obstructions therefrom. And in all matters pertaining to the highways, a town, to the extent of these powers and duties, is the representative of the state; and if it has the power to abate such a nuisance, as it undoubtedly has, there is no apparent reason why it may not, in a proper case, resort to a court of equity to aid it by injunction or other appropriate

remedy in the performance of its public duties as a governmental agency of the state." To the same effect is *Village of Pine City v. Munch*, (Minn.) 44 N. W. Rep. 197. In *Price v. Inhabitants of Plainfield*, 40 N. J. Law, 608, it is held that the city has the authority to bring a suit for land that is dedicated to the public. The theory upon which the right is permitted is by virtue of its representing the public, in which is the right of possession. In *Campbell Co. v. Town of Newport*, 12 B. Mon. 539, a suit in equity by the town against the county to restrain it in the erection of buildings upon the public square was allowed. In *City of Denver v. Mullen*, 7 Colo. 346, 3 Pac. Rep. 693, it is held that a city may maintain an action to abate a nuisance. *City of New Orleans v. Lambert*, 14 La. Ann. 247, holds that the city may by injunction restrain and abate a nuisance. In *City of Dubuque v. Maloney*, 74 Amer. Dec. 365, it is held that a city, by a suit for the benefit of the public, may enjoin a nuisance. In *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 627, the court holds that the state has the undoubted power by a suit in equity by its proper officers to restrain and abate a public nuisance. The law gives cities the authority over their public streets, and by this authority the town or city has the same power as the state, as its representative, to maintain the suit. In *City of Winona v. Huff*, 11 Minn. 119, (Gil. 75,) it is held that a city or town holds a public square for the use of the public, and it may maintain an action to recover it. In *Dummer v. Selectmen of Jersey City*, 40 Amer. Dec. 214, it is held that a city, or trustees for the public, may sue for the recovery of a public square. The court, in *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 541, holds that the city has the authority, as the representative of the public, to enjoin a nuisance, and use of a public square. In *Samuels v. Mayor, etc.*, of Nashville, 3 Sneed, 299, it is held that a city may enjoin a county from creating a public nuisance. The authority of the city in this respect is also admitted by Judge Dillon in his work on *Municipal Corporations*, (volume 1, 4th Ed., § 379, volume 2, § 659;) and by Mr. Wood in his work on *Nuisances*, (volume 2, 3d Ed., § 743.) We think that this suit can be maintained by the city.

The next inquiry is whether the averments of the petition show that the jail and the cesspool are an obstruction of the public square, and are abatable as nuisances. The allegations of the petition show that the square in question was dedicated by the county to the public for public use, and for the purpose of erecting thereon a courthouse. It appears that the jail and the cesspool are no part of the courthouse, and not used in connection therewith; but that they are devoted to uses by the county to purposes for which jails are ordinarily used. The jail

and cesspool are charged to be nuisances *per se*, because they constitute an encroachment and obstruction upon said public square, and operate as uses thereof inconsistent with the purposes of said dedication. The cesspool is also, in addition, charged to be a nuisance by reason of the fact that the foul gases arising therefrom are dangerous to the health of the inhabitants of the city. These allegations seem to state a permanent obstruction and use of the public square by the county in the manner stated. The facts alleged establish a dedication of the public square for the use and benefit of the public, with a right reserved in the county to use it for the purpose of erecting thereon a courthouse. The petition states all the facts necessary to enter into and create a complete dedication to public use. *President, etc., v. White*, 6 Pet. 431; *Com. v. Rush*, 14 Pa. St. 187; *Board of Education v. Inhabitants of Van Wert*, 18 Ohio St. 221; *City of Chicago v. Wright*, 69 Ill. 318; *Village of Princeville v. Auten*, 77 Ill. 326; 2 Dill. Mun. Corp. (4th Ed.) §§ 628-648; *Lamar Co. v. Clements*, 49 Tex. 348; *Harris Co. v. Taylor*, 58 Tex. 691.

The inference is fair from the allegations of the petition that the city of Llano, as a municipal corporation, did not exist at the time the dedication was made, and that it was created as a corporation after that time. But this fact would not affect the validity of the dedication, or the right of the public to the use and enjoyment of the property so dedicated. Dedications to public use will not fail because there is not at the time an existing grantee capable of taking. It will simply be held in abeyance until the existence of such grantee, and in such circumstances the owner will not be permitted to reclaim the use of the property so dedicated, so long as it remains in public use. *President, etc., v. White*, 6 Pet. 431; *Village of Mankato v. Willard*, 97 Amer. Dec. 209; *City of Winona v. Huff*, 11 Minn. 135, (Gil. 75;) 2 Dill. Mun. Corp. (4th Ed.) § 631. The city, upon springing into existence as a municipal corporation, is by operation of law invested with the control, for the use of the public, of all highways and public grounds within its corporate limits, subject to such reserved rights as may exist in favor of the donors. 2 Dill. Mun. Corp. §§ 631, 632, and notes. We do not intend to say that a dedication may be forced upon a city against its consent, although made for a public use. (*Gilder v. City of Brenham*, 67 Tex. 347, 3 S. W. Rep. 309;) for such is not the case made by the petition before us. A dedication made for the public use must be considered with reference to the purpose for which it was originally intended. The dedication of the public square to use and enjoyment of the public, with the right reserved in the county to erect thereon a courthouse, would imply that the county had reserved all the

rights it intended to retain in the thing granted; and a use by it for other purposes that are not in keeping with the original purpose for which the dedication was made, and in furtherance of some act tending to increase the facilities of the public generally in the use of the square in a way that said public squares are generally used by the public, would clearly be a diversion of the use and an invasion of the rights of the public. The easement in the public to the use of the square cannot thus be invaded by the owner. Except as to those privileges reserved, he has only such rights to use as any other member of the public, and a use not consistent with that of the public cannot be made by the owner. *Village of Watertown v. Cowen*, 4 Paige, 511; *President, etc., v. White*, 6 Pet. 431; *Com. v. Rush*, 14 Pa. St. 187; *Board of Education v. Inhabitants of Van Wert*, 18 Ohio St. 221. The easement of a square dedicated to public use does not vest in the county or city, but in the public. *Hoadley v. City of San Francisco*, 50 Cal. 266. In *Price v. Inhabitants of Plainfield*, 40 N. J. Law, 608, it is held that the word "Park," written upon a map dedicating property, indicates it was for the use of the public. In *Campbell Co. v. Town of Newport*, 12 B. Mon. 539, it is held that a dedication of a square for public buildings can only be used by the county for such purpose, and it will not be permitted to use it for a different purpose. In *City of Dubuque v. Maloney*, 74 Amer. Dec. 365, the rule is stated that a dedication made for a designated public use does not authorize the city to use it for another purpose. In *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 541, the railway company, by virtue of its charter, was authorized to run its road "over, across, and along the streets, alleys, public grounds, squares, etc., of the town of Jacksonville." In pursuance of this grant, it attempted to construct its road across a public square within said city. The square was dedicated to the public by the original proprietors of the land. The court, in perpetually enjoining the railway company in its encroachment upon the square, says: "The square was intended for beauty and adornment, and for the health and recreation of the public, and the donors never intended that it should be used as a street. * * * The donation was for a specific and defined purpose, * * * and was intended for the use of the public;" and any attempted use, different from that to which it was originally intended, would be a diversion of the trust. No power lies in the city or any other to do that. In *McCullough v. Board*, 51 Cal. 418, the city, through its board of education, by the consent of the city and county, attempted to use a part of one of the public squares of the city upon which to erect a schoolhouse. The court held that such authority cannot be conferred by the

city and county, as such a use would be inconsistent with the purpose for which said squares were created. In *Village of Princeville v. Auten*, 77 Ill. 327, the village board of trustees attempted to move the town hall from its present site, and to place it on the public square. It was held that the public square was devoted to the use and enjoyment of the public, and that neither the city nor the county could appropriate or use it for the purpose of erecting thereon public buildings. In *Lamar Co. v. Clements*, 49 Tex. 349, it is held that the county, having accepted the block or square in question from the donor for the purpose of erecting a courthouse thereon, was estopped from making use of the property so dedicated for an altogether different use. The case before the court in *Harris Co. v. Taylor*, 58 Tex. 690, in some of its features is similar to this case. There the original proprietors dedicated a block or square in the city of Houston as a "courthouse square." The county undertook to erect upon it a jail. Some of the adjacent owners enjoined the erection upon the ground that the erection of the jail was a use and appropriation of the square to purposes foreign to its dedication, and its erection would constitute a public nuisance. The county contended that the use of the property for a jail was in keeping with the purpose of the dedication, and that such jail was a public use and public necessity. The court perpetuated the injunction restraining such use of the property, and, in effect, held that the construction of the jail was a use inconsistent with the dedication, and that the right to erect a courthouse thereon did not confer the right to erect a jail. A dedication of property to public uses by the government or a county is measured by the same law that governs a dedication for such purposes by an individual, and when the dedication is made by the county it has no more right to devote the property to uses foreign to the dedication than an individual would have. *City of Dubuque v. Maloney*, 74 Amer. Dec. 365; *Samuels v. Mayor, etc., of Nashville*, 3 Sneed, 299; *Village of Princeville v. Auten*, 77 Ill. 326; 2 Dill. Mun. Corp. (4th Ed.) § 647; *McCullough v. Board*, 51 Cal. 418; *Lamar Co. v. Clements*, 49 Tex. 354; *Harris Co. v. Taylor*, 58 Tex. 693.

The rule that exists in Pennsylvania, announced in the case of *Com. v. Bowman*, 8 Pa. St. 203, that the right of the counties to the use of the public squares upon which to erect courthouses and public buildings has in that state "become so established by usage and custom as to have acquired the consistency of law," cannot, we think, obtain in this state; but that, rather, that rule should prevail that is announced in the case of *Village of Princeville v. Auten*, 77 Ill. 326, to the effect that a square dedicated to the public cannot, by reason of a custom or

usage, be used for a purpose inconsistent with the purposes to which it was dedicated. The fact that the county may use the square in part for its jail building, and it being of a public or quasi public use, will not excuse it from the application of these general rules, unless such jail is a use that is permitted by the terms of the dedication. If this square can be used by the county for its jail building, and this be justified upon the ground that it is a public use,—or, in other words, a use by the public,—it or the city, for the same reason, could use and appropriate the entire square to sites for the erection of such public buildings as they may be by law authorized to erect. The statement of such a proposition is an argument that defeats it. Clearly, the county or the city would have no such right. It would be an inexcusable appropriation and diversion of the square to purposes and uses foreign to its dedication. It is said, and we think justly so, that public squares, so far as the uses of the property are concerned, (except where a right is reserved in dedicating it,) are placed in the same category as public highways, (*President, etc., v. White*, 6 Pet. 431; *Com. v. Bowman*, 3 Pa. St. 204; 2 Dill. Mun. Corp. § 646,) and that the public have the right to the use and enjoyment of such highways to the extent of their entire length and width. It is a right in the concrete. And it makes no difference that the obstruction may not practically interfere with the use by the public; if it in fact is an obstruction and encroachment that is not in keeping with the use for which the property was dedicated, it is a purpresture, and a nuisance, and as such is abatable. *State v. Goodnight*, (Tex. Sup.) 11 S. W. Rep. 119; *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 626; *State v. Edens*, 85 N. C. 525; *Samuels v. Mayor, etc., of Nashville*, 3 Sneed, 299; *Harris Co. v. Taylor*, 58 Tex. 693; 1 Wood, Nuis. (3d Ed.) §§ 81, 248, 250-254; *Elliott, Roads & S.* pp. 477-485. Such obstructions and encroachments upon the highways that are permanent in character are in law regarded as purprestures and public nuisances per se. The doctrine laid down in *Peckham v. Henderson*, 27 Barb. 207, to the effect that an encroachment is not a nuisance if it does not materially interfere with the public enjoyment and use of the property, was, with kindred cases, revised by the same court in *Harrower v. Ritson*, 37 Barb. 301, and was, we think correctly, held to be in conflict with the settled doctrine of the well-considered cases on this subject. This rule is qualified to the extent that a temporary use of such public property under certain circumstances may be permitted, and such highways and public squares, when dedicated to public uses and enjoyment, may be improved or ornamented, so as to make the use for which they were originally intended more beneficial to the public. But

such improvements and use must be in keeping with the original purpose for which said dedication was made. To illustrate: The city would have the undoubted right to permit its highways to be in part occupied by a street railway, or to beautify and ornament its public squares. These acts, although permanent in character, would not be a diversion or a use inconsistent with the dedication, but would be acts in furtherance and in keeping with the original purpose in creating the highway or public square. They would tend, in the first instance, to increase the facilities for the use of the highway; and, in the second instance, may make the use and enjoyment of the public square more beneficial in the way it was originally intended it should be used. Such acts as these would not be obstructions, and would not fall within the category of purprestures and public nuisances.

The facts stated in the petition, if true, show that the use of the public square for the jail and cesspool was unauthorized, and that they are encroachments and obstructions upon said square in the nature of purprestures and public nuisances. For the reasons expressed, we think the court erred in sustaining the demurrers to the petition. The allegations of the petition that seek to abate the cesspool on account of the foul gases arising therefrom being injurious to the health of the inhabitants of the city may not, for the want of certainty, be sufficient. In cases of this character, the rule of pleading is prescribed in the case of *Dunn v. City of Austin*, 77 Tex. 141, 11 S. W. Rep. 1125, and, if this should be an issue in another trial, we suggest that the rule in that case be followed. The judgment of the court below is reversed, and the cause remanded.

SULPHUR SPRINGS & MT. P. RY. CO. v. ST. LOUIS, A. & T. RY. CO. IN TEXAS.

(Court of Civil Appeals of Texas. March 22, 1893.)

RAILROAD COMPANIES — FORFEITURE OF ROADBED — ACQUISITION BY OTHER COMPANY.

Even if it should be conceded that on failure of a railroad company to construct ten miles of road within two years of its incorporation, whereby it forfeits its charter, all rights in the roadbed are forfeited, a new company cannot, by simply taking out a charter calling for the same termini as the old company, acquire title to such property.

On rehearing. Denied.

For former report, see 22 S. W. Rep. 107.

H. McKay and Carter & Lewright, for appellant. Todd & Hudgins and Perkins, Gilbert & Perkins, for appellee.

HEAD, J. We adhere to the opinion heretofore rendered. By the very able opinion of the New York court of appeals, delivered in

1888, in the case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. Rep. 692, we are much strengthened in the conclusion reached by us that under our statutes the forfeiture of the charter of a railway corporation does not have the effect to divest, without compensation, the stockholders of their property rights in the roadbed acquired by their means. Some of the statutes of that state construed in that opinion seem to be quite similar to our own. The principal question in the case of *Railway Co. v. Casey*, 26 Pa. St. 287, so much relied upon by appellant to sustain this motion, seems to have been the constitutionality of a statute, about the meaning of which there was but little doubt, although it is not to be denied that there are expressions in that decision which go to the extent of holding that, upon the forfeiture of its charter by a railway corporation, its roadbed vests absolutely in the state, without compensation to the stockholders. We believe this part of the decision could only be sustained, even in the absence of a statute, in jurisdictions where the strict rule of the common law is in force as to the disposition of the property of dissolved corporations; and to remove any apprehension from the minds of investors that this might be the rule of decision in this state was probably the principal reason for the enactment of the statutes referred to in our former opinion. The whole course of legislation in this state has ever been to foster and build up railroad enterprises, not to tear down and destroy them. The great body of our people have always manifested a desire to encourage the construction of these great highways, by affording to those who will furnish the means for this purpose the most liberal and ample protection; and we believe it would do violence both to the letter and spirit of our statute to give it a construction that would deprive these investors of the most valuable part of their property without compensation. It may be that there is no statute in this state now in force that will authorize the old Texas & St. Louis Company to make a voluntary sale of this right of way, but, if some other company wishes to acquire it, it must do so by condemnation proceedings, or in some other way compensate those entitled to the assets of the old company. But even if it be conceded that we are in error in this, the appellant is in no better position. All that is contended for under the rule announced in the Pennsylvania decision and those holding with it is that, upon the forfeiture by a railroad of its charter, the roadbed becomes the property of the state; and we see nothing in the allegations in the petition which shows that appellant has acquired from the state the title so conferred upon it. We do not believe the simple taking out of a charter under our general incorporation laws, calling for the terminal points of the forfeited charter, can have any

such effect. If the Pennsylvania case is correct, the title to this right of way, according to the allegations of the petition, is still in the state, and it will require additional legislation to take it out.

We have had some difficulty in deciding as to whether or not appellant's petition was sufficient to enable it to recover against appellee by reason of the prior possession therein alleged. It will be noted that appellant did not content itself by alleging ownership generally, or even ownership by possession; but it went further, and pleaded the facts relied upon as constituting its title, and its possession seems only to have been claimed as an incident to and in right of such title. In *Express Co. v. Dunn*, 81 Tex. 85, 16 S. W. Rep. 792, it is said: "We do not understand that in actions of this character it is incumbent on a plaintiff to deraign title through writings from the sovereignty of the soil, or in some of the other methods in which title is acquired, but understand that an exclusive and peaceable possession of land furnishes *prima facie* evidence of ownership, which, if not rebutted, is sufficient to maintain such an action as this, or even ejectment or trespass to try title, against a trespasser or mere intruder;" citing a number of authorities. In this case appellant completely rebuts by its own allegations what might otherwise have been its *prima facie* title, evidenced by possession.

We also entertain serious doubt as to the sufficiency of appellant's allegations to show that it had the exclusive and peaceable possession necessary to enable a plaintiff in ejectment to recover upon such title alone. It would seem that where one seeks to recover a railway which extends over many miles, upon the ground of possession alone, he should go further with his allegations and proof than mere general statements which only show a possession that might not in fact extend beyond a very small part of the line. It looks too much like one going upon a hill-top and proclaiming himself to be in possession of the earth, and thereafter recovering against all who do not show a better title. At any rate, we do not think appellant's petition, when fairly construed, shows an intention to rely upon its possession independent of its real title for a recovery, and we believe no useful purpose could be subserved by prolonging this litigation by a reversal, even if appellant's allegations should be found to bring it within the language used in some of the decisions in a suit to recover a specific tract of land in the actual possession of the plaintiff.

Justice STEPHENS does not concur in the view entertained by a majority of the court as to the property rights of the stockholders in the right of way of a railway corporation whose charter has been forfeited, but does concur in the conclusion that appellant's petition fails to show that it has

acquired title to the right of way in question.

The motion for rehearing is refused. Motion overruled.

BOVET v. HOLZGRAFT.

(Court of Civil Appeals of Texas. Nov. 10, 1893.)

FIXTURES—AS BETWEEN LANDLORD AND TENANT.

A new stairway erected by a tenant in place of an old one removed by him is a fixture, which he cannot remove on the termination of the lease, in the absence of an agreement with the landlord giving him the right; and hence the landlord's refusal to permit such removal does not render him liable to the tenant for the value of stairway.

Appeal from Bell county court; John M. Furman, Judge.

Action by G. Bovet against Charles Holzgraft for rent. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

A. M. Monteith and D. E. Patterson, for appellant. James Boyd and Harris & Saunders, for appellee.

KEY, J. Appellant, as plaintiff, sued appellee, as defendant, for \$90, for rent of a storehouse in Belton, Tex.; \$54, damages to the same; \$20, the value of a stairway and partition removed therefrom; and for \$16.40, interest. The defendant pleaded a general denial; that he made certain repairs upon the house, among others a staircase, costing \$175; that, when he vacated the house, he owed \$50 rent; that plaintiff, through his agent, J. Tobler, agreed to take said new stairway for the rent due and the old stairway taken out by defendant; that plaintiff had ever since then used the new stairway, and was estopped from denying that he agreed to take same in satisfaction of any indebtedness due by defendant. The defendant also pleaded \$175, the value of the stairway placed in the house by him, as a set-off and in reconviction against the plaintiff's demand. Upon a trial in the county court, verdict and judgment were rendered for the defendant for five dollars. The defendant has remitted the five dollars in this court. The building in question was a two-story house. At the time appellee rented it, there was a spiral stairway about the middle of one of the side walls, and near said wall. There was also a partition wall, which perhaps divided the first story into two rooms, though it does not clearly appear in which story it was located. These appellee took out, and put in a new stairway in the front of the building, at a cost of \$175. At the time appellee rented the house from appellant's agent, he told the agent that some changes would have to be made in it before it could be used for a saloon, (the business appellee designed and used it for,) and said agent told him to make

any changes necessary to carry on his business. Two lease contracts were put in evidence, in each of which appellee obligated himself to return the building in as good condition as received, ordinary wear and tear excepted. The last lease expired February 1, 1887, after which appellee held possession of the premises until the following July. He refused to sign another contract to pay rent at the rate of \$60 per month, but offered to lease it at \$50 per month. Whether or not there was an agreement that he should pay \$50 per month at any time after February 1, 1887, is a question upon which there is conflict of testimony. At any rate, during the time in question appellee paid on the rent \$270, and, when he vacated the premises, he claimed that he only owed \$50 rent, while appellant claims that he owed \$60. Appellee testified that he told appellant's agent, Tobler, that he owed \$50 rent; that appellant might have the new stairway for \$100, \$50 to be paid in money, and the other \$50 to be applied to the rent; that said agent promised to think about it, and let him know in a few days, and had never given him a reply; that this was before appellee vacated the house. When appellee moved out of the house and surrendered possession to appellant, he did not remove the stairway placed therein by him, and he testified that he did not do so, because he was feeling unwell.

Among other instructions, the court charged the jury as follows: "If you believe from the evidence that defendant, with the consent of plaintiff, annexed to plaintiff's house the stairway described in defendant's answer, and, at the surrender of his possession, defendant abandoned said premises without severing or removing the said stairway, and without any agreement authorizing him within a reasonable time to demand of plaintiff the right to remove the same, or failed to attempt to remove the same, you are charged that in such event the stairway became the property of plaintiff, and defendant is not entitled to recover the same or the value thereof. But should you find that defendant, on surrendering possession of said premises, failed to sever or remove his said annexed property on account of the words or conduct of plaintiff, and that, relying thereon, and being induced thereby, he did permit the said property to remain so annexed pending a settlement between plaintiff and defendant, and that within a reasonable time thereafter defendant applied for permission to remove said property, which was refused, and the same used by plaintiff for his own benefit, then, in such event, the defendant would be entitled to recover of plaintiff the reasonable value of said property at the date of such refusal by plaintiff to deliver or permit defendant to remove the same; and, if you so believe, you will find for defendant

the reasonable value of said property at said time." In giving this charge, the court below committed error. The charge assumes that the stairway was not a fixture, or, if it was a fixture, it was such a one as appellee had a right to remove if he erected it with appellant's consent. In the light of the evidence in the record, which we have already summarized, neither of these assumptions was permissible. Unquestionably the stairway was a fixture. It was a necessary part of the house. In the absence of an elevator, it is as necessary to the proper use and enjoyment of the second story of a house that there be a stairway as a door, roof, or floor. However, as between landlord and tenant, there may be many fixtures attached by the latter which he may remove during or at the termination of his lease without the consent of the landlord. These are classed as (1) trade fixtures, and those erected for trade purposes, combined with other objects; (2) agricultural fixtures; and (3) fixtures set up for the purpose of ornament or convenience, or for domestic use. *Ewell, Fixt. p. 80, c. 4.* Under the testimony in the transcript, the stairway in question is not embraced in either of these classes. When appellee rented the house, it had a stairway in it connecting the two floors. This was a fixture in the sense which made it a part of the realty, and as much the property of the owner of the land as was any other part of the house. This appellee removed, and substituted the one in question for it. Therefore the latter became as much a fixture and as irremovable, without the consent of the owner of the premises, as was the former. Appellee did not claim in his answer that there was any agreement between him and appellant that he should have the right to remove the stairway; and, unless there was such an agreement, it became appellant's property, and appellee never at any time had the right to remove it; and consequently appellant's refusal, under such circumstances, to allow appellee to remove it, would not render him liable for its value. But, treating the stairway as an irremovable fixture, if there was a contract, either express or implied, by which appellant became bound to pay appellee for erecting the same, appellee is entitled to the benefit of such contract. Such a contract was pleaded by appellee, and the issue thus tendered ought to have been, but was not, submitted to the jury. The judgment of the county court is reversed, and the cause remanded.

GULF CITY ST. RAILWAY & REAL-ESTATE CO. et al. v. BECKER et al.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

APPEAL—FINAL JUDGMENT.

A judgment not disposing of the subject-matter of controversy as to some of the parties

who appeared is not a final judgment, from which an appeal will lie.

Appeal from district court, Harris county; James Masterson, Judge.

Action by T. C. Becker and others, as stockholders of the Gulf City Street-Railway & Real-Estate Company, against said company and others, alleging a fraudulent conspiracy, and a conversion of the company's property, and asking for a receiver and other relief. Judgment for plaintiffs. Defendants appeal. Appeal dismissed.

For former report, see 15 S. W. Rep. 1094, 80 Tex. 475.

James B. & Chas. J. Stubbs and Henry F. Fisher, for appellants. Howard Finley and F. M. Spencer, for appellees.

PLEASANTS, J. We are confronted in this case with a question involving the power of this court to revise the judgment appealed from. To warrant the exercise of such power, the judgment of the lower court must be final. A final judgment is one which disposes of the matters in litigation between all the parties before the court, when the judgment is rendered. A judgment for costs, only, for or against any one of the parties, plaintiff or defendant, is not a final judgment. There must be an express adjudication of the subject-matter of controversy as to all of the parties plaintiff and all of the parties defendant; otherwise, there is no final disposition of the matters litigated between the parties. *Vide Warren v. Shuman, 5 Tex. 441; Scott v. Burton, 6 Tex. 321; Hanks v. Thompson, 5 Tex. 6; Fitzgerald v. Fitzgerald, 21 Tex. 415; Martin v. Wade, 22 Tex. 224; Holt v. Wood, 23 Tex. 474.* The judgment in this case does not dispose of the subject-matter of controversy as to the defendant the city of Galveston, and as to several others of the defendants; all of whom, as the record shows, made their appearance in the cause, and were present, in person or by counsel, when the judgment was rendered. Under the decisions cited above, this court holds that the judgment appealed from is not a final one, and that the appeal must therefore be dismissed, and it is so ordered.

TRINITY COUNTY LUMBER CO. v. PINCKARD et al.

(Court of Civil Appeals of Texas. Nov. 16, 1893.)

On rehearing. For former report, see 23 S. W. Rep. 720.

PLEASANTS, J. In our opinion delivered when the judgment of affirmance was rendered in this cause we say that we do not think that the finding of the trial judge that Daniel Dalley paid taxes on the land in dispute for five years was correct, because the

evidence fails to show affirmatively payment of taxes by Dalley; and that payment by him could not, in our opinion, be presumed from the fact that the land was assessed in his name, and from the absence of any evidence of default in the payment of taxes; the record from the comptroller's office showing the assessment of the land to Dalley for several years, but showing neither payment nor non-payment of the taxes. We have since this motion was submitted again examined the statement of facts, and we are led to believe that we may have been in error in holding that there was no evidence of payment of the taxes by Dalley. The testimony of a former collector of taxes for the county of Trinity from 1870 or 1871 to 1875 or 1876 may be evidence of such payment, and we therefore correct our conclusions of fact in this particular, and will not announce as our conclusion that the finding of the trial judge on this point is without evidence to support it. This modification of our conclusions upon the facts renders it unnecessary to discuss the proposition submitted by counsel to the effect that, as the finding of the court was not excepted to or assigned as error by the appellees, it was not subject to revision by this court.

In the fourth paragraph of their motion, counsel for appellants contend that the sale of the land from Dalley to Brown (1877) was not a conveyance, but simply an executory contract for the sale of the land. If the notes recited in the deed of conveyance did in fact retain the vendor's lien on the land, then it is true that the title did not pass, and it may be that Dalley would continue to hold possession through Johnson, if the latter was his tenant, until the land was conveyed to Mrs. Pierson, on the 12th of December, 1879, which would give him possession for 10 years, if Johnson's tenancy be counted from the 4th of December, 1869, the day on which the statute commenced running. But the evidence was conflicting as to whether Johnson was Dalley's tenant or not. This we said in our opinion, and, while it is true we said we thought the evidence was sufficient to have justified the court in finding in favor of appellants on this issue, we also said that we could not reverse the judgment when the evidence was conflicting; and we find nothing in this motion which satisfies us that the judgment should be reversed. We still think there was no error committed by the court against the appellants in the admission or the exclusion of evidence. The declarations of Johnson while on the land were not admitted to prove title in him, but simply as explanatory of his occupancy of the premises. *Vide* *Mooring v. McBride*, 62 Tex. 312. The case of *McDow v. Rabb*, 56 Tex. 154, is not like this case, in this: the declarations offered in evidence and rejected were not offered to explain the possession of the declarant, but to prove title in

him; and this the court held was not permissible. Without reference to the testimony of the witness Pierson, as given in the statement of facts, we think the court did not err in excluding from his consideration in determining the issue of tenancy the alleged written acknowledgment of Josiah Johnson, on the ground that its execution had not been proved. The facts recited in the bill of exceptions show unmistakably that Pierson knew nothing of the execution of the paper except what had been stated to him by George Dalley, when the latter delivered to him, as the agent of Daniel Dalley, his title papers to the land. The motion is overruled.

WILLIAMS, J., disqualified, and not sitting.

LLANO IMPROVEMENT & FURNACE CO. v. CASTANOLA et al.

(Court of Civil Appeals of Texas. Oct. 13, 1893.)

GARNISHMENT—ATTORNEY'S FEES.

Where the answer of a garnishee admits an indebtedness to the principal defendant, and judgment is rendered therefor, the garnishee is not entitled to recover an attorney's fee from plaintiff, as Sayles' Civil St. art. 219, provides for such recovery only when the garnishee is discharged on his answer.

Appeal from Llano county court; W. S. Maxwell, Judge.

Action by M. Castanola & Son against Teague & Ottens. Plaintiffs obtained a judgment against defendants, and garnished the Llano Improvement & Furnace Company. Judgment was rendered against the garnishee, and it appeals. Modified.

Miller & Lauderdale, for appellant. Wm. J. Berne, for appellees.

FISHER, C. J. The appellant is entitled to a judgment against the defendants, Teague & Ottens, for reasonable attorney's fee to be taxed in the judgment. The answer of the garnishee admitting an indebtedness due the defendants was not contested, and it was not discharged, but judgment was rendered against it for the debt; hence, under article 219, Sayles' Civil St.,¹ it is not entitled to judgment against the plaintiff for its attorney's fees. The judgment below will be reformed, and here rendered in favor of the appellant against the defendants.

¹ Article 219 is as follows: "Where the garnishee is discharged upon his answer the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such cost shall be taxed against the defendant and included in the execution provided for in this chapter; where the answer is contested the costs shall abide the issue of such contest."

Teague & Ottens, for \$10, as compensation for its reasonable attorney's fees. The cost of the appeal is adjudged against the appellees. Judgment reversed.

CHAMBERLAIN v. SHOWALTER.

(Court of Civil Appeals of Texas. Nov. 15, 1893.)

EVIDENCE—ANCIENT DOCUMENTS—PRESUMPTIONS—ESTOPPEL—MISLEADING INSTRUCTIONS—ADVERSE POSSESSION—COLOR OF TITLE.

1. Where the record of the transfer of a land certificate in 1854 failed to show how or when such transfer came into the custody of the land office prior to the location of the certificate in 1874, it was necessary for the party offering such transfer in evidence as an ancient instrument to show how or when it came into the land office, or to explain its custody prior to the time it was known to be in such office, since the land office was not the proper depository of the transfer before the location of the certificate.

2. In the absence of such evidence, it was error to submit to the jury the question whether such transfer was the deed of the alleged grantor, as the court should have assumed that the transfer had not been executed by such grantor.

3. Mere knowledge by the owner of land of the existence of a forged title on the records of the county in which the land is situated, and delay in asserting his right, will not constitute an estoppel, in the absence of evidence by the person claiming the estoppel of some affirmative act of the owner, or an omission of some duty devolving upon him.

4. It was error for the court to submit the issue concerning estoppel, though embodying a correct proposition of law, after having directed the jury not to consider the plea of estoppel for want of sufficient evidence to sustain it, since such charges were contradictory, and tended to mislead.

5. A deed having on its face the essentials of a duly-registered conveyance is admissible for the purpose of prescribing land under the five-years statute of limitations, without proof of its execution, though an affidavit of forgery has been made against it.

6. An ancient instrument is admissible in evidence, notwithstanding an affidavit of forgery has been filed in relation thereto, if it comes from the proper custody and is free from suspicion.

Appeal from district court, Webb county; A. L. McLane, Judge.

Trespass to try title by James T. Chamberlain against W. Showalter. Judgment for defendant. Plaintiff appeals. Reversed.

Bethel Coopwood and A. Winslow, for appellant. S. G. Newton, for appellee.

JAMES, C. J. This was a suit in trespass to try title, filed March 20, 1886, by appellant, to recover a tract of 320 acres patented to James Chamberlain. The defenses consisted of the plea of not guilty, and the pleas of 3, 5, and 10 years' limitations. Defendant also pleaded in substance that in April, 1884, he became a purchaser of the land from the heirs of one Rafael Arispe, by warranty deed, alleging a valuable consideration paid them. That his grantors have since

been insolvent. That at the time he so purchased the land they and their ancestor, Rafael Arispe, had been in possession of it since 1874; and that said heirs exhibited and delivered to him the patent to James Chamberlain, dated March 8, 1878; also a certified copy from the general land office, bearing date March, 1876, of a transfer of said certificate from James Chamberlain to Newton J. Chamberlain, Jr., of date March, 1854; also a certified copy from same office of a power of attorney, dated August 8, 1873, from Newton J. Chamberlain, Jr., to James R. Ham, authorizing sale of said certificate; also a certified copy from same office of a transfer of said certificate from Newton J. Chamberlain, Jr., by his attorney in fact, J. R. Ham, to Rafael Arispe, all of which, viz. the patent and said certified copies, had been filed for record and duly recorded at the end of March and beginning of April, 1876. That said instruments and the registration thereof showed a complete chain of title from the sovereignty of the soil to said Arispe. That there was nothing upon the face of said papers to indicate forgery or suspicion. That plaintiff knew of the existence and registration of said instruments, and knew that said land was liable to be sold to an innocent purchaser, without notice of any fraud; yet took no steps to warn this defendant or any one else that such deeds were forgeries. That the defendant purchased from Arispe's heirs in good faith, without notice of plaintiff's claim. And that therefore plaintiff is estopped by his conduct to assert title to the land as against defendant. The cause was tried before a jury, resulting in a verdict for the defendant.

The defendant had in evidence no documentary title to the land in question, unless the transfer of March 23, 1854, was properly admitted as an ancient instrument, and the other transfer duly proved. An affidavit of forgery was made in reference to these instruments, the statutory effect of which was to require proof of their execution as at common law. Where a deed thus impeached is such as has the recognized qualities of an ancient instrument, it is held to prevail over the affidavit of forgery, and to be admissible notwithstanding it. The early rule of determining what writings are thus admissible, and the one applied in this state until of late years, was that the instrument should purport to be more than 30 years old, come from a proper custody, be free from suspicion, and supported by some evidence of the exercise of ownership under it. *Stroud v. Springfield*, 28 Tex. 664; *Holmes v. Coryell*, 58 Tex. 688. The rule which now obtains in this state dispenses with the necessity of showing acts of ownership in connection with the instrument. *Parker v. Chancellor*, 73 Tex. 478, 11 S. W. Rep. 503; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049; *Crain v. Huntington*, 81 Tex. 614, 17 S. W. Rep. 243. This element of verification being dispensed

with, there is left nothing to show in connection with a deed that appears genuine upon its face, and appears to be of the required age, save that it comes from the proper custody. The original of this transfer was by an order withdrawn from the general land office, and was before the court. It does not seem that there were any alterations upon its face or other defect in its appearance to cast suspicion upon it, but indorsed upon it in pencil was the word "Forgery." There is nothing in the evidence to show when the transfer was placed on file in the land office. The certificate would not, through the ordinary and proper channels, have found its way there until its location, which the record shows did not occur until 1874. That a transfer from the original grantee of the certificate would be filed in the land office any considerable time ahead of the certificate or its location would be an event so contrary to common experience in such matters that it cannot reasonably be presumed. The general land office is not a logical or proper depository for such instruments, under such circumstances. We find in the power of attorney to J. R. Ham, bearing date August, 1873, a recital that the certificate was then in the land office, also a recital that Chamberlain had sold him the certificate in 1854; but these recitals are not evidence. The record is absolutely silent as to when the transfer made its appearance in the land office, and as to how it came there. Had there been a previous location of it, there would have been some reason for its presence in that office. It devolved upon defendant, in asking that the transfer be recognized as an ancient instrument, to offer some fact or circumstance showing how or when it came into the office, or explanatory of its custody prior to the time it was known to be in the land office. The transfer was without a single fact or circumstance corroborative of its existence between the year 1854 and 1874. Had there been a conflict in the evidence as to its custody during that period, the entire matter might then have been submitted, with proper instructions, to the jury; but there was not only no conflict on this question, but no evidence whatever. The word "Forgery," written upon the instrument in pencil, may or may not have been such suspicious circumstance as to destroy its admissibility as an ancient document, but we do not hesitate to say that the absence of all evidence as to the source from which it came to the general land office, and the silence of the facts as to its previous history, deprive it of a supporting circumstance, without which it cannot be received as an ancient instrument. It is not strictly correct to say that an ancient instrument proves itself. The presumptions that follow from the conditions that indicate its genuineness are allowed to take the place of the proof necessary at common law, and chief among these condi-

tions has always been and still is the fact that it comes from a proper custody. To dispense with this requirement would be to push the rule beyond any known precedent, to throw down the last conservative barrier, and allow every instrument regular upon its face, and appearing to be over 30 years of age, to be introduced without any evidence of its execution. We do not wish to be understood as saying that it is necessary for the evidence to trace step by step the custody of the instrument from its purported date, but that some fact or circumstance should appear to indicate that, when the instrument is presented to the court, it has come from the place or depository where it naturally would be found if genuine. Had the evidence shown that the transfer of 1854 had come from the hands of Newton J. Chamberlain, Jr., or been found among his effects, or had it been shown that it was filed in the land office by Newton J. Chamberlain or his heirs or representatives, this would have afforded a reasonable presumption that it had been in such custody since its date, and would have given it the verity ascribed to an ancient instrument. The evidence fails even to show that there was such a person as Newton J. Chamberlain, Jr., and there was no evidence offered to prove the execution of the deed as at common law.

The court, in the first and ninth paragraphs of the main charge, submitted the question of whether or not it was the deed of James Chamberlain. This was erroneous, in view of what is above stated, as there was no evidence to authorize the submission of such issue. The court should have assumed that the deed had not been executed.

Upon the questions raised in reference to the plea of estoppel, we are of the opinion that the plea was not sufficient. The view taken of this by the district judge, and expressed in the ninth paragraph of the main charge, was correct. To constitute an estate by estoppel, something more must have been shown than mere knowledge by the owner of the existence of a forged title upon the record of the county wherein the land was situated, and delay in asserting his rights. Some affirmative act of the owner must be shown, as, for example, that he, by word or act, created the impression that the adverse title was valid, and thereby induced another to act, or, knowing that another was about to acquire the apparent title in good faith, stood by and willfully suffered it to be consummated. An omission, to be an estoppel, must be in reference to some duty devolving upon him. Where the law allows one a certain time in which to assert his right, it is implied that his right will remain available to him during that period, and, although fully informed of the adverse claim, his waiting merely cannot be held of itself to bar his title. This is what appellee claims, but the authorities he quotes do not go to that length. The exception to the plea

should have been sustained. It appears, furthermore, that there was no evidence that was sufficient in law to create such estoppel, and the court properly gave a charge asked by the plaintiff to that effect, and directing them not to consider the plea. The court, however, in the said ninth paragraph, submitted the issue concerning estoppel, and this charge, although embodying a correct proposition of law, was improper, for the reason that it submitted an issue in connection with which there was no evidence the jury could consider, and thus the charges were contradictory, and of such a nature as tended to mislead and confound the jury.

It seems that about 1853 the certificate was delivered to one Brown, to be located, and appellant argues that, the certificate being a chattel, and assignable by parol, Brown, having possession of it, had power to dispose of it. This is not tenable, and, if he was invested with the ostensible agency to dispose of it, it is not shown that he ever undertook to exercise it. From the views above expressed, it follows that no title was shown in defendant, either by deed or by estoppel.

It remains to consider the defenses of limitations. There was no basis for the claim under the statute of three years. We think, however, that the deed purporting to be from James Chamberlain to Newton J. Chamberlain, Jr., although inadmissible as a muniment of title, would have been admissible for the purpose of a deed in connection with the five-years statute, if it had been necessary for that purpose. The possession testified to in support of this plea was that of Arispe and his heirs, and the deed to which this possession was referable was the transfer to Arispe of 1873; and the prior deed in his chain of title, to wit, the transfer of 1854, was immaterial to this issue. This transfer to Arispe was recovered on March 29, 1876. There was evidence of the payment of taxes from 1875 to the time of the trial by defendant and the Arispes. The certificate was located, it seems, in 1874. Notwithstanding the affidavit of forgery was likewise directed to the deed to Arispe, and its execution was not proved, we are of opinion that this deed or transfer was admissible for the limited purpose of prescribing the land by the five-years statute. It is not necessary in respect to this plea that the deed used should have conferred any title; it is simply required to possess the appearance of a valid deed. In such case the execution of the deed need not be proved; otherwise, an affidavit of forgery would, in cases where the defendant finds himself unable to prove his deeds, have the effect, not only of defeating his title, but also of depriving him of a title by limitations which accrues to him by virtue of his deed being one that has upon its face the essentials of a conveyance, duly registered. We make this declaration of the law in or-

der that the deed or transfer may have its proper force, although it may not be admitted to convey title. *Parker v. Newberry*, 83 Tex. 430, 18 S. W. Rep. 815; *Wofford v. McKinna*, 23 Tex. 43.

We do not think it proper to discuss the sufficiency of the evidence with reference to possession, nor the feature of forgery touching the deed under which it is sought to obtain the benefit of the statute of five years, inasmuch as the case must be reversed for reasons already given, and the testimony on this subject may be different on another trial; nor do we deem it necessary to discuss the questions raised in reference to the statute of ten years. As the evidence stood, there should have been nothing submitted to the jury but the defense of limitations. The submission of the other issues was calculated to divert the attention of the jury from what was proper to submit to them, and it is not clear that their verdict was not the product of the erroneous charges. Therefore the judgment is reversed, and the cause remanded.

GALVESTON, H. & S. A. RY. CO. v. DAVIS.¹
(Court of Civil Appeals of Texas. Nov. 21, 1893.)

MASTER AND SERVANT—EVIDENCE—INSTRUCTIONS
—HARMLESS ERROR.

1. In an action against a railroad company for the death of a brakeman caused by the failure of defendant to provide a regular caboose car for deceased's train, there was evidence that the car used, while not a caboose car, was suitable for that purpose. *Held*, that the unsuitableness of such car for the purpose of a caboose could not be implied from the fact that its construction was different from a regular caboose.

2. Where there was no evidence as to the use of diligence by defendant, and no issue of fact thereon, and also no evidence from which the jury could find that the car in question was unsafe, instructions which defined defendant's duties in respect to diligence, and submitted to the jury the question of the unsuitableness and unsafeness of such car, were erroneous, and prejudicial to defendant.

On rehearing. For report of decision on appeal, see 23 S. W. Rep. 301.

JAMES, C. J. In appellee's motion for rehearing it is claimed that the appellant on the trial did not offer any evidence showing diligence on its part in the furnishing of a suitable car; in fact there was no such issue raised by the evidence. The evidence in this respect seems to be in the condition stated by appellee. Following upon this, appellee contends that the instruction upon which the case was reversed was not incorrect, and should not have occasioned a reversal, because the unsuitableness of the car itself would render the appellant liable in the absence of any evidence that diligence and care had been exercised in regard to it, and consequently the charge was not erroneous. This is assuming that the evidence shows

¹ Rehearing pending.

the car was unsuitable or unsafe for the purpose for which it was used. The twelfth assignment of error complains of the charge generally as unwarranted by the evidence, and specially for other reasons. The evidence showed what a regular caboose car was, and it also shows that the car which on the occasion of this accident was used as a caboose car was not one of these, and lacked many of the parts of a regular caboose car; but there was no evidence that the car which was so in use was not suitable for the purpose, and that this was so could not be implied from the fact only that its construction was different. What evidence there was on the subject indicates that it was suitable for the purpose. The witness Nicely describes it thus: "It was called a 'combination car,' and was ventilated, and could be used for stock or perishable freight or most anything." That it was reasonably suitable for the purpose for which it was then being used was the result of the evidence. There being no evidence relating to the use of diligence by the company, and there being no issue of fact thereon, there was no occasion for the giving of a charge which defined the appellant's duties in that respect; and, there being no evidence from which the jury could find that the car was unsuitable or unsafe, the question of its unsuitableness or unsafeness should not have been submitted to the jury; and, in our opinion, with these charges given, the jury would naturally conclude that the want of evidence concerning diligence would render the appellant liable; and, with the conspicuous testimony before them that there were regular caboose cars more perfect in their parts and construction than the car used on this occasion as a caboose car, they would naturally infer that the failure to use one of its regular caboose cars would per se render appellant liable. This would not follow in the absence of evidence that the car used was unsuitable or unsafe for the purpose of a caboose car. The charges were calculated to mislead the jury, and cause them to find a verdict on grounds that did not sufficiently appear in the evidence.

MISSOURI, K. & T. RY. CO. v. STONER.
(Court of Civil Appeals of Texas. Nov. 15, 1893.)

RAILROAD COMPANIES—CONNECTING LINES—FREIGHT CONTRACTS—FAILURE TO DELIVER—PENALTIES—BILL OF LADING—INTERSTATE COMMERCE.

1. Under Sayles' Civil St. art. 4258a, § 3, imposing a penalty on railroads for the acts of their officers, agents, or employees for detention of freight shipment after tender of freight due, as shown by the bill of lading, a company is not liable; the detention having been while the road was in the hands of receivers.

2. The receipt of freight by one carrier from another, to forward to point of destination, does not bind the receiving carrier to the

terms of the contract made by the first carrier with the shipper; such terms not being known by the receiving carrier, and there being no partnership relation between the carriers.

3. Where freight is shipped over connecting lines, which have agreed on a joint tariff of rates, in compliance with the interstate commerce act, the delivering line must collect the interstate commerce rate, and not that named in the bill of lading.

4. Where a carrier makes a contract for shipment of goods for a rate less than the interstate rate of the other lines over which it is forwarded, the delivering carrier may collect, not only the interstate rate, but the charges of the contracting line; such charges having been advanced to it by the connecting lines at the regular rates, in ignorance of the special contract.

Appeal from Cooke county court; J. E. Hayworth, Judge.

Action by P. B. Stoner against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

R. C. Foster and A. E. Wilkinson, for appellant. Potter, Potter & Giddings, for appellee.

HEAD, J. Appellee sued appellant to recover damages for the conversion of three head of Holstein cattle, and also the statutory penalty for their detention for six days after tender of the amount of freight due, as shown by the bill of lading. Judgment was rendered in his favor in the court below for \$350, the value of the cattle, and \$200 penalty, from which this appeal is taken. Appellee's petition charged that the penalty was incurred while appellant was in the hands of receivers, but it had since assumed all obligations incurred by them. In *Bonner v. Association*, (Tex. Civ. App.) 23 S. W. Rep. 317, it is held that receivers of a railroad are not subject to the penalty imposed by the statute upon which this suit is based. The statute only imposes the penalty upon railroads, for the acts of their officers, agents, or employees, and not upon carriers generally. 2 Sayles' Civil St. art. 4258a, § 3. And it is well settled that one suing for a penalty must recover, if at all, according to the terms of the statute. *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. Rep. 1014. A receiver of a railroad is neither its officer, agent, nor employe, but is the officer of the court making the appointment. *Turner v. Cross*, 83 Tex. 218, 18 S. W. Rep. 578. We therefore think appellant was not liable for the penalty allowed.

The bill of lading was issued by the Newport News & Mississippi Valley Company at Fulton, Ky., and stipulated for a through freight rate to Gainesville, Tex., of \$1.07 per 100 pounds, but did not name its connecting carriers, and limited its own liability to its line. It had no contract or arrangement with appellant for the issuance of such bills, nor is it charged in appellee's petition that any partnership or joint traffic arrangement existed between these companies. Appel-

lant did have a joint tariff of rates over its own and connecting lines from Memphis to Gainesville, which seems to have been made under such circumstances as to subject these lines to the penalties prescribed by the interstate commerce law. This rate was \$1.23 per 100 on an estimated weight for live stock such as these. These cattle were transported by the carrier which made the contract from Fulton to Memphis, and there delivered to a connecting carrier, which paid its charges, and conveyed them to Waggoner, in the Indian Territory, and there delivered them to appellant, which paid all the previously accrued charges, and completed the carriage to Gainesville. The charges paid by appellant when it received the cattle were according to its regular tariff of rates, and it had no notice of a special contract at a lower rate until appellee exhibited his bill of lading at Gainesville, after the arrival of the stock there. Upon these facts, the court gave the following charge to the jury: "It is the duty of the railway company to transport and deliver to the consignee all freight received by it for shipment, and if such shipment is made under a through bill of lading, fixing and providing the through rate of freight, and if such shipment is made under such bill of lading, and none other, then and in that event all railroads over which such shipment is made are bound by such through rate, except it be a connecting line that makes the connection in a state where, by reason of some statute, such line is compelled to accept and transport all shipments tendered it by such connecting line." It will thus be seen that the court below held the law to be that whenever one carrier receives goods from another, destined to a point on its line, without making a new contract, it thereby becomes a party to, and bound by, the contract made by the initial carrier with the owner, whether it has notice of its terms or not. We do not understand this to be the law. When goods are properly tendered to a common carrier for shipment, the common law requires it to receive them; and, if no special contract is made for compensation, it has the right to charge its reasonable and customary rates for like service. Where the goods are received from a connecting carrier, and the petition charges a partnership between the two, the facts set forth in the charge are admitted in evidence to sustain this allegation; and, if the partnership be established, each of the carriers will be bound by the contract as made, because it is its contract. *Railway Co. v. Tisdale*, 74 Tex. 8, 11 S. W. Rep. 900; *Railway Co. v. Baird*, 75 Tex. 258, 12 S. W. Rep. 530. This may also be said where one carrier is alleged to have ratified a contract made by the other. *Id.* But ratification presupposes knowledge of what one is ratifying, and this is neither alleged, proven, nor submitted in the charge in this case. The issues of partnership and

ratification, when properly raised by the pleading, are ordinarily questions of fact for the jury. We believe the court erred in charging the jury, as a question of law, that the receipt of freight by one carrier from another binds him to the terms of the contract with the owner, provided there be no statute such as ours in force when the goods are received.

But in this case there is an insuperable objection to requiring appellant to deliver the cattle upon tender of the amount due, as shown by the bill of lading issued by the Newport News Company. It was both alleged and proven in the court below that this was interstate commerce, and, from Memphis to Gainesville, passed through several states, over connecting lines of railroads, which had agreed upon a joint tariff of rates, in compliance with the act of congress regulating commerce between the states, and that this rate was much more than that stipulated for in the bill of lading for the entire distance. Under these circumstances, it has several times been held in this state that the delivering line must collect the interstate commerce rate, and not that named in the bill of lading. *Dillingham v. Fischl*, 1 Tex. Civ. App. 546, 21 S. W. Rep. 554; *Railway Co. v. Nelson*, (Tex. Civ. App.; decided Oct. 25, 1893,) 23 S. W. Rep. 732.

It may, however, be answered that appellant is nevertheless guilty of a conversion, because it demanded, not only the amount due under the interstate commerce rate from Memphis to Gainesville, but also the amount that had been advanced to the contracting carrier at Memphis, and as, under the contract, this carrier would not be entitled to anything, if its connecting lines consumed all appellee was to pay, appellant should not have been allowed to collect anything for it. Had not these charges already been paid to the contracting carrier by appellant, without notice of the terms of the contract, we believe this would be correct. *Railroad Co. v. Marsh*, 57 Ind. 505. But even as to this there is much conflict in the authorities. *Vaughan v. Railroad Co.*, 13 R. I. 578. But where the connecting carrier advances the charges of the preceding one at the usual rates, without notice of any special arrangement between it and the owner, the decided weight of authority seems to be in favor of the holding that the delivering carrier can demand of the consignee payment of the charges so advanced, and the owner must then look for reimbursement to the contracting carrier, upon its guaranty. *Schneider v. Evans*, 25 Wis. 241; *Wolf v. Hough*, 22 Kan. 659; *Wells v. Thomas*, 27 Mo. 17; *Schouler*, Bailm. § 610; *Hutch. Carr.* § 478a; *Ror. R. R.* 1263; *Vaughan v. Railroad Co.*, *supra*. The inconvenience which would result to shippers generally, should connecting carriers adopt the practice of each one col-

lecting its own charges, and of holding the goods until these are paid, as they would have the right to do, seems generally to have been regarded as sufficient reason for adhering to the views above indicated, and we shall not now undertake to dissent therefrom. The present and long-continued custom among the carriers, for each succeeding one to advance for the owner the charges of those preceding it, is certainly very convenient to shippers, and greatly speeds the carriage; and we do not feel disposed to make a ruling which, if accepted as the law, would have the effect of requiring every carrier, when goods are tendered to it by a connecting line, to delay receiving them until the original contract with the owner could be investigated. Either this would result, or we must treat every carrier as having authority to bind all others by its contracts, which we have no power, under the law, to do. The judgment of the court below will be reversed, and the cause remanded.

JOHNSON v. JOHNSON.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

TRIAL—ADDRESS TO JURY—HUSBAND AND WIFE—COMMUNITY PROPERTY—DIVORCE—ADULTERY.

1. The fact that the trial judge permitted defendant, who personally conducted his own defense, to go into facts in his address to the jury that were not in evidence, is harmless error, where the evidence is insufficient to support plaintiff's cause of action.

2. Pension money paid to a veteran in the Civil War is a donation from the government, and is his separate property, though he did not receive it until after his marriage; and the fact that he invested it in land does not change its character into community property.

3. Under Rev. St. art. 2861, subd. 3, which gives the wife a right to a divorce where her husband "has abandoned her and lived in adultery with another woman," the wife is not entitled to a divorce on the ground of adultery committed by the husband after she had without cause abandoned him.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Action by Maggie C. Johnson against E. B. Johnson for divorce. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Webb & Finley, for appellant.

FLY, J. This is a suit for divorce instituted by appellant against her husband, the appellee, on the ground of cruel treatment and adultery; with prayer for partition of certain community property, and for custody of a little boy. There was a general and detailed denial of each allegation in the petition, and, in addition, there was filed by the defendant a cross bill praying for divorce from the wife on the ground of cruel treatment. It is unnecessary for us to set out the facts in this opinion, it being sufficient to say that the verdict of the jury is sustained by the facts set forth in the record.

Appellant complains of the court permitting the appellee, who, it seems, conducted his own defense, to go into facts in his address to the jury that were not in evidence. This should not have been permitted. Appellee was disqualified as a witness, and he should not have been allowed to bring before the jury, under the guise of argument, facts to which the law rendered him incompetent to swear. It was a flagrant violation of the rules for the government of the district court, and the violator of them should have been promptly checked by the trial judge. However, a special charge asked by appellant was given, instructing the jury not to consider anything but the facts in arriving at a verdict. This would not, perhaps, have remedied the wrong done if there had been sufficient evidence for the appellant to have sustained a judgment of divorce. But the facts were insufficient. The charge of cruelty was totally unsupported by the evidence, there being no instance of cruelty shown, but merely conclusions of one witness that he was cruel, and this conclusion coming from a witness who seemed to be the prime mover and instigator of the divorce proceedings. What we have said answers the propositions under the third assignment of error.

There was, as before stated, no testimony to support the allegation of cruel treatment or outrages on the part of the husband towards the wife, such as would render their living together insupportable, and the court did not err in refusing to submit this issue to the jury, for, if it had, there could not have been a different result. For the same reason the fifth, sixth, and eighth assignments of error are not meritorious. It was not erroneous to state in this case to the jury what the pleadings of appellee alleged, although they were not sustained by the proof, and there was no verdict for appellee on his cross bill, which prayed for a divorce.

The indisputable evidence showed that the lot of land in which appellant claimed a half interest was paid for with money that had been paid appellee, after marriage, by the federal government, as back pensions. This money was his separate property, being a gift or donation from the government on account of supposed services performed by him as a Union soldier in the late war. Even if he had earned it, and it was not a donation, still he earned it before marriage, and it was his separate property, and the fact that it was paid after the marriage would not alter its character. It is provided by the statute granting pensions to such Union soldiers that they shall inure wholly to the benefit of such pensioner, (Rev. St. U. S. § 4747;) but our holding is put on the ground that the pension is purely a gift from the government, and as such is separate property under our statute. The fact that the pension money had been invested in real estate did not change its character as separate estate.

The evidence in this case discloses some suspicious circumstances that the evidence of appellee did not explain, but the statute permitting the granting of a divorce to the wife on the ground of adultery of the husband has not been met with the evidence. The clause in the statute is as follows: "Third. In favor of the wife, where the husband shall have left her for three years with intention of abandonment, or where he shall have abandoned her and lived in adultery with another woman." This statute, it will be seen, clearly requires that abandonment and living in adultery, in the case of the husband, must concur, before the wife is entitled to a divorce. In this case the wife had left the husband, had gone to a distant county, and had taken their only child with her, at a time when the husband was in very bad health. If there was any abandonment, she, and not he, had been guilty of it. The circumstances surrounding the husband while his wife was absent demanded an explanation, and, had it not been for the intermeddling efforts of so-called friends, who were inciting the wife to enter divorce proceedings, the explanation might have been given the wife, and the matrimonial affairs have been amicably settled. In a case in which the facts were much stronger than these the supreme court held they were insufficient to sustain a divorce. *Trevino v. Trevino*, 54 Tex. 261. The marriage tie, the most sacred of contracts, and one upon which the very foundation and perpetuation of civilized society is builded, cannot be rescinded upon mere suspicion, and without strict proof of all the facts requisite to sustain the necessary allegations under the clause of the statute through which the divorce is invoked. We are of the opinion that the judgment of the lower court should be affirmed.

BAKER v. WAHRMUND.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

PLEADING—VERIFICATION—GUARANTY—RIGHTS OF SURETY.

1. Where defendant in an action on contract pleads want of consideration, a defect in the form of the affidavit to the truth of the plea may be amended.

2. The consideration passing between the payee and the maker of a note is not sufficient to uphold a guaranty of the note, made, at the solicitation of the payee, several weeks after the execution of the note, where such guaranty was no part of the inducement to its execution.

3. A surety for the debts of a firm becomes subrogated to all the rights of the creditors, on paying the debts; and, when sued by any member of the firm, he is entitled to offset the debts thus paid.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by James L. Baker against Otto Wahrmond as guarantor of two promissory

notes. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

B. L. Aycock, for appellant. Upson & Bergstrom, for appellee.

FLY, J. Appellant sued appellee as indorser of two promissory notes. Appellee answered that he had signed the notes after their execution, as guarantor, and pleaded want of consideration. We conclude from the record that the following facts were proved: That on May 17, 1883, J. B. Belohradsky executed two promissory notes to appellant,—one for \$1,000, due 13 months after date, the other for \$946, due 16 months after date. That, about one week after the execution of the notes, appellant induced appellee to indorse the notes by telling him that he (appellant) wanted to raise the money on the notes, and that he could not do it without a surety on the note; that Belohradsky had told him (appellant) that Scholz would sign the notes, but Scholz refused, and that he had seen Belohradsky again, and he had told him that appellee might sign them. That appellee then wrote his name on the back of the notes. That he received nothing for signing the notes, nor did anyone else get anything. That the notes were given by Belohradsky for the interest that appellant had in the firm of J. B. Belohradsky. That appellant was, prior to the execution of the notes, a member of the firm of J. B. Belohradsky. That, at the time of the dissolution of the firm aforesaid, it was indebted to appellee in the sum of \$4,000 for borrowed money. That appellee, before the dissolution of the partnership, became surety for a number of debts to different parties, which became due at different dates from May 6, 1886, up to August 3d. The sums so paid by appellee on security debts for said firm amounted, in the aggregate, to about the sum of \$2,500, with interest. That the firm of J. B. Belohradsky & Co. consisted of J. B. Belohradsky, S. E. Baker, and appellant. That the first-named members of the firm were insolvent. That Belohradsky was living in Mexico. That none of the sums paid out on the security debts for the firm were ever repaid to appellee. That, after the dissolution of the partnership, appellee had taken a third mortgage on the property of Belohradsky, being all the property that had belonged to the firm, to secure the payment of the \$4,000 due by the firm for borrowed money. That all the property had been sold to pay off the mortgage debts, which it barely paid off, and that the firm had no other property. That the amount paid on the security debt had never been paid to appellee.

We shall discuss the errors assigned in appellant's brief, and give our conclusions thereon, in the order in which they are presented:

The first assignment of error goes to the action of the court in overruling appellant's special exceptions to appellee's plea of want

of consideration. Appellee alleged, in the plea excepted to, that "he did indorse his name on the back of said notes, but alleged and charges that, for said agreement to guaranty the payment of said notes, he received no payment and no consideration whatsoever, and that, therefore, said contract is not valid and binding against him." The exception did not go to the manner and form of the plea, but to the affidavit at the end of the answer, which is as follows: "Otto Wahr-mund, being first duly sworn, says that this statement in the above petition, that his guaranty was without consideration paid to him, is true." It is evident that the word "petition" was inadvertently used for "answer," but the exception was, that "the affidavit is restricted to a consideration paid to him." The exception was sustained, and appellee was permitted to amend his affidavit so that it read, "Now comes the defendant in the above styled and numbered cause, and says that the fact, as alleged in his first amended original answer, that his indorsement of guaranty of the notes sued upon is without consideration, is true." If the first affidavit was imperfect and insufficient, we are of the opinion that the amended one was sufficient. There was no error in permitting the amendment. It merely went to the form of the affidavit, the facts being sufficiently pleaded, and they are sworn to be true. It was not setting up new substance and facts, but simply was an amendment to the affidavit to the truth of the facts alleged. No form for the affidavit of failure of consideration is prescribed, it being only required that the plea be sworn to. Rev. St. art. 1265. In this connection, it may be said that, in order to render valid a contract of suretyship or guaranty, it must be supported by a sufficient consideration. This consideration is usually either of benefit to the principal or surety, or of detriment to the creditor; but, whatever it may be, the law will not inquire into the prudence or imprudence of the surety or guarantor in making the contract. But where the consideration between the principal and creditor has passed and become executed before the contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract. Brandt, Sur. p. 10, § 9. While, perhaps, strictly considered, the appellee was an indorser, and not a surety or guarantor, yet the same causes that will discharge a surety will ordinarily discharge an indorser, and we have viewed the case upon the lines laid down by the briefs of both parties.

The second assignment of error is without merit. The defendant (appellee) pleaded, in a proper manner, that he had paid certain notes for appellant's firm, and it was not error to permit proof of the notes so paid; and plaintiff's motion to exclude the notes from

consideration of the jury, after they had been admitted, was properly overruled. Upon the payment of the notes due by the firm of J. B. Belohradsky & Co., he was entitled to be substituted, as to the very debts themselves, to the creditors, and to have them assigned to him. He was subrogated to all the rights of the creditors. It was his right to sue for the debts, and when he was sued by the firm, or any member of it, he had the right to plead the debts he had paid off for the firm as an offset to any debt he might have owed the plaintiff. Appellee was entitled to have the notes transferred to him, and, whether it was done or not, equity considers that as done which ought to have been done; and, whether the transfer was made in writing or not, the fact that he paid the notes made them his, and subrogated him to all the rights and privileges of the payees. This rule of law springs from principles, the most obvious and patent, of natural justice. The surety has performed a duty that was properly due by another, and justice and right would demand that he be placed in a position to obtain redress from him for whose debt he had bound himself. The real consideration for the contract of indebtedness has not come into his hands, but it is, perchance, a labor of love or act of friendship; and in his misfortune he is made a favorite of the law, and every reasonable opportunity will be given him to recover his money. With all the redress given him by law, the Biblical truth will come home to him, that "he that is surety for a stranger shall smart for it, and he that hateth suretyship is sure." Brandt, Sur. p. 351, § 260; Sublett v. McKimney, 19 Tex. 439.

The seventh assignment says: "The court erred in submitting an issue at all to the jury on the counterclaims, because the defendant first indorsed the notes sued, then took a mortgage from J. B. Belohradsky on the brewery plant, that was liable, in equity, for the debts so set up; and his mortgage of four thousand was paid in full out of funds that were liable, primarily, (being partnership assets,) to the satisfaction of the very debts allowed to be set up in this action." This assignment might have merit, if it was supported by the facts, but it is not. The appellee swore, and he is uncontradicted on this point, that the mortgage for \$4,000 was given to secure a debt due by appellant's firm for money advanced by appellee to them. Portions of the security debts were not paid till long after the execution of the mortgage. The sale of the brewery plant under the mortgage brought only enough money to pay the mortgage debts, and, after the disposition of the debts secured by mortgage, the appellee was left with all the security debts due and unpaid to him. This view of the facts disposes of the sixth assignment, which is a violation of the rules, and too general in itself for consideration.

The last assignment brings in review the sufficiency of the proof to sustain the verdict. There were really but two points in evidence to be passed on by the jury, and those were—First, as to whether there was any consideration for the indorsement; and, second, whether, if there was a consideration, plaintiff's claim should be offset with that of defendant. There was a conflict in the testimony of the witnesses. If the appellee swore the truth, there was no consideration for his indorsement of the notes. He was not requested to sign them by the maker of the notes, but, at the instance and request of appellant, he signed them, in order that he might raise money on them. He did not raise money on them, and the consideration, if any, had been obliterated. The witnesses were before the jury, and no matter what our opinion may be of the proof, independent of the verdict, there was a conflict, and they have settled it in favor of appellee. We are not disposed to disturb it. The jury may have found for appellee upon either of the grounds of defense, and upon either their verdict would be sustained. The judgment is affirmed.

INTERNATIONAL BLDG. & LOAN ASS'N v. BIERING.

(Court of Civil Appeals of Texas. Nov. 22,
1893.)

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL OF STOCKHOLDER—CREDITS.

The by-laws of a building and loan association provided that any stockholder wishing to withdraw unpledged stock should give 30 days' written notice; that at the end of such 30 days such stockholder should be entitled to receive the amount actually paid in on such stock, with such interest or profits as the directors should determine, deducting all dues and fines against him; and that, if the interest on any loan or any dues remain unpaid more than three months, the directors may compel payment of principal, interest, and fines by proceeding on the securities according to law. *Held*, that where the association proceeded under the latter clause of such by-laws to compel payment, the stockholder was entitled to have credit for the withdrawal value of his stock under the provisions of the prior clause.

On rehearing. For report of decision on appeal, see 23 S. W. Rep. 621.

JAMES, C. J. Appellee has filed his motion for rehearing, and there are two matters treated of in the motion which we should notice. It suggests that upon the whole evidence it is reasonably clear that the maturity of the stock would take place in eight years. Such is not the result of the evidence. Its maturity was indefinite and indeterminate, and the stock may not have attained its par value for a much longer time than eight years, and possibly not at all. If in any argument of appellant it was admitted that the stock would have matured in eight years it could not change the fact as

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it appeared in the record. We are not altogether satisfied that there was a sufficient consideration for the supplemental agreement. If the only inducement to appellee to enter into this agreement had been a reduction of the interest from a usurious rate to 12 per cent., we would not have held that it was supported by a consideration, for then the association would have yielded nothing except what appellee was by law entitled to insist upon. But the interest was reduced to less than 12 per cent., and, besides, he obtained the right to redeem his shares on more favorable terms, as explained in the opinion, and the value of this to appellee is not capable of appraisal. We are content to adhere to our opinion in this case, and overrule the motion.

A counter motion for rehearing is made by appellant for the purpose of having the judgment of the court reformed in certain respects. In reference to this motion we will state that the only ground mentioned which is included in the assignment of error is the one that it was error to credit appellee with the withdrawal value of the stock. It seems to us that section No. 4, art. 8, of the by-laws is applicable to the case, where, after default for more than three months by Biering, the association had chosen to proceed against the securities, and had advertised the real estate under the deed of trust. It was therefore entitled to insist on a judgment for principal, interest, and fines (if any) only. The purpose of this proceeding was to determine this amount, and upon its determination it was proper for the court to credit thereon the withdrawal value of the stock, under section 1, art. 8, of the by-laws. Certainly, after paying the association in full under section 4 above referred to, appellee would be entitled to the benefit of said section 1, art. 8. We see no reason to amend the judgment as rendered. As to the amount of this withdrawal value and time of crediting the same this court followed the conclusions of the district judge, and nothing on this subject was assigned as error, or treated of in the brief of appellee, and it should not now be considered.

WILLIS et al. v. NICHOLS et al.

(Court of Civil Appeals of Texas. Nov. 10,
1893.)

EXCLUSION OF WITNESSES FROM COURT ROOM— JUSTICE'S JUDGMENT—EXECUTION SALE— DESCRIPTION OF LAND—JUDGMENT LIEN.

1. It is not an abuse of discretion for the trial judge to deny a motion by plaintiff to exclude two of his witnesses from the court room while the others are testifying, where such witnesses are defendants to the action.

2. A justice's judgment may be proven by the original docket containing it, and need not be proven by a certified copy.

3. The fact that an execution on a justice's judgment orders a sale of specified chattels in the first instance does not invalidate a sale of

the judgment debtor's land, where it appears that the chattels could not be found.

4. The fact that a sheriff's return on execution does not describe the land levied on with sufficient certainty will not invalidate the title of the purchaser at the execution sale, as against subsequent creditors of the judgment debtor, where the debtor pointed out the land to be levied on, and executed a deed to the purchaser to cure the defective description in the sheriff's levy.

5. Under Rev. St. art. 3158, which requires the index to judgment abstracts recorded to show the name of each plaintiff and of each defendant in the judgment, no lien is created where both the record of the judgment and the index thereof state merely the firm name of plaintiffs, but do not state the names of each partner.

6. In trespass to try title, where plaintiffs set up title under an execution sale, and attack defendants' title as being a fraudulent conveyance by the judgment debtor, an answer denying these averments, and alleging the transfer to be bona fide, and praying that the sheriff's deed to plaintiffs be canceled as a cloud on defendants' title, warrants a decree adjudging the land to defendants, though it is not described in the answer.

Error from district court, Travis county; James H. Robertson, Judge.

Trespass to try title by P. J. Willis & Bro. against A. W. Nichols and others. There was a judgment in defendants' favor, and plaintiffs bring error. Affirmed.

The other facts fully appear in the following statement by COLLARD, J.:

Suit by plaintiffs in error in form of trespass to try title, against defendants in error, A. W. Nichols, Joe Young, Riley Spence, and Dennis Corwin, to recover 1,200 acres of land, (part of the J. L. Bray one-third of a league in Travis county,) described in the petition, and for damages. The petition also alleges that defendant Dennis Corwin was on the 25th day of January, 1887, insolvent, and was indebted to plaintiffs; and on said date, being the owner, to defraud plaintiffs and other of his creditors, conveyed the land in controversy to defendant A. W. Nichols, by deed of such date, and that the conveyance was without valuable consideration. That plaintiffs hold title to the land by virtue of judgment, execution, levy, and sale. Prayer for cancellation of the conveyance to A. W. Nichols, for title and possession, and damages. Defendants answered by demurrer, general denial, limitation of three and five years, and plea in reconvention, upon the ground that Corwin had no interest in the land at the time of the levy and sale, and that it was not subject to his debts,—facts alleged to be then well known to plaintiffs. Defendants prayed to be quieted in their possession, and for cancellation of plaintiffs' deed, etc. A jury was waived, and the trial resulted in a judgment, on May 25, 1891, in favor of all the defendants, and for costs, and for Nichols for the land, canceling plaintiffs' deed under sheriff's sale of date November 5, 1890. Plaintiffs have appealed.

R. C. Walker, for plaintiffs in error. Corwin & Shaw, for defendants in error.

COLLARD, J., (after stating the facts.) The judgment set up by plaintiffs was rendered in Galveston county in their favor against Dennis Corwin on the 8th of December, 1884, and the sheriff's deed to them was dated November 5, 1890. After plaintiffs had offered in evidence their judgment against Corwin, executions, recorded abstract of judgment, and deed by the sheriff under the execution sale for the consideration of \$35, they made an oral motion asking the court to put the witnesses for plaintiffs, Dennis Corwin and A. W. Nichols, defendants, under the rule, which motion was overruled, because they were parties defendant, and because no affidavit was made in support of the motion that the ends of justice required the witnesses to be placed under the rule, this having heretofore been the practice in the county. Plaintiffs excepted to the ruling, and now assign it as error. The necessity of placing the witnesses under the rule is usually a matter for the exercise of the sound discretion of the trial court, and, unless such discretion is apparently abused, it will not be revised on appeal. 1 Greenl. Ev. 432. In this case the rule was invoked only as to two of the parties defendant. In such case, at least, we think the action of the court should not be revised, unless it be made to appear that the trial judge abused his discretion, even if it could then be done, they protesting. In this respect this case is distinguished from the case of *Watts v. Holland*, 56 Tex. 58. It is true, Corwin answered with the other defendants, setting up title to the land in Nichols, thereby, in effect, disclaiming title in himself, but he did not disclaim in form, and for all purposes other than the title he was a party. We do not find that there was reversible error in the ruling complained of.

Corwin was admitted to be the common source of title, and he conveyed the land in controversy to defendant Nichols by deed dated January 25, 1887, which deed, plaintiffs say, was made in fraud of Corwin's creditors, and was, therefore, void. Plaintiffs claimed title in themselves by virtue of a judgment in their favor against defendant Dennis Corwin, rendered in Galveston county, Tex., December 8, 1884, for \$1,226.55, and 10 per cent. interest per annum from date, upon which first execution issued January 30, 1885, returned nulla bona, and an execution—the sixth—issued October 7, 1890, on the judgment, directed to the sheriff of Travis county, with return showing levy on the land in suit on the 13th day of October, 1890, sale of the land by the sheriff on 4th day of November, 1890,—first Tuesday in the month,—and sale to plaintiffs for the sum of \$35; all of which documents were read in evidence. Plaintiffs also read in evidence sheriff's deed pursuant to the sale, dated November 5, 1890, the deed purporting to convey all the estate of Corwin owned in

the land on the 25th day of March, 1885. Besides the deed of Corwin to Nichols for the land, the latter claimed the land by virtue of judgment against Corwin and execution sale to himself, which judgment was rendered by Justice of the Peace of Travis County Fritz Tegener, on the 27th day of September, 1881, in favor of John A. Webb & Bro., for \$73 and \$10.95 collection fee, and all costs, for which execution was ordered. After such order, the judgment proceeds and concludes: "And it further appearing to the court that the title to one $3\frac{1}{2}$ gear does not pass to defendant, and that the said wagon be taken and sold to satisfy the demand of plaintiff." To prove this judgment, defendants offered the justice's original docket containing it, and it was admitted by the court, over objections of plaintiff that the judgment must be shown by a certified copy. In this there was no error. *Hardin v. Blackshear*, 60 Tex. 132; *Houze v. Houze*, 16 Tex. 598; *Wallis v. Beauchamp*, 15 Tex. 303.

It was also objected that the judgment foreclosed a lien on a wagon, and did not order execution, on which land could be sold. The officer who levied the execution testified that the wagon could not be found. The judgment does order execution. There was no error in admitting the judgment. Rev. St. art. 1340. The execution issued under the foregoing judgment on the 17th day of October, 1881, out of the justice's court, read in evidence by defendants, commands the sheriff "that of the goods and chattels, lands and tenements of said Dennis Corwin, and first out of the one $3\frac{1}{2}$ gear on which the plaintiff holds a lien, and to which wagon the title should not pass until fully paid for, you make the said sum of \$73, and the further sum of ten 95-100 dollars collection fee and \$4 85-100 costs, together with costs of this execution," etc. The return of the officer on the execution shows that on November 2, 1881, he levied the execution "on 1,200 acres of land out of the John L. Bray survey, second-class headright abstract No. 74, situated in Travis county, Texas," and, after proper advertisement, sold the same on legal sale day, December 6, 1881, in legal hours, at the courthouse door, to Albert Nichols, for the sum of \$101, the highest bid, the proceeds of which were applied to the satisfaction of the execution. Plaintiffs in error objected to the execution and return in evidence, because it directs that the wagon be first sold, which was not done. This objection was not good, because, as we have before seen, the wagon could not be found.

It is also objected to the execution that it was not admissible because the return on the same "is void for uncertainty, and does not describe the land sued for." The deed made by the sheriff pursuant to the sale,—of date December 7, 1881,—read in evidence by defendants, to Nichols, was objected to

upon the ground that it was not supported by a valid judgment, execution, levy, and sale. These objections are now insisted on by plaintiffs in error by assignment of error. The deputy sheriff, Hart, who made the levy, sale, and deed, testified: "I did not find the wagon, and I asked Mr. Corwin to point out property for a levy, and he pointed out this land, and told me to levy on it; and I levied on this land. I could not find the wagon. He said he was indebted to Nichols several thousand dollars, and 'I want him to have the land; and you sell it, and Nichols will buy it in.' I think he said something about the title; that Nichols had a title, and it was lost, or something to that effect. Nichols was living on the land, and Corwin said Nichols had a title to this land, but had lost it; and he wanted Nichols to take care of the old folks, and for his services at jail. My memory is not clear about it. I think he said he wanted it sold to strengthen Nichols' title." There is no evidence tending to show that Corwin was insolvent at the time the levy was made. He became insolvent in 1885, and has since been insolvent. His testimony and that of Nichols both tend to prove that in 1879, or prior thereto, Corwin executed a deed to Nichols for one-half of the 1,200 acres in controversy in consideration of Nichols' interest in another survey of 50 acres of land, which deed was destroyed by fire, in a trunk that belonged to Nichols' sister. Corwin was sheriff of Travis county for four years, and during that time Nichols served as jailor at \$45 per month, which were drawn and used by Corwin, Nichols not deriving any benefit from it. This being the condition of their business, Corwin executed the deed to Nichols in evidence for the whole 1,200 acres, of date January 25, 1887, attacked by plaintiffs for fraud. This last-named deed recites "that heretofore, to wit, about the year 1880, I made and executed to A. W. Nichols a good and sufficient deed of conveyance to the land hereinafter described for and in consideration of \$2,000, the said deed having been burned by accident, without record. For the above considerations I hereby have granted," etc., proceeding to convey the 1,200 acres of land conveyed to him, the grantor, by A. M. Cox, on September 27, 1873. Though the description of the land, as shown by the return of the sheriff, may not ordinarily be sufficient to support a judicial sale, seeming to be an undefined part of a larger survey, we think the execution, levy, return, and deed by the sheriff were admissible upon the issue of fraud set up by plaintiffs in the later deed of January 25, 1887, by Corwin to Nichols; and, secondly, admissible upon the ground that, the proceedings of sale being by consent and by direction of Corwin, the strict rule as to description of the land in judicial sales would not apply, and, such being the case, the de-

scription would be good. The evidence does not raise a suspicion of fraud when the levy and sale were made, and, no one being interested but Corwin and Nichols, the former, by directing the officer to make the levy, and adopting it, waived the irregularity, it being such defect only as would defeat a forced sale. In the case of *Wilson v. Smith*, 50 Tex. 369, 370, the question was one of uncertainty of description of land levied upon. The levy was upon 160 acres of land, being a part of the homestead tract of said James Bankston, (defendant,) exclusive of 200 acres exempt by law. It was in evidence that James Bankston pointed out the excess of his homestead tract over 200 acres for levy, and was present at and assented to the sale. The court, on appeal, held that the levy was not so uncertain as to make it void under an ordinary execution, and proceeded to say: "But, however it might be in case of such a levy and sale if objected to in time by the defendant in execution in this case, it was averred and proved that the levy was made on the land as pointed out by James Bankston himself, and that he was present at and assented to the sale. The purchaser, moreover, appears to have gone into peaceable possession, and remained until after Bankston's death. These facts are sufficient to show a waiver by Bankston of any irregularities in the levy or sale,"—evidently meaning the uncertainty of description, as that was the only irregularity in the sale. *Id.* 370. In the case before us the officer was acting by authority of a legal writ, and with the consent and direction of the owner. Corwin has ever since the sale recognized and affirmed Nichols' title to the land. In such case, the authority of the sheriff to sell does not depend solely upon a compliance with the law strictly applied, but by such authority, and with the consent and direction of the owner. It is not an enforced agency without consent, but a voluntary agency agreed to by him. We cannot hold that the sale to Nichols was void because of defects in the description of the land levied upon, or for other causes set up.

There was ample testimony, though some to the contrary, to support the finding of the court that the subsequent deed executed by Corwin to Nichols was made in good faith, and upon a good and valuable consideration; and such conveyance would cure any defects in the sale under execution. *Walker v. Emerson*, 20 Tex. 706.

We do not find any merit in the assignment that plaintiffs acquired a judgment lien upon the land before Corwin conveyed the land to Nichols by the deed of January 25, 1887. Plaintiffs in error contend that their abstract of judgment was recorded and indexed in Travis county on March 25, 1885. The copy of the abstract of the judgment referred to is as follows:

"State of Texas, Galveston county. In district court, Dec. term, 1884. (12,139.) P. J. Willis & Bro. v. Dennis Corwin. Date of judgment, Dec. 8, 1884.

Amount of judgment.....	\$1,226 55
Amount of costs.....	12 20
Amounts of credits.....	none
Amount due.....	1,226 55
	12 20
	<hr/> \$1,238 75"

This abstract was certified as correct by the clerk of the district court of Galveston county on the 19th day of March, 1885. There are indorsements and statements on the copy as follows: "Filed, Mch. 21, 1885, at 12 o'clock A. M. Recorded, Mch. 25, 1885, at 10 o'clock A. M." And indexed on the reverse side of said index as follows: "Corwin, Dennis, 445." And indexed on the direct side of said index as follows: "No. 12-139. Willis & Bro. v. D. Corwin. 445." Then follows the certificate of the county clerk of Travis county, that the foregoing is a "true and correct copy of its original, and that the indexes thereof, as the same appears on said indexes and the judgment record of said county, Book L, pp. 445," which certificate is made April 20, 1891. The statute requires that the index to judgment abstracts recorded "shall show the name of each plaintiff and of each defendant in the judgment," and then, when the judgment has been recorded and indexed as provided by statute, it shall, from the date of such record and index, "operate as a lien upon all the real estate of the defendant situated in the county," etc. *Rev. St. arts. 3158, 3159.* This statute must be strictly complied with to create the lien provided for. It has been held that the firm name alone of a party to the judgment in the index is not a compliance with the statute. *Glin Co. v. Oliver*, 78 Tex. 182, 14 S. W. Rep. 451. No lien was created by the foregoing record and index. The same abstract was refiled and indexed in the records of Travis county June 28, 1887, after Corwin's deed to Nichols was executed and recorded. The names of each member of the firm had been added in the style of the case, and an index made to correspond, giving the names of the individual members of the plaintiffs' firm. If this last record and index could create a lien, it did not affect the right of Nichols under his deed previously executed and recorded.

The last contention of plaintiffs is that "the court erred in rendering judgment for defendant Nichols on his cross action against the plaintiffs to remove cloud from title, because there was no pleading to justify such judgment against plaintiff, for the pleadings of the defendants nowhere allege ownership of the land sued for in defendant A. W. Nichols, and do not describe any land, and contain no data upon which to base said judgment on cross action." It will be borne in mind that plaintiffs set up their title by

virtue of their levy and sale under execution, and attacked the deed of Corwin (from whom both parties claimed) to Nichols, as made in fraud of creditors, and that it was without consideration, praying for cancellation of the same. Defendants denied these averments; set up that the land was not the property of Corwin at the time of the levy and sale to plaintiffs; that it was not subject to his (Corwin's) debt to plaintiffs; that the deed of plaintiffs, its record, and assertion of title thereunder, was a cloud upon defendants' title, and disquiets and disturbs them in their possession and enjoyment of the premises; on account of which they prayed that plaintiffs' deed and sale be canceled, and that the "said land be decreed not subject to the debt of plaintiffs," and that defendants go hence, etc. The court adjudged the land to Nichols, canceled the sheriff's deed to plaintiffs, and removed cloud from Nichols' title created thereby. Taking the pleadings of both parties together, and the issues made by them, we are of opinion that they warranted the judgment of the court and the relief granted. We find no error in the judgment, and it is affirmed.

FLENNER et al. v. WALKER.

(Court of Civil Appeals of Texas. Nov. 10, 1883.)

ADMINISTRATOR'S SALES — COLLATERAL ATTACK— APPEAL—PRESUMPTIONS.

1. An administrator's sale to pay debts is not subject to collateral attack on the ground that deceased was a volunteer in the Texas army from a foreign country, and that his estate was therefore exempt from administration by creditors, under Act Jan. 14, 1841, where the evidence leaves it uncertain as to whether deceased was a resident of Texas at the date of the declaration of independence, March 2, 1836, and hence a citizen of the republic, under section 10 of the "General Provisions" of the constitution.

2. The facts that administration on an estate was not granted until after the expiration of 10 years from decedent's death, and that the records of the probate court fail to show whether decedent was a resident of the county or had property there, or whether any claim against the estate was ever presented, allowed, or filed, are not sufficient to invalidate the administrator's sale of land for payment of debts on collateral attack by the heirs.

3. In trespass to try title by the heirs of a deceased owner of a head-right certificate against the purchaser thereof at an administrator's sale, where the findings of the trial court identify this certificate as the one on which a patent for the land in dispute was subsequently issued to the purchaser by the estate, the court of civil appeals will presume, in the absence of the patent from the record, that it contained the usual showing that it was issued by virtue of a location of the head-right certificate purchased at the administrator's sale.

Appeal from district court, Lampasas county; W. A. Blackburn, Judge.

Trespass to try title by S. A. Flenner and others against A. S. Walker, Jr. From a judgment in defendant's favor, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by FISHER, C. J.:

An action of trespass to try title, by the appellants against the appellee, to recover the Samuel Flenner one-third league head-right survey, patented to the heirs of Samuel Flenner, deceased. The court below rendered judgment in favor of appellee, and that the plaintiffs take nothing by their suit. This court finds the following as the facts, as gathered from the record: (1) The land in controversy, that described in the plaintiffs' petition, was patented to the heirs of Samuel Flenner on March 7, 1854, by the state of Texas. (2) Samuel Flenner died some time between the years 1839 and 1842. (3) Appellants Catherine Flenner, Margaret Morgan, Elizabeth Beaver, wife of F. O. Beaver, John Gillespie, and Anna Peightal, wife of James Peightal, were heirs of said Samuel Flenner. It was shown that there were other heirs of said Flenner, but their names are not known. (4) Deed executed by John H. Isbell, administrator of the estate of Samuel Flenner, to William R. Baker, dated December 15, 1852, conveying the one-third of league head-right certificate issued to Samuel Flenner. (5) This deed was executed under the following proceedings had in the administration of the Flenner estate: "Estate of Saml. Flenner. Be it remembered that the following proceedings were held before the Honble. court held in and for the county of Harris and state of Texas, in the matter of application for administration of this estate, in words, characters, & figures as follows, to wit: 'Petitn. Isbell. Petition J. H. Isbell, filed June 4th, 1851: "To the Honorable County Court of Harris County: Your petitioner, John H. Isbell, respectfully represents that Samuel Flenner, a citizen of said county, died several years since intestate; that he left some property which needs looking after; that there are no kindred of said Gates known to your petitioner in Texas; that debts are due by said estate; and that your petitioner is a creditor, and he believes that the property should be made available in order that said debts be paid. He prays, therefore, that he be appointed administrator of the said estate of Samuel Flenner, dec'd, with full powers as such, and according to law, and as in duty bound he will ever pray. John H. Isbell." Notice given. Notice application: "Notice of this application was this day given by me as the law directs. June 19th, 1851. W. R. Baker, Clk." Petition Apprd. From the minutes of June term, 1851, June 30th: "The petition of John H. Isbell for the appointment of administrator of the estate having been considered, and it appearing to the court that legal notice of this application has been given, as required by law, & no one appearing to contest the same, it is ordered, adjudged, & decreed by the court that John H. Isbell be, & he is hereby, appointed admin-

istrator of the estate, with full power as such, subject to the orders of court, with authority to receive into possession all of the effects of decedent." Inventory ordered: "It is further ordered that he file an inventory of all of the effects of said estate. It is further ordered that A. C. Davis, John D. Bergin, & Jas. B. Hogan be, and they are hereby, appointed to appraise said estate. It is also ordered that he file a bond in double the value of the inventory, with securities, to be approved by the court. It is further ordered that the estate be continued." Inventory. Inventory, filed July 15th, 1851: "Estate Saml. Flenner. Inventory, as furnished by J. H. Isbell, Admr.: To amt. of pay due him for services on Santa Fe expedition, probable amount about \$300. \$120.00. We certify that the foregoing inventory is correctly appraised by us. Robert Lockhart, Henry Levenhagen. Sworn & subscribed before me, W. R. Baker, Clk. I hereby certify that the foregoing inventory contains all the property of the estate of Samuel Flenner, dec'd, known to me, John H. Isbell. Sworn & subscribed, W. R. Baker, Clerk." From the minutes of July term, 1851, July 28th: "The administrator of this estate having his inventory of the property of this estate duly appraised and sworn to according to law, it is ordered that the same be approved & recorded. Also, having filed his bond with securities conditioned as the law requires, it is ordered that the same be, & it is hereby, approved. It is also ordered that said bond be entered of record. It is also ordered that the clerk issue the usual letters of administration." Petition for sale, filed July 29th, 1851: "To the Hon. County Court of Harris County: Your petitioner, J. H. Isbell, administrator of the estate of S. Flenner, dec'd, respectfully represents to the court that said estate consists of a certificate of public debt of the state of Texas for about \$275.00, and that no other property has come to his hands. He represents that said estate is indebted to a considerable amount, say seventy dollars, due Wm. Isbell, which has been presented, and that he knows of no other debts; also that your petitioner has expended about ten dollars for said estate to obtain the property, and that the cost of court, he is informed, will amount to forty dollars, & that he has no means in his hands wherewith to pay said claims. He prays, therefore, that he be allowed to sell the aforesaid property, in order that cost of court & the debts may be paid, & as in duty bound, &c. John H. Isbell. Sworn to & subscribed, W. R. Baker, Clerk." From the minutes of the July term, 1851, July 28: "The Admr. of this estate having filed his petition for a sale of the same, having been considered, it is ordered, adjudged, and decreed by the court that J. H. Isbell, Admr. of this estate, sell at public auction, to the highest bidder, for cash, at the courthouse

door of Harris county, after ten days' notice, the certificate of public debt due this estate, for services on the Santa Fe expedition. It is also ordered that he report said sale to the Sept. term next. It is also ordered that an order of sale issue in terms of the law. Also ordered that the estate be continued." a/c Sales, filed September 20 1851: "To the Hon. County Court of Harris County: The undersigned administrator of the estate of Samuel Flenner, dec'd, begs leave to report that, in obedience to an order of the court, he sold according to law & said order, after ten days' notice, the certificate of public debt granted to this decedent for services in the Santa Fe expedition, and the same brought the sum of thirty-five dollars, and, there being no higher bid, the same was sold for the sum. John H. Isbell. Sworn and subscribed before me, Sept. 20th. 1851. W. R. Baker, Clk." Petition for sale, filed Mch. 29, 1852: "To the Hon. County Court of Harris County: Your petitioner, John H. Isbell, administrator of the estate of Samuel Flenner, deceased, respectfully represents that said estate consists of a certificate for one-third of a league of land, the head right of said decedent issued by the board of land commissioners of Harrisburg county, upon which he has obtained from the Comr. Genl. a duplicate. He further represents that said estate is indebted to your petitioner in the sum of four hundred dollars, and that the cost of court & of administration will amount to about forty-five dollars, & that he has paid out for obtaining duplicate certificate the sum of seven dollars; and he further represents that he has no means of said estate wherewith to pay said claims, and that a sale is necessary. The premises considered, he prays that he be permitted to sell said certificate, also the land upon which the same may be located, as well as all grants of land by virtue thereof, to be made by the Govt. of Texas to the said Samuel Flenner, or his heirs or legal representatives. John H. Isbell, Administrator. Sworn to & subs. before me. W. R. Baker, Clk." From the minutes of the Mch. term, 1852, Mch. 29th: "The petition of the administrator of this estate for a sale having been duly considered. It is ordered, adjudged, and decreed that the administrator of this estate sell at public auction, to the highest bidder, on a credit of twelve months, at the courthouse door of Harris county, on the first Tuesday of May, A. D. 1852, within the hours prescribed by law, after twenty days' notice by posting, the head-right third of a league of land certificate issued to this decedent by the board of land commissioners of Harris county, 1st class, and upon which a duplicate has issued, signed by S. Crosby, commissioner of the general land office; also the land upon which the same may be located, as well as all grants of land by virtue of said head right

to be granted by the Govt. of Texas to the said decedent, or his heirs or legal representatives; and the said administrator is ordered to report said sale to the May term of this court." a/c Sales, filed May 4th, 1852. "The Admr. of this Est. of Saml. Flenner, dec'd, begs leave to report to the Honl. county court of Harris county that, in obedience to an order of said court entered at the last Mich. term, 1852, he sold at public auction, to the highest bidder, on a credit of twelve months, at the courthouse door of Harris county, within the hours of 10 A. M. & 4 P. M. on Tuesday, the 4th May, 1852, after notice, by posting at the courthouse door of said county and at three other public places outside of the city of Houston, in said county, the head-right third of a league granted to Samuel Flenner by the board of land commissioners of Harrisburg, 1st class, & the duplicate thereof issued by the Comr. of the Genl. land office, together with the land upon which the same may be located; and, Wm. R. Baker being the highest and best bidder for the same, at the sum of seventy dollars, & no one bidding any more, the said certificate was sold to him. John H. Isbell, Administrator. Sworn to & subscribed before me, May 4, 1852. W. R. Baker, Clk." From the minutes of June term, 1852, June 28th: "The Admr. of this estate having filed his report of a sale made by virtue of an order of this court entered at the last March term, & the same having been examined, and the sale inquired into, and it appearing to the court that said sale has been conducted in all respects according to law & the order of sale, it is therefore ordered, adjudged, & decreed by the court that said sale be, & the same is hereby, approved, in all things confirmed. It is also ordered that John H. Isbell, Admr. of the estate of Samuel Flenner, dec'd, execute & deliver to Wm. R. Baker, the purchaser at said sale, a deed & transfer of the right & title of said estate in & to a head right of a third of a league of land granted to Samuel Flenner by the board of land commissioners of Harrisburg county, 1st class, & the duplicate issued by the Genl. land office, together with the land upon which the same may be located." (6) Deed from Wm. R. Baker to the heirs of Mathias Wilbarger, dated April 6, 1855, conveying the land in controversy. (7) The appellee, Walker, is one of the heirs of Wilbarger, and has acquired the interest of the other Wilbarger heirs to the land in controversy.

Matthews & Wood, for appellants. W. B. Abney, Walter Acker, and Terrell & Walker, for appellee.

FISHER, C. J., (after stating the facts.) 1. The first assignment of error attacks the validity and legality of the administration sale of the certificate, for the reason that it

appears that Samuel Flenner was a volunteer in the Texas army from a foreign country, and was killed in one of the battles of the republic; therefore, that his estate, under the act of January 14, 1841, was exempt from administration, as it was not shown that the person administering was entitled to the estate as next of kin, nor that the heirs or next of kin of said Samuel Flenner authorized the administration. The only evidence in the record bearing upon the points raised by this assignment is that of John Flenner, as follows: "I am 80 years old. I knew Samuel Flenner, who served as a soldier in the army of Texas in the war for independence of Texas. I knew him when a child in my father's family, in Huntington county, Pa. He was born in that county, and prior to going to Texas he lived in what is now West Virginia. I think he went to Texas in 1837 or 1838. He was a soldier in the Texas army during the war for independence of Texas, but I don't know the exact time he was there. He wrote home after he was enlisted, and after the close of the war. I saw and read the letters, in which he stated that he was in the Texas army, and that he would get a quantity of land for his services. After the war he went to Houston city, and got into business, and he and another man kept an hotel. When the capital was changed to Austin city, he went there, and afterwards joined the Santa Fe expedition. I do not know how long he lived in different places. He was killed by Indians in the Santa Fe expedition on the 20th of July. This information I had from his comrades. After the war for independence of Texas, Samuel Flenner wrote me that he bought property in different places, and even gave the number of the lots. The last time I saw Samuel Flenner was in 1835 or 1836. I understood that Samuel Flenner did live in Harrisburg county, Texas, a short time; and that, I believe, was one of the places where he owned lots, but I am not certain. He wrote me that he owned some lots, but I forget the names of towns." This evidence, we think, is not sufficient to establish the fact that Samuel Flenner was a volunteer in the Texas army from a foreign country, in the sense intended by the act of January 14, 1841. It is not of that certain character that should exist in order to defeat the jurisdiction of a court that has apparently, in a legal way, exercised jurisdiction over a subject that it has the general power to deal with. When a court deals with a subject that falls within its general jurisdiction, and renders orders and decrees that are apparently valid, it is presumed that every fact necessary to exist in order to confer jurisdiction was established to the satisfaction of the court. If we consider whatever elements of hearsay evidence there may be in the testimony of John Flenner along with the evidence of any fact that he has testified

to, it establishes no more than that Samuel Flenner once lived in Pennsylvania, and that he went to Texas, and was a soldier in the war of independence. He says that he thinks he went to Texas in 1837 or 1838, and says that the last time he saw Samuel Flenner was in 1835 or 1836. So far as this evidence tends to establish the controversy, Samuel Flenner may have been residing in Texas at the date of the declaration of independence, on the 2d day of March, 1836, and his citizenship in the republic of Texas established by section 10, "General Provisions," of the constitution of 1836. If this be true, and we regard him as a single man,—of which fact there is no evidence to the contrary,—he would, by virtue of that section of the constitution, be entitled to one-third of a league as his head right, independent of the fact whether he was a volunteer in the army or not. If there is any recital in the patent or any of the title papers offered in evidence in the court below showing that the character of the certificate issued to Samuel Flenner was for services as a volunteer in the army, it is not shown by any fact stated in the record.

2. It is contended by appellants, in their third assignment of error, that the administration of the estate of Samuel Flenner and the sale of the certificate thereunder are void, for the following reasons: (1) It does not appear that the probate court of Harris county had jurisdiction to administer the estate, because Flenner neither resided nor died in Harris county, nor had he any property there, and that no inventory was ever filed. (2) It does not appear that any claim against the estate was ever presented, allowed, or approved. (3) The administration being sued out in 1851, more than 10 years having elapsed since the death of Flenner, the presumption is that there were no existing liabilities against his estate, and that the administration was fraudulently obtained and conducted for the purpose of acquiring, without lawful authority, title to the property of the estate. The proceedings show an administration valid against a collateral attack, and we think all of the points raised in this assignment are settled against the contention of appellants in the case of *Lyne v. Sanford*, 82 Tex. 61, 19 S. W. Rep. 847, and the cases there cited, and *Saul v. Frame*, 22 S. W. Rep. 984, (decided at last term of this court.)

3. The fourth assignment of error is as follows: "The court erred in its fifth and sixth findings of fact, in this: that it does not appear that the certificate described in the administrator's application for an order to sell, the order, report, or confirmation of sale is the same certificate by virtue of which the land in controversy was located and patented." The fifth and sixth findings of fact by the court below are as follows: "That on the 29th day of March, 1852, on applica-

tion of the administrator, there was an order by said probate court to sell the head-right certificate of Samuel Flenner; that on the 4th day of May, 1852, said administrator, John H. Isbell, according to law, sold said head-right certificate, the same upon which the land in dispute was located and patented, and which was then purchased by W. R. Baker, and the sale duly reported by the administrator and confirmed by the court." In this connection we will set out the seventh finding of the court to the effect "that on the 7th day of March, 1854, the state of Texas issued a patent for one-third league of land—the one in dispute—to the heirs of Samuel Flenner, deceased; that said patent was issued by virtue of the same head-right certificate that was sold under said order of the probate court of Harris county, and purchased by said Baker." It appears that the patent was in evidence before the trial court, but its contents are not stated in the record before us. All that we have is simply a statement that the plaintiffs read in evidence a certified copy of the patent to the heirs of Samuel Flenner for the land described in plaintiffs' petition, dated March 7, 1854, reciting that the land was located by virtue of duplicate certificate No. 2375/2476, issued by the commissioner of the general land office on the 16th day of March, 1852. The seventh finding of fact identifies the certificate sold by the administrator as the same head-right certificate upon which the patent was issued. In view of this finding, as the patent was before the trial court, we must assume, as there is no evidence here to the contrary, that there was some statement or recital in the patent which is usual showing that it was issued by virtue of a location made by the Flenner head-right certificate. If such was the fact, we think it sufficient to show the identity of the land in controversy as that located by the certificate sold by the administrator. The orders relating to the sale describe the certificate as the Flenner head right. There could be only one head right issued to Flenner. We find no error in the record, and affirm the judgment of the court below.

MARTIN v. LAND MORTG. BANK OF TEXAS.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

MORTGAGEE—NONPAYMENT OF INTEREST—DECLARING PRINCIPAL DUE—PLEADING—USURY.

1. Where a trust deed authorizes the mortgagee to declare the entire debt due for default in the payment of interest, an agreement to forbear so to do for the nonpayment of a specified installment, in consideration of the assignment to the mortgagee of all the rents accruing from the mortgaged premises, continues only for a reasonable time, and does not prevent the mortgagee from declaring the entire debt due

for the nonpayment of a subsequent installment of interest.

2. In a suit to foreclose a trust deed the complaint set up a clause in the mortgage empowering the mortgagee to declare the principal due for the nonpayment of the interest, and alleged that default had been made in the payment of two installments of interest, and that the entire principal was due for failure to pay the first installment. The answer alleged that the mortgagee had agreed to forbear to declare the principal due for the nonpayment of the first installment in consideration of the assignment to it of all the rents accruing from the mortgaged premises. *Held*, that a reply that the suit was authorized by the default in the second installment was sufficient, and showed that the suit was not prematurely brought.

3. The fact that interest is to be paid by coupon notes semiannually, and that the coupons bear interest at 12 per cent. after maturity, does not constitute usury.

Error from district court, Travis county; W. M. Key, Judge.

Action by the Land Mortgage Bank of Texas against Mathias Martin on a promissory note secured by a trust deed. There was a judgment in plaintiff's favor, and defendant brings error. *Affirmed*.

The other facts fully appear in the following statement by COLLARD, J.:

This suit was brought by the defendant in error against the plaintiff in error on April 4, 1891, on a promissory note executed by the latter to the former for \$3,000, borrowed money, and interest due thereon, of date March 1, 1887, and due March 1, 1892, interest payable semiannually on 1st September and 1st March of each year; the note bearing 10 per cent. per annum interest, and the interest made payable by coupons attached, to bear interest at 12 per cent. per annum after due. At the same time the note and coupons were executed the payer also executed a deed of trust to secure the payment thereof on certain lands described in the petition. It was provided in the deed of trust that, " * * * if any part of said debt or interest remains unpaid for five days after the same falls due, immediately thereupon the whole principal of said note, and the accrued interest thereon, shall become due and payable; and I, the said grantor, do hereby fully empower said trustee, original or successor hereunder, and it is hereby made his especial duty, at the request of the holder of said note, at any time after default, as aforesaid, to enter into and retain possession of or sell the above-described property, as a whole or in parcels, at public auction, either for cash or on credit, at the option of said trustee, or his successor, at the courthouse door of the county of Travis; * * * and, if any part of said debt or interest remain unpaid for six months after the same falls due, then the trustee may sell the said described property, or any part thereof, privately without advertisement." The amended petition of plaintiff below, filed May 8, 1891, set up the facts, the note, and in *hæc* verba the interest coupons due 1st Septem-

ber, 1890, and 1st March, 1891, and, as ground for maturing the entire amount, set up the foregoing stipulation in the deed of trust, and its breach by the nonpayment of the coupon due September 1, 1890. In the third section of the answer of defendant below he set up that about the 25th day of January, 1891, an agreement was made between the parties that, if defendant would make an assignment to plaintiff of the current rents on the Rock Hotel in Burnet, Tex., and a ranch of 600 acres, owned by defendant, in Burnet and Lampasas counties, Tex., then accruing to defendant, plaintiff would accept the same in full satisfaction of balance of accrued interest due by defendant on the interest coupon maturing on the 1st day of September, 1890; and that, in pursuance of such agreement, defendant made the assignment of the rents of the property for the year 1891, amounting to the sum of \$30 per month for the hotel and \$250 per year for the ranch, and authorized plaintiff to collect the rents as they became due, and to apply the same to defendant's indebtedness aforesaid; "and thereupon, and in consideration thereof, the said plaintiff undertook, promised, and agreed with this defendant that it would not institute suit to foreclose the mortgage described in plaintiff's petition, but would forbear to bring such suit on account of the failure of this defendant to pay the interest due September 1, 1890." To this, plaintiff replied, on June 3, 1891, that it did take an assignment of the rents mentioned merely as additional security for 'he interest maturing on the 1st of September, 1890, and the amount paid by it in liquidation and settlement of premium of insurance policy, and that it had succeeded in collecting, on the 22d day of March, 1891, \$30, stated in original petition, and that no further sum has been paid by defendant or his tenant. But plaintiff further replied that, if it should be held that it took the assignment of rents in payment of the balance due on the interest coupon due September 1, 1890,—which is denied,—then plaintiff alleges that the interest maturing on March 1, 1891, has not been paid when due, whereby the whole debt matured under the stipulation in the deed of trust, setting up particularly the stipulation, and invoking it as a ground for suit for the whole debt. Plaintiff, by its suit, set up claim for amount paid by it on insurance of some of the property mortgaged, provided for in the deed of trust to be paid by it in case defendant failed to do as he agreed to do. Trial was had before the court without a jury, and judgment was rendered, on June 23, 1891, for plaintiff for the \$3,000 due on the note, \$359.04 interest, and \$30.00 balance due on insurance premium paid by plaintiff, all aggregating \$3,389.04, and \$268.00 attorney's fees, all to bear interest at 10 per cent. per annum; foreclosing lien upon the mortgaged property, as prayed for; and granting order of sale, etc.; awarding

all costs against defendant, except those arising from attachment proceeding,—writ levied upon land by plaintiff, which was quashed,—which are adjudged against the plaintiff. Defendant has brought the case up by writ of error. The court below filed conclusions of fact and law. There is no statement of facts in the record.

The findings of the court are as follows:

"Facts.

"(1) All the allegations in the plaintiff's amended original petition, filed May 8, 1891, up to and including the fifteenth section or paragraph, are true. (2) That the allegations in the plaintiff's first supplemental petition, filed June 3, 1891, to the effect that the interest coupon note maturing March 1, 1891, has not been paid, is true; and, according to the express stipulations contained in the deed of trust, therein described and sued on, the failure to pay said coupon note for said interest matured the entire debt. (3) The evidence does not sustain defendant's plea of usury. (4) That the allegations in the third section of defendant's answer, as to the assignment of rents accruing to defendant on certain property, and the implied agreement by plaintiff, in consideration of such assignment, to forbear suing, are true. But said agreement did not embrace any definite time of forbearance. Said assignment and agreement were made February 3, 1891. (5) The plaintiff, acting by C. H. Silliman, its general manager, sued out an attachment herein, and caused the same to be levied on the real estate in Taylor county, belonging to defendant, as alleged, which attachment was recorded in that county as prescribed by law; which attachment, on motion of defendant, was quashed, because the affidavit upon which the same was issued was not in compliance with the statute. (6) Defendant employed counsel to represent him in this suit, and contracted to pay therefor \$250.00, and the expenses of said attorney while attending the court, which amount to \$50.00; and defendant himself has expended \$50.00 in expenses attending this court in this cause. (7) Defendant testified that the levy of the attachment on his land in Taylor county prevented him selling five acres of it at \$150.00 per acre; but he did not show that the land is not still worth \$150.00 per acre. And it was also shown that said land, when levied on, and at the time of the contemplated sale, was incumbered by a mortgage lien. (8) This suit was instituted April 4, 1891. (9) The allegations in the fifth and ninth sections of defendant's answer as to tenders made by him are true."

"Conclusions of Law.

"(1) The failure to pay the coupon note for interest due September 1, 1890, matured the entire debt. (2) The agreement to forbear—though for no specific time—must be construed to mean a reasonable time, provided

defendant paid the other note for interest when it fell due. (3) Defendant having failed to pay the note for interest due March 1, 1891, the entire debt again fell due, and the suit was not prematurely brought. The fact that the original petition did not allege that the principal became due because of the failure to pay the interest due March, 1891, but did allege that it was due because of the failure to pay the interest due September 1, 1890, ought not to subject the plaintiff to the payment of the costs of the suit, when, by pleadings filed before trial, it was alleged that the whole debt matured because of the nonpayment of the interest due March 1, 1891. (4) Defendant's tenders not being for the entire amount of the debt and costs, he is not entitled to any benefit therefrom. (5) The attachment having been quashed, plaintiff must pay all costs occasioned thereby, including a sum sufficient to have the order quashing same recorded in Taylor county. (6) The attachment having been levied on real estate only, defendant cannot recover damages on his cross action. (7) Plaintiff is entitled to judgment for its debt as sued for, principal, interest, and attorney's fee, against defendant, to a foreclosure of its mortgage lien against all defendants."

Walton, Hill & Walton, for plaintiff in error. C. Von Carlowitz, for defendant in error.

COLLARD, J., (after stating the facts.) Plaintiff in error says: "The court erred in its second finding of facts, to the effect that the nonpayment of accrued interest on the 1st day of March, 1891, matured the principal debt, which at that day had one year to run; the documents in evidence and introduced by plaintiff not legally being subject to that construction." The clause in the deed of trust hereinbefore referred to expressly provided that, "if any part of said debt or interest remains unpaid for five days after the same falls due, immediately thereupon the whole principal of said note and the accrued interest thereon shall become due and payable." We see no reason why this clause in the deed of trust should not be enforced. It is true that the amended petition did not set up the failure to pay the interest coupon due March 1, 1891, as a ground for maturing the whole debt, (it claimed this for the failure to pay the interest coupon due September 1, 1890,) but it did set out the nonpayment of the interest due March 1, 1891, and, when defendant answered that plaintiff had for a consideration agreed to forbear suit on the interest due September 1, 1890, plaintiff then set up the nonpayment of the interest due March 1, 1891, as maturing the entire debt. This interest accrued and matured the whole debt nearly one month before the original suit was filed. The agreement to forbear suit on interest due September 1, 1890, was expressly limited to that interest, and would not af-

fect the maturing of the debt and the right to sue on nonpayment of interest due March 1, 1891. Inasmuch as the agreement was so limited, a reasonable time of forbearance would not extend over after the time of maturity of the next coupon. This conclusion of the court is not inconsistent with the other finding that defendant's allegations of agreement of forbearance on the interest due September 1, 1890, were true.

Plaintiff in error assigns as error the finding of fact by the court that "the evidence does not sustain defendant's plea of usury," because the evidence, it is asserted, fully showed that defendant was charged under the guise of interest a bonus of \$300, in addition to interest at the rate of 12 per cent. per annum; and besides, the papers show on their face that the interest was compounded semiannually. There is no statement of facts. We have nothing but the finding of the court, which does not show the bonus claimed. The fact that the interest was to be paid by coupon notes semiannually, and that these coupons bore interest at 12 per cent. after maturity, does not constitute usury. *Miner v. Bank*, 53 Tex. 559; *Andrews v. Hoxie*, 5 Tex. 171; *Roane v. Ross*, 84 Tex. 46, 19 S. W. Rep. 339; *Lewis v. Paschal*, 37 Tex. 315; *De Cordova v. City of Galveston*, 4 Tex. 481, 482.

Plaintiff in error's third assignment of error is as follows: "The court erred in its fourth finding of fact that the allegations in the third section of defendant's answer as to the assignments [of rents] accruing to defendant on certain property, and the implied agreement by plaintiff, in consideration of such assignment, to forbear suing, are true. But said agreement did not embrace any definite time of forbearance. Said assignment and agreement were made February 3, 1891." The error consists in not giving effect to the implied agreement that grew out of and flowed from said assignment [of rents;] the rent assigned being \$360 per annum, and the yearly interest accruing on the debt being \$300. The rents did not go by the trust to the lienholder, his lien being on the corpus of the property. Subsequent to the creation of the lien on the corpus of the property, the borrower assigned the rents to pay accruing interest, which was abundant so to do. The court failed to give effect to the contract that, as long as the rents were sufficient to pay accruing interest, no suit would be brought for the interest, and no advantage taken of the forfeiture clause in the deed of trust. The assignment of the rent being continuing, and being sufficient to pay the rent, the suit was prematurely brought. Whether the foregoing be exactly true or not, there flows from the assignment an implied contract that the lienholder would forbear for a reasonable length of time, under the facts and circumstances, and the court erred in not finding that from the 3d of February to [4th April,] the date the suit was filed, was

not a reasonable time." The allegations in the third section of defendant's answer only set up the transfer of rents as a satisfaction of the interest due on the 1st day of September, 1890, and a forbearance to sue because of nonpayment of the same. The court's finding was that this part of the answer "as to the assignment of rents on certain property, and the implied agreement by plaintiff, in consideration of such agreement, to forbear, are true." The meaning of the finding, then, is that the assignment was made as stated, and that, in consideration thereof, plaintiff agreed to forbear bringing suit because of the failure to pay the interest falling due on the 1st day of September, 1890. The court also found all the allegations of plaintiff's amended petition, filed May 8, 1891, up to and including the fifteenth section or paragraph, to be true. The fifth and sixth sections of the amended petition allege that \$50 of the interest coupon for \$150, due September 1, 1890, was paid on November 18, 1890, and that the balance was due, and defendant had failed and refused to pay the same. It was also alleged in section (6) of the petition that no part of interest coupon due March 1, 1891, had been paid. These allegations are true, according to the findings of the court. No definite time of forbearance was agreed to, and a reasonable time only would be implied. It was not agreed that defendant would be indulged in case of failure to pay the interest on the next maturing interest coupon, nor could such agreement be implied. It could not be implied that, so long as the rents were sufficient to pay the accruing interest, no suit would be brought. Plaintiff was authorized to collect the rents mentioned, but it is evident that only \$50 had been paid on the coupon due September 1, 1890, and nothing on the rest of the debt, or interest, except \$30, (of the \$60 due plaintiff for amount paid for insurance on mortgaged property covered and secured by the trust deed,) which \$30 seem to have been collected out of the rents; though whether out of the rents or not is not deemed material. We think the court gave full effect to the assignment of and authority to collect the rents.

The fourth assignment of error has been virtually disposed of in the foregoing, and it may not be necessary to repeat what has been said, but we will notice some of the points. It is said that the court erred in the first, second, and third deductions of law. The first is that "the failure to pay the coupon note for interest due September 1, 1890, matured the entire debt." In fact it did; but the assignment of the rents made after the debt had matured—February 3, 1891—surrendered the right to sue for such failure at least for a reasonable time, but, as before stated, did not surrender the right to sue on subsequent default as to other interest coupons. In this sense we understand the findings of the court below, and they are

entirely consistent and correct, according to our views of the rights of the parties as before shown. The finding that "the agreement to forbear, though for no specific time, must be construed to mean for a reasonable time, provided defendant paid the other notes when they fell due," is the correct solution of the question; and so the finding that "the defendant having failed to pay the note for interest due March 1st, 1891, the entire debt again fell due, and suit was not prematurely brought," is a necessary conclusion. The suit was brought after the debt matured by default of payment of the coupon due March 1, 1891. The lower court adds to this finding: "The fact that the original petition did not allege that the principal became due because of the failure to pay the interest due March 1, 1891, but did allege that it was due because of the failure to pay the interest due September 1, 1890, ought not to subject the plaintiff to the payment of the cost of the suit, when, by pleadings filed before the trial, it was alleged that the whole debt matured because of the nonpayment of the interest due March 1, 1891." This is true. What the original petition did contain we cannot tell, except from the above finding; but the amended petition sets out the coupons due September 1st and March 1st, but only claims that the failure to pay the one due September 1st matured the entire debt, (which was also the case with the original petition, according to the finding above;) but when defendant set up facts to show that plaintiff had contracted not to sue for the default on the September interest, plaintiff then replied that the default of payment on the succeeding March interest authorized the suit. It was a sufficient reply to the answer, and showed that the suit was not prematurely brought. It was sustained by the facts. We find no error in the judgment of the court below, and it is affirmed.

KEY, J., did not sit in this case.

KRAKAUER v. CAPLES.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

DISTRICT COURT—JURISDICTION—ELECTION CONTESTS.

1. The fact that no salary was attached to the office of mayor of a city when plaintiff was voted for and qualified for that office does not deprive the district court of jurisdiction of an action brought by him against an alleged intruder, where, before the action was brought, the city council, as empowered by the charter, fixed the salary for the unexpired term in an amount exceeding \$500, the jurisdictional limit of the district court.

2. Where a city charter vests the council with power to judge of the election and qualification of its members, including the mayor, and no salary is attached to the office of mayor, a decision of the city council that the person receiving the highest number of votes has not the qualifications prescribed by the charter for the office is conclusive, and not subject to review

by the district court, which, prior to the constitutional amendment of 1891, had no jurisdiction in such cases unless the amount involved exceeded \$500 in value.

Appeal from district court, El Paso county; T. A. Falvey, Judge.

Action by A. Krakauer against Richard Caples to recover the office of mayor of the city of El Paso, and the salary attached thereto. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Hague & Davis, for appellant. T. L. Nugent, for appellee.

Conclusions of Fact.

JAMES, C. J. (1) That appellant was one of the two candidates for the office of mayor of El Paso at a regular election had on April 9, 1889, and received a majority of the legal votes. (2) That by a charter of the city of El Paso, enacted by the legislature and approved March 2, 1889, under the provisions of which the said election was held, it was provided that the mayor and aldermen of said city constitute the city council, and the said council shall determine the rules of its proceedings, and shall be the judge of the election and qualification of its members. That on the first Saturday after an election, or as soon thereafter as possible, the said council shall meet, and open and canvass the returns, and declare the result of the election. That council that canvassed the returns of this election were those duly holding over from the previous term. (3) That on the first Saturday after the election (April 13, 1889) the council convened for that purpose, and the adherents of Morehead, the opposing candidate for mayor, filed a protest and contest, charging that many of the ballots were spurious and illegal, and praying that the council examine the returns, and declare the legal result of the election. Thereupon the council determined upon a mode of procedure, and proceeded to canvass the returns and hear evidence, and continued the work until June 14, 1889, adjourning from day to day for that purpose, and, after duly canvassing the same, ascertained that appellant Krakauer had a majority; but, proceeding to pass upon his qualification for the office, declared that he was not eligible, and ordered another election. (4) That appellant was represented at said proceeding in the canvassing of the returns, but, on being notified that the council would proceed and pass on his eligibility, failed and refused to attend or be represented in such inquiry. (5) That the ground of his ineligibility was the fact that at the time of his election he had declared his intention of becoming a citizen of the United States, and had his first papers only; the charter of April 9, 1889, providing that a person, to be eligible to the office of mayor, must, among other requirements, be a citizen of the United States. (6) That appellant received his final papers of citizenship on May 23, 1889, and on June 19, 1889,

he took and subscribed the oath of office according to the provisions of the charter, no bond being required. (7) At the time of the election and of the action of the council declaring him ineligible and of his taking the oath no salary or other emolument was attached to the office, but, under a provision in the charter which provided that "all the officers and agents of the city except the aldermen and recorder [whose pay was fixed] shall receive for their services such compensation as the city council may ordain," the council did, on August 9, 1889, for the first time fix the salary of mayor at \$1,200 per annum. The term of the mayor's office was by the charter fixed at two years. (8) That the election ordered on April 13, 1889, took place on June 28, 1889, and appellee Richard Caples was declared elected, and performed the duties of the office for the remainder of the term; and the evidence shows he received the salary from August 9, 1889, (when the salary was fixed at \$1,200,) and that prior to such date the office was without value. (9) It was admitted that at the time of the proceedings of April 13, 1889, there was no general ordinance regulating the proceedings of the council, or providing rules to govern proceedings in reference to election contests, or investigations as to qualifications of its members. The suit was filed September 14, 1889, to recover the office, and for the salary of \$100 per month from August 9, 1889, to the time of trial. The district court dismissed the cause for want of jurisdiction, on the grounds assigned in the conclusions of the district judge that the office was worth less than \$500 at the time the council acted, this action being final on the subject, although afterwards, and before the bringing of the suit, the office may have become worth more than that sum.

Conclusions of Law.

We are of opinion that the district court had jurisdiction to determine the right of plaintiff to the office. At the time the action was brought, the office to which the plaintiff claimed to be entitled, by virtue of the salary attached to it, appeared to be of greater value than \$500. It is true that when he was voted for and when he qualified the office carried no salary or other compensation; but at the same time the charter provided for and contemplated the annexation of a salary to the office, which in due course of time was done, and when it was done the office became invested with a value, sufficient to bring controversies concerning it within the jurisdiction of the district court. It may be said that the fixing of a salary in respect to this office was not inherent in the office; that it rested in the bounty of the council, which could have placed it at a less sum or refrained from granting it altogether; but jurisdiction is to be determined by what is placed in controversy by the pleading of the plaintiff, unless it is made to

appear that the allegations have been falsely made for the purpose of conferring jurisdiction. We believe the court erred in its conclusion of law that there was no jurisdiction because of the fact that at the time the council acted the office had no value. The right of action by one entitled to an office against an intruder is in its nature a continuing one. The amount of the salary in this case was uncertain, owing to the control which the council had over the subject by ordinance; but when the salary that became attached to it made it exceed in value \$500, it seems to us it presented a case for the determination of the district court. If it was made to appear, as was done in this case, that the defendant was rightfully in office, the judgment should have disposed of the case on its merits.

The other reason given by the district judge for not determining the matters in issue, namely, that the action of the council in passing adversely on plaintiff's qualification for the office was conclusive, was correct. We take this view of it because at the time the council so determined the office was of no present value, and the subject-matter so committed to the jurisdiction of the council did not, therefore, come within the cognizance of the district or other constitutional court. The case of *State v. De Gress*, 72 Tex. 243, 11 S. W. Rep. 1029, makes it clear that there is constitutional authority for legislative grant of judicial power to special tribunals where the matter is not such as comes within the jurisdiction conferred on the courts expressly created by the constitution. See, also, *Seay v. Hunt*, *infra*. Where an office had no value, we know of no matters constitutional or other objection (under the constitution of 1876) to lodging the power to adjudicate matters relating to an office such as the one in question to a municipal council, or other special body. By the amendment of 1891, giving the district court jurisdiction over all contested elections, it may now be different. It was the duty of the council to proceed at a designated time after the election to determine the vote, and the qualification of the elected candidate. This duty devolved on them by law, and was performed at a time when, by reason of the office having no value, it must be conceded the district court and the other courts created by the constitution had no jurisdiction in the matter; and it is clear to us that the action of the council in passing adversely on the plaintiff's qualification was a final determination of that question. The later event of a salary being attached by the council to the office in excess of \$500, after another election had been ordered and another mayor elected, could not be held to render null and void the action of such special tribunal, taken under the circumstance and at a time when its power was complete and final over the subject-matter. There was nothing in the constitution or the charter au-

thorizing an appeal, nor did the district court possess any supervisory control over such tribunal upon which to base a power to review the act of the council. It has been held that it was not subject to be revised by a quo warranto proceeding, and this proceeding partakes of that nature. *Seay v. Hunt*, 55 Tex. 545. Our conclusion is that the plaintiff's right to the office did not exist after the aforesaid action of the council, and therefore he could not recover of defendant either the office or its emoluments. An inquiry into the question whether or not plaintiff's status as to citizenship rendered him eligible to the office would be useless. The council may have acted irregularly or arbitrarily and unjustly in deciding against the plaintiff's eligibility, but that body had the sole power to settle that question, and its action could not be revised by any other tribunal for an error, either of law or of fact. The petition of plaintiff was concerning a matter which was within the jurisdiction of the district court to hear and determine; but plaintiff has failed to show himself entitled to the relief he asked, and the form of the judgment should have been that plaintiff take nothing by his suit. The judgment will be reformed and rendered accordingly. The judgment here rendered being of the same nature as the one rendered in the district court, the costs will be adjudged against appellant and the sureties on the appeal bond, as provided in section 37 of the act relating to the court of civil appeals.

NEILL, J., disqualified, and not sitting.

DE LEON et al. v. McMURRAY et al.
(Court of Civil Appeals of Texas. Nov. 22, 1898.)

**DECLARATION—PEDIGREE—ADVERSE POSSESSION
AGAINST COTENANT.**

1. A son may testify to declarations made by his mother, since deceased, as to her father's family, the number of his children, the date of his death and that of some of the children, where there are deeds in evidence showing the relationship of declarant to her father.

2. The possession of land by grantees in a deed, wherein the grantors describe themselves as the "sole heirs" of the original owner, is adverse to the other heirs of the original owner from the time that the deed is placed on record, since the record of such a deed is an express notice of repudiation of any cotenancy with the other heirs.

Appeal from district court, Live Oak county; R. W. Hudson, Judge.

Action by Patricio de Leon and others against W. J. McMurray and others for an undivided one-half of designated land. From a judgment in defendants' favor, plaintiffs appeal. Reversed.

Dabney & Wilson, for appellants. Beasley & Flournoy and F. H. Church, for appellees.

JAMES, C. J. Appellants sued for an undivided half (being the sum of the undivided

interests claimed by the several plaintiffs) of a league and labor of land in Live Oak county, granted by the states of Coahuila and Texas to Francisco Leal. The defendants pleaded not guilty and the statutes of five and ten years' limitations. The demurrers and other pleas filed by defendants are not material upon this appeal, as judgment was for the defendants. By supplemental petition the coverture of the plaintiff Olivia Lozano was set up, the same being alleged to have existed from August 24, 1867. There is no written charge in the record, but it appears from a bill of exceptions that by agreement of counsel the court charged the jury orally, and exception was reserved to the following portion of the charge given: "You are instructed that the defendants have made out their plea of the statute of limitation as against all the plaintiffs except Mrs. Lozano, and you will find in favor of the defendants against all of the plaintiffs except said Mrs. Lozano; and as to her, if you believe from the evidence that she is a descendant of Francisco Leal, the party to whom the tract of land was granted, then you will find in favor of her and against the defendants for $\frac{1}{4}$ of $\frac{1}{4} \times 1.5$ of $\frac{1}{4}$ of $\frac{1}{4}$ of the entire Leal survey." And to this charge error is assigned, because, as stated, the proof of heirship was complete and uncontradicted and unimpeached. Error is also assigned in overruling plaintiffs' motion for a new trial, because the verdict was contrary to the evidence, in that the heirship had been made out by competent testimony, which was uncontradicted and not impeached. Error is also assigned in the action of the court in withdrawing from the jury the question of limitations as to the other plaintiffs, because, as stated in the assignment of error: First, the deeds under which defendants were claiming the larger portion of the land, viz. the 3.445-acre tract, (the upper portion of the league,) are not inconsistent with plaintiffs' title, nor such as to put the plaintiffs, who are cotenants with defendants, upon notice of an adverse holding; and, second, because the possession shown by defendants was a meretricious possession, consistent with the title of plaintiffs, which, however long-continued, will not justify an inference of ouster as matter of law, and was hence not proper to be determined by the court. They present what is assigned as the errors committed on the trial.

It is evident our attention should first be directed to the evidence adduced to show the heirship of the plaintiffs, for if, as stated by appellant, the evidence was sufficient, competent, and uncontradicted in favor of the heirship of plaintiffs, it was not proper for the jury to render a verdict based on a contrary finding. The witness by whom the heirship of plaintiffs was proved, if at all, was Patricio de Leon. His testimony shows that he was 56 years old at the time he made his deposition; that his mother was

Salome de Leon, and his father Felix de Leon; and that his mother died in 1852, and his father shortly previous. He testified that from information derived directly from his mother and father he knew that the father of Salome was Francisco Leal, and that he (Francisco Leal) had other children besides Salome, to wit, Juan Rafael Leal, Antonio Leal, and Miguela Leal, (all of whom except Juan Rafael the witness knew personally;) that Francisco Leal was killed by savages about 1836, in the neighborhood of what is now Live Oak county; that he obtained his knowledge of these matters directly from his parents, and that they were matters of common tradition in the family. In addition to the testimony of Patricio de Leon, a certified copy of the grant of 1835 was shown, and in the application attached thereto the grantee was described as a "widower with children." The depositions of two other witnesses were read, but they did not claim to have any knowledge of Francisco Leal or his children. The testimony of these other witnesses and of Patricio de Leon combined to show—First, that Miguela Leal married Alejo Perez, and had children named Volenta, Angelita, Felipe, and Romana Perez, and that Antonio Leal died without issue; that Juan Rafael Leal went to Mexico, and was afterwards unknown; second, that Salome de Leon had children named Patricio, Santiago, Sylvester, Samuel, Olivia, and Maria J. de Leon; that the plaintiffs Josefa de Leon, Alphonso de Leon, and Alfredo de Leon, and Abelina Noll, Sam de Leon, Maria J. de Leon, Patricio de Leon, Olivia de Leon Lazano, are the legal heirs of said Salome de Leon. This evidence is competent, and sufficient to establish the fact that plaintiffs would inherit and be entitled to any title that belonged to Salome de Leon; and to this extent the testimony appears to be from personal knowledge, and uncontradicted, and the witnesses testified by deposition without impeachment. To establish the relationship of Salome to the grantor, Francisco Leal, the evidence of her son Patricio as to statements by or information derived from her and her husband were introduced. Was this testimony admissible? A well-recognized exception to the use of hearsay evidence exists when pedigree or relationship is the object of proof. Statements or declarations emanating from a member of a family, the declarant being shown to be deceased, concerning the family pedigree, are competent evidence. The rule had its origin in necessity, growing out of the obvious difficulty of proving such matters as they existed at a remote period, and the presumed inability of the parties to obtain better testimony. As we understand the authorities, the only conditions annexed to this species of testimony are that the declarant must be shown to be dead, and that the declarations appear to have been made before the particular controversy arose. Appellees contend

that there is another prerequisite to such testimony, namely, that the declarant must be shown to have been related to the family. This is correct. If it appear that the person whose declaration is offered was not connected with the family, the declaration would not come within the rule. But the declarations of a person offered to show pedigree appear to have been considered in this state effective to prove the relationship of the declarant also. *Louder v. Schluter*, 78 Tex. 105, 14 S. W. Rep. 205, 207; *Fowler v. Simpson*, 79 Tex. 614, 15 S. W. Rep. 682. If the person back to whom pedigree is sought to be traced died at a very remote period, it is difficult to see how such testimony could be used, for it would be equally difficult to prove the relationship of the declarant. There is high authority, however, that the fact that the declarant was connected with the family must be shown by evidence independent of the declaration. *Fulkerson v. Holmes*, 117 U. S. 397, 6 Sup. Ct. Rep. 780. But these last-mentioned authorities hold that slight circumstances will suffice to establish the relationship of the declarant, and the record before us contains other and positive testimony of the relationship of the declarant Salome to Francisco Leal. Defendants used in evidence a deed from Volenta Perez, Felipe Perez, and Romana Perez to Frank J. McMurray, affecting the grantors, as "heirs and legal descendants of Francisco Leal, now deceased, being children of Miguela, daughter of said Francisco Leal, and wife of Alejo Perez." This is reiterated in other of the defendants' muniments of title. In the evidence of Patricio de Leon we have testimony of a fact fairly in his personal knowledge that Miguela and Salome were sisters, and thus it is made to appear that Salome was a daughter of Francisco Leal, without any resort to the declarations of Salome. This would admit the declarations of Salome, and at the same time render them superfluous. All things considered, we are constrained to say that the testimony before the jury to show that plaintiffs were descendants of Francisco Leal was both competent and convincing, and, standing alone, it follows that the jury found against the evidence in resolving the issue of heirship adverse to Mrs. Lozano, and this requires a reversal of the judgment.

In contemplation of another trial it is proper that we consider the action of the trial judge touching the defenses of limitations. It is conceded by appellants that all the conditions existed to create a title by limitations (except as against Mrs. Lozano, who had been since August 24, 1867, a married woman) but for the fact of cotenancy, and we must dispose of this branch of the cause in the light of that relation, which it seems did originally subsist between the children of Miguela Perez, under whom defendants claim title, and the descendants of Salome de Leon, who are the plaintiffs in the

suit. As the bare possession and user of the grant by the heirs of Miguella and their vendees were not notice of ouster to their cotenants, and the same did not continue for such time as would of itself justify a presumption of an ouster by any rule or authority known to us, and no express notice repudiating the cotenancy is shown, it follows that we must look to the conveyances or other acts of the heirs of Miguella, and those holding under them, to ascertain if they had assumed such an attitude towards the property as would be equivalent in law to an ouster. This evidence, briefly reviewed, is as follows: First. On February 26, 1870, the heirs of Miguella, designating themselves in the deed as the "sole heirs of Francisco Leal, deceased," convey to Miriam E. Mapes by metes and bounds a 360-acre tract, part of the grant to Francisco Leal. This was deeded to defendant W. J. McMurray on February 2, 1884, and occupied since 1870. Second. Angelita Perez, one of the five children of Miguella, on March 24, 1869, conveyed her interest in the grant to S. G. Olivares. Third. On June 15, 1874, Olivares conveys to Pat Pugh the undivided one-fifth of the grant, describing it as what he had acquired from Angelita Perez; and on January 8, 1876, Pugh conveyed to M. O. Staples a divided 861 acres in the grant by metes and bounds, which Staples conveys to M. A. McMurray on September 28, 1881. This was occupied since January 8, 1876. Fourth. On June 1, 1874, four of the five children of Miguella Perez (one,—Angelita,—having sold her interest to Olivares, does not join in this deed) convey to Frank J. McMurray "all their right, title, and interest in and to that tract of land * * * known as the headright of Francisco Leal, * * * deducting from the said headright one-fifth of the same, and 300 acres, previously disposed of." Fifth. On May 24, 1876, Frank J. McMurray executed a deed to his brother W. J. McMurray, conveying "all my right, title, and interest in and to the following described tract or parcel of land, to wit, one-half undivided interest, excepting my homestead, in and to the headright of Francisco Leal, * * * excepting from the same one-fifth of said headright, cut off from said survey on the south side, extending the full length on the south side; also a further tract of 300 acres; * * * said one-fifth having been sold to P. Pugh by the heirs of Francisco Leal, and the said 300 acres having been sold to Mapes by said heirs." Sixth. On October 13, 1880, F. J. McMurray executed a further deed to W. J. McMurray conveying "one undivided one-half interest in and to 3,445 acres of land, it being a portion of the land originally granted to Francisco Leal, * * * and being the same land conveyed to Frank J. McMurray by the heirs of Francisco Leal, June 1, 1874, * * * to which deed and record reference is made for further description of the lands herein con-

veyed; and it is expressly intended that the land herein conveyed is to include all our right, title, and interest in and to that portion of said tract of land known as 'McMurray Ranch.'"

We have set forth these conveyances thus fully in order that our views on this branch of the case may be understood. The evidence showed an actual possession of the grant by defendants for a sufficient period to ordinarily bar the claims of others. They had paid all the taxes, and their various conveyances were duly and promptly recorded. All this, however, would not be deemed adverse against those who stood as to them in the relation of cotenants. No question is better settled than that the possession under the circumstances above indicated of a tenant in common will be presumed to be in right of the common title. It appears, however, that as far back as 1870 the children of Miguella Perez were dealing with this grant as the sole heirs of Francisco Leal. They, on February 26, 1870, sell 300 acres of it by a deed designating themselves as "sole heirs of Francisco Leal," and the deed was placed on record. Prior to this, on March 24, 1869, one of the five children of Miguella conveyed her interest in the grant to one Olivares, who, by virtue of their deed, conveyed to Pugh the undivided one-fifth of the grant, which was also placed on record. On June 1, 1874, the other four of Miguella's children conveyed their right, title, and interest in the grant (excepting the 300 acres, and the undivided one-fifth theretofore disposed of) to Frank J. McMurray; and Frank J. McMurray, by two quitclaim deeds, conveyed by each an undivided half of the grant (observing said exceptions) to his brother W. J. McMurray, the last deed having been made in October, 1880. These deeds refer to the prior conveyances as having been derived from the heirs of Francisco Leal. It is our opinion that the possession of the defendants having been held under deeds from the children of Miguella which distinctly disavowed any community of title with others, and which deeds were notice to all by being placed on record, cannot be deemed a possession consistent with the rights of others interested in the original title. In connection with the subsequent deeds, which contain a continuous reference to defendants' original grantors as the heirs of Francisco Leal, it would be going too far to say that a condition of things did not exist, at the latest in 1883, which would create by necessary implication notice to plaintiffs that the possession was hostile to their title.

No disability was pleaded in behalf of the plaintiffs except for Mrs. Lozano, and her disability of coverture was established. We believe the district judge was correct in his ruling that all the other plaintiffs were barred by limitations, and he should have so instructed the jury upon the evidence be-

fore him. He erred in allowing the verdict to stand against Mrs. Lozano, because her heirship was established by competent, uncontradicted testimony, and limitations had not affected her. It would have been error to relieve the jury from the task of rendering the necessary verdict in respect to limitations; but, as the whole charge is not given in the record, the court may have directed the proper finding. In trials before a jury the findings on issues should be in the form of a verdict, in order to constitute the basis of the judgment, even though it be the glittering formality of an instructed verdict. We do not attempt to verify the charge in its statement of the interest of Mrs. Lozano in the land, as that is a mere matter of calculation, and, if not correct, can easily be remedied by a correct calculation. The judgment is reversed, and the cause remanded.

LEWY et al. v. CRAWFORD.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

ELECTION BETS — RECOVERY FROM STAKEHOLDER.

A wager on the result of an election is illegal, null, and void as between the parties; and the stakeholder, who is notified by one of the parties not to pay over the money to his adversary, after the result of the election has become known, but before an actual payment has been made, cannot defeat an action by such party for its recovery, since in such case there is a disaffirmance of the wagering contract before it has become executed.

Appeal from district court, Bexar county; W. W. King, Judge.

Action by Charles K. Crawford against A. Lewy and another for the recovery of a sum of money. From a judgment of the district court affirming the judgment of a justice of the peace in plaintiff's favor, defendants appeal. Affirmed.

Fleming, Camp & Camp and J. H. McLeary, for appellants. W. W. Herron, for appellee.

FLY, J. Appellee, as plaintiff, filed suit in the justice's court, on account for money had and received, amounting to \$175, against appellant Lewy, who came in and moved the court to have L. P. Peck, the other appellant, made a party to the suit, which was done. Judgment was rendered in the justice's court in favor of appellee for the amount of his claim, and the appellants appealed the case to the district court, where a like judgment was rendered for appellee. The facts, in brief, are that appellant Peck and appellee, Crawford, on the day of the state and national election, 1892, made a wager with each other on the pending election for governor, each one putting into the hands of appellant Lewy as stakeholder the sum of \$170. Appellee on the same day made another bet for \$5 on the gubernatorial

election, and this money, with that of his competitor, was also put into Lewy's hands as stakeholder. That appellee bet appellant Peck and the other person the \$175 that J. S. Hogg would be elected governor by 10,000 majority,—whether over George Clark or the field is left in doubt. A few days after the election, appellee notified stakeholder Lewy not to pay his \$175 over to Peck, but to give it back to him. That Lewy declined to do this, and had never paid the money over to any one, but still had it. The terms of the bet, or who was winner or loser, can cut no figure in the decision of this case. The whole transaction was clearly against public policy, and in open violation of one of the penal statutes of Texas. In every state and government wherever the right of suffrage has been retained by the people the deleterious and degrading effect of any species of gambling upon the result of a popular election has been recognized and unqualifiedly condemned. More especially is this true in a government like ours, where the stability and efficacy of the government rests upon the purity of the ballot box, and where everything that tends in the slightest to degrade the individual voter or to taint by bribery or corrupt influences the verdict of the masses of the people is a blow at popular government. The very theory of a popular form of government resting on the unpurchased will of the majority, is that the person elected to office is chosen by the free will of a majority of voters free to pass upon the qualification of the respective candidates, and free to act uninfluenced by bribes or sinister motives. This may be simply theory, but, unless this theoretical conception of popular elections is practically put into operation, so far as the vices, imperfections, and errors of mankind will permit, popular institutions must and will become a failure. The corruption of any one voter is a direct menace to the perpetuity of popular government. Legislators and courts in England and America have at all times frowned down and denounced by statutes and decisions the staking of any sum upon the result of an election. Whenever it is done, with him who has his money at stake, the question becomes one, not of the welfare and good of the government, nor one of the fitness of the individual candidates for office, but it is a question of gain and "filthy lucre," and in proportion to the size of the bet he becomes ready to influence others in improper ways to assist him in his unlawful enterprise. If Chief Justice Kent of New York looked with disfavor on the debauching of elections by gambling on them, 80 years ago, when the right of suffrage was restricted, and the voting population consisted of a few hundred thousand, scattered over a vast territory, much more may it be reprehended and feared when the right of suffrage is unrestricted, and the voting population will exceed twelve

millions. But no homily on this subject is necessary, for by the common consensus of civilized humanity the practice of betting on elections is condemned, and in most instances severely punished, by statute.

A gaming contract being illegal and void, courts have invariably refused to interfere between the parties to the wager, who, being in *pari delicto*, cannot invoke the aid of the courts in carrying out their contracts. The question, however, presented to this court is not whether it will enforce or affirm a gambling contract, but whether it will permit one of the parties to disaffirm it. We have investigated a large number of American cases, and in nearly all of them the rule is laid down that, as long as the money is in the hands of a stakeholder, either party has a right to demand his part of the money, and, if refused, can maintain an action at law, whether demand is made on the stakeholder before or after the happening of the contingency upon which the wager is suspended. This is the English rule, and is fortified by age, and hallowed by precedent. So far as our own courts are concerned, it is a case of first impression, as neither the direct question nor one similar to it has ever been presented for adjudication in this state. This being true, it may be interesting, if not profitable, to review some of the cases on the subject, which have come under our attention, and the number of adjudications elsewhere point to the conclusion that the evil aimed at is widespread and deep-seated among the American people. One of the earliest cases to which we have had access, and one which has been very widely and favorably cited, is the case of *Vischer v. Yates*, 11 Johns. 28. The opinion in this case was rendered by Chief Justice Kent, the great commentator on American law, and in a fine review of English decisions he lays down the broad rule, since followed by most courts, that courts must frown down in every legitimate manner any unholy tampering with or corruption of the ballot; that bets on election are illegal and void, and that courts will lend their aid in disaffirming such contracts, and will hold the stakeholder responsible, when notice is given by a party to a wager that he desires to withdraw his money. This learned judge struck the keynote that has in most American courts given tone to decisions on the subject. We quote from Chief Justice Kent in the opinion referred to: "The stakeholder ought not to be permitted to hold the money in defiance of both parties. There would be no equity in such a defense, and, if the plaintiff cannot recover back the deposit in this case, the winner cannot recover it; for that would be compelling the execution of an illegal contract as if it were legal, and would at once prostrate the law that declares such contracts illegal. The English rule is the true rule on this subject. On the disaffirmance of the illegal and void

contract, and before it has been carried into effect, and while the money remains in the hands of the stakeholder, each party ought to be allowed to withdraw his own deposit. The court will then be dealing equitably with the case. It will be answering the policy, and putting a stop to the contract before it is perfected. * * * The courts have gone quite far enough when they have refused to help either party, as against the other, in respect to these illegal contracts." It is true that this decision was overruled by the "court for the correction of errors," the decision being rendered by a divided court, and no court of any respectability, except perhaps that of California, has ever followed in the noisome wake of the decision of Senator Sanford, the mouthpiece of the New York court. On the other hand, the decision has been time and again repudiated, and the very doctrine held by Judge Kent was afterwards approved by the New York court of appeals. *Storey v. Brennan*, 15 N. Y. 524. Senator Sanford makes his decision turn on the question of the happening of the contingency concerning which the wager is laid. We quote from his opinion as follows: "In contracts of hazard the condition of the parties, after the uncertain event has happened, is extremely different from their situation before. Before the event has happened, and while it is uncertain who will be the winner or the loser, neither is much injured, and perhaps not at all, by declaring the contract void. The parties are treated alike; neither of them can complain; and if it is necessary for the public good that the contract should not proceed further, the decision is made without any sacrifice of justice between the parties. Not so if the hazard has ceased, and the wager has been lost or won, according to contract. A very different relation between the parties then takes place. If the losing party may vacate his contract, after the event has happened and is known, he is allowed to practice fraud upon the adverse party. To allow the loser to retract his contract because he is the loser would give sanction to the grossest perfidy and injustice. If this party wins, he profits by the contract, and takes the fruit of it; if he loses, he abjures the contract, and exonerates himself from its obligation. If he wins, he holds the wager by the laws of honor; if he loses, he refuses payment, or reclaims the wager, if paid by the laws of the land. According to the result, he avails himself either of the laws of honor or of the laws of the land. While the event is uncertain and unknown, he stands upon the laws of honor. When it has happened, and is against him, he retires to the laws of the land. While he contracts upon the basis of hazard, he incurs no risk. While he is himself wrapped in impenetrable armor, he contends with a naked adversary. When he talks of contingency and hazard he means certainty. When he

promises, he deceives; and while he pledges his faith, he betrays. It is only the loser who repents. However bitter and sincere his repentance may be, it is not that he has offended against public policy, but that he has lost his money. To prove the sincerity of his repentance, and as an atonement of his sin against public policy, he proposes to cheat his adversary, and take back his own money after it has been lost." We are unable to see the cogency of this rule. It is not the business of courts to determine at what point in the proceeding a man must repent, for repentance has nothing to do with the solution of the question. Doubtless repentance after losing a bet is like unto that which follows a drunken debauch, short-lived, and the offspring of a disordered liver or depleted pocket; but the senator never apprehended the great truth put by Judge Kent that it was not a question of sorrow and repentance, but one of disaffirming and destroying a contract made in violation of law and morals. Neither does his rule work harm to any one, but it leaves the parties exactly where they were when the violation of the law was initiated, and no one in law or morals has been defrauded of anything. In *Ball v. Gilbert*, 12 Metc. (Mass.) 397, the case of *Vischer v. Yates* is approved, and the following language is employed: "We think the money deposited by each party was a simple, naked deposit, respecting which the agreement to pay it over to one, according to the result of the pending presidential election, and not executed by actual payment, was wholly inoperative and void; and then by implication of law the money was so deposited to the use of the depositors respectively; and that an action for money had and received would lie for each party for the amount so deposited by him." In the case of *Stacy v. Foss*, 19 Me. 335, it is held: "When money is once paid over to winner, it cannot be recovered from stakeholder or winner; but when the money has not been paid over by the stakeholder, although it has been lost by the happening of the event, upon notice and demand, the stakeholder is liable to the loser for the amount by him deposited." This opinion sustains the opinion of *Vischer v. Yates*, delivered by the New York supreme court, and condemns the opinion of Senator Sanford, and says: "It best comports with public policy to arrest the illegal proceeding before it is consummated, and, in our judgment, the opinion of the supreme court is better sustained upon principle and authority than that of the court of errors." In a South Carolina case—*Bledsoe v. Thompson*, 57 Amer. Dec. 777—the same doctrine is enunciated. In Tennessee it was held that, if the stakeholder paid over the money without notice and demand by the loser, he would not be responsible, but otherwise if the notice was given. In *McAllister v. Hoffman*, a Pennsylvania case, (16 Amer. Dec. 556,) a case of bet-

ting on an election, it was held that money paid over to the winner, after notice, is recoverable, and the case of *Vischer v. Yates* is cited and approved. In the case of *Shackelford v. Ward*, 3 Ala. 37, it was said: Notice to stakeholder to hold money arrests it, and he may not afterwards pay over the money to either, whatever the determination of the event upon which depends the wager. In *Jeffrey v. Ficklin*, 3 Ark. 227, it is said: "The rule is that, if the contract be executed, and both parties in *pari delicto*, neither of them can recover from the other the moneys so paid; but, if the contract continues, and the party is desirous of rescinding it, he may do so, and recover back the deposit. And this distinction is made: that, where the action is an affirmation of an illegal contract for the performance of an engagement *malum in se*, it can in no case be maintained; but where the action is in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which is derived from an unlawful act, then it is consonant with the spirit and policy of the law that he should recover." In *Alford v. Burke*, 21 Ga. 46, the court says: "It may be considered now as well-established law that a party to an illegal or immoral or criminal contract may recover back from a stakeholder a deposit in his hands." The case of *Vischer v. Yates* is approvingly cited. In *Reynolds v. McKinney*, 4 Kan. 94, it is said: "Betting on elections is utterly prohibited by the laws of this state. It follows that all money placed in the hands of stakeholders is to be regarded as placed or deposited in their hands without consideration, to be repaid on demand to the person who deposited the same, or attached by any person having a valid claim, and showing cause of attachment against the depositor." In *Hardy v. Hunt*, 11 Cal. 343, after citing and approving *Vischer v. Yates*, it is held: "There can be no doubt that the wager was illegal and void as against public policy; the direct effect of such wagers being to affect the purity of elections. This has been often—indeed, we believe, universally—held whenever the question has arisen. If this suit had been to recover a wager of this sort the action could not be maintained. But this is not the question. The party depositing the money for this illegal purpose may retract the illegal act. The money is not forfeited for the benefit of the stakeholder." It would seem this opinion was afterwards qualified by the supreme court of California. There are many other cases on this same subject, but we have quoted sufficient to show the general trend of the American decisions.

We hold that the wager made between appellee, Crawford, and appellant Peck was illegal, and *ab initio* null and void, and the stakeholder occupies the same position towards them that he would have done had

they voluntarily left their money in his hands without any stipulations; and, being a bailee, he is responsible to each of the depositors for the amount of his deposit. We are not assisting in executing an illegal contract; we ignore it; we treat it as though it did not, and could not exist. Our decision will not recognize the existence of the contract, but says there was no contract. We cannot permit a stakeholder to defend successfully against a man who wishes to annul an illegal contract, and is seeking to recover his deposit, and who would defeat his claim by setting up as a defense the illegal and void contract. He has no equity against the appellee, whose money he is holding. He cannot set himself up to decide that a party cannot retire from a contract which the courts would not enforce. Appellee does not rely on the illegal contract to establish his right to the money, but he says that appellant Lewy has his money on deposit, and he wants it. He gave notice in time to stop it in the hands of the bailee. He seeks to regain it, and he is entitled to it. It is the policy of courts, as hereinbefore indicated, to pursue that course that will discountenance gambling on elections, and have a tendency to check it; and when it is known that the loser can, at any time before the money is paid over, reclaim it from the stakeholder, it will have a discouraging effect on those who have the desire to stake their money on the result of popular elections. We are of the opinion that there was no error in the judgment of the lower court, and it is affirmed.

VOGT v. BEXAR COUNTY et al.¹

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

ANSWER—EMINENT DOMAIN—ESTABLISHMENT OF HIGHWAY

1. In an action for trespass, where the answer alleges the premises to be a highway, without stating how they became so, defendants are not restricted to showing that the road was established by proceedings in the county commissioners' court, but may show an establishment by grant, prescription, dedication, or in any other lawful way; and a special exception to the answer, on the ground that certain proceedings in the county commissioners' court, not referred to in the answer, were invalid, should be overruled.

2. Due process of law requires that a landowner be given notice of proceedings whereby it is sought to condemn his property to a public use, and also an opportunity to protect his rights.

3. Rev. Civil St. art. 4367, requires the county commissioners' court, in proceedings to establish a highway, to appoint a jury consisting of five freeholders, to be sworn as prescribed. Articles 4368-4371 require the jury to issue and serve notice of the proceedings on the landowner, to assess damages on presentation of a written claim by the landowner, and to lay out and mark the road, and report to the commissioners' court. Article 4372 requires the commissioners' court, on approving the report of the jury, to allow the landowner adequate com-

pensation for the taking of his land, and, when paid or secured, to order the road opened. *Hed.* that these provisions do not contemplate a taking of private property for a public use without adequate compensation being first made or secured, or otherwise than by due course of law.

4. The notice required to be served on the landowner by article 4370 is a jurisdictional fact, which should affirmatively appear in the record; and, if the giving of such notice is so affirmatively shown, the proceedings are void.

Error from district court, Bexar county: George H. Noonan, Judge.

Trespass to try title by Johann G. Vogt against Bexar County and others. There was a judgment in defendants' favor, and plaintiff brings error. Reversed.

Geo. C. Altgelt, for plaintiff in error. Otto Staffel, for defendants in error.

NEILL, J. The plaintiff in error brought this action in the form of trespass to try title, and for damages to 727½ acres of land situated in Bexar county, on the Medina river, the damages claimed being laid at \$1,000. The defendants answered by a general denial and a disclaimer of any interest in the land sued for, except three strips, respectively of 30, 20, and 40 feet wide, running through the land, which they averred were at the time, and were since the supposed unlawful entry, trespasses, and wrongs alleged in plaintiff's petition, and now exist within the limits of Bexar county as public roads and highways, which were known as the "Benton City Road," the "Frio County Road," and the "Baywaters Road." and that the defendant Mann was the duly-appointed road overseer of the two latter before and at the time of said supposed wrongful entry and trespasses; and Mann's entry was justified on the ground that he was a resident citizen of Bexar county, and such entry made in the exercise of his rights as such citizen, and in the lawful discharge of his duty as road overseer of the two last-named roads. It was also alleged in said answer that, if the defendant Bexar county at any time entered upon any of the land in controversy, such entry was made in the lawful exercise of its general control and superintendence of said public roads. The plaintiff in his supplemental petition, excepted to defendants' answer on the following grounds, viz.: (1) Because it does not set out with sufficient certainty the proceeding had in the county commissioners' court, in that it does not appear that a jury of view was appointed, as required by law. (2) It does not appear from said alleged proceedings that plaintiff was in any manner compensated for damage done to his land. (3) Because the statute vesting the power in the county commissioners to condemn private property for public use as a road is unconstitutional. These exceptions were all overruled by the court. Certain orders of the county commissioners' court in relation to the laying out and establishment of the roads, which are referred to in our conclu-

¹ Rehearing denied.

sions of fact, were read in evidence from the minutes of said court, to which plaintiff objected, and moved the court to exclude, upon the grounds as follows: "First, because it was not shown that the jurisdiction of said court ever attached, in that there was no petition of freeholders before said court, and it did not appear that any notice of the application for the opening of said several roads had ever been given, and because, if the said roads crossed plaintiff's land, no provision was made to compensate plaintiff for the injury to the land; second, because the opening and laying out of a public road over a citizen's land was a special proceeding under the statute, and it had not been shown that the law had been complied with; third, because it was not shown that the commissioners that laid off the road were sworn; fourth, because it was not shown that plaintiff was served with process, or was ever compensated for the injury to his land; fifth, because the proceedings are void for uncertainty, in this: that the location of the road cannot be determined therefrom." The case was tried by the court without a jury, and judgment rendered on defendants' disclaimer in favor of plaintiff for the land, subject to the right of Bexar county to the roadways over it; from which judgment the writ of error was sued out. The errors assigned relate to the action of the court in overruling plaintiff's special exceptions to defendants' answer to the admission of the minutes of the commissioners' court in relation to the laying out and establishment of said roads, and to the sufficiency of the testimony to support the judgment.

Conclusions of Fact.

(1) The plaintiff is the owner of the land sued for. (2) On August 12, 1887, the county commissioners' court of Bexar county appointed a jury of view to lay out and mark the road from the Frio city to the Quintana road, but it does not appear from the record that the members of the jury appointed were freeholders of Bexar county, which road was by said jury laid out through the premises of plaintiff, as shown by their report filed in the county commissioners' court of Bexar county on the 17th day of October, 1887. (3) On the 17th day of November, 1887, the following order was made by said court, and entered on its minutes, viz.: "This day came on to be heard the report of the jury appointed on August 12, 1887, to view the road from the Frio city road to the Quintana road, favorable to the opening of the said road, and also the contest of William Vogt; and, the court having heard the evidence and considered the matter, it is ordered by the court that the said report of the jury of view be in all things adopted, and ordered entered of record in the minutes of this court; and it is ordered by the court that said road be known as the 'Baywaters Road,' and that the same be opened as a

third-class road, by the overseer of the Frio county road, Mr. J. B. Mann, to whose precinct said road is assigned. It is further ordered that no damages be allowed said contestant." (4) That like proceedings of the county commissioners' court are shown by its minutes in relation to the Benton city and Frio city roads. The proceedings in relation to these two roads also show that the surveyor was ordered to survey said roads, and that he surveyed them in pursuance of said order, and made plots and field notes of them in his report to the court, which was approved by it; and it also appeared that the jury to lay out the Benton city road were sworn according to law. (5) It does not appear from the record that any compensation was paid the plaintiff by Bexar county for running its road through his lands, nor does it appear that he was ever served with notice, as required by article 4370, Rev. Civil St. There is no proof whatever of such service upon him, and he was not given the opportunity of presenting his claim for damages that is provided by law in such cases. (6) The entry of the defendant Mann upon plaintiff's land was in his supposed capacity as road overseer of the Baywaters road, in pursuance of his duties. (7) The evidence is insufficient for us to determine the amount of damages sustained by the plaintiff to his land by reason of the roads being laid out and opened upon it.

Conclusions of Law.

The defendants, in their answer, simply alleged the existence within the limits of Bexar county of certain duly-established roads. There were no allegations as to any proceedings in the county commissioners' court, and, as the special exceptions to the answer erroneously assume the averment of proceedings in said court, they have no application to the answer. The defendants, by their answer, were not restricted to showing that the roads were established by proceedings in the county commissioners' court, but could show that they were established by grant, prescription, dedication, limitation, by order of court, or in any other lawful way. As suggested by counsel for defendants in error in his brief, if plaintiff had specially excepted to defendants' answer because it fails to set out in what manner said roads became public, then the question might arise whether the general allegation of the public highway is sufficiently certain under the rules of pleading; but, as the exceptions are to matter which does not appear in the answer, and do not relate to it, they are not well taken, and were properly overruled by the court below.

In authorizing the appropriation of individual property for the public use, our constitution and laws have prescribed certain conditions and procedure which must be strictly observed and performed. McIntire v. Lucker, 77 Tex. 259, 13 S. W. Rep. 1027.

The constitution requires that the laying out, construction, and repairing of county roads shall be provided for by general laws, (article 11, § 2;) and that the legislature shall make provision for laying out and working public roads, (article 16, § 24.) A general law was passed, as directed by the constitution, the provisions of which we will consider further on in this opinion. Whatever may be the title of the tribunal upon which the authority to direct the opening of roads is conferred, its authority is, in such matters, of a jurisdictional nature; and, when acting in the matter of opening roads, such tribunal is engaged in the exercise of judicial functions. It is essential to the validity of the proceedings of the tribunal acting in such matters that it have jurisdiction of the subject-matter and of the person of him whose land is sought to be appropriated; and the weight of authority is that the jurisdiction must appear on the face of the record; and that, if the record affirmatively shows jurisdiction, then the same presumptions will be indulged in favor of the proceedings as are indulged in favor of proceedings in courts of general jurisdiction. *Elliott, Roads & S. 218, 219; Crossley v. O'Brien*, 87 Amer. Dec. 334; *Lewis, Em. Dom. § 605*. It is an elementary principle that, before a man can be deprived of his property for public use, he must have notice of the proceeding whereby it is sought to appropriate his property, and given an opportunity to protect his rights. To take one's property, and assess his damages, without notice of it, is repugnant to every principle of justice, and such a proceeding is not due process of law, and is violative of our constitution, as well as that of the United States, and void. All the authorities agree that due process of law requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property. *Stuart v. Palmer*, 74 N. Y. 183; *Davidson v. New Orleans*, 96 U. S. 97; *People v. Essex Co.*, 70 N. Y. 229; *Welmer v. Bunbury*, 30 Mich. 201; *Chase v. Hathaway*, 14 Mass. 222; *Scott v. City of Toledo*, 36 Fed. Rep. 385. In view of these general principles of law, we will now examine our statutes in relation to public roads, and see if there has been such a compliance with them in the appropriation of plaintiff's property to the use of the public as will justify the appellees in withholding it from him.

Article 4360, Rev. Civil St., provides that "the commissioners' courts of the several counties shall have full power, and it shall be their duty, to order the laying out and opening of public roads when necessary, and to discontinue or alter any road whenever it shall be deemed expedient, as hereinafter prescribed; provided," etc. Article 4367, Id., is as follows: "All roads hereafter ordered to be made shall be laid out by a jury of freeholders of the county to be appointed by

the commissioners' court; said jury shall consist of five persons, a majority of whom may proceed with or without the county surveyor, as ordered by the commissioners' court, to lay out, survey and describe such road to the greatest advantage to the public, and so that the same can be traced with certainty; and the field notes of such survey, or description of the road, shall be included in the report of the jury; and if adopted shall be recorded in the minutes of the commissioners' court." Article 4368 is: "The jurors provided for in the preceding article shall, before proceeding to act as such, take the following oath before some officer authorized to administer oaths, to wit: '—do solemnly swear that I will lay out the road now directed to be laid out by order to us directed from the commissioners' court, according to law, without favor or affection, malice or hatred, to the best of my skill and knowledge, so help me God.'" "It shall be the duty of such jurors, when qualified as provided in the preceding article, to proceed to lay out and mark the road in accordance with the order of the court and the law, and to report their proceedings in writing to the next regular term of the commissioners' court." Article 4369, Id. Article 4370: "The jury of freeholders provided for in article 4367 shall issue notice in writing to the landowner through whose lands such proposed road may run, or to his agent or attorney, of the time when they will proceed to lay out such road, or when they will assess the damages incidental to the opening of the same, which notice shall be served upon such owner, his agent or attorney, at least five days before the day therein named," etc. Article 4371: "The owner of any such land may, at the time stated in such notice, or previously thereto, present to the jury a statement in writing of the damages claimed by him, if any, incident to the opening of such road, and thereupon the jury shall proceed to assess the damages, returning their assessment and the claimant's statement with the report, to the commissioners' court." Article 4372: "If the commissioners' court shall approve of the report and order such road to be opened they shall consider the assessment of damages by the jury and the claimant's statement therefor, and allow such owner just damages and adequate compensation for the land taken, and when paid or secured by the deposit with the county treasurer, to the credit of such owner they may proceed to have such road opened." The article then provides for an appeal by the owner if he is not satisfied with the assessment. And article 4373 is: "If, in the judgment of the commissioners' court, from the report of the commissioners named in the two preceding articles, the road should be deemed of sufficient importance, the court may order the survey or opening of the same; but the court shall first order the payment of the damages assessed,

if any, by the commissioners of view to be made to the owner of the land out of the county treasury, and the county treasurer shall have paid the same or secured its payment by special deposit of the amount in his office, subject to the order of such owner, and shall notify such owner by mail or otherwise of such deposit." From these provisions it will be seen that the power to order the laying out and opening of public roads is vested in the county commissioners' court of the several counties in this state, and, in the exercise of such authority, it is indispensably necessary (1) for the court to appoint a jury consisting of five freeholders of the county; (2) for the members of such jury, before proceeding to act, to take the oath prescribed; (3) for the jury to issue the prescribed notice to the landowners through whose land the proposed road may run; (4) for such notice to be served within the time and manner prescribed; (5) for the jury, upon the presentation to it, within the proper time, of the written statement of the damages claimed by the owner, to assess the damages; (6) for the jury to lay out and mark the road in accordance with the order of the court; (7) for the jury to report their proceedings in writing to the next term of the commissioners' court; (8) for the commissioners to approve the report of the jury, and order the road opened, and allow the owner just damages and adequate compensation for his land taken, and, when paid or secured as provided, to have such road opened. The provisions quoted must not be confused with those regarding neighborhood roads, for they differ in several essential particulars. When these provisions of the law have been thus complied with there is no infraction of the constitutional safeguard to the person which inhibits the taking, damaging, or destruction of his property for or applying it to a public use without adequate compensation being first made or secured by a deposit of money; nor of those that provide that no citizen of this state shall be deprived of property except by due course of the law of the land. The eight prerequisites enumerated are absolutely necessary to the taking of the property of an individual for the public use as a highway, and we believe them all jurisdictional. It may not be necessary that they should all appear of record on the minutes of the county commissioners' court, for it seems from good authority that in matters of this character it is not necessary that there should be a formal judgment affirming its existence, nor that there should be an express finding of jurisdictional facts, but that it is enough if the judgment impliedly asserts the existence of jurisdiction. Elliott, Roads & S. 219. It is safer, however, for the record to show a performance of all of these requisites. In regard to the notice required by article 4370, our commission of appeals said, speaking through Judge Acker, that "the

service of this notice in the manner required by statute is indispensable to the exercise of the jurisdiction of the commissioners' court. It is a jurisdictional fact, which must be affirmatively shown to sustain the jurisdiction of the commissioners' court in making the order establishing and directing that a public road be opened on the land of a citizen. Without service of such notice, the action of the jury of freeholders and the order of the commissioners' court are nullities." While it has been held that an order of the commissioners' court may be proved and given effect, although it may not have been entered upon the minutes of the court, (Ewing v. Duncan, 81 Tex. 235, 16 S. W. Rep. 1000; Brown v. Ruse, 69 Tex. 589, 7 S. W. Rep. 480,) matters of so much importance as those under consideration, to the public, as well as to the individual citizen, should not be left in parol. From our conclusion of facts drawn from the evidence, it is apparent that the record of the county commissioners' court, when tested by the principles announced in this opinion, does not affirmatively show that said court acquired jurisdiction to appropriate plaintiff's property to the public use for roadways. Nor is it shown by such record, even when aided by parol evidence, that such jurisdiction attached. Therefore the proceedings of said court whereby the county of Bexar claims easements over plaintiff's property are null and void, and are no defense to plaintiff's action. It is obvious that plaintiff has sustained some damages to his property, but, as the evidence disclosed by the record is insufficient for us to determine the amount, we cannot render judgment here in his favor for such damages. For the reason of the insufficiency of the evidence to sustain the judgment of the court below, and our inability to determine from the record the amount of damages sustained by the plaintiff, the judgment of the district court is reversed, and the cause remanded, for a new trial in accordance with the law announced in this opinion.

JAMES, C. J., did not sit in this case.

VON STEIN v. TREXLER.

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

JUDGMENT RECORD—INDEX — ASSIGNMENT FOR BENEFIT OF CREDITORS—PRIORITIES.

1. Rev. St. art. 3158, which requires the index to the judgment record to be alphabetical, and to show the name of each plaintiff and of each defendant, is sufficiently complied with by placing defendant's name in the proper alphabetical position, followed by plaintiff's name, though neither party is designated as defendant or plaintiff, and though neither the word "versus" or "against," nor any abbreviation thereof, is placed after the name of either party.

2. In Texas a judgment lien takes precedence of a prior, unrecorded deed by the judgment debtor, unless the judgment creditor has notice thereof.

3. The fact that an assignor for the benefit of creditors conveyed away land, by a deed not recorded, before executing the deed of assignment, does not divest the assignee of the legal title, so as to enable a judgment creditor of the assignor to fix a lien on the land by the subsequent record of his judgment.

4. A judgment creditor of an insolvent, who has made an assignment for the benefit of creditors, cannot accept dividends from the assignee, and at the same time subject to the lien of his judgment lots conveyed away by the insolvent, by an unrecorded deed, before making the assignment, but for which the assignee received the purchase money.

Appeal from district court, Bexar county; George H. Noonan, Judge.

Trespass to try title by Paul Von Stein against L. A. Trexler. From a judgment for defendant, plaintiff appeals. Affirmed.

George C. Altgelt, for appellant. Joseph Ryan and Crenshaw & Bell, for appellee.

FLY, J. This is an action of trespass to try title to two lots of land in the city of San Antonio. We conclude that the following facts are established by the record: (1) That Sam Maverick was common source of title. (2) That on March 6, 1891, F. E. Grothaus recovered a judgment for \$305 against Sam Maverick. (3) That an abstract of this judgment was properly registered by the county clerk of Bexar county on March 9, 1891, and execution was issued on August 5, 1891, and levied on the two lots in controversy, to wit, lots 7 and 8 in block No. 2, and the same were duly sold by the sheriff of said county after proper notice, and were bought by appellant, and deed properly executed by the said sheriff was delivered to appellant, and the same was duly recorded. (4) That Sam Maverick on June 17, 1890, by general warranty deed with vendor's lien reserved, conveyed lot No. 8 in block 2, being one of the same sold under execution as aforesaid, to J. W. McCrary, the consideration being \$25 cash, and a note for \$275, and payable on or before June 17, 1891, with 10 per cent. interest, and that on same date, June 17, 1890, said Maverick conveyed to J. T. Massey lot No. 7, the other lot in controversy, for \$25 cash, and a note for \$325, due on or before June 17, 1893, with interest at 10 per cent. per annum, a vendor's lien being reserved in the warranty deed to secure the unpaid purchase money. (5) That neither of the two said last deeds, although both were duly acknowledged on day of execution, were recorded until June 26, 1891, when both were duly recorded. (6) That on June 22, 1891, J. W. McCrary properly and duly conveyed by warranty deed said lot No. 8 to appellee, and on same day J. T. Massey made a warranty deed conveying to appellee said lot No. 7, said two lots being those in controversy, and both of these deeds were recorded on June 26, 1891. (7) On December 26, 1890, Sam Maverick made a general deed of assignment for the benefit of all of his creditors to Reagan Houston; that said Houston

qualified as assignee on same day, and on same day, to wit, December 26, 1890, the deed of assignment was filed for record in the clerk's office of Bexar county; and that the assignment was of an insolvent estate. (8) That F. E. Grothaus had no notice, actual or constructive, of the conveyances made by Maverick to Massey and McCrary until the deeds were filed for record on June 26, 1891. (9) That F. E. Grothaus filed his verified claim against Maverick with the assignee, Houston, and accepted under the assignment and received his first installment of 10 per cent. of his claim from the assignee on July 18, 1891, and that the assignment is still pending. (10) That on June 26, 1891, said Reagan Houston, assignee of Sam Maverick, executed, acknowledged, and delivered to appellee releases of the vendor's lien retained by Maverick, reciting in the releases full payment of the purchase money by appellee, and on same day said releases were filed for record in the county clerk's office of Bexar county. (11) That the judgment of F. E. Grothaus against Sam Maverick was properly abstracted, recorded, and indexed in the proper book by the county clerk of said county. (12) That Massey and McCrary fenced the lots in controversy, but they were never actually occupied by any one, and there has not been a house on them. (13) That the vendor's lien notes given by Massey and McCrary to Sam Maverick were paid by appellee, and the estate of Sam Maverick, which was insolvent, got the full benefit of the payment.

Conclusions of Law.

The lien given by the law to a judgment creditor is a statutory one, and there must be a substantial compliance with the requirements of the statute in order to obtain the benefits of the law, and cause the lien to attach. The proper indexing of the book in which the abstracts of judgments are recorded is as essential, under our statutes and decisions, as the abstract of the judgment itself, and our courts have been very strict in requiring a substantial compliance with the statute on this point. *Gin Co. v. Oliver*, 78 Tex. 183, 14 S. W. Rep. 451; *Pierce v. Wimberly*, 78 Tex. 187, 14 S. W. Rep. 454; *Bonner v. Grigsby*, 84 Tex. 330, 19 S. W. Rep. 511; *Evans v. Frisbie*, 84 Tex. 341, 19 S. W. Rep. 510. The statute (article 3158) says: "The index to such judgment record shall be alphabetical, and shall show the name of each plaintiff and of each defendant in the judgment and the number of the page of the book upon which the abstract is recorded." The statute was substantially complied with in this case, and under other circumstances would have fixed a lien on the property in controversy. It is true that the name of Maverick comes first in the index, and there is no designation of which is plaintiff and which defendant, and neither is there any letter indicating the word "against" or "ver-

sus" after either name, the names being simply inserted as follows: "Maverick, Sam F. E. Grothaus p. 40." From the excerpt taken from the index, we see that the above copy was taken from among the M's, where it belonged, alphabetically. It is defendants generally against whom judgments are pending, and it is defendants' names that we generally wish to find by resorting to the alphabetical list. It would entail a vast amount of labor, and greatly impair the usefulness of an index, if the names of the plaintiffs, alone, and not of the defendants, were arranged alphabetically. The law does not require a cross index. "Maverick" was the name that any one interested in this abstract of judgment would have desired to see, and this name is placed in its proper alphabetical position. The law does not require that the words "plaintiff" and "defendant" shall be placed in the index, but simply the names of each plaintiff and each defendant, and the number of the page on which the abstract is recorded. The statute has been complied with in this case. There was no such actual, visible, and open possession of the lots in controversy by McCrary and Massey as to put Grothaus upon notice of their claim to the land. They fenced the land, and put some lumber on it; but no one ever lived on it, and these acts were not inconsistent with the continuing ownership of Maverick, and were not notice that he had parted with the title to the lots. In Texas a judgment lien would attach, in spite of an unrecorded deed, unless there was notice—actual or constructive—of it brought home, in some manner, to the judgment creditor. That has not been done in this case. Blankenship v. Douglas, 26 Tex. 228; McKee v. Sultenfuss, 61 Tex. 325; Grace v. Wade, 45 Tex. 532.

On December 26, 1890, Maverick made a deed of assignment to all his property, real and personal, to Reagan Houston, as assignee, and at the time that the judgment of Grothaus was abstracted, registered, and indexed, the legal title to all Maverick's property was in the assignee. It is true that this property was held in trust, but, as long as the claims of the creditors were unsatisfied, he could hold the property, with the absolute power of disposition of all of it that was necessary to settle the debt due by Maverick. The judgment lien of Grothaus could only attach to the interest that Maverick had in the land sold to Massey and McCrary, and the title to the land would, so far as the lien is concerned, be held to be in him. But all the interest of Maverick in the land had been transferred by him to Reagan Houston long before any lien could have attached. If his estate had been solvent after the payment of all the debts, the lien would doubtless have attached to all the real property that remained; but it is shown in this case that the estate was insolvent, and therefore there could be no

doubt that the legal title absolutely vested in the assignee, subject to the purposes of the trust. The facts clearly show an outstanding title in the assignee, and he has, by the releases given by him, transferred his title to appellee. Keating v. Vaughn, 61 Tex. 518; Shropshire v. Behrens, 77 Tex. 273, 18 S. W. Rep. 1043; Barber v. Hutchins, 66 Tex. 319, 1 S. W. Rep. 275. When the deed of assignment was executed, the title to all the property of the assignor passed to the assignee for the purpose of the trust, and the power to fix a lien upon it by any creditor ceased at that moment. Schoolher v. Hutchins, 66 Tex. 324, 1 S. W. Rep. 266. Therefore, at the time that the abstract of the judgment was filed, the title to the property was in the assignee, and no lien could be placed upon it, in any manner, by appellant.

A very anomalous state of affairs is presented in this case, as it seems that, at the same time that Grothaus had the land sold under his execution and supposed lien, he had actually accepted, under the assignment, and received, his proportion of a dividend declared by the assignee. We hardly think appellant was in a position to sell this property belonging to the assignee, and at the same time appropriate a part of the money that was being paid into the assignment by appellee to clear his title to the land. The testimony shows that the notes to the land had been placed in the hands of T. C. Frost, but that did not alter the fact that the legal title to the land remained in Maverick until he parted with his title, to Reagan Houston, for the benefit of his creditors, and Houston receipted for the purchase money paid by appellee, and conveyed to him his title, and the assignment got the benefit of the money. At the time of the execution sale, the deeds to Massey and McCrary from Maverick, their deeds to appellee, and the releases of Reagan Houston, were duly recorded, and the appellant had full notice that the title to the lots had vested in appellee. The fact that the land had been conveyed by Maverick to Massey and McCrary can in no conceivable manner alter the fact that Maverick had sold all his property to Houston, and that this deed of assignment was properly acknowledged and recorded, long before Grothaus had obtained his judgment, and he was affected with full notice of this transfer at the time that the abstract was filed and recorded. If Maverick had not sold the property to Massey and McCrary, what would have been the status of affairs when Grothaus attempted to fix a judgment lien on the land in controversy? The title to the lots would have been vested in the assignee, and any attempt to fix the judgment lien upon it would have been futile, and of no effect whatever. The fact that he had sold the land, reserving a vendor's lien, does not alter the proposition, for all title Maverick had went to Houston, assignee, and there

was nothing left upon which to fix a lien. If the lien was fixed by registration of the judgment on the property in controversy, it attached also to all the other property of Maverick that had been sold by him to Reagan Houston for the benefit of creditors. Such a position will hardly be seriously contended for, and yet it is fully as reasonable as that the title to the property sued for was still in Maverick, and that the land was subject to be held by a judgment lien, and sold under execution. The judgment should be and is affirmed.

ELLIS v. KERR et al.¹

(Court of Civil Appeals of Texas. Nov. 22, 1893.)

JUDGMENT—EQUITABLE RELIEF—PARTIES—SET-OFF.

1. The assignee of a judgment, seeking to enforce it, is the only necessary party to an action by the judgment debtor to enjoin its collection.

2. A judgment debtor is entitled to offset against the judgment a debt owing to him by the judgment creditors, both of whom are insolvent, without presenting it to the administrator of one who has died, or of reducing it to judgment, as against the other.

3. A judgment debtor is entitled to offset against the judgment a claim against the judgment creditors which was not due when the action was brought, but which matured after the judgment creditors had become insolvent, and before judgment was finally rendered against the debtor on appeal in the supreme court, where he was unable to plead the offset, owing to its lack of original jurisdiction.

4. An assignee of a judgment takes it subject to all equities that then exist between the parties, including the right of the debtor to offset against the judgment a claim arising out of the same transaction as the one in which the judgment was rendered, but which the debtor was unable to plead at the beginning of the action because it was not then due, and which he could not plead when it matured, owing to the pendency of an appeal in the action to the supreme court.

Appeal from district court, La Salle county; R. W. Hudson, Judge.

Action by M. F. Ellis against John A. Kerr and others to enjoin the collection of a judgment, and to offset a claim against it. From a judgment for defendants, plaintiff appeals. Reversed.

S. M. Ellis and James Raley, for appellant. Lane & Mayfield, for appellees.

NEILL, J. This is an appeal from a decree of the district court of La Salle county dissolving a writ of injunction, and dismissing appellant's suit for want of equities in his bill. The appellant, in his petition for injunction, complains of J. A. Kerr, the surviving partner of the firm of L. O. Dargan & Co., and of his agent and attorney of record, E. R. Lane, and alleges, substantially, that on March 20, 1886, John A. Kerr and L. O. Dargan were partners under the firm name of L. O. Dargan & Co.; that during said month complainant sold said firm cer-

tain sheep then in Presidio and Pecos counties; that at the time of the sale he was indebted to one Ebeling in the sum of \$3,700, evidenced by his promissory note to him, due July 1, 1889, which note was given for 1,131 sheep on complainant's ranch at the time the note was executed, in Pecos county; that it was provided in the note that, on the failure to pay it when due, the holder thereof should be authorized to take possession of the sheep, and sell them, after giving 10 days' notice of the time and place of sale, and, after deducting the expenses of the sale and the amount due on the note from the proceeds of sale, to pay the surplus to Ellis; that, as a part of the consideration due complainant for the sheep, Dargan & Co. assumed and agreed with him that they would pay Ebeling the note, and save Ellis harmless thereon; that Dargan & Co. failed to pay the note, or any part of it, to Ebeling, when due, and that complainant was compelled to pay Ebeling the principal and \$50 due on said note; that on the 1st day of July, 1889, which was before the maturity of the note, Dargan died insolvent and intestate, and that Kerr, his surviving partner, was also, at the time of Dargan's death, insolvent, and has been so ever since, and is a nonresident of Texas; that Dargan's estate is insolvent, and that Rupert R. Claridge is its administrator; that in 1886 Dargan & Co. sued complainant in the district court of La Salle county for damages, upon the alleged ground that the flock of sheep sold them by him were 600 head less than Dargan & Co. claimed they bought; that in said suit judgment was rendered in the district court in complainant's favor, but that it was appealed to our supreme court, and by it reversed (16 S. W. Rep. 789) on the 26th day of May, 1891, and final judgment rendered in favor of A. L. Dargan & Co. against complainant for the sum of \$1,610.54, and all costs, which judgment was certified to the district court of La Salle county for observance; that, at the time of the trial of said case in the district court of La Salle county, complainant's note to Ebeling was not due, and that L. O. Dargan & Co. were then solvent and responsible; that R. R. Claridge, as administrator of the estate of L. O. Dargan, and John A. Kerr, as surviving partner of said firm, and their agent and attorney of record, E. R. Lane, are now attempting to enforce the payment against complainant of said judgment of the supreme court, and costs, and refuse to allow him to offset said judgment with the \$5,200 paid by complainant to Ebeling; that, owing to the insolvency of the estate of Dargan and of John A. Kerr, complainant is without remedy at law against Dargan's estate and Kerr. Complainant then prays that he be allowed to offset said judgment against him for the sum of \$1,610.50 by the amount of \$5,200 he paid Ebeling, and that Claridge, as administrator of the estate of L. O. Dargan, as well

¹ Rehearing pending.

as the heirs and devisees of said estate, John A. Kerr, his attorneys and agents, and E. R. Lane, be restrained and enjoined from enforcing said judgment against him. He then prays for a writ of injunction against the defendants, and that upon final hearing it be made perpetual. Before the trial of the case, the complainant entered a discontinuance as to the defendant Kerr. Although the injunction was prayed for and relief asked against Rupert R. Claridge, as the administrator of Dargan's estate, the bill for the injunction was not filed against him, nor was citation asked against him, nor does it appear that he was ever cited as a defendant, nor did he answer in the case. The defendant Lane answered by demurring to the sufficiency of appellant's bill upon the grounds that it was insufficient, in law or equity, to entitle him to the relief prayed for, and that, he having dismissed as to John A. Kerr, the surviving partner of Dargan, the case should be dismissed, for the reason that the proper and necessary parties were not before the court. The defendant Lane also answer by a general denial, and, by special answer, that he was the owner of the judgment sought to be enjoined, which previous to the institution of this suit had been transferred to him by a writing duly filed in the papers in the cause wherein the judgment was rendered; that the consideration of its transfer to him was his ownership of one-half of it by virtue of a contract with Dargan & Co. to give him one-half of the amount recovered as his fee in payment of his services as an attorney for recovering said judgment, and that the balance of the judgment was taken by him in discharge of a debt due him from Dargan & Co. under an agreement between him and Dargan & Co.; and that complainant knew of his ownership of the judgment prior to the time he instituted this suit.

From this answer, the allegations of which, as between appellant and the appellee Lane, must be taken as true, it appears that neither Dargan's estate nor Kerr owned any interest in the judgment, but that Lane was the sole owner of it. From appellant's bill, the allegations of which must also be taken as true, it appears that Lane was seeking to enforce the judgment. These matters being assumed as true, we do not think that it was necessary that Dargan's administrator or Kerr should be parties to the suit to enjoin the collection of the judgment by Lane. He was the only party, according to his own showing, interested in the judgment, or in its collection, and therefore the only necessary party to the suit. Kerr and Dargan's estate were insolvent, and the only remedy appellant had was the equitable one of offsetting the judgment by their debt, which he had been compelled to pay; and it would have been futile for him to have presented his claim to the administrator of an insolvent estate, and await his action upon it, (Smalley

v. Trammel, 11 Tex. 10; Bank v. Cresson, [Tex. Sup.] 12 S. W. Rep. 819,) or to have proceeded to judgment against his other insolvent debtor, before resorting to his equitable remedy for protection against the judgment. We think that the dismissal of the suit by appellant, as to Kerr, was no ground for the dissolution of the injunction and dismissal of the case. If the owner of the judgment wished to adjust any equities between himself and Kerr, growing out of the transaction in relation to the judgment, he should have pleaded them, and retained him in the case for the purpose of having them adjudicated. Dargan & Co. being insolvent, and appellant's debt not being due from them at the time the suit upon which the judgment was finally rendered in the supreme court was tried in the district court, such debt could not then have been pleaded in the case in offset to the claim of Dargan & Co. against appellant; and Dargan & Co. having become insolvent before the debt matured which they had assumed to pay for appellant to Ebeling, and he being compelled to pay it, it would be inequitable to compel him to pay the judgment of Dargan & Co. against him, if they owned it, while they owed him a much greater amount, which appellant could not collect, on account of their insolvency.

Nor do we think that Lane is in any better attitude in relation to the judgment, by reason of its transfer to him, than Dargan & Co. would be, if they owned it. When the judgment was recovered, Dargan & Co. were insolvent, the debt to Ebeling had matured, and, on account of such insolvency, appellant had been compelled to pay it; and, when it was assigned to appellee, he took it subject to all the equities that then existed between the parties to the judgment. *Freem. Judgm.* § 427; *Wright v. Treadwell*, 14 Tex. 256.

In this case, according to the allegations in plaintiff's bill, the appellant's claim is of the same nature, it arising from the same transaction, as the one upon which the judgment was rendered. It could not be pleaded in the suit in which the judgment was obtained, because it was not due, and Dargan & Co. were solvent. The claim of offset did not then exist in appellant's favor. After the case was appealed to the supreme court, and Dargan & Co. had become insolvent, and their debt paid by appellant, he could not, on account of its jurisdiction, set it up in that court as an offset to the demand against him. When the judgment was rendered, he had no remedy, except the one pursued by him; and we think, if the matters pleaded are true, it is a just and equitable one. Ordinarily, a judgment cannot be offset by a claim not reduced to judgment. But the insolvency of the party against whom the set-off is claimed is sufficient ground for the exercise of the jurisdiction of a court of chancery in allowing a set-off in cases not provided for by statute, although the demands on both sides are not liquidated by judg-

ments or decrees. *Gay v. Gay*, 10 Paige, 376; 22 Amer. & Eng. Enc. Law, p. 451, and authority cited under note 1. After Ellis paid off the note to Ebeling, the lien on the sheep was discharged, for it was his note, and he was primarily liable for it. The liability of Dargan & Co. to pay it was to him, and, as between the parties, the effect of its payment by Ellis was the payment of their debt. But that its payment discharged the lien is too clear for argument, unless Dargan & Co. owned the sheep for which the note was given. That they did not own them is apparent from the fact of their insolvency. The court erred in dissolving the injunction and dismissing appellant's suit, for which reason its judgment is reversed and remanded.

WOLERT v. ARLEDGE.

(Court of Civil Appeals of Texas. Nov. 23, 1893.)

CONTRACT OF SALE—WHAT CONSTITUTES—ACTION FOR BREACH—EVIDENCE OF USAGE—MEASURE OF DAMAGES.

1. Plaintiff telegraphed defendant at what prices he would furnish him February and March bacon, "f. o. b. Kansas City," and defendant telegraphed back: "Will take one car February and March bacon. Forward contracts, and draw for margins." Contracts were sent, stipulating for the purchase of 25,000 pounds, to be delivered in February, and a like quantity to be delivered in March. Defendant refused to sign the contracts, alleging that by usage of trade a carload of bacon was 20,000 pounds. *Held*, in an action for breach of contract, that it was error to instruct that if the parties contemplated that, before the agreement as expressed in the telegram should be regarded as binding, its terms should be reduced to writing, and signed, and margin put up, then the telegrams would not constitute a contract, since the telegrams did constitute a contract if by usage of trade in Kansas City a car load of bacon was 25,000 pounds.

2. The admission of evidence to show a usage in Texas, where defendant lived, as to the number of pounds in a car load, was error, since the contract was to be executed in Kansas City.

3. The measure of damages, if plaintiff were entitled to recover, would be the difference between the contract price and the market value of the bacon in Kansas City at the time it was to be delivered, together with the cost of putting it on the cars for shipment.

Error from district court, Houston county; W. Q. Reeves, Judge.

Action by Alex. Wolert against S. C. Arledge. There was judgment for defendant, and plaintiff brings error. Reversed.

Nunn & Nunn, for plaintiff in error. A. A. Aldrich and J. R. Burnett, for defendant in error.

PLEASANTS, J. The appellant brought suit against appellee for damages on account of breach of contract. Plaintiff was engaged at Tyler, Tex., in the commission and brokerage business, and the defendant, S. C. Arledge, was a grocer at Crockett, Tex. On the 10th of November, 1890, Arledge ad-

dressed Wolert a postal card, asking for prices of bacon for February and March delivery, and on same day Wolert, in reply to the postal, wired Arledge as follows: "February short clear bacon six cents; March seven five, all loose, f. o. b. Kansas City; margin half cent per pound. Quick reply if want any. Market booming." On the same day the telegram was confirmed by letter. On the 13th of November Arledge wired Wolert as follows: "Will take one car February and March bacon. Forward contracts, and draw for margins." On the 13th of November Wolert wrote to Arledge in these words: "Your telegram of even date at hand, reading as follows: 'Will take one car Feb. and March bacon. Forward contracts, and draw for margins.' I have bought same to cover, and will make out and forward to you to-morrow, and draw for margins." Contracts were sent in accordance with the advice contained in the letter from Wolert, and also a draft for \$250, to cover the margins. The contracts stipulated for the purchase of 25,000 pounds of bacon by Arledge, to be delivered on board of train at Kansas City, free of charge, in February, and for the like quantity to be delivered in March, at same place, and on same terms. Arledge refused to sign the contracts, and promptly returned the same, together with the draft unbonored; alleging as his reason for not signing that he had agreed to buy two cars of bacon, and that a car of bacon was 20,000 pounds, and not 25,000 pounds. The plaintiff, Wolert, upon return of the contracts and the draft, sent contracts for the delivery of 40,000 pounds of bacon,—20,000 in February and the like quantity in March,—and drew for \$200 instead of \$250; but Arledge declined to honor the draft, or to sign the contracts, and refused to have any further communication on the subject. Bacon declined on the 13th of November, 1890, and continued to decline until after March. In the months of February and March, 1891, the plaintiff, Wolert, sold at public auction in St. Louis, Mo., the 50,000 pounds of bacon, such as the defendant by his telegram of the 13th of November agreed to take, and afterwards brought his action to recover of the defendant the difference between the amounts for which the bacon sold in February and March and the prices at which it was offered to defendant in the month of November; and upon trial of the cause verdict and judgment were rendered for defendant. The appellant complains of the charge of the court in several particulars.

If by the usage of the trade in Kansas City a car load of bacon is understood to be 25,000 pounds, then the telegram sent by Arledge to Wolert on the 13th of November, and Wolert's reply thereto of the same day, constituted a contract between the parties, and a breach of its terms by either would give the other the right to recover damages; and the court should not have

instructed the jury "that if the parties contemplated that, before the agreement between them, as expressed in the telegram, should be regarded as binding upon them, the terms of their contract should be reduced to writing, and signed by them, and the margin be put up, then the telegrams would not be more than negotiations for a contract, and would not constitute a contract, or give plaintiff a cause of action." Whenever a distinct and definite proposal is made by one person to another, and the latter accepts the same absolutely, and without qualification or condition, the minds of the parties meet, and negotiations close; and the proposal and acceptance constitute a contract, mutually binding, as soon as the acceptance, when negotiations have been by wire or through the mail, is deposited in the post office or the telegraph office for transmission to the person making the proposal. It sometimes occurs that, when the parties have agreed, their correspondence shows that the agreement is not considered by them as final and binding until contracts referred to in the negotiations have been executed between the parties, but in this case the court is of the opinion that the direction in the defendant's telegram of the 13th of November, to "forward contracts and draw for margins," does not modify or change the purport of the preceding words of the telegram, "Will take one car Feb. and March." Usage comprehends the habits, modes, and course of dealing, which are generally observed, either in any particular branch of trade or in all mercantile transactions. A usage must be established, known, certain, and uniform, and reasonable, and not contrary to law. The office of a usage is to interpret the otherwise indeterminate intentions of parties, and to fix and to explain the meaning of words and expressions of doubtful or various senses. Usage must be proved by evidence of facts, not by mere speculative opinions, and by witnesses who have had frequent and actual experience of the usage, and who do not speak from report alone, and they must speak as to the course of the particular trade. 2 Greenl. Ev. §§ 248, 251, 252. It has also been held that the rules of the chamber of commerce established for the purpose of maintaining uniformity in commercial usages of the place are admissible to show the existence or nonexistence of a particular usage in that place. Vide *Kershaw v. Wright*, 115 Mass. 631. A usage of trade, of which all dealers in that line of trade are bound to take notice, must be known, must be uniform and certain. In this case the plaintiff insisted that by the usage of the trade a car load of bacon meant 25,000 pounds; while the defendant insisted that by usage a car load meant 20,000 pounds. The court, under this state of case, should have submitted under instructions, in conformity with the law as above outlined, the issue of the existence or non-

existence of a usage obtaining among those engaged in the bacon trade at Kansas City, which fixed and determined the quantity of bacon contained in a car load; and, if the jury found that such usage did exist, and that it determined the number of pounds of bacon by the expression "a car load of bacon" to be 25,000, their verdict should have been for the plaintiff, if they further found from the evidence that the plaintiff was able and ready to deliver the bacon free of charge on the cars at Kansas City at the times mentioned in the correspondence between the parties, for transmission to Crockett, Tex., on defendant's account; and, on the other hand, if the jury found that by the usage of the trade of that city a car load of bacon meant 20,000 pounds, the verdict should have been for the defendant; and so, if the jury found that there was no established usage obtaining among those engaged in the bacon trade at Kansas City, by which the number of pounds contained in a car load was fixed and determined, the verdict should have been for the defendant. If there be no usage determining the number of pounds of bacon intended by the expression "a car load," then the correspondence between the plaintiff and the defendant cannot be held to constitute a contract binding between them, because both the proposal to purchase and the acceptance of the proposals were indefinite as to the quantity of the commodity which was the subject of their negotiations. If the usage fixed the number of pounds to a car load to be 20,000, the plaintiff should not recover, because he tendered for execution a contract different from the one created by the telegrams, and this gave the defendant the privilege of declining to make a purchase on any terms with the plaintiff. The latter not having complied with the terms of defendant's proposal, he had the right to refuse to treat further with the plaintiff. If, however, a usage exists which fixes the term "a car load" to mean any number of pounds between certain limits, and 25,000 pounds be within those limits, the plaintiff would be entitled to a recovery if he was able and ready to deliver the bacon at the place and at the times and on the terms proposed by him in his correspondence with the defendant. But no such issue as this was raised by the pleadings or the evidence. The court did not err, as contended by appellant, in refusing to instruct the jury that the correspondence between the parties established a contract binding upon them. As we have seen, a usage must be shown to exist in the place where the contract is to be executed, and that place, in this case, is Kansas City. Evidence, therefore, tending to show the habit and custom of individuals engaged in business at Crockett, in conducting that business at Crockett, was immaterial and irrelevant, and should not have been submitted to the jury.

The measure of damages, if plaintiff be entitled to recover, is the difference between the contract price and the market value of the bacon in Kansas City at the time it was to be delivered to defendant, plus the cost of putting it upon the cars for shipment. Vide 3 Pars. Cont. p. 208; and *Welden v. Meat Co.*, 65 Tex. 487. The sale of the bacon in St. Louis is not evidence of the value of the property in Kansas City. The sale of the meat without notice to the defendant cannot in any way affect him. When the vendor sues the vendee for breach of contract, he may elect, when there has been no delivery, to treat the property as his own, and sue immediately for the difference between the actual value of the property and the price to be paid; or he may consider the property as the vendee's, and sell it with due precaution, and after reasonable notice of his intention to sell, given to the vendee, and may sue and recover the balance of the price after giving credit for the amount received from the sale; or he may consider the property as the vendee's, subject to his call or order, and then the vendor recovers the whole of the price which the vendee should pay. But these rules apply only where the vendor has possession of the goods himself. When he has contracted with a third party for the goods, then the vendor can recover only the difference between the market value and the contract price. Vide Pars. Cont. supra. There was no necessity of a tender of the goods in this case after the repeated refusals of the defendant to carry out the contract which plaintiff insists was made by defendant's telegram of the 18th of November, and plaintiff's acceptance of the proposal contained in that telegram. The bacon in question was never in the possession of the plaintiff, and he can recover only the difference between the market value of the bacon in Kansas City at the times the same should have been delivered to defendant, with the cost of placing the meat on the cars for shipment, if the latter had been willing to receive the same at the price for which plaintiff contracted to sell. And to entitle him to recover the plaintiff must allege and prove the market value at Kansas City in the months of February and March, and his readiness and willingness and ability to make delivery of the goods in conformity with the terms of his contract. The petition seems to have been framed with the view to recover the difference between the price obtained upon the sale of the goods and the price for which he had contracted to sell them to defendant. Plaintiff could not sell the goods as the property of the vendee, and bind him thereby, without having given him reasonable notice of plaintiff's purpose to sell. Vide *Leonard v. Porter*, 4 Civil Cas. Ct. App. § 55, and authorities therein cited; and *Kempner v. Heidenheimer*, 65 Tex. 591. The suit is for the recovery of damages for alleged breach of contract,

and if there was in fact a contract, and a breach by the defendant, (which can only be determined by another trial,) plaintiff should not be refused recovery because he may have been mistaken in his measure of damages. For the error in the charge the judgment of the lower court is reversed, and the cause remanded.

STATE v. WILLIAMSON.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

CONTRACTS — PUBLIC POLICY — CRIMINAL LAW —
LARCENY — EMBEZZLEMENT.

1. An assignment of his unearned salary by a government employe is void, as against public policy.

2. An assignment of his unearned salary by a government employe being void as against public policy, an employe who has made such an assignment, and has been appointed agent of the assignee to collect it, is not guilty of larceny or embezzlement if he collects and appropriates it.

Appeal from criminal court, Jackson county; John W. Wafford, Judge.

J. A. Williamson was convicted of larceny and embezzlement, and appeals. Reversed.

L. F. Bird and A. F. Smith, for appellant.
R. F. Walker, Atty. Gen., Marcy K. Brown, Pros. Atty., and J. J. Williams, Asst. Pros. Atty., for the State.

BURGESS, J. At the January term, 1893, of the Jackson criminal court, the defendant was indicted, charged, under the first count, as agent of John Mulholland, with embezzling the sum of \$107; under the second, with grand larceny of the same sum. At the same time he was arraigned, and entered his plea of not guilty, and the cause was continued until the April term, 1893. At said April term he filed a demurrer to the indictment, which was by the court overruled, whereupon he was tried, convicted, and his punishment assessed at imprisonment in the penitentiary for a term of two years. After unsuccessful motion for new trial and in arrest, he appealed to this court.

The facts in this case are that in November, 1892, the defendant was employed as a mail carrier in the post-office department at Kansas City, Mo., at a salary of about \$107 per month. November 30, 1892, defendant sold to John Mulholland the salary he would earn for the month of December for \$100, giving an order to Mulholland on the postmaster for that sum. Then, to prevent the postmaster from learning of the loan, Mulholland appointed defendant his agent to collect the same. Defendant afterward sold the same salary to other parties, and, when it became due, collected it from the government, and refused to pay it over to Mulholland. The contract between the defendant and Mulholland, which was read in evidence by the state, is as follows: "Kansas

City, Missouri, Nov. 30th, 1892. Mr. F. B. Nofsinger, Postmaster: For value received, I have this day assigned and sold to John Mulholland the amount due me for labor performed, or to be performed, during the month of December, 1892, in carrier department; and said Mulholland is authorized to execute such receipts as you may require, and also to indorse warrant (or check) in my name. I further state that I have no cause to believe that I will not earn the salary so sold, and have no indication or knowledge of being discharged. I also agree that it is a part of this contract that if, for any reason, I fail to earn full salary of \$——, that this assignment and order for warrant (or check) shall continue in full force for the month of ——, 189—, and until said amount of \$—— has been earned. I read the above before signing. Respectfully, J. A. Williamson."

The vital question in this case, and the one upon which this prosecution and conviction must stand or fall, is as to the validity of the contract between the defendant and Mulholland. If the contract was void, because against public policy, then the defendant must be discharged, not being guilty of any criminal offense under the statute. It will be observed, in the outset, that the contract was for the sale of the unearned salary of defendant as mail clerk in the United States post office at Kansas City, Mo., for the month of December, 1892. The rule of law is well established in England that such contracts are absolutely null and void, as being against public policy. This subject was under review in the case of *Bliss v. Lawrence*, 58 N. Y. 442, where all the authorities, both English and American, were reviewed, and it was held that the assignment by a public officer of the future salary of his office is contrary to public policy and void. See, also, *Schwenk v. Wyckoff*, 46 N. J. Eq. 560, 20 Atl. Rep. 259; *Field v. Chipley*, 79 Ky. 260; *Beal v. McVicker*, 8 Mo. App. 202. It will also be observed that in the cases of *Brackett v. Blake*, 7 Metc. (Mass.) 335; *Mulhall v. Quinn*, 1 Gray, 105; and *Macomber v. Doane*, 2 Allen, 541,—which are sometimes referred to as announcing a different rule, that the point of public policy was not considered by the court in either of them, but that the questions involved in them were regarded as relating altogether to the sufficiency of the interest of the assignor in the future unearned salary, to distinguish the cause from those of attempted assignment of mere expectation, such as those of an expectant heir. The court held, in these cases, the expectation of future unearned salary, being founded on existing engagements and contracts of employment, was capable of assignment, and that the existing interest was sufficient to support the transfer of the future unearned salary. The case of *State v. Hastings*, 15 Wis. 75, seems to announce a somewhat similar rule; but as, in that case, the order for

the unearned salary, with authority to collect the same, had been transferred to an innocent purchaser, the case turned principally on the question of estoppel. The question as to whether or not the assignment of the unearned salary was against public policy was not raised or discussed in that case, either. The reason of the rule is that the public service may not be so good and efficient when the unearned salary has been assigned as when it has not been, and that the public service is protected by protecting those engaged in the performance of public duties; and this, not upon the ground of their private and individual interest, but that of the necessity of securing the efficiency of the public service, by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work, at such periods as the law has appointed for their payment. *Bliss v. Lawrence*, *supra*. If an officer can assign his unearned salary for a month, he can, of course, assign it for a year, or longer; and it will hardly be contended, in such case, that he would be as efficient and diligent as if he were to receive his salary in person, or for his own benefit, as it became due. For these reasons, we think the contract for the sale and collection of the unearned salary of defendant void and of no effect, being against public policy.

It is, however, contended by the attorney-general, for the state, that, even admitting that the assignment was void, yet, as defendant collected the money for and as the agent of Mulholland, he is guilty of the crime for which he stands convicted, and cites, as sustaining this position, *State v. Shadd*, 80 Mo. 358; *Com. v. Cooper*, 130 Mass. 235; *Com. v. Rourke*, 10 Oush. 397; *State v. Tumey*, 81 Ind. 559; and *Dunl. Paley*, Ag. 62. An examination of these authorities will show that they were all cases where the money or property with which the defendants were charged with stealing or embezzling as agents was where the transactions out of which the fund grew and the money was paid were illegal; and the law, in such cases, is that, if money has actually been paid to an agent for the use of his principal, the legality of the transaction of which it is the fruit does not affect the right of the principal to recover it out of the agent's hands, nor divest him of his right thereto. But no such state of facts exists in the case at bar. Here the salary was legally earned and to be earned, but the attempted assignment thereof was void. The defendant, then, was never divested of his right to collect for himself and in his own right, and was not the agent of Mulholland in so doing. If there was no assignment,—and we hold there was none,—he was not the agent of Mulholland, but acted for himself, in collecting the money. As for the morals of the transaction, in so far as the defendant is concerned, they are certainly not to be approved or commended, but dis-

honest and dishonorable conduct does not always constitute criminal offense.

There are other questions raised by counsel for defendant in their brief, but, as the result reached necessarily results in a reversal of the case, it is not thought necessary to pass on them. The case will be reversed, and defendant discharged. All concur.

CHURCH et ux. v. CHICAGO & A. R. CO.
(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY
— ACTION FOR DEATH OF RAILROAD EMPLOYEE—
INSTRUCTIONS—NOTICE TO PRODUCE DOCUMENTS.

1. In an action for the death of a railroad employee, plaintiff's evidence tended to show that while decedent was standing on the track in the discharge of his duties he was struck by a train which approached from behind without giving any signal as required by the company's rules. Defendant introduced evidence that decedent went hurriedly on the track, immediately in front of the approaching train, and endeavored to remove a cable which his duty required him to keep off the track. *Held*, that whether decedent was guilty of contributory negligence was a question for the jury.

2. An instruction that plaintiff may recover if the jury believe that decedent remained at his post of duty, and was, without fault on his part, struck and killed by defendant's engine because of failure to sound the whistle, requires the jury to find that such failure was the proximate cause of his death.

3. Defendant's requested charge that if decedent was standing on the track as the train approached, attending to his usual business, then it was his duty to watch for trains, and if by looking he could have seen, or by listening could have heard, the train coming in time to get out of its way, and he failed to do so, the verdict must be for defendant, though the engineer gave no signal, was properly modified by adding, "unless the jury shall believe" that decedent "was thrown off his guard by such failure to give a signal."

4. An instruction given at plaintiff's request, which leaves to the jury the question whether defendant's rules required the whistle to be sounded as trains approached the place where decedent was killed, is not inconsistent with an instruction given at defendant's request that no rule was read in evidence requiring the whistle to be sounded on approaching the place of the accident, there being evidence that the rules of defendant required the whistle to be sounded on approaching "obscure" curves, and that the curve at the place of the accident was within the designation "obscure."

5. Inconsistency in instructions given at appellant's request is no ground for reversal.

6. Where the evidence is conflicting, and the testimony of one witness is essentially different in some respects from that given by him in a deposition previously taken, it is not error to charge that if the jury believed any witness had willfully sworn falsely as to any material fact in the case they may disregard the whole or any part of his testimony.

7. Where an unmarried woman brings an action and serves notice on defendant to produce on the trial certain documents, and she afterwards marries, and her husband joins her as a party plaintiff, a new notice need not be served, since the case is the same though the title is changed.

Appeal from circuit court, Lafayette county; Richard Field, Judge.

Action by William Church and Kate Church, his wife, against the Chicago & Alton Railroad Company to recover for the death of Kate Church's former husband, caused by defendant's negligence. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. Robertson, for appellant. Graves & Aull, for respondents.

BLACK, O. J. The plaintiff Kate Church brought this suit to recover damages for the death of her former husband, Charles Dixon. Since that time she married William Church. The case was here before on an appeal from the ruling of the trial court sustaining demurrer to the plaintiff's evidence. 109 Mo. 413, 19 S. W. Rep. 412. On the last trial the defendant produced much evidence, and at the close thereof asked the court to give an instruction that on the pleadings and all the evidence the plaintiff could not recover, which the court refused, and this ruling is now assigned as error, the claim being that the undisputed evidence shows contributory negligence on the part of the deceased.

Dixon, the former husband of plaintiff, was run over and killed by a west-bound passenger train on the defendant's road. He was at the time in the employ of the defendant, assisting in operating a rock crusher. The defendant's road runs east and west at the place of the disaster. The rock crusher was located on the north side of the railroad track, and the rock quarry on the south side. An incline plane track ran down from the upper part of the crusher to the north rail of the railroad track, thence south across the railroad track by what is called a "strap track," and thence on south some eight feet to a turntable, where tracks radiated out into the quarry pit. Small cars, holding about twenty bushels, were loaded with rock, and then run out to the turntable, where they were adjusted to the incline track, and then pushed north to the south side of the railroad track. They were then drawn over the railroad track and up the incline to the crusher by a wire cable attached to a drum in the crusher. The cable was attached to the cars by means of a clevis. It was the duty of Dixon to attach the cable to these small cars when ready to be drawn up, to detach it when they came back unloaded, and to keep the cable off the railroad track. The railroad track, looking east from the crusher, runs on a curve to the south, close to and around a bluff on the south of the railroad. At the time of the accident the quarry had been worked out some 50 feet from the railroad track south into the bluff, and some 50 feet east and west of the turntable. A person standing on the railroad track, where crossed by the strap track, could see east along the railroad for a distance of 1,035 feet, but standing on the turntable he could not see east so far. For

a more detailed description of the surroundings reference is made to the statement of facts in the former opinion.

The charge in the petition is that defendant maintained a whistling post 150 yards east of the crusher, at which persons in charge of west-bound trains were required to sound the steam whistle for the protection of passengers and employees, and that on the occasion in question the engineer neglected and failed to give the signal, by reason of which Dixon was killed. The plaintiff produced some evidence tending to show that there was a post with a whistling board on it just east of the crusher, and she produced much evidence to the effect that it was customary for the trains going west to whistle at that point, to give warning to the men at work at the crusher. She also produced evidence of a positive character that the whistle was not sounded or the bell rung on the occasion in question, and this evidence was supported by the testimony of persons employed at the quarry, who say they heard no whistle or bell. On the other hand, the evidence of the fireman and engineer is quite positive that they sounded the whistle and rang the engine bell.

The evidence having a more direct bearing upon the issue of contributory negligence is as follows: Mr. Boyett, a witness for the plaintiffs, testified: "I was working in the quarry at a point 13 or 14 feet south of the south rail of the railroad track, and about 30 feet east of the turntable. Did not hear or see the train coming from the east until it was at my side. I did not see Dixon right at the time the engine passed me, but I saw him just after it passed me. I then saw him on the track, about the center of the crossing. He was standing with his head down, pointing to the northwest." On cross-examination he said: "The engine was 40 or 50 feet from the strap track when I first heard it. I then looked to see what Dixon was doing. He seemed to be trying to clear the track. He seemed to be in a grasping position, grabbing at the cable or something that was on the track. I did not see him go on the track. I did not see him when the engine struck him. The engine cut off my view of him. The engine was very close to him when he made the grab,—right on him,—I cannot give the exact distance. I cannot say whether any of the little cars were standing by the side of the railroad track or not. The moment the train caused me to look up I saw him on the track, and I do not know what he was doing before that time. He was grabbing at the cable when I first saw him." The evidence of Mr. O'Brien, the foreman of the crew operating the crusher and quarry, is to the effect that Dixon, in attaching and detaching the cable, usually stood in the center of the main track with his back to the east. That he saw Dixon immediately after the train passed. He was then laying on the north side of the main

track, about 50 feet west of this strap track. Other evidence shows that these small cars went up the incline track and back to the railroad track once in every five or eight minutes. The witnesses for the defendant testified as follows: Pat Moore: "I was working in the quarry, 20 or 30 feet south-east of the cable. I heard the train before I saw it. It was 300 or 400 feet off when I first heard it, and it was about 200 feet from me when I first saw it coming. I saw the cable on the track, and then looked for Dixon. He was then 12 or 14 feet southwest of the cable. I saw him throw his gloves and a piece of board used for gauging tracks, and run across to the main track. He checked up, and made a scrape or kick with his foot at the cable. That was the last I saw of him. The cowcatcher shaded me, and I could not see him. He was looking to the east when he threw down his gloves and this board. It looked to me like he was looking at the train coming. He ran as hard as he could. Cannot say how far he was from the engine when he started. He was moving when I saw him kick at the cable. At the time Dixon was killed we small rock cars were all being loaded, except one empty car, which was standing on a track which runs due south of the turntable." On cross-examination the witness stated: "The last car came down the incline five or six minutes before Dixon was killed. He had his face to the east when in the act of kicking. His left foot was over the north rail, and he scraped or kicked with his other foot, and was in a stooping position. The engine was about 50 feet from him when he started, and he had about 25 feet to run; when he got on the main track the engine might have been 10 or 15 feet from him." Thomas Griffin: "I attended to the cable in the crusher. When I last saw Dixon he was running to the main track, to get the cable off of it. He was out south of the turntable, fixing some tracks. I was trying to pull the cable off the track. I saw him running towards the track, and he was within 3 feet of the track when I last saw him. The cable caught on something at the bottom, and I looked down to see what was holding it. I next saw Dixon lying on the south side of the main track." Miller Hooper: "I was there at work, and saw the train strike Dixon. I was north of the railroad track. He was out in the quarry, fixing a track. I saw him throw down his gloves and gauge, and run to the main track. He made a leap to get across the main track. He got his foot over the north rail, in a stooping position, and made a kick and grab at the cable, and the engine struck him,—the steam chest struck him. When he threw down his gloves and started to run the engine was about 150 feet from the place where he was when struck, to the best of my judgment. I judge he was 10 or 12 feet from the engine when he jumped across the track. When struck he

was thrown 20 or 25 feet north of the main track. I was 10 feet north of the main track and 150 feet west of the crusher. When I first saw the train coming it was 150 feet east of the strap track." On cross-examination the witness said: "I saw him throw down his gloves, and knew what they were." Being asked if he did not know that Dixon had his gloves on when found after he was struck, he said: "Yes, sir; it seems to me he had his gloves on. I was mistaken. When the train ran up to the strap track Dixon leaped over the main track, and just as he struck the north rail of the railroad track the train struck him. He was getting out of the way of the train as fast as he could. As far as I could see, the engine struck him on the right hip. Question. The train came upon Dixon unawares, did it not? Answer. Yes, sir; I guess it did. Q. When the train came upon Dixon he was at the south rail of the main track, was he not? A. Yes, sir. Q. And that is the place he leaped from, was it not? A. Yes, sir." The engineer testified that he was sitting on the right-hand side of his cab, looking forward; that he saw the cable on the track when within 20 feet of it; that his train was running about 25 miles per hour, and that he was about 5 minutes behind time; that he did not see Dixon, and there was no man on the track when he came around the curve in sight of the crusher; that Dixon was in the air, going from the engine in a northwest direction when he first saw him; that he could not see a man standing in the middle of the main track when nearer than 20 feet, and that he could not see a man on the south rail when nearer than 75 feet; that he thinks the cowcatcher struck him. "Question. Suppose he had been standing on the north rail, his leg across the north rail? Answer. He would have been knocked right down; not thrown up at all." If on the north side, he would have been struck with the end of the bunting beam. He could not have been struck by the steam chest, unless he was up in the air.

The first contention of the appellant which we will notice is this: that the undisputed evidence on both sides shows that the deceased went upon the track immediately in front of a rapidly approaching train, and that such an act constitutes contributory negligence. Although contributory negligence is a matter of defense in this state, and the burden of proof rests upon the defendant, still if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, or from other undisputed evidence in the cause, that the injured party was guilty of negligence proximately contributing to produce the injury, the court should direct a nonsuit. But the question of contributory negligence is one for the jury where the facts are in dispute; and it is also one for the jury where the facts, though undisputed, are such as to lead the minds of

sensible men to different conclusions. 2 Thomp. Trials, § 1680; Roddy v. Railway Co., 104 Mo. 250, 15 S. W. Rep. 1112; Weber v. Railway Co., 100 Mo. 195, 12 S. W. Rep. 804, 13 S. W. Rep. 587; Barry v. Railroad Co., 98 Mo. 62, 11 S. W. Rep. 308. According to the evidence of Mr. Boyett, Dixon was, immediately before the collision, on the strap track, about the middle of the railroad track, in a stooping position, with his head pointed to the northwest; that is to say, with his back towards the approaching engine. This evidence, and the evidence of O'Brien, leaves Dixon in the position he usually occupied when attaching and detaching the cable, and a fair inference to be drawn from it is that Dixon was engaged in that work when struck. This evidence therefore tends to show that Dixon did not know of the approaching train. On the other hand, Moore says the small cars were all being loaded except one, which was standing on a track south of the turntable. This evidence of Moore being true, Dixon could not have been in the act of attaching or detaching the cable to a rock car. Besides this, the evidence of Moore and of the other two witnesses for defendant is to the effect that Dixon was 30 feet south of the railroad track; that he ran from that part of the railroad track, and attempted to move the cable then on that track. If the evidence of these three witnesses is true, then Dixon evidently saw the approaching train, and went upon the railroad track immediately in front of the approaching engine. Such an act would be gross negligence on his part, contributing to the injury. But can it be said that the evidence of these three witnesses stands undisputed? We think not. In the first place, there is a material difference between Boyett and the witnesses Moore, Griffin, and Hooper in this: the first places deceased in the middle of the track, with his back to the engine, while according to the other three witnesses he was at no time in that position. Some of the cross-examination of Hooper tends to support the evidence of Boyett. But there is another reason why this court cannot say the evidence of defendant's witnesses stands undisputed. Moore and Hooper state in positive terms in their direct examination that Dixon threw down his gloves and ran to the railroad track, and yet Hooper concedes on cross-examination that Dixon had his gloves on when found dead. This discrepancy and other features of the case show that the evidence on both sides ought to be examined by the triers of fact with great care. A nonsuit because of contributory negligence disclosed alone by the defendant's witnesses should be allowed with great caution, and it should never be awarded where the truthfulness of the evidence is open to doubt; for, while jurors have no right to arbitrarily disregard the evidence of any witness, still it is for them, and not the court, to say what

weight and credit shall be given to the testimony of the various witnesses. The question of contributory negligence ought to be submitted to the jury where it becomes necessary to ascertain the credit to be given to the testimony of the witnesses, and that is the case here.

2. It was the duty of the deceased to keep the cable out of the way of trains, and he assumed the risks incident to that work; but he did not assume risks arising from negligent acts of those in charge of the train. This follows from the ruling made on the former appeal that Dixon was not a coservant with those in charge of the train. The present case is entirely unlike that of *Evans v. Railroad Co.*, 62 Mo. 49. There the plaintiff had charge and control of the train which inflicted the injury, which is not the case here.

3. After the plaintiff had introduced her evidence, she read a notice to the defendant to produce on the trial a copy of the rules and a copy of the time card in force at the time of the accident, regulating the operation of trains, service of which had been duly accepted. The defendant objected, because it "was a notice in the other case, and not in this, and it ought not to go to the jury." Counsel for plaintiff then stated: "It is not offered to go to the jury; it is offered to make the record complete, and to show why parol testimony has been received concerning the same matter." It is enough to say this notice was not read as evidence to the jury, and whether it was properly or improperly heard by the judge is wholly immaterial. Nor was it necessary to serve a new notice after the title of the cause had been changed because of the marriage of plaintiff. It remained the same suit, though it became necessary to make the second husband a party.

4. Objection is made to the first and second instructions on the ground that they fail to require the jury to find that the failure to sound the whistle was the proximate cause of the injury. The first instruction declares, among other things: "And if the jury further believe from the evidence that at the time when said train killed said Dixon he was carefully and prudently discharging his duties in handling said cable while said train was approaching, and that the engineer in charge failed to sound said whistle at or near said whistling point, and that by reason of the failure to sound said whistle said Dixon, while so engaged in the discharge of his duty, was not warned of the approach of said train, so as to enable him to make his escape, and that by reason of the failure to sound said whistle said Dixon remained at his post of duty, and in discharge thereof, while detaching said cable or removing the same from the track, in a careful and prudent manner, and without any fault of his own, was struck and killed by said train or engine, then the jury shall find for plaintiff." And the second instruction is in these words:

"No. 2. If the jury believe from the evidence that Charles Dixon was in the regular discharge of his duties, attending the cable at the crusher of the defendant, exercising ordinary care, and that he would not have received the injuries resulting in his death if the defendant or its engineer had sounded the whistle on approaching the said crusher, and that the defendant's rule or time card required such whistle to be sounded on approaching the same, and that the defendant or its engineer or other servants failed to sound said whistle on approaching the crusher on the morning of December 20, 1886, and that by giving such signal the death of Dixon would have been avoided, they will find for the plaintiff." The first of these instructions, it will be seen, requires the jury to find that Dixon remained at his post of duty, and was, without fault on his part, struck and killed, because of a failure to sound the whistle. Surely this makes the failure to sound the whistle the proximate cause of his death. We think the objection not well taken.

At the request of the defendant the court gave some instructions, two of which are as follows: "No. 5. If the jury believe from the evidence in the case that Charles Dixon left the cable across the track, and afterwards saw or heard the train approaching, and undertook to remove the cable to prevent the train from running over it, and in doing so was struck by the train, the verdict must be for the defendant, whether the whistle was sounded or not." "No. 8. Should the jury believe from the evidence in the case that Charles Dixon was standing on the track of the road as the train approached, attending to his usual business, then it was his duty to watch out for the train; and if by looking he could have seen, or by listening he could have heard, the train coming in time to have gotten out of its way, and he failed to do so, the verdict must be for the defendant, though the engineer failed to give any signal of his approach, and though Dixon was at the time trying to get the cable off the track, unless the jury shall believe that Dixon was thrown off his guard by such failure to give a signal." The court added to the eighth the last clause, "unless the jury," etc., and to this ruling error is assigned. These two instructions place the entire defense of contributory negligence before the jury in a most favorable light for the defendant. But for the qualifying words added to the eighth instruction, it would have been, in effect, a demurrer to the evidence. They were properly added.

5. It is again insisted that there is a conflict between plaintiff's second instruction, before set out, and the one numbered 14, given at the request of the defendant, which declares "that in the rules of defendant put in evidence there is contained no rule requiring the defendant's engineers drawing regular trains to ring the bell and sound the whistle, or either, upon approaching the rock

crusher in question." To an understanding of this objection it is necessary to look to the evidence, and the order in which it was produced on the trial. The plaintiff, in making out her case in chief, read in evidence a deposition of the fireman, taken by the defendant, in which he testified on the cross-examination that there was a whistling post just east of the switch track at the crusher; that the engineer sounded the whistle and rang the bell at that place, because they knew men were working at the crusher; and that they had been giving these signals ever since the crusher was erected. The plaintiff also read the deposition of the conductor, taken by defendant, in which he said there was no requirement to whistle or ring the bell at this place more than at any other curve; that there was a rule in the time card for the sounding of the whistle at obscure curves, but not for ringing the bell. According to other evidence this was an obscure curve. On behalf of the defendant the engineer testified at the trial that he could not remember about that morning in particular, but that he always whistled down about the switch, to warn the men at the crusher; that he had no orders about running trains other than those in the book of rules; that he did not know anything about obscure curves; that railroad men called curves obscure, but the time card did not call for them; that when Dixon was killed he was running under the time card and rules which took effect November 14, 1886. Dixon was killed on 20th December, 1886. In rebuttal the plaintiff read in evidence the deposition of the engineer previously taken in the case, in which he said the rule was to "whistle at all whistling posts, read crossings, obscure curves,—the obscure curves are meant more for wild than for regular trains," and that the rules were general, and applied to all engineers on the road. The defendant put in evidence the time card and rules of 14th November, 1886, in which it is provided: "Engineers must run with great caution around abrupt curves, sounding the whistle at least 80 rods before entering the curve, and continuing to sound at short intervals until the curve is passed." The expression "abrupt curves" used in the rules read in evidence by the defendant evidently means the same thing as "obscure curves" as used by the witnesses. The fourteenth instruction given at the request of the defendant ought therefore to have been refused, but we cannot say the giving of it renders the instructions inconsistent. The plaintiff's instruction leaves it to the jury to say whether the defendant's rules and time card required the whistle to be sounded on approaching the crusher. Under this instruction and the evidence in the case the jury might well find that the curve passed over by the train before reaching the crusher was one within the meaning of the rule read in evidence, and it was therefore the duty of the

engineer to sound the whistle when approaching the crusher. The defendant's instruction told the jury that the rules read in evidence did not require the engineer to sound the whistle upon approaching the crusher in question. It seems to inform the jury that the rules do not specifically mention or point out this crusher as a place where the whistle must be sounded, but it was certainly not designed or intended to take the question whether the curve in question was one within the meaning of the rules away from the jury. That it was not designed to take this question away from the jury is manifest when we examine instruction numbered 14a, given at the request of the defendant, which contains this statement: "The court instructs the jury that, although the jury may believe from the evidence in the case that defendant had a rule, then in force, requiring engineers to sound the whistle on the engine on approaching this crusher, that fact did not relieve the deceased of his duty to look out," etc. This instruction, asked by the defendant, and given by the court, leaves it to the jury to say whether the rules of defendant required the engineer to sound the whistle on approaching the crusher, and is in perfect accord with the instruction given at the request of the plaintiff. But if it can be said there is any inconsistency in the instructions, that inconsistency constitutes no ground for reversal, because the inconsistency is between instructions which were given at the request of the appellant itself. *Harrington v. City of Sedalia*, 96 Mo. 583. 12 S. W. Rep. 342.

6. The court, at the request of the plaintiff, told the jury that if they believed any witness had wilfully and intentionally sworn falsely as to any material fact in the case, then they were at liberty to disregard the whole or any part of the testimony of such witness. The objection urged to this instruction is that there was no contradictory or false evidence in the case. Some of the witnesses testified in the most positive terms that the whistle was not sounded, while others testified in a like positive manner that it was sounded, and they were all in a position to see and hear. This was a material issue in the case. There was also a conflict in the evidence in other respects. The evidence given by one witness on the trial was in some respects essentially different from that given by him in a deposition previously taken in the case. On this state of the evidence there was no impropriety in giving this instruction, and it follows that the court did not err in giving it. As to the other objections made in the appellant's brief, it is sufficient to say that we think they are not well taken. The judgment is affirmed.

MAOFARIANE, J., not sitting. The other judges concur; BAROLAY, J., agreeing in the result, but not to all that has been said.

BARCLAY, J., (concurring.) While agreeing to the judgment, my consent is not given to the intimations in the first paragraph in the foregoing opinion to the effect that if the testimony of defendant's witnesses to contributory negligence of deceased appeared "without any conflict of evidence" "the court should direct a nonsuit." On that point it is my opinion that where the burden of proof under the pleadings is on one of the parties, upon a material issue in the cause, the question of the credibility of the oral testimony offered on that issue, even though uncontradicted, is one for the jury and for the trial judge in reviewing the verdict. It is not a question for this court, under the constitution of Missouri, guarantying trial by jury in actions at law; and my assent is not accorded to any observations that may be supposed to impair the force of the earlier rulings on this subject. *Bryan v. Wear*, (1835,) 4 Mo. 106; *City of Memphis v. Matthews*, (1859,) 28 Mo. 248; *Gregory v. Chambers*, (1863,) 78 Mo. 296; *Schroeder v. Railroad Co.*, (1892,) 108 Mo. 322, 18 S. W. Rep. 1094.

WELLER v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Missouri, Division No. 1.
Nov. 6, 1893.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—DAMAGES—DEATH BY WRONGFUL ACT.

1. In an action against a railroad company for killing a traveler at a highway crossing, where negligence by the railroad company is clearly established, the defense of contributory negligence must be clearly made out to warrant the court in taking the case from the jury; and, if inferences other than that of contributory negligence may be fairly drawn from the evidence, the question is for the jury.

2. Evidence by the only eyewitness to an accident at a railroad crossing that deceased, driving a wagon in the nighttime, did not use any precaution to ascertain the approach of a train after he got within 50 feet of the track, does not show him guilty of contributory negligence, as matter of law, when it appears that he had an unobstructed view of the track for 600 feet before reaching the crossing.

3. In an action against a railroad company for killing a traveler at a highway crossing, where the defense is contributory negligence, and the evidence is almost conclusive that he drove recklessly on the track, it is error to instruct that he had a right to presume that the employees of the company would use ordinary care in moving trains, and that he was not bound to anticipate the company's failure to ring the bell, carry a light, and run its train within a limited rate of speed, since the jury may well have inferred that the traveler's failure to exercise care did not exist if the company omitted the acts enumerated. *Brace, J.*, dissenting.

4. For killing a traveler at a railroad crossing the amount of damages is fixed by statute at \$5,000, and evidence as to the social or business standing or relationship of the widow is not admissible.

5. The driving of a horse at a rate of speed forbidden by a city ordinance at the time of a collision between the wagon and a railroad train on a highway crossing is such

negligence on the part of the driver as will prevent recovery against the railroad company if it contributed directly to the accident.

Appeal from circuit court, Jackson county; James Gibson, Judge.

Action by Arbell Weller against the Chicago, Milwaukee & St. Paul Railway Company for the death of her husband. From a judgment in plaintiff's favor, defendant appeals. Reversed.

Pratt, Ferry & Hagerman, for appellant.
Gage, Ladd & Small, for respondent.

MACFARLANE, J. Plaintiff sues to recover damages on account of the death of her husband, caused, as is alleged, by negligence of defendant. The accident resulting in the death of plaintiff's husband occurred on December 6, 1887, at a point on Fifteenth street, in Kansas City, where it is crossed by the Belt Line Railroad, and by a train of cars operated by defendant over that road. The trial resulted in a judgment against defendant for \$5,000, and it appealed therefrom.

The negligence charged was (1) in running the train in the city at a rate of speed in excess of six miles an hour; (2) running the train without having at least "one large lamp, headlight, or lantern conspicuously placed in front of the same,"—both contrary to the ordinances of the city; and (3) a failure to give the required statutory signals of ringing a bell on the engine in approaching the crossing. The answer was a general denial and a plea of contributory negligence.

Fifteenth street was one of the principal thoroughfares of the city of Kansas, running east and west. In the center of the street was a double-track cable street railway, cars going east running over the south track, and those running west over the north track. The Belt Line Railroad, also double tracked, running in a northeasterly and southeasterly direction, crossed this street at an angle of about 33 degrees. The street, as well as the Belt road, towards the northeast, was graded some feet above the level of the land on either side, on account of a ravine running across them. About 18 feet of the graded street lay between the north rail of the northmost cable track and the top of the grade. Askew street, running north and south, intersected Fifteenth street, measuring by the traveled part of the street, about 120 feet east of the most westerly rail of the Belt road. On the corner of Askew avenue and Fifteenth street stood two small frame buildings, occupying about 50 feet, fronting on the latter street. After these buildings are passed, one traveling east has an unobstructed view of the Belt Line road for 600 or 700 feet, to about the eastern limits of the city. On Askew avenue about half a block north of Fifteenth street was located the depot of a dummy line railroad. This line ran up Askew avenue to the next street, (Fourteenth,) which it followed to

wards the east one block, and then took a northwesterly direction. At the date of the accident—December 6, 1887—defendant was constructing its road outside the city, and was accustomed in the evening of each day to run in a work train on this Belt line. The husband of plaintiff lived east of the city, and traveled over Fifteenth street in going and returning from his home to the city. An ordinance prohibited the running of trains in excess of six miles an hour, and required each train run in the city after sunset to have one large headlight, lamp, or lantern conspicuously placed in front of the same. On the evening of December 6th, deceased, returning from the city to his home, driving a horse attached to a light wagon along the north side of Fifteenth street, collided with the work train operated by defendant over the Belt road, and from injuries received therefrom died in a few days. At the conclusion of the evidence offered by plaintiff, defendant asked that the jury be instructed to return a verdict for defendant, which was refused.

The court gave the following instructions for plaintiff: "(1) The jury are instructed that at the time said William P. Weller was injured the law imposed upon the servants, agents, and employes of the defendant, while running, conducting, or managing the locomotive and train of cars in question, the following duties: That they should not move the same within the city limits of the city of Kansas at a greater rate of speed than six miles an hour; that they should not run and move said locomotive and train of cars within the city of Kansas, between sunset and sunrise, without having at least one large lamp, headlight, or lantern in a conspicuous place in front of the same, facing the direction in which the same was moving; that they should, immediately upon entering the city of Kansas, cause the bell on the engine to be rung, and keep the same ringing until the same should have crossed Fifteenth street. And if the jury believe from the evidence that the agents, servants, and employes of the defendant, while running, conducting, or managing said locomotive and train of cars upon the occasion referred to, failed to perform any one or more of the duties specified in this instruction, such failure was negligence. And if you believe from the evidence that, in consequence of such negligence in any one or more of the particulars hereinbefore mentioned, the deceased received the injuries which resulted in his death, your finding should be for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which contributed to the injury; and the burden of proving such negligence is upon the defendant." "(3) Negligence on the part of the deceased which will prevent the plaintiff recovering in this action must be such as directly contributed to his injury, and consists of the want of ordinary care.

Ordinary care means that degree of care which may be reasonably expected of ordinarily prudent persons in the situation of the plaintiff's husband at and just before the time the accident occurred, and in determining whether the deceased was using such care you should take into consideration all the circumstances surrounding him at the time; and you are also instructed that he had a right to presume that the agents and servants of the defendant, in moving trains along said railroad track, would use ordinary care, and he was not bound to anticipate or be prepared for any acts or omissions on their part declared by the court in plaintiff's instruction No. 1 to be negligence." For defendant it granted the following: "(2) It was the duty of Weller to both look and listen for approaching trains on the Belt Line track. If, on account of darkness or other cause, he was prevented from seeing, then he was bound to take extra precaution by listening. And if the noise from his wagon, if any, prevented his hearing the approach of the train, then he was required to stop and listen. These duties the law required of him, and any failure to comply therewith was negligence." "(4) It was the duty of Weller to look in both ways and listen for trains on the Belt line. And if at any time before he got on the track he could either by looking or listening have known of the approach of defendant's train, then he was bound to do so, and was negligent if he did not do so."

1. The evidence was all introduced by plaintiff, and is without conflict. The train inflicting the injury was within the limits of the city, and was being run at a rate of speed in excess of the rate limited by ordinance. This was an act of negligence which, if causing the injury, would authorize a recovery unless the husband of plaintiff was guilty of contributory negligence. There is no doubt the evidence tended to prove that deceased was negligent in going upon the track at the time and in the manner shown, but his act cannot, as a matter of law, be declared negligent, unless the facts exclude every other reasonable inference. If inference other than that of contributory negligence can be fairly drawn from the evidence, then the question becomes one of fact for the jury to decide. Only one person who witnessed the casualty testified on the trial, and from his evidence, with the situation of the streets, railroad tracks, lights, and other surroundings, we must determine whether the court should have taken the case from the jury. Collins, the witness, testified that he was at the time a gripman on one of the Fifteenth street cable cars on the south track, headed east. That it was the rule and custom to stop the cable cars about 50 feet from the Belt road track, and for the conductor to go forward, to see if the track was clear and a crossing safe. These cable cars had a brilliant headlight in front. His car had stopped

as usual about 50 feet west of the railroad track. The cable car on the north track fronting west had stopped, and was standing on the east side of the railroad. While standing he heard the rumbling of a train coming down the track from the northeast. He could not then see it. About the same time he heard the rattling of a wagon about 100 feet away, coming down the north side of Fifteenth street from the west. This wagon was driven by deceased, Mr. Weller. When Weller passed the cable car he was driving in a rapid trot, at a rate of six or seven miles an hour. When opposite the car, witness called to him to look out for the train. Weller evidently did not hear or understand, for he drove on without check. When within about 25 feet of the track witness shouted to him again to look out for the train. At this warning Weller turned his head, and looked over his right shoulder towards witness, but did not check his speed. Upon reaching the track the train struck him. Collins testified further that the night was dark. The street was hard, and the buggy rattled. The headlights from the two cable cars threw a bright light across the track. That he heard the bell on the engine ring feebly twice before the collision. That he saw no headlight, lamp, or lantern in front of the train until about the time he called to Weller the second time. Weller did not look, so far as witness could see, in the direction from which the train was coming, nor did he check the speed of his horse the least when he drove upon the track. It was shown by the evidence, as before stated, that the railroad track to the northeast—the direction from which the train came—was straight for 600 feet, and upon an embankment, and the view was unobstructed, after Weller passed the buildings, though the bright light from the cable cars made it dark up the railroad track to one on the street, and Collins could not see the train until he called the second time to Weller, when he was within about 25 feet of the track. The speed of the train, running with the hind end of the engine in front, was about 12 miles per hour, and when it came in sight was within about 50 feet of the point of the collision with the wagon. It was shown that Fifteenth street was the most direct and practicable route from the house of Weller to the business part of the city, but it was not shown how frequently it had been traveled by him.

The law that a traveler, before entering upon a railroad track, must observe some precautions for his own protection and safety, and that a failure to do so will be such negligence as will preclude a recovery in case of injury, is as well settled in this state as is the law that a railroad company is guilty of negligence in running a train without observing the reasonable precautions required by law or ordinance. The measure of precaution to be observed by a traveler depends

often upon the circumstances and surroundings. The general rule is that in knowingly approaching the track of a railroad he must use his sense of sight or hearing to ascertain if there be danger. If the view is so obstructed that he cannot see, he should carefully listen. The circumstances may not require that he both look and listen, but common prudence requires that he do either the one or the other, and a failure to do so renders his act negligent in law. In treating the question of the duty of a traveler to look and listen before attempting to cross the track of a railway, and the legal effect of a failure to perform his duty in that respect. Beach, in his work on Contributory Negligence, (2d Ed. § 180,) reaches the following conclusion: "In the progress of the law in this behalf the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as a matter of law." If it appear from the evidence that the traveler did look or listen, or both, then it becomes a question for the jury to determine, considering the situation, the duty of the railroad company, and all the facts and circumstances in evidence, whether the precautions taken were reasonable. There are cases, also, in which one going upon a railroad track may show himself or be shown to have been so heedless of known danger as to preclude a recovery as a matter of law for injuries received through his own recklessness. In such case he assumes the risk of injury. These principles are established by numerous decisions of this court. *Zimmerman v. Railway Co.*, 71 Mo. 476; *Henze v. Railroad Co.*, Id. 636; *Hanlon v. Railroad Co.*, 104 Mo. 381, 16 S. W. Rep. 233; *Stepp v. Railroad Co.*, 85 Mo. 235; *Easley v. Railway Co.*, (Mo. Sup.) 20 S. W. Rep. 1073; *Kenney v. Railroad Co.*, 105 Mo. 284, 15 S. W. Rep. 983, and 16 S. W. Rep. 837; *Gratiot v. Railway Co.*, (Mo. Sup.) 21 S. W. Rep. 1094; *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. Rep. 909.

The question, then, arises on the demurrer to the evidence, whether deceased himself failed to exercise such reasonable care and to take such reasonable precaution as would preclude his widow from recovering damages on account of his death. It may be proper to say here, as was held in the *Blueborn Case*, (Mo. Sup.) 18 S. W. Rep. 1103, that where the evidence of negligence on the part of the railroad company, which resulted in an injury, is clearly established, in order to defeat a recovery as a matter of law on the ground of contributory negligence, the defense should be clearly made out. In other words, to repeat and emphasize what has been said, if inferences other than that of contributory negligence may be fairly drawn from all the evidence and the facts and circumstances shown to exist, then the question becomes one of fact for the jury. The greatest difficulty in each case lies in the appli-

cation of these principles to the facts of the particular case. In this case only one witness to the conduct of the deceased testified. What he saw was necessarily from his point of observation. According to his testimony, he heard the rattling of the wagon driven by deceased for 100 feet before it passed him, situated 50 feet from the track. He heard the wagon, then, before it passed the frame buildings. The horse was moving at a rapid trot, 6 or 7 miles per hour, and its speed was not checked until the collision occurred. The wagon rattled on the hard ground so witness could hear it 100 feet away. It is quite evident that plaintiff did not listen carefully or at all for a train. The witness had his eyes upon deceased from the time he passed him until he was struck. He was driving in the bright light thrown out by the headlights of the two cable cars, in full view of the witness, and, so far as he could see, never turned his head in the direction of the railroad track from which an approaching train might have been expected. Witness saw the train, with a light on its front end, when deceased, who was nearer, was within 25 feet of the track, but deceased gave no indications of seeing it himself. We think it clearly and conclusively established that deceased did not look for the train, or use any kind of precaution to ascertain the approach of one after he got within 50 feet of the track. From the frame buildings to where the witness was situated was a distance of about 60 feet. The view of the railroad track was unobstructed, and, except for the darkness, a train could have been seen for over 600 feet. How plaintiff used his eyes passing over this part of the street, the evidence does not inform us. If it had been shown by the evidence that, after coming from behind the buildings, plaintiff looked carefully up and along the track for a train, and could not see it on account of the neglect of the company to have a light placed in front as required by ordinance, we would say that the issue should have been left to the jury to say whether, under all the circumstances, the precaution taken was such as ordinary care demanded, or whether stopping and listening and approaching the track at a more moderate rate of speed was also required.

In the absence of all evidence, did the jury have a right to draw the inference that deceased did what common prudence and ordinary care demanded of him? The rule of law that ordinary care requires a traveler at a railway crossing to look up and down the track, when the view is unobstructed, before venturing to cross it, is drawn from the ordinary conduct of the average of mankind in the daily affairs of life. From the same source is deduced also a correlative rule that, in the absence of direct evidence or rebutting circumstances, one, in attempting to cross a railroad track, will be presumed to have been in the exercise of proper

care. *Petty v. Railway Co.*, 88 Mo. 320; *Schlereth v. Railway Co.*, (Mo. Sup.) 21 S. W. Rep. 1113; *Crumpley v. Railway Co.*, 111 Mo. 158, 19 S. W. Rep. 820. In this case, had there been no witness to the conduct of deceased, and it had been shown that defendant was negligent in failing to comply with the ordinance requiring the train to carry a light, then the jury might have drawn the inference that deceased looked for a train, and failed to see on account of the default of those in charge of the train. In such case the question of contributory negligence would have been one for the jury, to be determined in the light of all the circumstances. We are not able to see that the facts disclosed in this case call for the application of a different rule. If it had been shown that deceased, when he passed the frame buildings, having then a clear view of the track for 600 feet, looked carefully up the track for a train, and saw no light or other indications that one was approaching, we could not say as a matter of law that he was guilty of negligence in driving the remaining 50 feet without again looking. If no train had in fact been within 600 feet, no danger of collision would have appeared. The duty of deceased required him to look up and down the track for trains before crossing it. What more natural than that he should first look in the direction in which he could see? The cable car may have stood as an obstruction to his vision of the track to the southwest. When he heard the warning of Collins, if he had already looked in the other direction, what more natural than that, coming from behind the cable car, he should then turn his eyes upon the track to the southwest, which he did? But it is insisted that the train did in fact carry the light, which plaintiff could have seen had he looked. In answer to this we need only say that the evidence tended to show that no light was in front of the train until about the time deceased turned his head to the right. Whether one was there before that was also a question for the jury. We think, under all the evidence, the case was one for the jury, and the demurrer to the evidence was properly overruled.

2. Complaint is made to that part of the plaintiff's third instruction which tells the jury that deceased "had a right to presume that the agents and servants of defendant in moving trains along said railroad track would use ordinary care, and he was not bound to anticipate or be prepared for any acts or omissions on their part declared by the court in plaintiff's instruction No. one to be negligence." The omissions referred to were failure to ring the bell, failure to carry a light, and failure to run within a limited rate of speed. The proposition that every one is presumed to know and observe the law, and that persons on the streets of a city have a right to presume that a railway company will obey the commands of

the state and municipal laws in running their trains, has been too often declared by this court to justify us in a further consideration on the question in the abstract. *O'Connor v. Railroad Co.*, 94 Mo. 150, 7 S. W. Rep. 106, and cases cited; *Kelny v. Railway Co.*, 101 Mo. 78, 13 S. W. Rep. 806; *Kenney v. Railway Co.*, 105 Mo. 270, 15 S. W. Rep. 983, and 16 S. W. Rep. 837. The plea was contributory negligence. The evidence tended to show—indeed, it was almost conclusive—that deceased drove recklessly on the track, without the observance of any of the requirements of ordinary care. Under this plea and the evidence, was plaintiff entitled to the instruction? If deceased had the right to invoke the presumption, and was not bound to anticipate or be prepared for any act or omission on the part of defendant, what became of the plea of contributory negligence? While it is undoubtedly the law in this state that a railroad company is negligent per se in operating its trains upon streets in disregard of statutory or municipal regulations, and also that one using such highways has the right to assume that such regulations will be observed, he is not for that reason to shut his eyes and close his ears to their nonobservance. Railroad tracks are places of danger, though trains are run under the most careful observance of the strictest regulation; and the duty rests upon a traveler, on approaching a track, to use reasonable care to ascertain if there be danger. If he use such reasonable precaution for his own safety as the law or common prudence enjoins, he has the right, in the absence of information to the contrary, in determining whether the way is open and safe, to rely upon the presumption that the corporation will perform its duty, and observe the precautions imposed upon it. *Sullivan v. Railway Co.*, (Mo. Sup.) 23 S. W. Rep. 149; *Jennings v. Railway Co.*, 112 Mo. 268, 20 S. W. Rep. 490; *Lynch v. Railway Co.*, 112 Mo. 420, 20 S. W. Rep. 642; *Crumpley v. Railway Co.*, 111 Mo. 152, 19 S. W. Rep. 820. The traveler has no right to rely wholly upon the obligations of the company to observe the requirements of law and proper care, while he himself is disregarding both. The rule of contributory negligence is not changed or abrogated by reason of a statute or ordinance imposing the duty on account of a violation of which the injury resulted. *Turner v. Railroad Co.*, 74 Mo. 602; *Zimmerman v. Railroad Co.*, 71 Mo. 476; *Hanlon v. Railroad Co.*, 104 Mo. 381, 16 S. W. Rep. 233; *Crumpley v. Railroad Co.*, supra. "The statute does not absolve persons approaching a public railway crossing from exercising common prudence to avoid danger, nor shift the responsibility to another, should injury ensue from a failure to exercise it." *Kenney v. Railway Co.*, 105 Mo. 284, 15 S. W. Rep. 983, and 16 S. W. Rep. 837. There was evidence from which

the jury could have found that plaintiff both saw and heard the approaching train, and knew it was not observing the law. With such information they are told that deceased was not, in the exercise of due care, required to take precautions to avoid the result of such negligent omissions. The jury may well have inferred that the duty of looking for a train, the omission of which they were told by defendant's instructions would be contributory negligence, did not apply in case defendant was omitting a duty imposed by an ordinance. Indeed, the instructions are only reconcilable on that theory. A similar instruction was condemned in the recent case of *Lynch v. Railway Co.*, supra. We think, also, that the question of contributory negligence should have been left to the jury upon all the evidence, without giving prominence to a presumption which deceased may or may not have indulged. Under the evidence, the instruction was improper.

3. The impropriety of the admission of evidence over the defendant's objection, giving the relationship of plaintiff to other persons, will occur to the court on a retrial. The damages recoverable under the statute do not depend in the least upon the social or business standing or relationship of the widow of one who lost his life by the negligent operation of a train. The amount of damage is fixed in such case at \$5,000.

4. On the trial, defendant offered to read in evidence an ordinance of the city, which provided that no person within the city should drive any animal in any street faster than a moderate gait, or should drive any such animal in such a manner as to come into collision with or strike any other object or person. The court refused to permit the ordinance to be read, and of its action defendant complains, and we think justly. There was a plea of contributory negligence. The ordinance was offered to support that plea. If the horse was being driven by the deceased faster than a moderate gait when the collision occurred, the act would have been negligent; and, if it contributed directly to the injury, would bar a recovery. The rule in this state is well settled that the violation by a railroad company of an ordinance limiting the rate of speed of a train is negligence per se. *Weber v. Railroad Co.*, 100 Mo. 194, 12 S. W. Rep. 804, and 13 S. W. Rep. 587, and cases cited. No reason can be perceived for a distinction in favor of one driving a horse in violation of law, instead of an engine. Both acts are alike prohibited. *Shearman and Redfield*, in their work on Negligence, (section 13,) say: "The violation of any statutory or valid municipal regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence if the other elements of actionable negligence exist." They illustrate the

proposition by reference to a statute or ordinance regulating the speed of vehicles, horses, or trains. It is true the ordinance does not fix a speed that would be immoderate, but that fact does not affect its admissibility as evidence. In the absence of an ordinance, no rate of speed, however immoderate, would, in itself, as a matter of law, be negligent. It is so held in this state in respect to the movement of railroad trains, (*Maier v. Railway Co.*, 64 Mo. 278; *Wallace v. Railroad Co.*, 74 Mo. 594,) and in other states of riding and driving, (*Brennan v. Town of Friendship*, 67 Wis. 223, 29 N. W. Rep. 902; *Carter v. Chambers*, 79 Ala. 223; *Crocker v. Ice Co.*, 92 N. Y. 652.) If the gait at which Weller was driving was not moderate, then, under the ordinance, his act would be pronounced negligent in law. Without the ordinance, though the driving was found not to have been moderate, still the jury may have found it at the same time not to have been negligent. Immoderate or rapid driving, with no ordinance, is negligent or not, owing to circumstances. Immoderate driving, with the ordinance in force, is negligent under all circumstances. In the first case the jury find from all the circumstances whether the act was negligent, while in the second it finds whether the driving was moderate. In the circumstances shown in one case this court held that it was the duty of both parties "to drive at a moderate rate on the streets." *Schaabs v. Wheel Co.*, 56 Mo. 176. Ordinarily it would be for the jury to say whether the driving was negligent, not whether it was moderate. The question in that case was left to the jury to determine whether the driving was negligent, and the remark of the judge was outside of any issue presented by the record. A similar question was recently decided by the supreme court of Connecticut. The horses of two persons being driven in opposite directions ran together, and that belonging to plaintiff was killed. The action was based upon a statute requiring persons meeting in the highway each to turn to the right and slacken his pace. Defendant pleaded contributory negligence, and on the trial read in evidence an ordinance prohibiting any one in the city from driving at a faster rate than "an ordinary trot or six miles an hour." Defendant requested the court to instruct that, if plaintiff was not obeying the ordinance at the time of the accident, such unlawful act, if it directly contributed to the damage, was a conclusive bar to plaintiff's recovery. This the court refused. The supreme court, after a careful examination of the questions, held that the instruction should have been given as asked. The court sums up the result of the investigation as follows: "In every case which we have been able to examine where it appears that disobedience to the law directly contributed to the injury, it has been accepted as a perfect defense." *Bros-*

chart v. Tuttle, 59 Conn. 8, 21 Atl. Rep. 925. See, also, *Newcomb v. Protective Department*, 146 Mass. 600, 16 N. E. Rep. 555; *Shear. & R. Neg.* § 646. While one is transgressing the law he should not be permitted to claim indemnity for an injury from the wrongful act of another, to which his own transgression contributed.

On account of the errors indicated the judgment is reversed, and the cause remanded for a new trial. All concur; *BRACE, J.*, not agreeing to what is said in the second paragraph.

STATE v. ROBINSON.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

MURDER—DELIBERATION—TRIAL—COMPETENCY OF JURORS—EVIDENCE—OBJECTIONS NOT RAISED ON TRIAL—INSTRUCTION—DEFENDANT'S FAILURE TO TESTIFY—PRESUMPTION—NONEXPERT EVIDENCE—MISCONDUCT OF JUROR.

1. Under Rev. St. 1889, § 4197, declaring it a good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried, but providing that, if such opinion is founded only on rumor and newspaper reports, and not such as to bias the juror's mind, he may be sworn, jurors who have read in newspapers what "purported" to be the evidence taken at the coroner's inquest, and what "purported to be" defendant's confession of the crime for which he is being tried, are competent.

2. Where, on a murder trial, no objections were made nor exceptions saved to the admission in evidence of defendant's confession, the question of alleged error in its admission cannot be raised on motion for new trial or on appeal.

3. Error cannot be predicated of the court's refusal to explain the term "reasonable doubt," it being difficult to explain the term so as to make it plainer.

4. An instruction based on the theory that the prosecution relied solely on circumstantial evidence was properly refused where, in addition to circumstantial evidence, there was a confession of defendant admitting his guilt.

5. Rev. St. 1889, § 4219, providing that defendant's failure to testify shall not be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place, does not warrant an instruction that defendant's failure to testify shall not create any presumption against him.

6. The admission of testimony of a nonexpert witness that defendant's overcoat had blood stains on it is not error where such witness qualified the statement by saying the spots were such as he would have taken to be blood spots; it being unnecessary that the witness be an expert to testify what the spots on the overcoat looked like.

7. Where defendant told a person that a bundle which he was seen to carry on the evening the crime was committed was tobacco which he had purchased from G., testimony of G. that he did not sell defendant any tobacco on that evening was competent.

8. Defendant's confession was that he had met deceased, a young woman, and, after walking together, they stopped at a gate and talked; that deceased quarreled with him about another man, told him she would cut his throat, drew a knife on him to do so, and defendant knocked her down; that she got up and struck at him with the knife; that defendant took the knife away from her, and said, "If one of

us has got to die, * * * I just as well be hung for you as you for me," and that he took the knife from deceased, and struck her in the throat. Held a deliberate killing, without apparent provocation or necessity.

9. A motion for new trial, based on the ground that a juror took notes during the trial, was properly overruled where it did not affirmatively appear that defendant had no knowledge of such fact before the jury retired to consider their verdict.

Appeal from criminal court, Pettis county; John E. Ryland, Judge.

Richard Robinson was convicted of crime, and appeals. Affirmed.

The facts appear in the following statement by SHERWOOD, J.:

The defendant, a negro, was convicted of murder in the first degree, the charge being that he killed Johanna Schollman, a white girl, by stabbing her with a knife. In substance, the salient facts developed at the trial are these: The deceased was employed as a domestic in the family of Mayor Stevens of Sedalia. The defendant was also in the employ of Mayor Stevens, and slept in a room at the barn. On the evening of October 24, 1892, which was Sunday, the deceased left Mayor Stevens' house, and went to Mr. Miller's, a place she was accustomed to visit, which was on the corner of Grand avenue and Twenty-Fifth street. She arrived there between 6 and 7 o'clock, having in her hand a little bundle, which she said contained her nightgown. She took supper there, said she expected some one to call for her, and that she was going out to see relatives next day, in Benton county. She seemed to feel uneasy. Pretty soon the one who was to come for her came, and called out her name at the door, (who it was Mrs. Miller did not know,) and she got into a buggy with the unknown man whom Mrs. Miller did not see, and rode off with him. This was about 7 o'clock. At 10 o'clock on the same evening some unknown person called at Miller's for deceased, by calling her name at the door, but no one responded to this call. A little after 7 o'clock the defendant obtained a buggy from Field's livery stable, drove off in a few minutes, and about 9 o'clock, when he returned the buggy, the horse was cool, did not seem to have been driven hard nor far, and, though the streets were muddy that afternoon, the horse was not muddy. When defendant returned the buggy, he left therein a bundle, of which more hereafter. About 11 o'clock that night defendant returned to Mayor Stevens' barn, where he slept. Another negro, Swepstone, was in the bed, having arrived something like half an hour before. When defendant came in he lit his pipe, and sat there smoking, but when he went to bed his companion, who meanwhile had fallen asleep, did not know. Defendant was in bed, however, the next morning, and got up by 6 o'clock, and started out on horseback, and came back from town, bringing a piece of meat for the family, and took it to the house. That morn-

ing early he had also called by Field's livery stable, and asked for a small bundle which he said he had left in the buggy the night before. This being given him, he rode off with it. On that same morning,—Monday, October 25th,—at an early hour, the body of deceased was discovered near the corner of Seventeenth and Moniteau streets. The deceased had apparently received the fatal wound, which was a puncture of the interior jugular vein on the left side of the neck, and she had apparently been dragged by the heels, as shown by the disarranged condition of her clothing and the depression of the weeds from that place, which gave indications of a struggle, some 60 feet, to where she was found on her back at the corner of the hedge. On her right jaw there was a well-marked bruise of some kind. The punctured wound had the appearance of having been made by a pen knife. Dr. Muehl, the coroner, said: "I saw some marks where the body was lying, and others in the vicinity. I saw a path where the body had been dragged. Then went back to where originally the struggle evidently took place, at the southwest corner of the lot of the hedge there on Moniteau street, and there was a clot of blood there where the woman had probably been knocked down there, and dragged to the place where we found her. This trail was continuous from where it had taken place to where she was. The blood had come from the wound, for the side of the face and neck was also covered with blood which came from the wound itself, and there was more or less hemorrhage from the nostrils from the blow or shock." On the hedge and on the weeds there were bits of fur which were identical with that on the jacket of deceased, and which could be easily traced along the path where the body had apparently been dragged. A knife was also found in the field, inside the hedge, and on the open blade of the knife was blood, and fur precisely like that with which the cloak of deceased was trimmed. The sexual organs gave tokens, as testified by one of the physicians, that an outrage had perhaps been perpetrated on the deceased prior to her death. One of the witnesses thought that the body of the deceased had been brought from a distance, and then dumped down where found, but the other witnesses thought as did Dr. Muehl. That physician also stated that in case of a punctured wound, such as borne by deceased, the blood does not spurt out, but seeps,—goes slowly; and that it might take several hours between receiving such a punctured wound and the occurrence of death. He was also of opinion that the deceased had been dead four or five hours, though he admitted it might have been longer; could not say exactly. He saw the body between 8 and 9 o'clock in the morning. Dr. Muehl also stated that he did not think that loss of blood alone produced the death of the deceased, but was also caused by the blow, the

shock, hemorrhage, and fright. There was also testimony in behalf of defendant, to the effect that deceased was seen between 7 and 9 o'clock on the evening of the 24th of October, with a white man, in a restaurant at Sedalia, and that defendant came into De Jarnett's restaurant in that city about 9 o'clock that evening, and bought a piece of chicken.

Suspicion was directed towards defendant by testimony elicited at the coroner's inquest, and defendant was arrested and committed to the Pettis county jail. While there, Hyatt, having been present at that inquest, asked defendant what had become of the bundle which defendant had left in the buggy, and he told Hyatt that it was only some tobacco which he had bought of Gottschalk that Sunday evening, just after he got into the buggy he had hired of Field. Asked by Hyatt what he had done with the overcoat he had worn that evening, describing it, he answered he did not wear such an overcoat, but that he wore a brown overcoat, trimmed with fur, which Hyatt would find behind the door in his room, which Hyatt did; but on looking between the mattresses of defendant's bed he found the light overcoat which he had described to defendant, and which was abundantly shown to have been defendant's, hidden between the mattresses on defendant's bed, and spotted with what appeared to be fresh blood stains. On Tuesday after the homicide, Oliver, working for Mayor Stevens, found under a manure pile at the south side of the barn a night gown, pocket comb, and pocketbook shown to be those of the deceased girl. Gottschalk testified that he never sold defendant any tobacco on the Sunday evening mentioned, and never kept his store open of a Sunday. Several witnesses testified to defendant's being in the vicinity of where the crime was committed on the night of its commission. Shortly after defendant's being incarcerated in jail the sheriff became alarmed at the threats of mob violence, and so he spirited defendant away on a midnight train, and took him to California. Defendant was aware of the reason for which he was being taken away at that time, and seemed nervous and frightened. On the way down there, the sheriff got into conversation with defendant, during which he said to him: "Dick, we want to know the facts in this case. It will be better to tell the truth about this matter. I think it will be a relief to you if you will simply state them, and relieve your mind and conscience of them." And the sheriff further stated to him, "Whatever you say to me will probably be used against you in evidence." But defendant declined to make any statement then; but he told the sheriff that "if he would come back the next day, or later, that he would talk to him about the matter mentioned; that he didn't feel like talking that night," etc. On the next day the sheriff re-

turned, and defendant was told that some things had been found in Stevens' barn which might be used as evidence in the case, and he was again warned by the sheriff that any statement he might make, etc. Thereupon defendant made the following confession, which, being reduced to writing, was signed by him, which was read in evidence: "California, Mo., October 26th, 1892. Hannah Schollman left Mr. Stevens' house about 5 o'clock Sunday eve last to go to Mr. Miller's, on corner of Wilkerson and Grand avenue. The next time I seen her I met her on the north side of street near Prospect schoolhouse, about 8:30 P. M. We walked together from Second to Grand avenue, from there to Broadway, then to Monteau, then direct south to Hunnefelts', and stopped at gate and talked. She quarreled with me about Taylor Williams. She said she had a notion to cut my throat. She drew a knife to cut my throat, and I knocked her down with my fist. She got up on her feet, and she struck at me with the knife, and I grabbed the knife, and I knocked her down the second time. She said, 'You son of a bitch, I am going to kill you, or I will have it done.' She got up again, and I threw her down, and sat down by her side. I said, 'Hannah, what do you mean?' She said, 'One of us has got to die to-night.' I told her to go into the house, (that is, her uncle's house.) I gave her back the knife on the south side of the hedge, near middle of the street. I then started to go home. She said: 'If you will come back I will behave myself, and go into the house. I just want to speak to you one minute.' I went back to her again, and she made a break with the knife. I grabbed her. Said: 'Hannah, you had better quit. I ain't going to run from you any more.' She said: 'One of us has got to die. If you don't kill me, I will kill you.' She got the knife fastened so she could not get to use it on me. I took the knife away from her, and said, 'Hannah, if one of us has got to die,' I said, 'I just as well be hung for you as you for me.' I then struck her in the throat with the knife. She fell at my feet, but did not say a word. This took place at the corner of the hedge, about 10 o'clock that night. After she had fallen, I stooped down and said to her, 'Hannah.' She did not answer. I thought I had cut her wind pipe, as she did not answer me. She lay there about 5 minutes, and then I drug her by catching hold of her just above her knees, and drug her about thirty feet east from where I killed her. I then threw the knife into the hedge fence. I then left her lying on the ground, and come home by coming down Monteau to Broadway, then to Grand avenue to Wilkerson, then to Quincy, then home, Stevens' stable. I had been down during the next day, (Monday,) and heard the people talking, and I concluded I had better hide the bundle (that is to say, the comb and gown and pocketbook) in the

manure pile south of Stevens' barn. All the money I had that Sunday eve and up to the time I was arrested was \$2.20. I did not get a five-dollar bill changed, nor did I offer a \$5 bill to the livery man to pay for the buggy and horse. We never were criminally intimate. If she was a bad girl, I did not know it. I got the buggy to take Frances Williams out riding, but she would not go. Francis lives north of Pacific railway. The above and foregoing is as true a statement

as I can make. Dick X Robinson. Wit-
mark.

ness this signature. John J. Kinney." The defendant established a good character as a peaceable and law-abiding citizen, etc. Any matters omitted in this statement will be adverted to in the opinion of the court.

D. E. Kennedy, for appellant. R. F. Walker, Atty. Gen., for the State.

SHERWOOD, J. Numerous errors are assigned as grounds for reversal of the judgment, which will now be considered.

1. And first as to the objection that certain incompetent jurors were placed on the list and on the panel that afterwards tried defendant. In *State v. Hultz*, 106 Mo. 41, 16 S. W. Rep. 940, a juror was ruled incompetent who had heard the witnesses testify at a preliminary examination, and had read a report of the evidence in a local newspaper. In the present instance the jurors in question had read in local newspapers what "purported to be" the evidence taken at the coroner's inquest, and what "purported to be" the confession made by defendant to the sheriff. Our statute touching the qualification of jurors is contained in section 4197: "It shall be a good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried, but if it appear that such opinion is founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn." This statute is short, plain, and easily obeyed. First, if the juror has formed or delivered an opinion, the statute disqualifies him; but, second, if such opinion be "founded only on rumor or newspaper reports," he is not disqualified, provided his opinion "is not such as to prejudice or bias the mind of the juror." In *Bryant's Case*, 93 Mo. 273, 6 S. W. Rep. 102, the jurors challenged had read "the report of the testimony of the former trial as published in the newspapers mentioned, and substantially as contained" in that record. When this is the case, it seems quite clear that a proposed juror would be incompetent; for surely no well-founded distinction can be taken between being present when testimony is delivered orally in a cause, and reading the same testimony taken down and accurately published in some newspaper; in a word, there is no difference between the hearing ear and the seeing eye. This view is fully

sustained by *State v. Culler*, 82 Mo. 623, where it was ruled that one who had read as originally written or printed in a newspaper the evidence taken before the coroner, and formed an opinion therefrom, is disqualified from serving as a juror in that cause. Other authorities, holding the same view, will be found in *Bryant's Case*, 93 Mo. loc. cit. 284 et seq., 6 S. W. Rep. 107. But the trouble in the case at bar is that it is not made to appear that the reports read in the local papers were either a literal or a substantial report of the confession of the defendant as contained in the present record. This being the case, such printed statements must be regarded simply as "rumors and newspaper reports." And, as the jurors said they were without bias or prejudice, they were competent under the statute already quoted, and hence objections to them were not well taken.

2. There was no objection made or exception saved to the introduction of the confession of defendant in evidence, and it was too late to raise the point in the motion for a new trial or in this court. Aside from this, the testimony already given shows in a very clear manner that the confession was properly admitted, and was taken in circumstances fully authorized by the following authorities: *State v. Patterson*, 73 Mo. 695; *State v. Phelps*, 74 Mo. 128; *State v. Hopkirk*, 84 Mo. 273. We reaffirm the principles therein announced.

3. The instructions given on behalf of the state were in usual form as to murder in the first and second degrees, confession made by defendant, good character of defendant, and as to reasonable doubt. The instruction on the last topic is in substantially the same form as was approved in *State v. Nueslin*, 25 Mo. 111, and that form of instruction has been generally followed since then. It is urged that the jury should have been told what a reasonable doubt was, and that it should have been explained to them. But this was unnecessary. It is difficult to explain simple terms like "reasonable doubt" so as to make them plainer. 1 Bish. Crim. Proc. § 1094. Every attempt to explain them renders an explanation of the explanation necessary. On the part of defendant were given the following instructions: "(1) The jury are instructed that the law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt as charged must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities, of guilt, but the law requires proof by legal and creditable evidence of such a nature that, when it is all considered, it produces a clear, undoubting, and entirely

satisfactory conviction of defendant's guilt; and the burden of establishing the guilt of the defendant as above required is on the prosecution. (2) The jury are instructed that when the evidence fails to show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence. And in this case, if the jury find upon careful examination of all the evidence that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance which the jury ought to consider, in connection with all the other evidence in the case, in making up their verdict. (3) The jury are further instructed that the indictment in this case is of itself a mere accusation of charge against the defendant, and is not of itself any evidence of the defendant's guilt; and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of the indictment in the case. (4) The court further instructs the jury that in this case the law does not require the defendant to prove himself innocent, but the law imposes upon the prosecution to prove that the defendant is guilty in manner and form as charged in the indictment, to the satisfaction of the jury, beyond reasonable doubt; and unless they have done so, the jury should find the defendant not guilty. (5) The jury are instructed further that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit him, unless they feel compelled to find him guilty as charged, by the law and the evidence in the case, convincing them of his guilt as charged beyond reasonable doubt. (6) The jury are instructed that they are the sole judges of the credibility of the witnesses, and of the weight to be given to their testimony. In determining such credibility and weight, you will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial, his relation to or feelings towards the defendant or the deceased, the probability or improbability of his statements, as well as the facts and circumstances given in evidence. In this connection you are further instructed that if you believe that any witness has knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony." Considering these instructions in connection with those given on behalf of the state, they set the matters for investigation before the jury in a fair light.

4. It is claimed that an instruction should have been given similar to the one approved in *Moxley's Case*, 102 Mo. 374, 14 S. W. Rep. 969, 15 S. W. Rep. 556, to the effect

that where the prosecution relies on circumstantial evidence alone, that then, etc. *Id.*, 102 Mo. loc. cit. 388, 14 S. W. Rep. 972. Such an instruction was inapplicable to the facts in this case, because here, although there was some circumstantial evidence which strongly corroborated the confession of defendant, yet the latter was positive testimony; a solemn admission by the defendant of his guilt. As to whether he made that confession was solely the province of the jurors to determine.

5. Another instruction, it is said, the court ought to have given, and that was to the effect that if a party accused fail to testify such failure shall not create any presumption against him. There was no error in refusing such an instruction. Section 4219, Rev. St. 1889, is the one relied on to sustain this view; but the concluding words of that section provide that such failure to testify shall not "be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place." If the court had given such an instruction, it would have disobeyed the spirit, if not the letter, of the law.

6. It is assigned as error that the court permitted Hyatt to testify that there were blood stains on defendant's overcoat when he found it between the mattresses on defendant's bed. There was no objection made by defendant's counsel to the introduction of this evidence. Besides, Hyatt of his own volition qualified his first statement by saying, "they are * * * what I would have taken to be blood when I seen them." It was not necessary for Hyatt to be an expert in order to testify what the stains on the overcoat "looked like." Frequently the opinion of a witness as to the appearance of an object he has seen is the best and only evidence attainable; nevertheless it is competent. *State v. Parker*, 96 Mo. loc. cit. 393, 9 S. W. Rep. 733, and cases cited. Because Hyatt was not an expert, defendant's counsel moved the court that the latter portion of his testimony, just mentioned, be stricken out.

7. There is no doubt that the rule is that where evidence is improvidently admitted, though without objection, such evidence may be excluded by an instruction, or stricken out on motion. Two cases in this court attest the correctness of this position. *State v. Cox*, 65 Mo. loc. cit. 32; *State v. Owens*, 79 Mo. loc. cit. 631. This is the prevailing rule elsewhere. 2 *Thomp. Trials* § 2354. But, notwithstanding this, the ruling of the trial court in denying defendant's motion was correct, for reasons already stated.

8. It is likewise assigned as error that Gottschalk was permitted to testify, as he did, that he did not sell defendant any tobacco on Sunday evening, nor did not keep his store open on Sundays. There was no error in this ruling. The telling of falsehoods by persons suspected of crime about

matters which are likely to lead to their detection is always competent. It shows their guilty fears, thus tends to show that their apprehensions have some foundation. Such fabrications are common among criminals, who thus seek to divert suspicion from themselves. *State v. Dickson*, 78 Mo. loc. cit. 449, and cases cited; *Whart. Crim. Ev.* (9th Ed.) § 751 and cases cited.

9. It is urged that the verdict is unsupported by or against the evidence. This seems a singular position when considering the confession made by defendant, as well as the very cogent corroborating circumstances heretofore related. It is true that Dr. Small states as his opinion that the deceased was not stabbed at or near the place where she was found, and that she was not dragged there, and he was also of opinion that the wound in her neck was inflicted after death, and yet he says he did not see the wound. He bases this opinion on the small amount of blood found on the ground at the locality where the body lay, but he admits that the flow of blood from such a wound would not be large, if "she (deceased) had too much of a shock." But, however this may be, it belonged to the jury to say which theory they adopted and regarded as supported by the facts. This they have done by their verdict.

10. It is also contended that the verdict of the jury is against the evidence and the instructions of the court, for the reason that, even taking the confession of defendant as true, it lacks any evidence of deliberation. This claim is without foundation. The facts set forth in that confession show a deliberate killing with a deadly weapon, after an express declaration of an intention to kill, and this without apparent provocation or necessity. *Whart. Crim. Ev.* (9th Ed.) §§ 736, 764; 1 *Whart. Crim. Law*, § 381.

11. The last point for determination is whether the verdict was vitiated in consequence of Juror Freeman A. Glass having taken notes of the testimony during the progress of the trial. It is contended that it was. This point will be considered in several ways. (a) In the first place, in some of the states statutory provisions sanction the taking of notes by jurors during the trial. 2 *Thomp. Trials*, § 2595 et seq. (b) In the second place, the authorities are divergent as to whether the taking of notes by a juror is such an act as has the prejudicial effect here claimed for it. *Id.* § 2585, and cases cited. (c) In the third place, where misbehavior of a juror is charged as having occurred during the trial, it must affirmatively appear that the party complaining thereof did not know of the fact before the jury retired to consider of their verdict. *Id.* § 2620, and cases cited. This material fact is not disclosed in the affidavit filed, and the statement of it in the motion for a new trial is no evidence of its existence, as all our authorities show. If the complaining

party knew during the trial of such misbehavior, it was his duty to call immediate attention of the court to it, and not take his chances of a reversal based on such ground. (d) In the fourth place, under our rulings the affidavit or testimony of a juror is not received to gainsay or impeach his verdict. Of course, what a juror cannot do directly, he cannot do indirectly. The statement, therefore, in the affidavit of counsel that the juror had stated since the trial that he took notes of the testimony while it was in progress, is wholly inadmissible for the reason stated, and for the additional reason that such statement would be but the most pronounced hearsay. *Id.* § 2622. For these reasons there was no error in overruling the motion for a new trial based on the ground just considered.

Finding no error in the record, we affirm the judgment, and direct the sentence pronounced to be executed. *State v. Pagels*, 92 Mo. loc. cit. 817, 4 S. W. Rep. 937; *Rev. St.* 1899, § 4298. All concur.

STATE v. HERMANN et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

MANSLAUGHTER—FOURTH DEGREE — PRINCIPALS— EVIDENCE—DECLARATIONS.

1. On a prosecution for the killing of a person while present at a fight between J. and G., testimony as to what B. said to J. with regard to G. in the presence of deceased was properly excluded, there being no pretense that deceased said anything that might characterize his subsequent conduct.

2. Manslaughter in the fourth degree being the intentional killing of a human being in the heat of passion, on a reasonable provocation, without malice, and without premeditation, and under circumstances that will not render the killing justifiable, or (*Rev. St.* § 3476) the involuntary killing of another by a weapon or by means neither cruel nor unusual, in the heat of passion, in any case other than justifiable homicide,—where two persons ran together to the scene of a fight, and one of them, shouting, "Shoot them down!" threw a club at a person present, which knocked him down, and the other grabbed him as he attempted to rise, and struck him, the two may be equally guilty, though the blow which caused death was that received from the club first thrown.

3. The exclusion of a conversation between deceased and one of those engaged in the fight occurring prior thereto cannot be treated as error in the absence of evidence as to the nature of the conversation.

Appeal from circuit court, Linn county; G. D. Burgess, Judge.

Joseph Hermann and Baptiste Hermann were convicted of manslaughter, and appeal. Affirmed.

O. F. Smith and Crawley & Son, for appellants. R. F. Walker, Atty. Gen., and Morton Jourdan, Asst. Atty. Gen., for the State.

GANTT, P. J. At the adjourned term of the Chariton county circuit court the grand jury returned an indictment against the de-

defendants. It consisted of two counts. The first count charged defendants, Joseph and Baptiste Hermann, with murder in the second degree in the killing of one Joseph A. Brown on the 13th of December, 1890. The second charged Baptiste Hermann with being accessory to the crime. At said term defendants were arraigned, and each for himself entered a plea of not guilty. They jointly filed their application and affidavit for a change of venue, which was allowed, and the cause ordered transferred to the Linn circuit court, held at Brookfield, Mo. At the February term of the Linn circuit court, held at Brookfield, the cause was continued, upon the application of defendants, until the regular September term, 1891, at which term the defendants were tried, convicted of manslaughter in the fourth degree, and their punishment assessed at two years in the penitentiary. After unsuccessful motion for a new trial and in arrest, they appealed to this court.

The evidence tended to prove these facts: That on the 13th day of December, 1890, the defendants, the deceased, and several other parties attended a turkey shooting match on the farm of the widow Grotjon in Chariton county, Mo. That during the progress of the shooting match a dispute arose between Bates Johnson and Ed. Grotjon, which resulted in a fight between these two parties. Others soon participated in the trouble, and when one Henry Laker ran in, we deceased, Joe Brown, told him to stand off. The defendants then came running up, one with a club and the other with a shotgun. Joe Hermann laid down his gun, and picked up a club, which he threw at and struck Joe Brown on the left side of the head. From the effects of the blow Brown staggered and fell, when Baptiste Hermann jumped up and grabbed Brown, and struck him three or four licks in the face with his fist. All the parties then stopped fighting, and Brown started home in company with the negro boy, Hez Mocre, who lived with his father. Along the road Brown was compelled to sit down and rest, and complained of a very serious pain in his head. After going home he retired, and remained in bed three or four hours, when, from the effects of the blow with the club, he died. The doctors (the coroner and his assistant) who held an autopsy found under the skull bone a clotted mass of blood. They testify that death resulted from concussion occasioned by the blow. The defendants were both arrested the same night, about midnight, by sheriff Anderson, to whom each of them denied the fact that Joseph Hermann had thrown the club, but said to the sheriff that Henry Laker had thrown the club that struck Brown and knocked him down. Upon the trial of the case defendants testified that Joseph Hermann threw the club; that at the time he did so Brown was advancing upon him with a club raised; that it was thrown in self-defense. They

are, however, contradicted by other witnesses, who all say that Brown was standing perfectly still at a distance variously estimated from 5 to 15 feet away; that the two Hermanns ran up to where the fight was in progress between Johnson and Grotjon, and that defendant Joseph Hermann said: "Shoot them down, every one of them!" It also appears from the testimony that when the difficulty first arose Brown was at the barn, some distance from the place of quarrel. Baptiste Hermann was a son-in-law of Mrs. Grotjon, and resided on her farm at the time of the killing. The rulings of the court will appear in the further discussion of the assignments of error.

1. During the cross-examination of the witness Johnson Burnett, counsel for defendants asked him if he communicated to Bates Johnson anything Ed. Grotjon had said about the turkeys. The objection of the prosecuting attorney to the question as irrelevant was sustained. Witness was then asked if he made any kind of communication to Bates Johnson with regard to Ed. Grotjon in the presence of deceased. The objection to this was also sustained. No offer was made to show what the communications were, or how they were material to the issue on trial. What Burnett said to Bates Johnson was foreign to the case. The question did not disclose anything that was material, and the answers were properly excluded. There was no pretense that the deceased said or did anything there that might characterize his subsequent conduct. *State v. Douglass*, 81 Mo. 231.

2. It is next insisted that the court should have directed a verdict of acquittal as to Baptiste Hermann, and the refusal of the circuit court to so instruct, either at the close of the state's case or after all the evidence was in, is urged as error. There is much evidence that Joseph and Baptiste Hermann came on the scene simultaneously, Joseph armed with a gun, Baptiste with a club; that Joseph laid down his gun and took up a club, which he threw at and struck the deceased, Brown, on the left side of the head. There was evidence that this club was a deadly or dangerous weapon. Baptiste was present. He heard his brother shout, as they ran together to the place of difficulty between Johnson and Grotjon, "Shoot them down, every one of them!" After this he saw his brother assault Brown, the deceased, with a club, and knock him down. There is evidence, then, that as the deceased attempted to rise the defendant Baptiste, to use the language of the witness, "grabbed him, and commenced to hit him." Another witness says, "He jumped on him, and hit him with his fist." Brown died that night from the effects of the blows received in the encounter. From this evidence the jury might well find that they were both actively aiding, assisting, and abetting each other, and therefore both were principals, and each responsible

for the crime committed by the other in their united and combined assault upon the deceased. But it is argued that defendant Baptiste cannot be convicted of manslaughter, because Joseph, whom he was aiding and abetting, struck the blow which caused the death of Brown, and was only convicted of manslaughter, and that in manslaughter there can be no such thing as an accessory before the fact. In *State v. Phillips*, (Mo. Sup.) 22 S. W. Rep. 1079, it was said arguendo that there could be no accessory in manslaughter, and citing *Bibbith's Case*, 4 Coke, 43b; 1 Hale, P. C. 437. If this statement could be confined and limited to those homicides denominated at common law as "involuntary manslaughter,"—"homicide per infortunium,"—it would appear to be founded on reason, but, inasmuch as by our statute all accessories before the fact are now made principals, and the distinction between principals in the first and second degree has been abolished, the rule stated in 1 Hale, P. C. 437, and cited in *State v. Phillips*, supra, is too broad under our statutes, and was not necessary to the decision of that case. Bishop, in his first volume of *Criminal Law*, (8th Ed., § 678,) says that manslaughter does not commonly admit of an accessory before the fact, "yet probably there may be manslaughter wherein this is not so." "And there may be principals of the second degree of manslaughter." The dictum of Lord Hale was expressly considered in *Gaylor's Case*, Dears. & B. Cr. Cas. 288, in 1857, and it was said by Erle, J., on appeal: "If manslaughter be per infortunium or se defendendo there is no accessory; but there are other cases in which there may be accessories. That seems to be the solution of Lord Hale's dictum. In 7 Cox. Crim. Cas. 253, the same case is reported, and Erle, J., is made to say: 'It is clear that Lord Hale, in laying down the law in the passage cited, [the same cited in Phillips' Case,] only alludes to causes of killing per infortunium or se defendendo. In other cases of manslaughter there seems to be no reason why there may not be accessories.' And such is the reasoning of Bishop, 1 Crim. Law, 348. A. 2, in which he shows that the absence of malice reduces the homicide from murder to manslaughter in voluntary manslaughter. See, also, *Reg. v. Murphy*, 6 Car. & P. 103. In *Stipp v. State*, 11 Ind. 62, this question came before the supreme court of that state upon a state of facts identical in principle with those in the case at bar, and it was insisted that because the prisoner did not give the blow, and because there could be no accessories before the fact in manslaughter, he could not be convicted, but the court held that it was not necessary he should aid in striking the blow, but, if he was engaged with the person who gave the blow which caused the death, in the common illegal undertaking, he was guilty as a principal. In *Goff v. Prime*, 26 Ind. 196, the same court, under a statute which defined

manslaughter thus: "If any person shall unlawfully kill any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter,"—held that one who was present aiding and abetting in the commission of a common assault and battery, resulting in the accidental death of the person assaulted, might be guilty of aiding and abetting in the perpetration of the crime of manslaughter. In *Hagan v. State*, 10 Ohio St. 459, under a similar statute, the supreme court of Ohio held that the element which constituted the crime of manslaughter as defined by that statute did not preclude the possibility that there might be aiders and abettors before the fact in the commission of manslaughter. In *State v. Coleman*, 5 Port. (Ala.) 32, the supreme court of Alabama said: "Upon authority it seems unquestionable that there may be aiders and abettors in manslaughter," and Russell (1 Crimes, 456) lays it down that, "In order to make an abettor to a manslaughter a principal in the felony, he must be present, aiding and abetting the fact committed." Under our statute, (section 3944, Rev. St. 1889,) all distinctions between principals and accessories before the fact have been abolished, and an accessory before the fact can be indicted and convicted as a principal. *State v. Stacy*, 106 Mo. 11, 15 S. W. Rep. 147, and cases there cited. Manslaughter in the fourth degree, under the statutes of this state, has often been defined by this court to be the intentional killing of a human being in a heat of passion on a reasonable provocation without malice, and without premeditation, and under circumstances that will not render the killing justifiable or excusable homicide; and section 3476 further defines it to be "the involuntary killing of another by a weapon, or by means neither cruel nor unusual, in the heat of passion, in any case other than justifiable homicide." *State v. Ellis*, 74 Mo. 215; *State v. Dieckman*, 75 Mo. 570; *State v. Umfried*, 76 Mo. 404; *State v. Douglass*, 81 Mo. 231. Under these statutes no reason is seen why two or more engaged in a common assault upon another may not be engaged in the killing of a human being in the heat of passion, and upon the same provocation, and, if all present are aiding and abetting each other, why they are not all principals, and equally guilty of manslaughter, if death ensues, even though only one strikes the fatal blow. There was evidence to this effect in this case, and it was so found by the jury. We perceive no error in the action of the court in overruling the demurrer to the evidence, and refusing the two instructions drawn for that purpose. Under the evidence, Baptiste was a principal, and not an accessory before the act at common law, even under Lord Hale's definition, as he was present, not absent, when the crime was committed. 1

Hale, P. C. 617; 4 Bl. Comm. 37; Rex v. Gordon, 1 Leach, 515; People v. Bearss, 10 Cal. 68; Kelley, Crim. Law, § 49.

3. Defendants complain that their witness Fred Emmert was not permitted to tell all the conversation that occurred between Brown, the deceased, and Bates Johnson, but, as in the case of Burnett, defendant made no attempt to show the court the relevancy or materiality of all that conversation, and the court did permit the witness to state that Bates Johnson said that he was going to whip Ed. Grotjon, and asked deceased to stay with him, and deceased said that he would stay with him. In the absence of all evidence as to what statements were excluded or their nature, we cannot assume they were of such relevancy or importance as to require a reversal of this cause. Bank v. Aull's Adm'r, 80 Mo. 199; State v. Douglass, 81 Mo. 231.

4. The fourth and fifth instructions, read together, correctly informed the jury that if the defendants, while in the heat of passion, aroused by the fighting and quarreling of deceased with friends and neighbors of defendants, threw the club, and struck and killed Brown, not in a cruel or unusual manner, and without malice, and not in self-defense, they were guilty of manslaughter in the fourth degree; and if Joseph Hermann threw the stick and killed Brown under these circumstances, and that Baptiste was present at the time, aiding, assisting, and helping Joseph in the perpetration of said assault, then both were equally guilty. These two instructions fairly presented the law of the case to the jury, and defendants' exceptions must be overruled. There was evidence to support them both. The other instructions were full and liberal to the defendants on the presumption of innocence, the benefit of reasonable doubt, and self-defense. We find no error in either of them, and, there being sufficient evidence to submit the case to the jury, their verdict must stand. Judgment affirmed.

SHERWOOD, J., concurs. BURGESS, J., not sitting.

STATE v. HOBBS.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

WITNESS—CREDIBILITY—INSTRUCTIONS.

1. An instruction in a criminal case that defendant and his wife are competent witnesses for defendant; that the jury should not discard their testimony for the reason alone that one is defendant on trial and the other is his wife, but might consider such facts in determining their credibility; that, if they believe that any witness has intentionally sworn falsely as to any material fact, they may disregard the whole or any part of the testimony of such witness,—is erroneous, as telling the jury by implication to disregard defendant's testimony on some ground, but not alone because he is defendant on trial. State v. Austin, (Mo. Sup.) 21 S. W. Rep. 31, followed.

2. Such instruction is also erroneous in that it applies a similar rule to the testimony of the wife of defendant.

Appeal from circuit court, Lincoln county: El. M. Hughes, Judge.

Thomas Hobbs was convicted of manslaughter in the fourth degree, and appeals. Reversed.

Norton & Avery, for appellant. R. F. Walker, Atty. Gen., for the State.

SHERWOOD, J. The trial in this cause resulted in defendant being convicted of manslaughter in the fourth degree, and his punishment assessed at fine of \$500. Among other instructions given by the court of its own motion was the following: "The jury is further instructed that the defendant and his wife are competent witnesses in behalf of the defendant, and the jury should not discard their testimony for the reason alone that one is the defendant in this case and on trial, and the other is his wife, but such facts may be considered by the jury in determining the credit to be given to their respective testimony; and the jury is further instructed that they are the sole judges of the credibility of the witnesses and of the weight of the evidence, and, if the jury believe from the evidence that any witness has intentionally sworn falsely as to any material fact in the case, then they are at liberty to disregard the whole or any part of the testimony of such witness." This instruction, so far as the defendant is concerned, is the counterpart of one given by the same learned judge in Austin's Case, 21 S. W. Rep. 31, which was one cause of reversal in that case. The instruction here is doubly erroneous, for the reason that a similar rule is laid down in it as to the wife of defendant. Judgment reversed, and cause remanded. All concur.

STATE v. RECTOR.

(Supreme Court of Missouri, Division No. 2.
Nov. 9, 1893.)

HOMICIDE—INDICTMENT—EVIDENCE—SUFFICIENCY.

1. Where an indictment for murder undertakes to charge that the crime was committed by an assault with some heavy weapon, to the jurors unknown, the omission of the word "with" is fatal.

2. Where the concluding part of an indictment for murder states merely that the accused "him, the said —, in manner and form aforesaid, did kill and murder," etc., omitting "by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought," it is fatally defective.

3. Where the evidence of defendant's brother, an eyewitness, and of the person who did the killing, and of defendant, who is charged merely with aiding and abetting, shows that defendant did not, by word or act, aid, abet, or assist the person who did the killing, and the other evidence tends to corroborate rather than to contradict the statements of such witnesses, a verdict of guilty is not supported by the evidence.

Appeal from circuit court, Perry county; James D. Fox, Judge.

John Rector was convicted of murder in the second degree, and he appeals. Reversed, and defendant ordered discharged.

The other facts fully appear in the following statement by SHERWOOD, J.:

The defendant was tried for the crime of murder in the first degree, resulting, after a severance granted, in conviction of the second degree of that offense; punishment, 10 years in the penitentiary. The charging part and conclusion of the indictment under which the trial occurred are as follows: "That Henry Willis, on the 1st day of June, A. D. 1892, at the county of Perry and state of Missouri, in and upon the body of one Charles Cargile, then and there being, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did make an assault, and that the said Henry Willis some heavy weapon or instrument, to those jurors unknown, which which said instrument or weapon he, the Henry Willis, in his hands then and there had and held, then and there, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, did forcibly strike and beat the said Charles Cargile in and upon the body of the said Charles Cargile, fracturing and breaking the neck of the said Charles Cargile, giving to him, the said Charles Cargile, a mortal injury, of which said mortal injury he, the said Charles Cargile, did then and there instantly die; and that John Rector then and there, feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, was present, aiding, helping, abetting, comforting, assisting, and maintaining the said Henry Willis in the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And the jurors aforesaid, upon their oath aforesaid, do say that the said Henry Willis and John Rector him, the said Charles Cargile, in manner and form aforesaid, did kill and murder, against the peace and dignity of the state. John B. Davis, Prosecuting Attorney."

The substance of the testimony in this case as to how Cargile came to his death is embodied in the following statement Sheriff Anderson testified to as having been made by Willis to him: "L. M. Anderson, being produced, sworn, and examined on the part of the state, testified as follows: 'I am the sheriff and jailer of Perry county, and as such have had defendant and Henry Willis in my custody since their commitment to jail on the charge of murdering Charles Cargile. Rector made no statement to me about the difficulty with Cargile, but Willis made a statement in the presence of Rector. Willis said that they (meaning the Rector family, including Willis) had been run out of their shanty by the high water, and that, on the morning of the day Cargile died, (the water having gone down before that,) he and John

Rector, Ed. Rector, and old man Rector went up to the cabin to clean it out. That, when they got there, old man Cargile was there. That Cargile said to Willis, 'It looks pretty luxurious here.' That Willis replied, 'If you call mud and water luxurious, I guess it is.' That Cargile then said to Willis, 'Did you see any of my posts down here?' That Willis answered, 'There ain't any of your posts here.' That Cargile then said to Willis, 'You are a damned lying son of a bitch.' That, at the time of saying this, Cargile drew his knife. That Willis then ran at Cargile, and hit him with his fist on the right side of the neck. That Willis then ran back, and took the hoe off of Rector's shoulder, and hit Cargile on the back with it as Cargile was coming at him with an open knife, and that he then ran after Cargile as the latter started to run, and threw the hoe at him, and hit him on the hip. That Cargile, after running a little piece, turned around, and said to Willis, 'You've played hell.' Willis made the statements detailed by me a few days after he was put in jail, some time in the fore part of June, 1892, and has made the same statement to me at different times since then. He made the statement of the occurrence given by me before he had had any opportunity of seeing and consulting a lawyer. He and Rector had no counsel until the court appointed counsel, at the October term, 1892.'"

The testimony of Edward Rector, a brother of defendant, in its material portions, is as follows: "On the morning of the day Cargile died, my father, William Rector, my brother, John Rector, Henry Willis, and myself went to our shanty to clean it out, so that we could move back into it. We had been run out of the shanty some weeks before that by high water, and had been camping at a high place in a tent some three or four hundred yards south of the shanty. We took a hoe along with us to scrape the mud out of the shanty. John Rector carried the hoe, and walked in front. Willis was close behind him, and my father and I last. When we got to the shanty we found Charles Cargile there. He was standing by a pen about fifteen or twenty steps from the shanty. He spoke to Willis, and Willis stopped to talk to him. My father and I passed by them, and went on into the shanty. John Rector, the defendant, also passed by them, and came as far as the shanty door. About the time that we got into the shanty, I heard Cargile call Henry Willis 'a damned lying son of a bitch,' and threaten to cut his guts out. I then looked out of the shanty door, and saw Henry Willis backing towards the shanty, while Cargile was coming at him with his knife open. Willis backed quickly until he reached the front of the shanty door, where John Rector was standing, with the hoe in his hand. Willis then grabbed the hoe out of John's hands, and struck Cargile with it on the left side. Cargile then

turned to run, and Willis took two or three steps after him, and threw the hoe at him, striking him on the hip. Cargile continued to run until he got inside of the field, when he turned, and said to Willis: 'You've played hell, God damn you.' The hoe with which Willis struck Cargile was a light garden hoe. On the day before this difficulty, John Long told Henry Willis and John Rector, in my presence, that Charles Cargile, on the Saturday previous, had said he intended to shoot them (Rector and Willis) on sight. John Rector, the defendant, took no part in the difficulty mentioned by me. He did not give Willis the hoe to strike Cargile with. Willis snatched it from him. If Willis had not struck Cargile with the hoe, Cargile would have cut him with the knife. Cargile was close to him, and coming at him as he backed and struck with the hoe. Cargile held the knife open and drawn ready to strike. It was a long blade. [Here witness is shown the knife identified by Willie Cargile and others.] That looks like the knife Cargile had. He had the big blade open when he was coming at Willis. If Willis hadn't backed very fast, Cargile would have cut him before he got hold of the hoe. I did not see Cargile fall in the field after the difficulty was over. I went back into the shanty, and helped clean it out. The door of the shanty is on the south side. Cargile ran around the house, and went north, towards his house, after the fight. I did not see Willis hit Cargile with his fist. I suppose this took place before I looked out of the shanty. John Rector and Henry Willis helped us rake mud out of the shanty for about an hour after the fight was over. They then took the boat, and said they were going to Peter Tucker's. They came back about four o'clock P. M. During the day we got moved back into the shanty. John and Willis staid around the shanty that evening and night. We heard two shots fired at about eight o'clock. We all went to bed that evening at about an hour and a half after sundown. When we heard the shots we looked out, but did not see or hear anything. * * * At about four o'clock on the afternoon of the day after the inquest, John Rector, Henry Willis, and I started to Peter Tucker's after some tobacco. We were in the boat, and rowing across the bayou, when we heard two shots, one right after the other, close to us, and heard the shot strike around us. One shot passed through my hat. We looked, and saw several men coming towards us. After the shooting commenced, Willis said, 'Let's jump out, or they will hit us.' Accordingly, John Rector and Willis jumped out, and waded through the water. I staid in the boat. When the shooting commenced, John was rowing, Willis was sitting in the stern, and I in the bow, of the boat. The first I heard was the shooting. They never halted us before they shot. I did not hear anybody halloo 'Halt!' until after two shots were

fired. I did not know anybody except me and John and Henry were around until I heard the guns go off, and heard the shot hitting around us. John and Henry jumped out and ran, in order to keep from being shot."

The testimony of Willis, the coindictée of defendant, in so far as important to be quoted, is this: "On the morning of the difficulty, at about seven or eight o'clock, I went with my cousins John and Ed. Rector and my uncle William Rector from our tent to the shanty. We went to clean the mud out of the shanty, in order to move back into it. The water then had gone down, and left the shanty. John Rector carried a small garden hoe on his shoulder, to be used in scraping the mud out of the shanty. When we neared the shanty, we saw Cargile standing by a log pen close to the shanty. I was in front, and he spoke to me, saying, 'Good morning, Willis.' I said, 'Good morning,' to answer him. He said, 'This looks billous down here.' I said, 'Yes.' He then began to talk about some posts he had lost by the overflow, and asked me if I had seen anything of them. I told him no; that there were none of his posts about there. He then called me a damned liar, and drew back to hit me. He was in reach of me, and, in order to prevent him from striking me, I hit him with my fist on the left side of the neck, under and in front of the ear. Cargile then drew his knife, and rushed at me with it open, saying: 'You damned lying son of a bitch, I will cut your guts out.' Old man Rector and Ed. Rector had passed by us before the difficulty had commenced, and gone into the shanty. John Rector had also passed us, and stopped close to and in front of the shanty door. John was standing in front of the shanty door when Cargile drew the knife and run at me. I backed quickly to the shanty door, where John was standing holding the hoe. I asked him to give it to me, and, as he didn't hand it to me, I grabbed it out of his hands, and struck Cargile with it twice, once on the side and arm, and once on the back. Cargile then turned and ran, and, as he did so, I followed him two or three steps, and threw the hoe at him, hitting him on the hip. Cargile ran north, towards his house. After he had run about forty or fifty steps, he turned and said, 'Willis, you've played hell.' I replied, 'I don't know whether I have or not.' The last I saw of Cargile he was still going through the field towards his house. Then he fell and lay still. It is about three hundred yards from our shanty to Cargile's house. John Rector took no hand in the difficulty between me and Cargile. He did not strike nor attempt to strike Cargile. He didn't aid or abet me in any way in the difficulty. I hit Cargile with my fist and with the hoe, as I have stated, in self-defense. If I hadn't struck Cargile with the hoe, he would have cut me with his knife. He run

at me, and was nearly close enough to cut me when I hit him with the hoe. [Here witness is shown the knife identified as being found close to Cargile's body by other witness.] That looks like the knife Cargile had in his hand when he rushed at me. He had the big blade open. I did not see Cargile fall in the field. After watching him for a short time as he went north towards his house, I went into our shanty, and helped clean it out. I helped for an hour or so, and then, in company with defendant, John Rector, took the boat, and went to Peter Tucker's. We returned to the shanty about four o'clock in the afternoon, and remained there until about nine o'clock next morning, when we again went to Tucker's. Returning again early in the afternoon, we remained around the shanty until the next day at about four o'clock in the afternoon, when John and Ed. Rector and I started in the boat to Tucker's to get some tobacco. We had just got in the boat, and were going over the bayou, when we heard two shots fired, one right after the other, and heard the shot striking all around us. I said to the boys, 'We'd better jump out, or we'll get hit.' As soon as I said this John and I both jumped out, leaving Ed. Rector sitting in the boat. We ran across the water, and made our way towards Peter Tucker's. We were afterwards arrested, about a quarter of a mile from and in sight of Mr. Tucker's house. We jumped out of the boat, and ran to save our lives. They were shooting at us, and we were afraid we would be shot if we stayed in the boat. A third shot was fired after we jumped out. The first I heard was the shooting. I heard no one halloo 'Halt!' before the shooting commenced."

The testimony of the defendant fully corroborates that of the other witnesses whose testimony has already been quoted. Other evidence tends in the same direction; for instance, the body of Cargile was found by his son in his own field about 8 o'clock in the evening of the day of the homicide, and close to it was his knife, with the large blade open, and indications of knee and finger prints in the soft mud, showing that he had fallen there, and there were tracks of one man leading to where the body had apparently fallen, and the tracks of two men coming and going towards that spot. This was a little over half way towards Cargile's house from that of Rector's, the houses being some 300 yards apart. There were no wounds on the body of deceased which could have caused death, except perhaps a contusion (without any abrasion of the skin) between the cheek and the neck, which probably had been caused, as testified by Dr. McMenomy, a witness for the state, by a sand bag or by the fist. This physician thought the neck of deceased was dislocated close to the skull, and that he did not think Cargile could have reached the point where his body was found after receiving such an injury; but he ad-

mitted it was possible for the dislocation to have been caused by the fall on the ground where the body lay, and that a man might have his neck slightly injured by a blow, and then the dislocation be completed by a fall; and he finally admitted, also, that he could not tell how or where the dislocation occurred. There was no autopsy of Cargile's body.

Dr. Waters, a witness for defendant, testified that "there can be a displacement of the vertebrae without compression of the spinal column. A blow upon the neck might cause the rupture of a blood vessel, thereby causing an effusion of blood, in which event one could move and travel until the effusion compressed the spinal column. It is possible, but not probable, that the turning of the neck and head of deceased by Dr. McMenomy increased the dislocation. The probability from Dr. McMenomy's testimony is that Cargile died from the rupture of a blood vessel and consequent effusion of blood, which finally compressed the spinal cord, causing death. In this event the victim of the violence would be able to travel a considerable distance after receiving the injury. It is possible that a person may receive a partial dislocation of the neck, and that afterwards the dislocation may be completed by a fall. Dr. McMenomy did not make a sufficient examination of the neck of deceased to determine whether or not his death was instantaneous on receiving the injury. A person so injured might after the injury have traveled a considerable distance."

The testimony of Dr. Morton, another witness for defendant, supports that of Dr. Waters. There was testimony of threats on the part of deceased towards Willis and defendant, and of the latter towards deceased. It also appeared in evidence that these threats had been communicated. It was also shown in evidence that on the morning of the homicide, and shortly after its occurrence, Willis and defendant went over to Peter Tucker's, and there, it seems, Willis related to Tucker that he had given deceased a whipping; and when this statement was repeated by Tucker to his daughter Mollie Allen, in the presence of Willis and defendant, neither of them denied it, and thereupon defendant remarked, "Cargile got enough before he run." There was also testimony to the effect that on a prior occasion, some weeks before the homicide, Annie Bechtol, another daughter of Peter Tucker, heard defendant and Willis laughing about running deceased over the water in a flat boat, at which time threats of defendant towards Cargile were made. There was also testimony that two witnesses, who were going in a boat on the bayou on the afternoon of the homicide, saw defendant going north, towards where the body of Cargile was afterwards found. One of the witnesses says defendant was "sneaking" towards that spot. Both agree that he was in about 25 yards of where the body was

found. They hallooed at him, when he stopped, looked around, and changed his course, and went back southward, in the opposite direction from which he had come, going towards the Rector shanty.

This is the substance of the testimony. Anything material heretofore omitted in it will be adverted to further on.

John V. Noell and Chas. A. Killian, for appellant. R. F. Walker, Atty. Gen., for the State.

SHERWOOD, J., (after stating the facts.)

1. The indictment in this cause is clearly bad, and this for several reasons: (a) because, the word "with" being omitted therefrom, there is no allegation showing with what the alleged homicidal act was done. In criminal prosecutions everything constituting the offense must be set forth with certainty and clearness; nothing must be left to be implied. This is true of all felonies. Hawkins says "that in an indictment nothing material shall be taken by Intendment or implication." 2 Hawk. P. C., c. 25, § 61. If an essential word be dropped, it is fatal. Whart. Crim. Pl. (9th Ed.) § 275, and cases cited. (b) The indictment is also faulty in that it has not the proper conclusion. "Did kill and murder" is wholly insufficient. The indictment, in its conclusion, should have alleged: "And so the jurors aforesaid, upon their oath aforesaid, do say that the said Henry Willis and John Rector him, the said Charles Cargile, in manner and form aforesaid, and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder," etc. State v. Meyers, 99 Mo. 107, 12 S. W. Rep. 516; 2 Bish. Crim. Proc. §§ 541, 548; Whart. Hom. § 849; Com. v. Gibson, 2 Va. Cas., loc. cit. 74; 3 Chit. Crim. Law, 737, 779; Kelly, Crim. Law, (2d Ed.) § 503. Any material omission in the conclusion of an indictment is as fatal as if occurring in any other portion of the instrument. State v. Pemberton, 30 Mo. 376.

2. The evidence in this cause is entirely lacking in every constituent element necessary to establish the guilt of defendant. This is apparent for several reasons: The evidence shows beyond peradventure that defendant did not, by word or act, aid, abet, or assist Willis in striking Cargile either with fist or hoe. This appears in the clearest possible manner by the testimony of Ed. Rector, and by that of Willis, who entirely exonerates defendant from any participation in the acts resulting in Cargile's death. Though the probative force of defendant was affected by the record of his conviction for larceny, yet still that record did not destroy his competency as a witness, and he testifies to substantially the same facts as Willis and Ed. Rector. There is no testimony to the contrary. In fact, the evidence tends to corroborate the statements made by the three

witnesses just mentioned. Cargile is found dead, with his knife open lying by his side, the soft mud indicating that he had walked and fallen there. The contusion between his cheek and his neck is shown by the testimony of one of the physicians might have resulted from a blow of the fist; and the testimony of other physicians shows that, if the death did result from a blow of the fist, it was in consequence of a rupture of a blood vessel, which produced a fatal pressure on the spinal cord, and that in such circumstances, a person suffering from such an injury might be able to walk as far as Cargile is said to have walked before he fell. Besides, as no autopsy was held, it is impossible to tell what really did cause Cargile's death, and so one of the physicians testified. He may have died as a result of heart disease or of one of the "thousand natural shocks that flesh is heir to." It is true that defendant did not, after discovering that Cargile still laid where he fell, obey the dictates of humanity, by going to his assistance, or by informing the neighborhood of the sad affair; but defendant was not tried on the humanity counts, and there is no evidence to be found in the record that defendant attempted to escape. The endeavor to escape being shot, by jumping into the water, is a widely different thing. If the evidence did show an attempt to escape, that fact, standing alone, would not be sufficient. "In criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt. * * * And this degree of conviction ought to be produced when the facts proved coincide with, and are legally sufficient to establish, the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis; for it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence." 2 Greenl. Ev. (14th Ed.) § 29. Suspicious, however strong, or probabilities, however great, will not answer. Even a prima facie case will not warrant a conviction. Ogletree v. State, 28 Ala. 693, and cases cited.

3. Whatever may have been the guilt of Willis, there is nothing in the evidence to implicate the defendant. But if Willis, in doing what he did do, was only engaged, so far as the evidence shows, in his lawful self-defense, then clearly no culpability could attach either to him or to defendant, although the latter encouraged or aided him in doing an act lawful in itself. 2 Bish.

New Crim. Law, § 1259; 1 Bish. Crim. Law, § 877; 1 East, P. C. 289. The trial court gave an instruction embodying the view just presented, and this, under the authorities, was correct. As there is no evidence which supports the verdict, the judgment will be reversed, and the defendant discharged.

As to clause (a) of the first paragraph, no opinion is expressed by my associates. Judge GANTT is in favor of reversing and remanding. BURGESS, J., concurs.

STATE v. BANKS.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

MURDER—INDICTMENT—EVIDENCE—CONTINUANCE.

1. It is not error to overrule a motion for a third continuance on the ground of the absence of material witnesses, if defendant has not used proper diligence in trying to obtain their depositions or attendance.

2. Where, before the instructions to the jury, an absent witness is brought into court, and leave is given defendant to examine him, he cannot complain of the refusal of the court to grant a continuance on account of the absence of that witness.

3. An indictment charging, in the conclusion, that defendant "maliciously, premeditatedly, and of malice aforesaid, did kill and murder deceased, against the peace and dignity of the state," sufficiently charges murder.

4. Where, in a criminal case, the inference of guilt can be reasonably drawn from the evidence, the verdict will not be interfered with on the ground of the insufficiency of evidence.

Appeal from criminal court, Johnson county; John E. Ryland, Judge.

Charles Banks was convicted of murder, and appeals. Affirmed.

I. W. Whitsett and A. S. Hammer, for appellant. R. F. Walker, Atty. Gen., and Morton Jourdan, Asst. Atty. Gen., for the State.

BURGESS, J. Defendant was convicted at the April term, 1893, of the criminal court of Johnson county, of murder in the first degree, for shooting with a pistol, and killing, one Isaac Palmer, at Sedalia, Pettis county, on the 29th day of August, 1892. The indictment was found in the latter county, where the offense was committed, and the venue subsequently changed, on the application of defendant, to the criminal court of the county of Johnson. At the April term, 1893, of the Johnson criminal court, the defendant filed his third application for a continuance on the ground of the absence of witnesses, and the second application on account of the absence of one John Williams and Nelson Frazier, which was by the court overruled. An attachment was issued for Frazier, and he was brought into court during the trial. The case is here on defendant's appeal. No brief has been filed in behalf of defendant.

The evidence discloses the following state of facts: On the 29th day of August, 1892, several negroes had congregated in the Main Street Pool Room at Sedalia. This pool

room was conducted by two negroes, and in it was a pool table, billiard table, card table, a stove, and some chairs. That among several negroes present were the defendant, Banks, and the deceased, Palmer. That immediately before the difficulty the deceased was sitting on the pool table, in the south side of the pool room, and defendant was at the northeast corner of the pool room. That, after some talk between the deceased and defendant about a game of craps, the defendant started walking in the direction of the deceased, with a drawn revolver in his hand, saying, "You have been bulldozing me all the time," when deceased replied he "hadn't been doing anything to him." Defendant said, "I have a notion to shoot you," put his pistol in his pocket, and went around where deceased was sitting on the table, and said, "I will fight you a fair fist fight, if you want to fight," when deceased replied: "I do not want to fight. I do not want to fight you." And, as defendant advanced towards deceased, deceased got down off the table, and started in the opposite direction, towards the door leading into the street. Defendant quickened his step, and overtook him, saying, "Don't you believe I will kill you?" and with his left hand pushed deceased's head to one side, and, with a revolver in his right hand, fired a shot that entered the right side of deceased's head, killing him instantly. Defendant then ran out of the back door into the alley, and several blocks away, where he attempted to hide himself in a hedge fence, where he was discovered by the chief of police, and arrested. Upon being secured, a revolver with four loaded chambers and one empty shell was found upon his person. Defendant attempts to excuse the murder on the theory that he fired the shot in self-defense, and testifies that the deceased was advancing upon him at the time he fired the shot. In this statement he is contradicted by every eyewitness to the shooting. Witnesses for defendant testify that the character and reputation of deceased for peace and quiet were bad, and that he was generally regarded as a dangerous man; had previously shot a man, and had made threats against defendant, which had been communicated to him. Upon the arrival of the constable, a few minutes after the shooting, the body of the deceased negro was searched, and no weapon of any kind was found upon his person, nor in the pool room about him. Upon the case made by the testimony, the court instructed the jury as to murder in the first and second degrees, and self-defense.

The first point made in defendant's motion for a new trial, for our consideration, is that the verdict is against the evidence. It seems, from a careful reading of the evidence, that this point is not well taken, as it discloses a clear case of murder in the first degree, unless the defendant, at the time of the homicide, was acting in self-defense, which was a question for the jury, under the ev-

idence and instructions. Beside, this court has uniformly held that when, in a criminal cause, the inference of guilt can be reasonably drawn from the evidence, it will not interfere with the verdict on the ground of insufficiency of the evidence to support it. *State v. Orrick*, 106 Mo. 111, 17 S. W. Rep. 176, 329; *State v. Jackson*, 106 Mo. 181, 17 S. W. Rep. 301; *State v. Moxley*, (Mo. Sup.) 22 S. W. Rep. 575.

Another contention is that the court committed error in refusing to give instructions asked for by defendant, and giving instructions on the part of the state. A careful reading of the instructions will satisfy any judicial mind that there is no merit in this contention, as the instructions given presented fairly and pointedly every phase of the case disclosed by the evidence. In fact, the instructions are to be commended for their clearness, and they cover the entire case. While some of these asked by defendant, and refused, contained correct expositions of the law, the same matters embraced in them were included in the instructions which were given.

A further contention is that the court committed error in admitting illegal and irrelevant testimony, and in refusing to admit legal and relevant and competent evidence offered on the part of the defendant. Nothing is suggested in the motion for a new trial wherein any such error was committed, and we have looked in vain through the record to find it.

After the panel of 40 qualified jurors had been selected, and the list delivered to defendant, he filed his third application for a continuance because of the absence of John Williams and Nelson Frazier, witnesses for defendant, by whom he alleged that he expected to prove certain facts material to his defense, which facts were set out. The affidavit was in proper form, and no objection was taken to it on that account, but it was overruled because of the want of diligence on the part of defendant in obtaining the testimony of the two witnesses. No error was committed by the court in overruling this application. The cause had been once continued because of the absence of the witness Williams, and after the change of venue, and at the fourth term after the indictment was found, defendant asked another and second continuance because of the absence of this same witness: It appears from the affidavit that the witness Williams was a stranger, only temporarily in Sedalia, at the time of the homicide, and there was scarcely a probability that his testimony could ever be secured, as he seems to have been roaming about, having no permanent place of abode. The proper diligence was not exercised in trying to obtain his deposition or attendance. *State v. Dusenberry*, 112 Mo. 277, 20 S. W. Rep. 461; *State v. Sneed*, 91 Mo. 552, 4 S. W. Rep. 411. There should be, and is, accorded to the trial judge, largely, the discretion of

passing upon the application of defendant for a continuance; and unless it clearly appears that such discretion has been abused, to the prejudice of the rights of the defendant, this court will not interfere. We are not inclined to think that there was any abuse of discretion on the part of the court in overruling this application. *State v. Gamble*, 108 Mo. 500, 18 S. W. Rep. 1111; *State v. Marshall*, (Mo. Sup.) 22 S. W. Rep. 452; *State v. Steen*, Id. 461; *State v. Carter*, 98 Mo. 176, 11 S. W. Rep. 624.

The record shows that the witness Frazier was brought into court, under an attachment, before the instructions were read to the jury, when the court announced to defendant's counsel that the witness was present, and that they would be permitted to examine him, if so inclined. They declined to do so, and defendant cannot now complain of the refusal of the court to grant a continuance on account of the absence of this witness.

The final contention is that the indictment is insufficient in law, and does not charge any offense against the defendant; that nowhere in the body does it charge the defendant of murder, nor in the concluding clause does it use the word "murder." There might be something in this position, if it was sustained by the record, but it is not. The indictment concludes as follows: "And so the grand jury aforesaid, upon their oath aforesaid, do say that the said Charles Banks the said Isaac Palmer, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of his malice aforesaid, did kill and murder, contrary to the statute in such cases made and provided, and against the peace and dignity of the state." The indictment is according to the most approved form, and contains every allegation necessary, and in no way is it defective.

The verdict is fully sustained by the evidence, and the case was unusually well tried. There is no error apparent in the record. The judgment should be affirmed, and it is so ordered. All concur.

STATE v. BRANDENBURG.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

CRIMINAL LAW—SEDUCTION—EVIDENCE—INSTRUCTIONS—ARGUMENT OF COUNSEL.

1. In a prosecution under Rev. St. § 3486, for seducing an unmarried woman under 18 years of age, under promise of marriage, it is not error to refuse to allow defendant to answer a question as to whether it was his honest intention to marry the prosecutrix, and if he is now ready to do so, or to instruct as to defendant's good faith in making the promise to marry, as, by plain provision of the statute, an offer to marry is no bar to the prosecution.

2. Testimony that the witness is acquainted with prosecutrix, and has never heard anything against her character, is competent evidence of her character, and he need not base

his knowledge on what is "generally said" of her.

3. Where defendant's testimony is immaterial, it is not necessary to instruct the jury as to his competency.

4. Where, in a prosecution for seduction, the prosecuting attorney, in argument to the jury, remarked that the return of the writs by the officers showed that defendant ran away, and skipped out, and the prosecuting witness had to work in a factory to support herself and child, and the court rebuked him, there is no error, as it will be presumed that the rebuke warned the jury to disregard the statement.

Appeal from circuit court, Montgomery county; R. M. Hughes, Judge.

Isaac Brandenburg was convicted of seduction, and appeals. Affirmed.

Edmonston & Cullen, for appellant. R. F. Walker, Atty. Gen., for the State.

BURGESS, J. The defendant was convicted in the circuit court of Montgomery county for seducing and debauching one Mattie Owens, an unmarried female of good repute, and under 18 years of age. The case is in this court on his appeal. The facts developed by the testimony are that during December, 1890, and January, 1891, defendant boarded at the home of the prosecutrix, at Danville, Montgomery county, Mo. That defendant and the prosecutrix were engaged to be married. The prosecutrix testified that, on December 26th, defendant asked her to have sexual intercourse with him. She replied, "It was not right," when he said, "It wouldn't be no harm. We are engaged," and she then consented. That they had sexual intercourse twice during January, 1891, and each time they had about the same conversation. That the parents of the prosecutrix refused to permit defendant to come to the home of the prosecutrix, and refused to permit her to marry defendant. That defendant always expressed a willingness to marry her, and never refused. The mother of prosecutrix testified that she forbade her daughter marrying defendant, and ordered him not to come on the place again. That she told her daughter she had rather see her dead than marry defendant. That she and her husband offered to settle the case for less than \$100. Letters written by defendant to prosecutrix were identified, and read in evidence, in which defendant renewed his offer to marry her. The testimony gives the prosecutrix a good reputation for chastity and virtue.

The indictment is well enough, and good under the section of the statute under which it was drawn, containing, as it does, all necessary averments. *State v. Eckler*, 106 Mo. 585, 17 S. W. Rep. 814; *State v. Primm*, 98 Mo. 368, 11 S. W. Rep. 732.

It is contended by counsel for defendant that the court committed error in allowing the witnesses MacMahan and Bellamy to testify to the reputation of the prosecutrix, because they were not qualified to do so. This contention is not sustained by the rec-

ord, which discloses the fact that each one of these witnesses testified that he was acquainted with Mattie Owens,—one of them. (Bellamy,) that she went to school to him in 1890,—and they both testified that they had never heard anything against her. In passing upon a similar question by this court, *Sherwood, J.*, said: "That reputation may, with justice, well be called good, which no slander has ever ventured to even so much as question. A blameless life, oftentimes, though not always, gives origin to such a reputation. But when it can be said of a man, by those well acquainted with him, that they never heard his reputation as to truth and morals discussed, denied, or doubted, it is equivalent to passing upon him the highest encomium. The authorities abundantly establish that the person testifying need not base his knowledge on what is 'generally said' of the person whose character is in question, but may base his knowledge of the reputation of such person on evidence of the negative nature above noted." *State v. Grate*, 68 Mo. 22, and authorities cited.

Defendant was introduced as a witness in his own behalf, and asked whether or not it was his honest intention to marry the prosecuting witness, if he had always held himself in readiness and willing to marry her, and if he was not then ready and willing to do so. These questions were all objected to by the state, the objections sustained, and the defendant duly excepted. It is urged with much earnestness that the court should have permitted these questions to be answered, as the answer thereto would have shown that defendant acted in good faith in promising to marry Mattie Owens, and was not guilty of any deception in promising to do so. It is the act of seducing and debauching which is the gravamen of the offense, and, if this is done by promises of marriage, the crime is complete, no matter what the defendant's intentions may have been, or what offers he may have made after the act was consummated. Section 3486. Rev. St., provides that: "If any person shall, under or by promise of marriage, seduce and debauch any unmarried female of good repute, under eighteen years of age, he shall be deemed guilty of felony * * * but if, before judgment, upon an indictment, the defendant marry the woman thus seduced, it shall be a bar to any other prosecution of the offense, but an offer to marry the female seduced by the party shall constitute no defense to such prosecution." While, by the plain provisions of the statute, marriage by the defendant of the female seduced, before judgment, is a bar to the prosecution, the mere offer to do so is not. This position finds support in the case of *State v. Pierce*, 27 Conn. 319, where, under a statute like the Missouri statute, it is said: "The proposition that a virtuous and innocent female, who has been persuaded by a man to surren-

der her chastity to him by a promise of marriage, which is the strongest temptation that could be offered to prevail upon her to part with her innocence, and in which she implicitly confided, is not, although such promise was made honestly, and with an intention to perform it, within the protection intended by the statute on which this information is founded, is, on the face of it, so absurd that we deem it unnecessary, formally, to refute it. Is it less a seduction that it was accomplished by the most powerful inducement which could be offered to his victim, or that such inducement consisted of a promise which was intended to be performed? Moreover, the prosecuting witness testified that, although the defendant always expressed a willingness to marry her, and never refused to do so, she never saw or heard of him after the 5th day of July, 1891, until after his arrest, when he wrote her.

The court, in defining "good repute," as used in the statute, adopted the same definition as did this court in the case of *State v. Wheeler*, 108 Mo. 638, 18 S. W. Rep. 924, which we are satisfied is correct, and according to the meaning as those words are used in the statute.

Another contention is that the court should have instructed the jury that defendant was a competent witness in his own behalf, and the weight to be given to his testimony, although no such instruction was asked by him. A sufficient answer to this contention is that the only matters that defendant testified to were that as to his name, and that he had promised to marry the prosecuting witness. Certainly, there was no error, under such a state of facts, in the failure of the court to instruct as to his competency, and the weight to be given to his testimony, as it was of no consequence or importance.

There was no error in refusing to give the instructions prayed for by defendant. The first and third embodied the good faith on the part of the defendant in promising to marry Mattie Owens, which was not the law, as hereinbefore stated, while the second was substantially given in the other instructions given on the part of the state.

During the argument before the jury on the merits of the case, one of the attorneys for the state remarked "that the return of the writs by the officers showed that the defendant ran away, or skipped out, and that the prosecuting witness had to work in a tobacco factory to support herself and child." Counsel for defendant objected to such remarks, and the court then stopped the attorney, rebuked him, and directed him to confine his remarks to the record and facts in proof. This is all that the court could do, and all that was required. We are justified in assuming that the rebuke of the court warned the jury to disregard the statements. *State v. Lee*, 66 Mo. 165; *State v. Finn*, 24 Mo. App. 344. As there is no er-

ror in the record which will justify a reversal of the cause, the judgment will be affirmed, and it is so ordered. All concur.

STATE v. LEWIS.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

MURDER — SELF-DEFENSE — INSTRUCTIONS — EVIDENCE — REVIEW ON APPEAL — HARMLESS ERROR.

1. Defendant was convicted of murder in the second degree. It appeared that a few minutes after the release of defendant from an arrest made at the instance of deceased, and while he was standing on a corner with friends, deceased passed by, having his hand in his pocket. Defendant said to him, "Howdy, Alf?" and deceased replied, "You son of a bitch," and started to turn around, at the same time attempting to draw his hand from his pocket, whereupon defendant shot him. After defendant was arrested, in reply to a question why he had killed deceased, he replied that he thought he had just as soon kill him then as any time. In the pocket of deceased was found a slung shot, and for some time before the killing there had been hard feeling between them, and each had made threats against the other, which had been communicated. *Held*, that the verdict was not against the weight of the evidence.

2. An instruction on manslaughter is properly refused, where there is no evidence on which to base it.

3. It is error to instruct that the jury are not authorized to acquit on the ground of self-defense if they believe from the evidence that defendant voluntarily sought or brought on or invited the combat or difficulty in which deceased lost his life, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily entered into the difficulty of his own free will, since, if mutual combat is entered into without any felonious intent, it is not murder if one of the combatants is killed.

4. An erroneous instruction on self-defense is no ground for reversal where there was no evidence which would warrant acquittal on the ground of self-defense.

5. The fact that defendant was cross-examined in regard to matters that he did not testify to in his examination in chief is no ground for reversal, where the cross-examination was upon immaterial matters, not calculated to prejudice the jury.

6. Refusal to submit to defendant his testimony taken before the committing magistrate, before interrogating him in regard thereto, is no ground for reversal, when the questions were immaterial, and the answers confirmatory to what he testified to in chief, and in no way tended to prejudice the jury.

7. It is not error to strike out testimony that deceased, two weeks before the killing, had a revolver, as such evidence is immaterial.

8. It is within the discretion of the court to refuse to require the prosecuting attorney to close his argument before the jury immediately following the close of the argument for the defense, though there may be ample time to do so.

Appeal from circuit court, Platte county; William S. Herndon, Judge.

Frank Lewis was convicted of murder, and appeals. Affirmed.

Wm. Forman and John W. Coots, for appellant. R. F. Walker, Atty. Gen., for the State.

BURGESS, J. At the December term, 1892, of the circuit court of Platte county,

the defendant was convicted of murder in the second degree, for shooting and killing one Alf Spencer, and, after an unsuccessful motion for a new trial, he appealed to this court. The facts, as they appear from the record, are as follows: Deceased and defendant, previous to the killing, had a difficulty, when the deceased went before a justice of the peace, and had a warrant issued for defendant, upon authority of which he was arrested. He was afterwards taken before the magistrate, and released until a subsequent day. A few minutes after his release, defendant, Sank Modesty, Charles Corbin, and Warren Fields were standing on a corner of a street in Platte City, when deceased came along with his overcoat on,—with his right hand in the right pocket,—and passed between the parties, when defendant said to him, "Howdy, Alf?" and deceased replied, "You son of a bitch," whereupon the deceased started to turn around, facing defendant, making at the same time an effort to pull his hand out of his pocket, when defendant drew his pistol, and shot deceased in the head, back of the left ear,—the ball ranging forward and upward, lodging in the temporal bone on the opposite side of the head,—killing him instantly. On the same evening, he was arrested, and, when asked by the officer having him in charge what he killed Alf for, replied, "Well, I thought I had just as soon kill him now as any time." There had been bad feelings existing between the parties for some time, and threats had been made by each one against the other, which had been communicated to them. After the death of Spencer, a slung shot was found tied to his right arm, his hand still being in his pocket. The court instructed for murder in the first and second degrees, on self-defense, and refused to instruct for manslaughter in the third degree, when asked to do so by defendant.

The first ground insisted upon by the counsel for the defendant for a reversal of the cause is that the verdict was against the weight of the evidence, and clearly the result of passion or prejudice. This contention is not borne out by the facts in the case, as disclosed by the evidence, which shows a clear case of murder upon the part of the defendant.

Another contention is that the court should have instructed for manslaughter in some of the degrees, but no suggestion is made in defendant's brief as to what degree, or what evidence authorized or entitled defendant to such an instruction. While it was the duty of the court to give instructions covering the whole law arising on the facts, whether asked or not, as held by this court in the cases of *State v. Gassert*, 65 Mo. 352; *State v. Wilson*, 98 Mo. 440, 11 S. W. Rep. 985; *State v. McKinzie*, 102 Mo. 620, 15 S. W. Rep. 149,—it was also its duty to confine its instructions to the case made out by the testimony. *State v. Brady*, 87 Mo. 142; *State*

v. Wilson, 88 Mo. 13. There was no evidence whatever upon which to predicate an instruction for manslaughter in any degree. There was not a particle of evidence tending to show that the homicide resulted from the heat of passion induced by lawful provocation. On the part of the state, the testimony would have well warranted the jury in finding a verdict for murder in the first degree. *State v. Kloss*, 23 S. W. Rep. 780, (not yet officially reported.) On the part of the defendant, the testimony tended to show that he acted in self-defense. The trial court gave instructions embracing within their scope murder in the first and second degrees, and embracing the theory of self-defense; and this was all, under the evidence, to which defendant was entitled. The homicide, as disclosed by the evidence, was either murder in the first or second degrees, unless committed in self-defense, and to this extent the instructions covered the entire case.

The ninth instruction given at the instance of the state was as follows: "The court instructs the jury that the law does not permit a person to voluntarily seek or invite a difficulty or combat, or put himself in the way of being assaulted, in order that, when hard pressed, he may have a pretext to take the life of his assailant; and if you believe from the evidence that the defendant voluntarily sought or brought on or invited the combat or difficulty in which the said Alf Spencer lost his life, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily entered into the difficulty of his own free will, then you are not authorized to acquit the defendant on the ground of self-defense." The criticism on this instruction is, we think, well founded. To voluntarily enter into a difficulty without any felonious intent, or for the purpose of wreaking malice or inflicting great bodily harm, does not make the person so doing guilty of murder. If there be mutual combat, without any felonious intent, and death ensues therefrom, the offense is only manslaughter. "Where, however, the defendant in a criminal case provokes the difficulty or begins the quarrel with the purpose of taking advantage of the deceased, and of taking his life, or doing him some great bodily harm, then there is no self-defense in the case, however imminent the peril of the defendant may become in consequence of an attack made on him by the deceased; and, when the defendant kills the deceased under such circumstances, he is guilty of murder in the first degree." *State v. Gilmore*, 95 Mo. 554, 8 S. W. Rep. 359, 912; *State v. Davidson*, 95 Mo. 155, 8 S. W. Rep. 413; *State v. Partlow*, 90 Mo. 608, 4 S. W. Rep. 14; *State v. Hays*, 23 Mo. 287; *State v. Packwood*, 26 Mo. 340; *State v. Berkley*, 92 Mo. 41, 4 S. W. Rep. 24; *State v. Parker*, 96 Mo. 382, 9 S. W. Rep. 728. After instructions similar to the one now under consideration have been so often condemned by this court,

It is somewhat strange that trial courts will persist in committing the same error,—in failing to follow the rule of law so often announced. As commending the rule laid down in the Partlow Case, see *Hash v. Com.*, (Va.) 13 S. E. Rep. 405, 406; *Meuly v. State*, 20 Tex. App. 274, 9 S. W. Rep. 563. A similar doctrine is announced in *Johnson v. Com.*, by the Kentucky court of appeals. 23 S. W. Rep. 507. In the first instruction given by the court at the instance of the defendant the law of self-defense is clearly defined, and is quite favorable to the defendant. This instruction is not in harmony with No. 9,—the one on the same subject given on the part of the state,—and for this reason the case would have to be reversed, but for the fact that the defendant suffered no damage from the error, because there was no evidence of self-defense in the case, as was said by this court in the case of *State v. Gilmore*, supra: "At the time defendant drew his pistol, and fired, his danger was not imminent. His adversary had drawn no weapon, and no weapon was drawn by him. The right of the defendant to defend himself did not arise until he had done everything in his power to avoid the necessity of shooting his adversary. If he could safely have avoided using his weapon, he was not justified in using it." *State v. Johnson*, 76 Mo. 121. At the time defendant shot deceased, he (deceased) seems to have been unoffending,—making no effort to assault the defendant. At any rate, there was no such demonstration of assault, or overt act, in this case, as sometimes forbids retreat, and justifies instantaneous action. 1 Whart. Crim. Law, § 486a; 1 Bish. Crim. Law, § 872. Furthermore, that there was no self-defense in this case is shown by defendant's own conduct, and his statement to the deputy sheriff, who asked him what he killed Alf for, when he replied, "Well, I thought I had just as well kill him now as any time." He was the aggressor, and at no time acted in self-defense.

It is further contended that the court committed error in permitting the defendant to be cross-examined in regard to matters that he did not testify to in his examination in chief. This contention does not seem to be borne out by the record in the case, and, while it may be true that the cross-examination was not in the same language, yet his cross-examination was restricted to the same matters about which he testified to in chief, or matters that were immaterial; and certainly, in order to justify the reversal of the cause on the ground that the defendant was cross-examined with reference to matters as to which he had not testified in his examination in chief, such cross-examination must have been in regard to some material matter, or something which had a tendency to prejudice the jury against the defendant or his case, and no such cross-examination was had in the case at bar. The ends of justice would not be subserved by the reversal of the

cause simply because the prosecuting attorney asked the defendant, on his cross-examination, some trivial question in regard to some matter of no consequence, with reference to which he had not testified in his examination in chief, and which could not possibly have had any prejudicial effect on the minds of the jury.

Nor was the prosecuting attorney required to submit to the defendant his testimony taken before the committing magistrate on his preliminary trial, before interrogating him in regard to statements made by him on that occasion, for the reason that all the questions asked by the state in regard thereto were immaterial, and the answers of defendant confirmatory only to what he had testified to in his examination in chief on the trial of the case at bar, and had no tendency whatever either to discredit or contradict him. *State v. Avery*, 113 Mo. 475, 21 S. W. Rep. 193. Had it been otherwise, the objection would have been well taken. 1 Greenl. Ev. §§ 463-465; *Prewitt v. Martin*, 59 Mo. 325.

There was no error committed in ordering all reference to the gun to be stricken out, as testified to by the witnesses Armstrong and Brooks, in the hands of deceased two weeks before the homicide, as it was immaterial.

Nor was there any error in the refusal of the court to require the prosecuting attorney to close the argument before the jury immediately following the close of the argument for the defense, though there may have been ample time to do so, as this was a matter in the sound discretion of the court, and it does not appear that such discretion was not properly exercised.

The indictment is well enough, and no objections have been suggested to any defect in it, except in a general way, and we have been unable to discover any. The judgment is affirmed. All concur.

STATE v. MALONEY.

(Supreme Court of Missouri, Division No. 2
Nov. 21, 1893.)

JURY—CRIMINAL LAW—SECOND CONVICTION.

1. A juror is not disqualified to serve on a trial for robbery by the fact that he was a juror on a former prosecution in which defendant was convicted of maiming, the record of which was, without objection, read in evidence on the trial for robbery.

2. On a trial for robbery, the record of a previous conviction of defendant was read in evidence for the purpose of increasing the punishment. Such record showed that the indictment charged in separate counts an assault with intent to kill and a felonious wounding; that the first count was quashed, and that defendant was convicted of the wounding, as charged in the second count. *Held*, that there was no evidence to support an instruction as to the degree of punishment in case the jury should find that on the former prosecution defendant was convicted of an assault with intent to kill.

Appeal from Hannibal court of common pleas; Reuben F. Roy, Judge.

Michael Maloney, alias Pluck Maloney, was convicted of robbery in the first degree, and sentenced to imprisonment for life, and he appeals. Reversed.

D. H. Eby, for appellant. R. F. Walker, Atty. Gen., for the State.

BURGESS, J. At the January term, 1893, of the Hannibal court of common pleas, the defendant was indicted for robbery in the first degree. The indictment also charges that defendant had previously been indicted and convicted in the same court for assault with intent to kill, and his punishment fixed at two years' imprisonment in the penitentiary. On the last trial defendant was convicted, and his punishment fixed at imprisonment in the penitentiary for and during his natural life. After an unsuccessful motion for a new trial, defendant prosecutes his appeal to this court.

On the trial of the case at bar the state read in evidence, without objection, the indictment, judgment, and sentence of the court, and the entire record of the first case against the defendant. The indictment in the case was in two counts,—the first for assault with intent to kill; the other for maiming, wounding, disfiguring, and inflicting great bodily harm. The record shows that on motion of defendant the first count was quashed, and that the conviction was under the second and last count. The admission of this record is now assigned as error, and insisted upon by counsel for defendant for reversal of this case. It does not appear from the record in this case that this action of the court was excepted to at the time, and exception saved, and it is not, therefore, subject to review. *State v. Ramsey*, 82 Mo 138.

The record discloses the fact that one Abram Bird, who was selected, qualified, and served as a juror on the trial of this case, was also one of the panel of jurors on the trial of the first cause, which was unknown to defendant at the time of his selection as a juror in the case in hand, nor was he informed of the fact until a portion of the evidence had been introduced; but as soon as he ascertained the fact his counsel called the attention of the court to it, and asked that the juror be discharged, which the court declined to do. This juror answered on his voir dire touching his qualifications as such that he had not formed or expressed an opinion as to the guilt or innocence of the accused, and was found by the court to be qualified to sit in the case; nor is there any evidence that he was not so qualified. While the defendant was entitled to a trial by an impartial jury, who had neither formed nor expressed an opinion as to his guilt or innocence, the mere fact that one of the jurors sat as such on a former trial of defendant for a criminal offense, the rec-

ord of which was read in evidence in this case without objection, did not, by any means, render him incompetent to sit as a juror in the case at bar, the offense being an entirely different one in all of its essential features. Defendant's former conviction was shown by the record; the only evidence aliunde necessary, if any, being that of his identity, which was not denied; but, even if such evidence had been necessary or introduced, the juror would not have been disqualified for that reason. While the record of the former conviction of defendant shows that he had been convicted of felonious wounding, the court instructed the jury as follows: "The court instructs the jury that if they find from the evidence in this cause beyond a reasonable doubt that the defendant on the 9th day of October, A. D. 1890, in Mason township, in the county of Marion, and in the state of Missouri, in the Hannibal court of common pleas, within and for the townships of Mason and Miller, in said county, was charged with and convicted of the crime and felony of assault to kill, and afterwards, to wit, on the 11th day of October, 1890, was by said court sentenced to imprisonment in the penitentiary of the state of Missouri for the period and term of two years, and that defendant complied with said sentence, and was discharged therefrom on the 11th day of April, 1892; and if the jury further believe from the evidence in this cause beyond a reasonable doubt that the defendant, after his discharge from the imprisonment as aforesaid, and within three years next before the 11th day of January, A. D. 1893, at the township of Mason, in the county of Marion, aforesaid, did make an assault upon Levi Leffel with force and violence, and did then and there with force and violence take and carry away from the person of said Levi Leffel any of the current money of the United States, to wit, any gold or silver coin or paper money of the United States, of any value whatever, against the will of the said Levi Leffel, by force and violence against the person of said Levi Leffel, and that said money was then and there the property of the said Levi Leffel, and that the defendant then and there took said money as aforesaid with the intent on the part of said defendant to deprive said Levi Leffel of his said property, and to convert said money to the defendant's own use, and without any claim of right to said property on the part of said defendant, and without any belief on the part of said defendant that he, the said defendant, was the owner of said property, or some interest therein, and that said taking was from a depraved heart on the part of the defendant,—then the jury will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary for the term of his natural life." There was no evidence whatever upon which to predicate this instruction. An assault with intent to kill and an assault for felonious

wounding are two distinct offenses, and are so declared by our statute. An assault with intent to kill may be committed without any wounding. This evidence was not a variance from the allegation in the indictment in the case at bar, but an absolute failure of proof. For the error of the court in giving this instruction the case will have to be reversed and remanded, and it is so ordered. All concur.

STATE v. FLANDERS.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

FALSE PRETENSES — OBTAINING SIGNATURE — INDICTMENT—DUPLICITY—EXCEPTIONS — DECLARATION OF CONSPIRATOR—SECONDARY EVIDENCE—HARMLESS ERROR.

1. An indictment under Rev. St. 1889, § 3564, providing that one who, with intent to defraud another, shall by false pretense obtain the signature of any person to a written instrument, shall be punished as for stealing the property or thing so obtained, which alleges that defendant, with intent to defraud C. of a certain lot, by false pretenses obtained of him the execution of a deed and all his interest in the lot, is not double, the gist of the offense being the obtaining of the signature, and the allegations as to the property being surplage.

2. Refusal to admit evidence in support of a special plea as to the illegality of the grand jury that drew the indictment cannot be considered on appeal, no exception having been saved, but the question having been raised for the first time on motion for new trial.

3. Acts and declarations of another may, in the discretion of the court, be admitted against defendant prior to evidence of a conspiracy between them.

4. Though declarations of a co-conspirator, made after the common enterprise is at an end, are inadmissible, they being immaterial, their admission is not reversible error.

5. Evidence that the deed, the signature to which defendant was charged with having obtained by false pretenses had been destroyed, was sufficient foundation for the introduction of a certified copy of the record.

Appeal from criminal court, Jackson county; John W. Wofford, Judge.

Francis L. Flanders was convicted of obtaining a signature to a deed by false pretenses, and appeals. Affirmed.

Saml. Foster, K. McC. De Weese, and Boland & O'Brady, for appellant. R. F. Walker, Atty. Gen., M. K. Brown, Pros. Atty., and J. J. Williams, Asst. Pros. Atty., for the State.

BURGESS, J. At the January term, 1893, of the Jackson criminal court, the defendant was jointly indicted with one Henry Sleek, charged with feloniously and designedly obtaining from Ludwig Goetz and Henrietta Goetz, his wife, by means of false and fraudulent representations, a general warranty deed to lot No. 8, of block No. 63, in Kansas City, Mo., with the intent to cheat and defraud. At the same term this defendant was arraigned, and entered his plea of not guilty. He then filed his separate demurrer,

which was by the court overruled, and the cause continued until the next regular term. Defendant thereupon filed his special plea to the indictment, which was by the court denied. At the April term, 1893, of said court, the defendant was tried, convicted, and his punishment assessed at imprisonment in the penitentiary for a term of three years, and, after unsuccessful motions for new trial and in arrest, defendant appealed to this court.

The testimony discloses these facts: That on the 23d day of April, 1890, Ludwig Goetz and his wife were the owners of two houses and lots, described as "lot eight, in block No. 63, in Eastern Kansas, an addition to the city of Kansas;" that they had lived in one of these houses for more than 20 years, and rented the other house to a tenant; that Dr. Flanders, the defendant in this case, resided near them, and had made numerous efforts to purchase this property. These people disliked Flanders, and would have nothing to do with him, and refused at all times to sell the property to him. They were poor, ignorant Germans, and unable to read or write English. On this property were two mortgages, amounting to about \$2,600. A few weeks prior to April 23d, one Henry Sleek, who is jointly indicted for this crime with this defendant, learning of the mortgage upon this property, went to Goetz and wife, and urged them to permit him to secure for them a loan of eastern money on long time, sufficient to make up and satisfy the other mortgages, which they agreed to do. A general warranty deed was presented to them, and represented to be a deed of trust to secure this loan of eastern money, and was signed by them, and duly acknowledged, which conveyed to the defendant Flanders the property above described. Flanders accepted the deed, and, when informed of the fraud, refused to reconvey the property. He also refused to pay off the other mortgages, but offered to buy them, providing the parties would assign them to him. This they refused to do, but offered, if Flanders would pay them, to satisfy and discharge the record. The testimony tends to show that Sleek was the agent of and acting for this defendant, yet at no time did he convey the knowledge or intimate to Goetz or his wife that the transaction was being made with Flanders. Goetz and his wife both positively deny any knowledge as to the contents of the deed signed by them, or that they ever authorized Sleek, or any one else, to sell the property for them.

The defendant's first contention is that the indictment is bad for duplicity, and that the demurrer thereto should have been sustained. It is contended that the indictment charges the defendant with having in the transaction obtained two separate and distinct articles,—real estate, which is one offense under the statute; and signatures to a deed, which is another offense, the punish

ment of which is different,—and that the indictment is therefore double. After making all the necessary averments as to false representations, the indictment contains the following allegations: "And the said Henry Sleek and Francis L. Flanders then and there, with the felonious intent to cheat and defraud the said Ludwig Goetz and Henrietta Goetz of their right, title, interest, and property in and to said lot eight, (8,) feloniously and designedly, by means of said pretenses and representations so made as aforesaid, did obtain and receive of and from the said Ludwig Goetz and Henrietta Goetz the execution, acknowledgment, and delivery, as aforesaid, of the warranty deed aforesaid, and all the right, title, interest, and property of the said Ludwig Goetz in and to said lot eight." Then follows the allegation of the value of the property, and the indictment closes with the allegation of knowledge on the part of the defendants.

The section of the statute under which the indictment was drawn (section 3504, Rev. St. 1889) provides that "every person who with intent to cheat and defraud another, shall designedly, by color of any false token or writing, or by any other false pretense obtain the signature of any person to any written instrument * * * shall, upon conviction thereof be punished in the same manner and to the same extent as for feloniously stealing the money or property or thing so obtained." The punishment for such an offense is fixed by section 3541, Rev. St., at imprisonment in the penitentiary not exceeding 5 years, or in the county jail not less than 6 months, or by fine not exceeding \$1,000 or less than \$500, or by both a fine not less than \$100 and imprisonment in the county jail not less than 3 months. The gist of the offense is the obtaining the signatures to the deed, an instrument of writing, with intent to cheat and defraud; and all other averments as to the acknowledgment and delivery of the deed, and the title of Goetz in and to the property, were mere surplusage, and of no consequence. If the thing—that is, deed—was thus obtained, the offense was then complete. Mr. Bishop (volume 1, Crim. Proc. § 497) says that "if an indictment is founded on a statute, and it contains allegations covering all the terms of the statute, and making a complete offense, and then if it adds something by way of making the offense appear more enormous, the latter matter may be disregarded as mere surplusage." Again, he says (section 480:) "Suppose there is matter in the indictment defectively alleged, yet if, rejecting all this, enough remains to meet the requirements of the law, the indictment is good; the surplusage passes for naught." *State v. Meyers*, 99 Mo. 107, 12 S. W. Rep. 516. In the case of *Com. v. Bolkom*, 3 Pick. 281, it was held that in an indictment charging an innholder with suffering persons "to play at cards and other unlawful games,"

the words "unlawful games" might be rejected as surplusage. The surplusage words employed in this indictment do not in any manner affect its meaning, or charge any criminal offense, and should be disregarded. The indictment is not double, and is, we think, sufficient.

The record discloses the fact that on the 6th day of April, 1893, counsel for defendants filed what they called a "special plea to the indictment," alleging that the grand jury that found the indictment was not legally drawn and summoned, and that their acts were void, asking permission to introduce evidence in support of the plea, which was denied by the court. No exception was saved to the action of the court in regard to this plea, and it cannot now be reviewed by this court. It was too late to raise this question for the first time on the motion for a new trial. *State v. Williams*, 77 Mo. 463; *State v. Burnett*, 81 Mo. 119; *State v. Foster*, (Mo. Sup.) 22 S. W. Rep. 465.

Objection is taken to the action of the court in permitting proof of the acts and declarations of defendant's co-indicttee, Sleek, done and made in the absence of defendant, before any evidence, as he contends, of collusion or confederation had been introduced. This, under the rulings of this court, rests largely in the discretion of the trial court. It would be error if such proof was admitted, unless such conspiracy was shown before or after such evidence was introduced. It is well-settled law that when a crime is committed by several persons the acts and declarations of one cannot be shown against the others unless they are all conspirators, and, in order to make the acts and declarations of one admissible against the others, such conspiracy must be shown to exist either before or after such evidence is introduced. It may be shown by circumstances as well as by direct and positive evidence. In the case of *State v. Walker*, 98 Mo. 95, 9 S. W. Rep. 646, and 11 S. W. Rep. 1133, Black, J., in speaking for the court, says: "It is for the court, in the first place, to say whether there is any evidence of a conspiracy, and for the jury to determine whether there was one, and its objects. Again, it is a matter resting largely in the discretion of the trial court as to when that proof shall be offered. The prosecution may prove the declaration and acts of one, made and done in the absence of others, before proving the conspiracy, provided the proof is afterwards made. *State v. Ross*, 29 Mo. 32; *State v. Daubert*, 42 Mo. 239; *Whart. Crim. Ev.* (8th Ed.) § 698a. It is therefore not material at what time the proof of conspiracy was made. A conspiracy, it is to be remembered, can seldom be shown by direct and positive evidence. It need not be so shown. It may be shown by facts and circumstances." 2 *Whart. Crim. Law*, (9th Ed.) § 1398. The evidence shows that Sleek, in the first place, was pretending to Goetz to secure a loan

for them for about \$2,600, and, while Goetz and wife would have nothing to do with defendant, Sleek had the deed made out to defendant without their knowledge; that he (Flanders) furnished whatever money was furnished, and, as soon as he got the deed, demanded rent of one of the tenants, and began negotiations for the adjustment of other debts which were liens on the property, and in one instance declined to pay off a note executed by Goetz, unless the holder would sign it to him. These and many other occurrences, unnecessary to detail here, had a very strong tendency to show a conspiracy between him and Sleek, to obtain the deed by fraud, and fully justified the court in admitting evidence of the acts and statements of Sleek against defendant before the deed was delivered to him.

Henrietta Goetz, a witness for the state, was permitted to testify, over the objection of defendant, to a conversation that she had with Sleek in his office after the deed was executed and delivered, in which she stated that "Flanders was at our place to collect rent. After that I got my son, and go up to Sleek, and asked him to let me see the papers I signed. He said the papers were with Mr. Flanders. I said, 'What has he got to do with our property?' He said, 'He is the man that furnishes the money.' I told him I didn't want the money from Flanders. I didn't want anything to do with Flanders. I told him he was there to collect the rents. 'What has he got to do with the rent?' Flanders said: 'He has got a deed, he told the tenants.' Sleek said: 'He is just fooling you. You must not believe that. This is just a loan you signed.'" There is no question but that this conversation with Sleek, and his statements made at the time, having occurred after the conspiracy was ended, were inadmissible against Flanders. The common enterprise was then at an end, and no statement made by either one of the conspirators in the absence of the other was admissible as against the one not present. This has been the uniform ruling of this court. *State v. Minton*, 22 S. W. Rep. 806, (not yet officially reported); *State v. Duncan*, 64 Mo. 266; *State v. Fredericks*, 85 Mo. 145; *State v. Melrose*, 98 Mo. 597, 12 S. W. Rep. 250; *State v. Hilderbrand*, 105 Mo. 818, 16 S. W. Rep. 948; *State v. McGraw*, 87 Mo. 161. But the matters testified to by this witness were of such an immaterial and unimportant character that this court would not be justified in reversing the case on that ground alone. In fact the declarations of Sleek made in that conversation had no tendency to implicate or incriminate Flanders. On the contrary, Sleek stated in the conversation that the paper signed was a mortgage,—“this is just a loan you signed.” These declarations asserted the innocence of Sleek, and, if he was innocent, Flanders was. If Sleek's statements were true, no crime was committed, as the transaction was noth-

ing but a loan; and, while Sleek stated that Flanders furnished the money, Flanders himself testified that he did. It is difficult to conceive how defendant could have been prejudiced by the admission of this testimony.

The court admitted in evidence a certified copy of the record of the warranty deed from Goetz and wife to defendant, to which defendant objected, because not the best evidence, and because the proper foundation had not been laid for its introduction. In prosecutions for forgery, “before evidence of the forgery will be admitted at the trial, the forged instrument must be produced, or its nonproduction justified from necessity; as by showing that it is lost or destroyed or not within reach of the process of the court, or is in the possession of the defendant. And in the last instance, not in the others, reasonable notice must have been given him to produce it.” 2 Bish. Crim. Proc. (3d Ed.) § 433. The same rule, by parity of reasoning, would seem to apply in the case at bar. The evidence shows that the original deed was in the possession of the defendant, and the law is that he should have been given notice to produce it at the trial, unless it had been lost or destroyed. Defendant testified that he showed the deed to Mrs. Goetz, when she snatched it from his hand, and tore it up. She also made the same statement when testifying as a witness. Defendant further stated that he did not have the deed with him, and that he could not say where the deed was. This made out at least a prima facie case of the loss or destruction of the deed, and secondary evidence was permissible for the purpose of showing its contents. (*Foulkes v. Com.*, 2 Rob. [Va.] 836; *Rex v. Haworth*, 4 Car. & P. 254; *U. S. v. Britton*, 2 Mason, 464; and this by a copy from the records of deeds, (*Henderson v. State*, 14 Tex. 508.)

There seem to be no well-founded objections to the instructions, as they cover every phase of the case, and were well authorized by the evidence. There are some other objections urged as to the rulings of the trial court, but they seem to be without merit. The verdict of the jury establishes defendant's guilt beyond a reasonable doubt, and, as there is no reversible error in the proceedings or record, the judgment will be affirmed. All concur.

STATE v. NELSON.

(Supreme Court of Missouri, Division No. 2
Nov. 21, 1893.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—INSTRUCTIONS.

On the trial for assault on a city marshal with intent to kill, defendant testified that he shot four times at the marshal, merely to scare him away, and with no intention to kill. Held, that defendant's own testimony justified a conviction, and did not require an instruction as for a simple assault.

Appeal from criminal court, Lafayette county; John E. Ryland, Judge.

William Nelson was convicted of assault with intent to kill, and appeals. Affirmed.

John Welborn, for appellant. R. F. Walker, Atty. Gen., for the State.

BURGESS, J. The defendant was at the March term, 1898, of the criminal court of Lafayette county, convicted of an assault with intent to kill one Marcum Squires by shooting at him with a pistol, and his punishment fixed at imprisonment in the penitentiary for three years. The state offered evidence tending to show that at the time of the shooting, which occurred at the town of Napoleon, Lafayette county, on the 9th day of December, 1892, Marcum Squires was the city marshal of that town, and that he was informed that the defendant was carrying a pistol concealed, and had been exhibiting it in a saloon; that, as city marshal he attempted to arrest defendant, who ran, at the same time pulling a revolver out of his pocket, and, when ordered by the marshal to halt, instead of doing so turned and fired at him three or four times, hallooing at him (Marcum) to shoot his firecracker, at the same time firing two additional shots. Defendant admitted shooting at Squires four times, but testified as a witness in his own behalf that he did not shoot until after the marshal had fired at him, and that he had no intention to kill, but simply fired his pistol at Marcum for the purpose of scaring him only. Squires was not hit by either one of the shots. Defendant did not ask the court to instruct the jury as for common assault, but now insists, and did in his motion for a new trial, that it was the duty of the court to do so anyway. This is the only point insisted upon in this court for a reversal of the case. Section 4208, Rev. St. 1899, makes it the duty of the trial court to instruct the jury in writing upon all questions of law arising in the case which are necessary for their information, whether asked to do so or not. This has been the uniform rule announced by this court. *State v. Palmer*, 88 Mo. 570; *State v. Banks*, 73 Mo. 592; *State v. Maguire*, 113 Mo. 670, 21 S. W. Rep. 212. While the defendant testifies that he shot at the marshal three or four times with a deadly weapon, he also testifies that he had no intention to kill at the time, and shot merely to frighten him. The defendant had the right to testify as to his intention in shooting. *State v. Banks*, 73 Mo. 592; *State v. Palmer*, 88 Mo. 568. But the statements of defendant were so incumbered with the physical facts and conduct of defendant, so unreasonable and inconsistent with the experience of mankind, that the court was not bound to believe him and to instruct the jury on his testimony for a less grade of offense than that of assault with intent to kill. While *State v. Banks*, 73 Mo. 592; *State*

v. Palmer, 88 Mo. 568; and *State v. Tate*, 12 Mo. App. 327,—seem to announce a contrary rule, the more recent decisions are the other way. *State v. Anderson*, 89 Mo. 332, 1 S. W. Rep. 135; *State v. Bryant*, 102 Mo. 24, 14 S. W. Rep. 822; *State v. Turlington*, 102 Mo. 642, 15 S. W. Rep. 141. Had the defendant shot the marshal through the heart and killed him, he could with the same propriety have testified that he did not intend to do so,—a statement that no one would be inclined to believe. Defendant's statement that he did not intend to kill, but shot merely to frighten his pursuer, when at the same time he admitted the shooting, was not worthy of belief, and, as was said by this court in the case of *State v. Bryant*, supra, "so here the physical facts in the case are equally plain, and we shall not stultify ourselves by believing the defendant's words in preference to his acts. The latter are the true exponents of his intention, and they furnish the only safe key to his motives." The evidence shows conclusively that the defendant, if guilty of any offense at all, was that of an assault with intent to kill, and the verdict is sustained by the evidence. Judgment is affirmed. All concur.

STATE v. HACK.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

CRIMINAL LAW—ADMISSIONS OF THIRD PERSON—CREDIBILITY OF WITNESS—HARMLESS ERROR.

1. On a trial for larceny, evidence that a person other than defendant admitted that he stole the goods is hearsay.

2. It is proper cross-examination, as bearing on the credibility of a witness, to ask her if she had not kept girls for the purpose of prostitution.

3. A witness for defendant may be asked on cross-examination if she did not offer the prosecuting witness money if he would go away and not testify against defendant.

4. Where defendant's counsel objects to remarks of the prosecuting attorney, who thereupon desists, and the court instructs the jury to disregard such remarks, there is no error of which defendant can complain.

Appeal from St. Louis criminal court; Henry L. Edmunds, Judge.

Richard Hack was convicted of grand larceny, and appeals. Affirmed.

C. P. Johnson, for appellant. R. F. Walker, Atty. Gen., and C. O. Bishop, for respondent.

BURGESS, J. The defendant was jointly indicted with one Patrick Brown, in the St. Louis criminal court, for the crime of burglary in the first degree and grand larceny in stealing from a dwelling house. At the regular term next thereafter a severance was ordered, and the defendant put upon his trial. He was acquitted of burglary and convicted of grand larceny, his punishment being assessed at three years in the penitentiary. After unsuccessful motions for a new

trial and in arrest, he appealed to this court.

The testimony on the part of the state tended to show that Valentine Gardner, the prosecuting witness, resided on the ground floor of the building No. 722 Clark avenue, in the city of St. Louis; his premises consisting of two rooms and a kitchen. He slept in the front room. He was acquainted with both defendants. Was in their company on the evening of October 12, 1892, and until about 2 o'clock in the morning of October 13th. They were drinking together. At the hour named, Gardner went home, and to bed, closing the door and two windows of his sleeping room. As he undressed, he put his clothes upon a chair. In his vest pocket was a gold-plated watch and chain, (of the aggregate value of about \$75,) also his pocketbook, containing about \$18 or \$20. He got up about half past 6 in the morning, found one of the windows up, and the door open, and discovered that the watch, chain, and money were gone. He met defendants during the forenoon, and spoke to them about his loss, and they declared to him that they knew nothing about the missing articles. On that same morning, however, shortly after 5 o'clock, the defendant went into the second-hand store of one Abe Gallant with the watch in question, and offered it for sale. While they were negotiating the terms, defendant Brown came in with the chain, and offered it for sale. Gallant consented to pay for the two articles \$21, and gave defendant \$11 for the watch and Brown \$10 for the chain. Both defendants lived upstairs over Gallant's store, with one Justine Burkhardt, the mother of defendant, who rented from Gallant, and kept a boarding house. A police officer came into the store during the forenoon, and recovered the watch and chain, and afterwards arrested the defendant and Brown. Both denied all knowledge of the property, but appellant afterwards stated to him that he had obtained the watch from Brown, and admitted that he disposed of it to Gallant. The testimony on the part of the defense tended to show that defendant came into his sleeping apartment, at his mother's, and went to bed, between 11 and 12 o'clock that night; that he came in alone, and remained there during the night, but that Brown came in about 2 o'clock in the morning, waked up Mrs. Burkhardt, and had a talk with her, holding something in his hand; and that, although defendant woke up at the time, he did not get out of bed. Mrs. Burkhardt testified that Brown had a watch and chain in his hand at the time, and defendant undertook to show by her the conversation between her and Brown regarding the watch and chain, but on the objections of the state the evidence was excluded. While on the stand under cross-examination by the state, Mrs. Burkhardt was asked by the circuit attorney "whether or not she had at divers places kept girls for the purpose of prosti-

tution." Defendant objected. The objection was overruled by the court, and she answered that she had not done so. She was also asked on cross-examination "whether she had not, at the preliminary examination of this case, in the court of criminal correction, offered the prosecuting witness the sum of \$300 if he would get out of town, and not appear as a witness against her son, (the defendant.)" Over defendant's objection, the court permitted the question to be pressed, and she answered that she did not, but that, on the contrary, the prosecuting witness offered to go out of town and drop it if she would give him that amount. She also stated that she slept in a room adjoining that of her son, with a man to whom she was not married, but whom she expected to marry "in July next," (the trial being in February.) Defendant testified in his own behalf, and stated that he went to bed about 11 o'clock on the night of October 12th; that he was awakened about 2 o'clock in the morning, and heard Brown asking his mother for \$10, holding a watch in his hand; that his mother refused, and asked whose watch it was, but he did not hear the remainder of the conversation, as he went to sleep again; that he saw Brown about 7 o'clock in the morning, who then had "Gardner's watch and chain," and asked him (defendant) to go with him to Gallant's to borrow some money on a watch; that Brown stated that he had got the watch from Gardner; that he went with Brown, and got \$10 himself on the watch; that he knew it was Gardner's watch, as he had once redeemed it from pawn for Gardner. He admitted that he and Brown had been drinking with Gardner the night before, and that when arrested he had told the officer that he knew nothing about the watch. In rebuttal, over defendant's objection, the state was permitted to show by the prosecuting witness that while the preliminary examination of this case was pending in the court of criminal correction Mrs. Burkhardt offered him \$300 to leave town, and not appear as a witness against her son. (the appellant.) The court instructed the jury to acquit of burglary, and submitted the question of guilt of larceny from a dwelling house, punishment conditioned upon the ascertained value of the property,—whether of the value of \$30 or less. The court also instructed upon the presumption of recent possession, alibi, credibility of witnesses, presumption of innocence, and reasonable doubt. The record shows that the circuit attorney, in his closing address to the jury, used the following language: "Gentlemen of the jury. The counsel for the defendant has given you several illustrations of how innocent men may come into possession of stolen property. That is all right; but what would you do, or any innocent man do, were he found in the possession of stolen property? Why, he would introduce witnesses to prove that he had a good character, which would show

that he was not liable to be guilty of such a thing." When defendant objected to the remarks, nothing further was said on that point by the circuit attorney, and the court said nothing at the time, but at the close the court said to the jury: "Gentlemen, the defendant's character is not in issue. He has introduced no evidence of good character, but the law presumes his character to be good. The state is not permitted to attack his character, and the remarks of the circuit attorney were improper, and should be entirely disregarded by you." No brief has been filed by defendant.

The first ground assigned as error in defendant's motion for a new trial deemed worthy of attention is the action of the court in instructing the jury. No particular objection is made to any of the instructions, and, after a careful examination of them, we have been unable to find any objection thereto. They seem to present the law of the case as we understand it, and are eminently fair and just to the defendant. He had no cause for complaint in regard to them.

It is also urged that the court committed error in admitting illegal, improper, and incompetent testimony on the part of the state, and in excluding proper, legal, and competent testimony offered by the defendant. No testimony in chief was admitted on the part of the state over the objection of the defendant. But when Mrs. Burkhardt (defendant's mother) was testifying as a witness in his behalf it was attempted to prove by her a conversation between her and defendant's co-defendant Brown in regard to the watch and chain in question, which was excluded by the court on the objection of the prosecuting attorney. This evidence was offered for the purpose of proving by the admission of Brown that he had committed the larceny, and not the defendant on trial. This evidence was mere hearsay, and clearly inadmissible. *State v. Evans*, 55 Mo. 460; *State v. Duncan*, (Mo. Sup.) 22 S. W. Rep. 699. In a criminal case the defendant cannot introduce the admissions of a third party tending to show that such party, and not the defendant, committed the crime charged. This witness was also asked on cross-examination whether she had not, at different places, kept girls for the purpose of prostitution, to which objection was made by defendant, and the objection overruled. She answered in the negative, and no evidence was offered by the state to contradict her in this statement. This inquiry was proper, as the prosecution had the right to know her vocation, and what she had been and was then engaged in, as affecting her credibility. 1 Greenl. Ev. § 456; *State v. Grant*, 79 Mo. 113. She was also asked, and, over objection by defendant, required to answer, whether she had not offered the prosecuting witness, Gardner, money to leave the city, and not appear against her son. It was held by this court in the case of *State v. Downs*, 91 Mo.

19, 3 S. W. Rep. 219, that when a witness for the state denies, on cross-examination, at a designated time and place he agreed to leave, and not testify against the defendant, in consideration of \$100, that he may be contradicted by the defendant, as it is not a collateral matter, but goes directly to the credit of the witness, showing him to be corrupt. If the inquiry tends to show the corruption of the witness it is permissible. Whart. Ev. (3d Ed.) § 547; 1 Greenl. Ev. (15th Ed.) § 462. It is difficult to conjecture what would be more cogent proof of the corruptness of a witness than to show that he had hired or attempted to hire, by the use of money, another witness to disappear, or absent himself from the place of trial.

The only remaining question is as to the remarks of the circuit attorney in his closing address to the jury, which are heretofore set forth in this opinion, and which were objected to by defendant at the time. When the objection was made, the circuit attorney desisted in his objectionable remarks, and at the conclusion of his address the court directed the jury to disregard them, conceding that the remarks were objectionable, and out of place. While we see nothing objectionable in the remarks objected to, the court, by his direction to the jury to disregard them, counteracted any baleful influence they may have had on the jury, or any prejudice that may have been created in their minds against the defendant by reason thereof. We have been unable to discover any error in the record which would justify a reversal of the cause, and it will therefore be affirmed. All concur.

STATE v. CANTLIN et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 21, 1893.)

CRIMINAL LAW—EXCEPTIONS—MOTION FOR NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—INSTRUCTIONS.

1. In a criminal case, exception should be saved at the time the court fails to give all needful instructions, and the point should be preserved in the motion for a new trial.

2. It is not necessary that the word "feloniously," used in an instruction, be defined.

3. A requested instruction singling out a certain fact need not be given.

4. A new trial cannot be had on newly-discovered evidence which is the testimony of one a witness for defendant on the first trial.

Appeal from St. Louis criminal court; Henry L. Edmunds, Judge.

John Cantlin and others were convicted of robbery, and appeal. Affirmed.

The other facts fully appear in the following statement by SHERWOOD, J.:

Robbery in the first degree is the charge in one indictment, on which charge the defendants were convicted, and their punishment assessed at five years' imprisonment in the penitentiary. The charging portion of the indictment is this: "That Louis Hen-

dricks, John Cantlin, Richard Cantlin, William Shadwick, and Thomas Mooney, late of the city of St. Louis aforesaid, and state aforesaid, on the 9th day of October in the year of our Lord 1892, at the city of St. Louis aforesaid, with force and arms, in and upon one John Dougherty feloniously did make an assault, and the said John Dougherty in fear of immediate injury to his person then and there feloniously did put, and by force and violence to his person forty-seven dollars, lawful money of the United States, of the value of forty-seven dollars, all of the goods and property of the said John Dougherty, from the person and against the will of the said John Dougherty then and there with force and violence, as aforesaid, feloniously and violently did rob, steal, take, and carry away."

The testimony of Dougherty is to the effect that the prosecuting witness was by trade a steam and gas fitter, but had for several years worked as a common laborer. Had a wife and 10 children, whom he had left in New Orleans until he was able to send for them. He had saved enough money from his earnings to send for them, and had \$47 besides, and they were on their way to St. Louis on a steamer to join him, when the alleged offense was committed. He was boarding meanwhile in a cheap lodging house, kept by one Mrs. Farrington, where he paid \$1 per week for his room. Appellants all lodged in the same house on the floor above Dougherty, and paid 10 cents per night for their accommodation. The two Cantlins and Shadwick roomed together. The money above mentioned consisted of one new \$10 bill, five \$5 bills, and six \$1 bills, and was carried by Dougherty on his person in a small tobacco bag in his inside vest pocket. On the afternoon of October 9, 1892, (a Sunday,) about half past 3 o'clock, Dougherty went to a water-closet on the second floor of this lodging house, and while there took out the bag and the money, and was counting it over, the door being slightly ajar at the time, when appellant Mooney appeared at the door, and, looking at him, remarked, "Quite a nice roll you have there." Dougherty answered, "Only a few pennies I have been saving up;" and immediately returned the money to his vest pocket. He was "somewhat surprised and alarmed" at being thus seen by Mooney, as he did not want any of his fellow lodgers to know that he had the money. Mooney walked away, and soon after Dougherty came from the closet into the hall. As he was walking towards his room, appellants John and Richard Cantlin seized him around the neck and shoulders, appellant Shadwick caught him by the legs, and appellant Mooney struck him with either a banister or bedslat. He was thus thrown and beaten down. Mooney thrust his hand into the vest pocket and took therefrom the little bag and money, and Dougherty became unconscious. On reviving, he found himself

in the dining room, with Mrs. Farrington and a Mr. Clark. He was bleeding profusely, and stated that his money had been taken. In a few minutes police officers came to the house, to whom he made the complaint, and the appellants were taken into custody, all four of them being found in a room on the third floor. Dougherty acknowledged that on the evening before he had asked two other lodgers on his floor for the loan of a quarter, to get his wash from the laundry, (but did not get the money,) and also that on this same Sunday afternoon he applied to a lady in the house for the same sum for the same purpose, (which he did not get,) but stated that he did not tell either of the parties that he had no money, and that he had requested the loan as he did not want to break any of his bills. He denied having been in the room of defendants that afternoon, and having a fight there with them, or that he was acquainted with or associated with them, or drank with them. And he also said that he did not see or know of his brother-in-law, Conley, having any difficulty with any of defendants at or about the time of the robbery; but he did not deny that Conley was there at that time. He further stated that after the robbery occurred he quit boarding at Mrs. Farrington's, giving as a reason therefor that he was afraid of his life among the class of people who boarded there. Annie Bogans, a negro woman, whose social status was demonstrated by the marriage license of which she made prompt proof on taking the witness stand, testified in substance and in particular as follows: That she was not acquainted with Dougherty, nor with any of defendants but Louis Hendricks, whom she always knew by the name of "Cincinnati Loui," and who on former occasions had often joined her in a social glass of beer at her house. That on the afternoon in question, and about the time already stated, she was proceeding down town with a friend, in order for the latter to take a street car, which being done, witness started to return home, and while on the street car tracks in the center of the street, and passing in the rear of Mrs. Farrington's boarding house on the rear or Eighth street side, she "heard such a scrummishing upstairs," and heard a man halloo "Help!" "Watch!" That she looked up, and saw in the hall of the second story John and Richard Cantlin and William Shadwick holding Dougherty, while Louis Hendricks and Thomas Mooney were pounding him with clubs, and saw Mooney run his hand into Dougherty's pocket, and take his money out, whereupon witness hallooed to Hendricks, and said "Cincinnati Loui, you ought to be ashamed of yourself." That thereupon a large crowd gathered about the house, and, to use the language of witness, "just after Mooney got the money he ran out on the second floor porch on the Eighth street side, in front of everybody, and untied a little black bag, and took out the

money. Mooney then slid down one of the porch posts down into the crowd, and I hit him with a piece of wagon stick that I had in my hand, and I said, 'There is the man who has the money;' and Louis Hendricks came out next after Mooney, and they all went back upstairs." Police Officer Callahan testified to arresting a number of men in the house shortly after the alleged robbery, and taking them to the police station, where Dougherty identified the defendants as his assailants, and the others were released. Defendants were searched immediately after their arrest, but no money was found on them, nor in the room where they were arrested was money found, though search was made there just after arrests. When arrested, there were some bruises on John Cantlin's face.

On the part of defendants the testimony showed the following: At about half past 3 o'clock on the afternoon of Sunday, October 9, 1892, appellants, with some others, were in the room of the Cantlins, on the third floor, drinking beer. After a while Dougherty, with his brother-in-law, one Conley, came to the door. Conley asked Richard Cantlin for his bucket, to get some beer, which was refused. Conley then knocked Cantlin down. Dougherty ran into the room, exclaiming: "All hands off; a fair fight!" and advanced on John Cantlin. They began fighting, scuffled out into the hall, and then Dougherty dragged Cantlin down the stairs to the second floor. Mooney alone followed to assist Cantlin, (the others remaining in the room,) securing a loose banister on the way down, and when he reached the lower hall, seeing Dougherty had Cantlin down on the floor, he "knocked Dougherty down, and used him rather roughly." Cantlin also secured a piece of banister, and was beating Dougherty with it, when Mrs. Farrington came out of the dining room, and separated them, and Mooney and Cantlin returned to their room. Shadwick and the others had meanwhile separated Richard Cantlin from Conley, who disappeared, and Shadwick and Richard did not leave the room until arrested by the officer. Defendants all denied taking any money from Dougherty. Defendants also introduced testimony establishing good character, and showing that Dougherty, in spite of his assertions to the contrary, was well acquainted with all of the defendants except perhaps Hendricks, and frequently was in their rooms, laughing and drinking with them. The testimony of defendants themselves was abundantly supported by that of others who were in the room with them at the time the fight occurred. Mrs. Farrington testified that she had lain down that afternoon to take a nap, and about half past 3 heard Dougherty in the hall, calling for help. She opened the dining room door, and saw what she took to be a fight going on in the hall. Mooney and one of the Cantlins had Dougherty down on

the floor, and were "pounding him with a club." She had to push them back to prevent them from hitting him after she entered the hall. She and a Mr. Clark took Dougherty into the dining room. He seemed "to be dazed." She fastened the door securely behind her, to prevent Mooney and Cantlin from coming in. After a few minutes Dougherty revived, called for help, and said, "I have been robbed of my money." She had frequently loaned Dougherty small amounts of money, (as she did other boarders,) which he had always promptly repaid. She also stated that after Dougherty said he was robbed she went to the water-closet; that no light was burning there that Sunday afternoon, and it was quite dark in there, too dark for one to count money; and that she went into the water-closet on purpose in order to see how light it was. Mrs. Farrington also expressed her confidence that no one could stand where Annie Bogans stood on the Eighth street car tracks, and distinguish any one in the hall of the second floor of her boarding house, but she does not state that she went down to the tracks in order to see if this were the case. She also stated that she nailed down the north windows on the second floor of the Eighth street side. And she further said that the doors on the second floor rooms were closed that afternoon, and that she was "sure" neither Mooney nor any other one of defendants slid down the porch posts that Sunday afternoon, though she does not state why she was "sure." And, respecting Dougherty's quitting her boarding house immediately after the alleged robbery occurred, she states that he remained at her house for some three weeks after its alleged occurrence, and until his family came from New Orleans. Such, in brief, is the testimony herein.

At the close of the testimony the court gave the several instructions as to good character, competency, and credibility of witnesses, presumption of innocence, and reasonable doubt, and also gave the following instructions: "(2) If you believe and find from the evidence that in the city of St. Louis, and on or about the 9th day of October, the defendants [naming them] assaulted John Dougherty, and from his person, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person, did feloniously rob, steal, take, and carry away the property of John Dougherty, to wit, forty-seven dollars, —if from the evidence you so find, you will convict them of robbery in the first degree; and unless you so find and believe from the evidence, you should acquit them." "(5) The court instructs the jury that every person who is present at the commission of a felony, aiding, abetting, assisting, or encouraging the same by words, gestures, looks, or signs, is in law deemed to be an aider and abettor, and is liable as a principal. But, on the other hand, mere presence at the

commission of a felony or other wrongful act does not render a person liable as a participator therein. If he is only a spectator, innocent of any unlawful intent, and does not aid, abet, assist, or encourage those who are actors, he is not liable, as principal or otherwise. Therefore, if from the evidence you believe and find, beyond a reasonable doubt, that any of the defendants actually assaulted the prosecuting witness, John Dougherty, and by force and violence, or by putting him in fear of some immediate injury to his person, took from him or from his person, against his will, the property described in the indictment, with the intent at the time to steal, take, and carry away such property, and that any of the other defendants were then and there present aiding, abetting, and encouraging in any way or by any means the same, you should convict such other defendant of the offense of robbery in the first degree; otherwise you should acquit such other defendant. (6) The jury are instructed that, in order to convict all of the defendants in this cause, it is not necessary that the jury should believe that each and all of the defendants actually assaulted or struck the prosecuting witness, John Dougherty, or that they even took hold of him, or even touched his person; but if the jury believe from the evidence, beyond a reasonable doubt, that any of the defendants actually assaulted the said John Dougherty, and by force and violence to his person, or by putting him in fear of immediate injury to his person, took from him, against his will, the property described in the indictment, with the intent then and there to steal, take, and carry away the said property, and further find that the other defendants, or any of them, were present aiding, assisting, or encouraging, or for the purpose and with the intent to aid, assist, or encourage, if necessary, the defendant or defendants actually making such assault, then the defendant or defendants so doing or so present for the purpose aforesaid are equally guilty with the one or ones actually making such assault; and the jury should so find." Defendants asked the following instructions, which were refused: "(1) If the jury find from the evidence that the prosecuting witness, John Dougherty, on the morning of the alleged offense, did not have as much money as 25 cents in his possession, or that on the morning of October 9th, or on the evening just prior to the day of the alleged offense, he had not sufficient money with which to pay for his laundrying, these facts may be taken into consideration by the jury in determining whether or not he was actually robbed of money, as charged in the indictment. (2) Though the jury may find that one or more of the defendants on the occasion of the alleged offense clubbed the prosecuting witness, John Dougherty, yet if they further find and believe from the evidence that no money was forcibly taken from him, as charged in

the indictment, they will find the defendants not guilty." The grounds alleged for a new trial in the separate motions are the same, viz. that the court gave illegal and erroneous instructions, that the court refused proper and legal instructions, and that there is no evidence to support the verdict; and on the part of Shadwick and Mooney there was the additional ground suggested of newly-discovered evidence.

T. S. Burnett, for appellants. R. F. Walker, Atty. Gen., and O. O. Bishop, for the State.

SHERWOOD, J., (after stating the facts.)
 1. The defendants are not represented in this court, but in the motion for a new trial the grounds on which defendants rely have already been set forth in the preceding statement. One of the grounds of the motion is that there is no evidence to support the verdict of the jury. The record itself contradicts this assertion; there is evidence to support the verdict. As to whether the jury should have believed the defendants rather than Dougherty, was a question solely for the jury. If the testimony of Dougherty had transcended all bounds of human probability, or if he had stated facts physically impossible, then such a ground as is now urged might be tenable; but this is not the case. And if his testimony was contradicted by several witnesses, or was improbable, still, within the bounds before mentioned, we cannot usurp the province of the triers of the facts, as we have again and again decided. *State v. Breedon*, 58 Mo. 507; *State v. Moxley*, (Mo. Sup.) 22 S. W. Rep. 575; *State v. Orrick*, 106 Mo. 111, 17 S. W. Rep. 176, 329. The like line of remarks applies to the testimony of Annie Bogans; and while on this point it may not be improper to observe that in the affidavit made by John Schmidt, the keeper of a grocery store under the Farrington boarding house, and which affidavit was filed in support of the motion for a new trial made by Hendricks, it appears that the affiant at the time the alleged robbery occurred, while in his store, heard Dougherty halloo, "Murder!" "Police!" "Help!" and, on looking up at the window on the Eighth street side and on the second floor, saw Dougherty with his head out of the window. and, looking over across the street, saw Hendricks walking quietly along; and upon this showing Hendricks was granted a new trial, and thereupon a nolle proas. was entered as to him. If John Schmidt in his own store on the ground floor could see Dougherty with his head out of the second-story Eighth street window, it would not seem difficult for Annie Bogans, standing out in the center of the street, and on the car tracks, to do the same thing. Of course, the testimony of Schmidt was not before the jury, but it has a strong tendency to show that the testimony of Annie Bogans was neither impossible, false, nor feigned.

2. The instructions given by the court seem fairly to cover the issue joined between the state and the defendants, and if they did not there is no statement in the motion that the court failed to give all proper and needful instructions. So that, if the court did fail to instruct the jury upon all questions of law arising in the case which were necessary for the information of the jury in giving their verdict, exception should have been saved at the time such failure occurred, and the point should have been preserved in the motion for a new trial, and this for the reason that exceptions in criminal causes occupy the same footing as do those in civil matters, and can only be preserved by the same methods of procedure. *State v. De Mosse*, 98 Mo. loc. cit. 344, 11 S. W. Rep. 731; *State v. Foster*, (Mo. Sup.) 22 S. W. Rep. 468.

3. As to the word "feloniously" being used in the second instruction given at the instance of the state without defining the meaning of the term, it suffices to say that under *State v. Scott*, 109 Mo. 226, 19 S. W. Rep. 89, such process of definition was unnecessary. Besides, the other instructions given set out very plainly all the constituent elements of the crime charged, and so there was no opportunity for the jury to be misled.

4. The instructions asked by defendants seem to be covered by those given; but, if not, it is not requisite that the trial court should single out a certain fact, and base instructions on that.

5. On the part of two of the defendants—Shadwick and Mooney—the ground of newly-discovered evidence was suggested in the motion for a new trial, and supported by the affidavit of Mrs. Farrington. Examining her affidavit, it, while more full in details, does not differ very materially from her testimony as already related; but, if it did, she was the witness of the defendants, and if they failed to elicit from her all she knew about the case, such failure cannot be attributed to anything but lack of diligence in failing to discover that she knew more than her testimony on the stand indicated. *Cook v. Railroad Co.*, 56 Mo. 380, and cases cited. Judgment affirmed. All concur.

RELIANCE COAL & COKE CO. v. KENTUCKY COAL & COKE CO.

(Supreme Court of Tennessee. Sept. 16, 1893.)
MINES AND MINING—LEASES OF ADJOINING COAL LANDS—RESERVATIONS—INJUNCTION.

1. A lease of coal lands reserved to the lessor and his assigns the joint use of such portions of the leased lands as might be necessary for roads, railways, water ways, side tracks, and other structures necessary for the profitable working of adjacent coal lands of the lessor and his assigns, but not so as to injuriously interfere with the workings of the lessee. *Held*, that the lessee might enjoin the making of an entry through and under his land for the purpose of mining coal on adjacent leased land, where the weight of evidence showed that the coal in the adjacent lands could be mined profit-

ably without such entry, though not so profitably or so conveniently as with it.

2. The reservation in the lease as to "roads, railways, water ways, side tracks, and other structures" related to surface ways for the purpose of ingress and egress to the surface of the adjacent land, and did not embrace underground entries through complainant's leased land.

3. The language of complainant's lease could not be enlarged or altered by the grant in a subsequent lease, of adjoining land, of all such rights of making entries and erecting structures for mining purposes under, through, or upon complainant's leased land as the lessor was competent to grant, since the lessor could grant no rights over complainant's land, except in strict conformity with the reservations of complainant's lease.

4. The making of an entry through, and the erection of structures on, complainant's land, by the lessee of adjoining land, for the latter's exclusive use, were not authorized by the reservation in complainant's lease.

Appeal from chancery court, Claiborne county; John P. Smith, Chancellor.

Bill by the Reliance Coal & Coke Company to enjoin the Kentucky Coal & Coke Company from opening entries on defendant's land, and from committing further trespasses thereon, and for an accounting. From a decree for defendant, complainant appeals. Reversed.

H. M. Carr and G. W. Saulsberry, for appellant. Jesse L. Rogers, for appellee.

WILKES, J. Complainant and defendant are lessees from the American Association, Limited, of adjoining tracts of coal lands in Claiborne county; complainant's lease being of date August 8, 1891, and covering what is called in the record "Lease No. 7," while defendant's lease is dated September 29, 1891, and covers what is called "Lease No. 9." The lease to complainant provides, among other things, that it shall have the exclusive right and privilege of mining coal upon the property leased, and that it shall at any time during the lease peaceably and quietly hold and enjoy the premises leased, without any let or hindrance from the lessor or its assigns, or any other person lawfully claiming the same, or any part thereof. It also provides for a minimum royalty or dead rental of \$5,000 per year for each year after the first, or a minimum annual rental of \$10 per acre, and covering about 500 acres of ground. The fourth paragraph of the lease contains this language: "Said first party [meaning lessor] retains and reserves the right * * * to build and construct houses, roads, railways, tramways, quarries, brick works, saw-mills, or other works or improvements, or to farm thereon, all land not used or required by the second party for its works, which work is to have first consideration and preference." The fifth contains: "The party of the first part [to wit, the lessor] retains the right, for itself or its assigns, to the joint use, during the continuance of this lease, of all such portions of the above-described lands as may be necessary for roads, railways, water ways, side tracks, and other structures

necessary for the profitable working of other lands of the party of the first part, or its assigns, in the vicinity of the above-leased premises, but not to injuriously interfere with the working of the party of the second part," etc. In the lease to defendant of lot No. 9, these words of conveyance are also used, to wit: "All such rights as making entries and erecting structures for mining purposes under, through, and upon the premises adjoining the above, known as 'Lease No. 7,' as the party of the first part is competent to grant." On the property leased by complainant, defendant began opening an entry through and under the surface; began, also, the construction of a side track at the opening of the entry, about 500 feet in length; and is proposing to erect a tippie and coal chute for the purpose of loading its coal into cars at the opening of the entry; and was cutting timber and removing coal from the premises of complainant,—whereupon this bill was filed to enjoin defendant from the further opening of entries, and the commission of any further trespasses, and disposing of the coal taken out of the entry, and for an account.

Defendant admits that it had commenced to open the entry, as stated, along the coal seam on complainant's property; that it intended to make an entry 16 feet wide for the distance of 100 feet, and then drive a crop entry at right angles, 9 feet wide, until it reached its own premises, and that in so doing it was taking the coal out of the entry, as it progressed, just as it would dirt, stone, or any other material obstructing the way; and it claimed the right to do this under the clause of the lease heretofore set out.

On the trial of the cause, after much proof was taken, the chancellor held that the complainant was entitled to no relief; that the defendant had the right to make necessary roads, railways, water ways, side tracks, or other structures over or through the tract of land leased to complainant, necessary for the profitable working of the lands leased to the defendant, but so as to not injuriously affect or interfere with the working of complainant on its leased premises. The court further found and decreed that such way as defendant was making through complainant's land was necessary for the working, profitably, of the coal on defendant's land, and that said way, as well as the side track that the defendant was constructing at its entry at the time of the filing of the bill in this case, would not injuriously interfere with the working of the complainant on the premises. The injunction was thereupon dissolved, and defendant was permitted to proceed with its work, under the direction of the court, and complainant was taxed with the costs. From this decree, complainant appealed, and has assigned errors:

First, that the chancellor erred in finding that the way, as defendant was making the same, through complainant's lease,

was necessary for the profitable working of the coal on defendant's lease. Upon this question of fact, the proof is very conflicting, and the contention of each party is well sustained by the testimony of mining and engineering experts. After a careful examination of the entire testimony, we are of opinion the chancellor is not sustained by the weight of the testimony. Under the proof, it is apparent that the opening of the way, as proposed by defendant, would be very advantageous to it, and that by the use of such way its property could be more profitably, easily, and conveniently worked; but we are not convinced that such way is necessary for the profitable working of the coal on defendant's premises, in the sense that no other way is open for its profitable operation, but the weight of the testimony is that the coal on defendant's leased premises may be profitably, but not so conveniently, worked, without making use of this way. We consider this established by the testimony of Jackson Dickson Park, and, to some extent, conceded by defendant and its witnesses.

The second assignment is that the chancellor erred in finding that the way, as the same was being opened by defendant, through complainant's lease, together with the side track that defendant was constructing at its entry, would not injuriously interfere with the working of complainant's premises. Upon this question of fact, there is likewise great conflict of apparently reliable testimony; and it is remarkable that competent, reliable, intelligent witnesses,—many of them experts, with large experience, and ample opportunities for knowledge,—should differ so widely from each other. We are fully satisfied, however, that the entry proposed to be made, and the side track proposed to be laid, and the tippie, chute, and other appurtenances of the mining plant proposed to be erected and built on complainant's premises by the defendant would materially interfere with, damage, and injure complainant's rights under its lease, by occupying one of the most eligible sites on its lease, to its own exclusion, by taking out coal from complainant's premises, which it has the right to mine; by erecting structures and a mining plant for defendant's use on complainant's land, to the exclusion and prejudice of complainant in erecting a similar plant.

The third assignment of error is that the chancellor erred in holding that defendant had the right to make necessary roads, railways, water ways, side tracks, or other structures over or through complainant's premises. This assignment involves the proper construction of the provisions of the two leases, portions of which have been heretofore set out. While we may look to the language used in the lease to defendant to ascertain its rights as against its lessor, it is evident that, being of later date than com-

plainant's lease, it cannot prejudice the same. It will be observed that only the fifth clause of the lease relates to the reservation made in favor of the lessor or its assigns in regard to contiguous property; clause No. 4 relating to such reservations as were made to the lessee in the premises therein leased,—the latter relating to the premises leased, and the former to premises in the vicinity of that leased. Looking to the language of this clause, we are of opinion that it relates only to such surface ways over the leased premises as are necessary for the purpose of ingress and egress to the surface of other properties adjacent or in the vicinity, and does not relate to or embrace underground entries through the leased premises; and the term "railways, water ways, side tracks, and other structures necessary for the profitable working of other lands in the vicinity," means such surface ways and structures as are necessary for such ingress and egress. To hold that, under this language, underground entries could be made by defendant on complainant's premises, and underground ways could be cut through the coal under the surface, and that tipples, chutes, and other conveniences of a mining plant, could be established on complainant's land, would be to subject it to such a servitude as would greatly damage, if not totally destroy, its value. If this were so, and complainant's premises were favorably located, then it would follow that entries could be run under its surface in every direction that might be beneficial to other properties, and it might be made the common center of mining plants for all the property in its vicinity, to the great damage or utter destruction of complainant's rights under its lease. Such incumbrances and servitude cannot arise unless they are expressly provided for, and reservations to that extent are made in plain, unambiguous letters. Such rights do not arise in favor of contiguous landowners by implication of law, and such ways are not ways of necessity, and the question is not one of convenience, but one of necessity. *Pearne v. Manufacturing Co.*, 90 Tenn. 629, 18 S. W. Rep. 402.

For the same reason, and upon the same grounds, the fourth assignment of errors is well made, and must be sustained. This assignment is that the chancellor erred in finding that the entries, side tracks, tipples, and other structures in process of erection by defendant on complainant's lease, came within the reservation clause in complainant's lease providing for roads, railways, water ways, side tracks, and other structures, as therein specified. This language in complainant's lease cannot be enlarged, or in any wise altered, by that put in the lease to defendant, to wit: "That the defendant should have all such rights of making entries and erecting structures for mining purposes under, through, or upon the premises of complainant as the lessor was competent to

grant." The lessor could grant no rights over complainant's premises other than in strict conformity with reservations made in complainant's lease. Again, the reservation under the fifth clause retains the right to the lessor or its assigns to the joint use of all such portions of the lands as may be necessary for roads, railways, water ways, side tracks, and other structures necessary for the profitable working of other lands in the vicinity, etc. There is no reservation of any way, track, structure, or road to be used exclusively by an owner of other property, but the reservation is only for the joint use of such owners and complainant. It will hardly be contended that the entry proposed to be made by defendant under complainant's land, and the side track and mining plant intended to be built by it, are intended for the joint use of itself and complainant, but they are designed for defendant's exclusive use, and are not authorized under the reservations in complainant's lease. It follows that the chancellor was in error in refusing relief to complainant, and his decree is reversed, and the injunction prayed in the court below will be made perpetual. Defendant will pay the costs of this and the lower court, and the cause is remanded for an account of the coal mined, timber cut, and waste committed on complainant's premises by defendant.

LITTLE ROCK & M. R. CO. v. BARRY.¹

(Supreme Court of Arkansas. Nov. 25, 1893.)

FELLOW SERVANTS — TRAIN DISPATCHER AND ENGINEER — ACTION FOR PERSONAL INJURY — INSTRUCTION AS TO DAMAGES.

1. A train dispatcher, who controls the movement of trains, represents the company, and is not the fellow servant of an engineer injured in a collision resulting from his negligence.

2. Where the only evidence as to the expenses of plaintiff's sickness resulting from the injuries caused by defendant is plaintiff's testimony that he paid the doctor everything he had, and still owed him, without stating any amount, it is error to instruct the jury that they may consider as an element of damages the past and present expenses of the sickness.

Appeal from circuit court, Pulaski county; Robert J. Lea, Judge.

Action by G. F. Barry against the Little Rock & Memphis Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

U. M. & G. B. Rose, for appellant. W. L. Terry and J. M. Moore, for appellee.

HUGHES, J. The appellee was fireman on a special passenger train of the appellant, which came in collision with a freight

¹ Rehearing pending.

train standing on the main track of appellant's road, at Forrest City. The appellee, perceiving that a collision would occur, jumped from his position on the special train, believing, as he testified, that it was necessary for him to do so to save his life. He was, as the evidence tends to show, injured thereby, and upon the verdict of a jury recovered judgment against the appellant for \$10,000, to reverse which the case was brought here on appeal. The road is a single-track road, and the special and the freight were both coming west when the collision occurred. Between Edmonson and Forrest City there was no telegraph station, but there was one at Edmonson, and one at Hopefield, which places are east of Forrest City, on the appellant's road, and west of Memphis. The testimony shows that the freight train left Edmonson at 9:40 A. M., and that it was then about three hours behind its schedule time, and that it did not reach Forrest City until 1:35 or 1:50 P. M., the same day. It was due at 7:45 A. M., but was over five hours and thirty minutes late, having been delayed between Edmonson and Forrest City by the breaking in two of the train. The special train left Memphis at 11:40 A. M., left Hopefield at about 12:35 P. M., and passed Edmonson at 12:54 the same day. The superintendent of the road told the conductor of the special to keep a sharp lookout for the freight, and the conductor told the engineer of the special that the freight was in the bottom,—the country between the Mississippi and St. Francis rivers,—and that he must keep a sharp lookout for it. Just east of Forrest City, through Croley's ridge, there is a deep cut, and a reverse curve on the road in the shape of the letter S. The freight train was a heavy and long one, and could not sidetrack at Forrest City, and the rear cars of the freight train extended back into this cut in Croley's ridge. When the special reached this cut, its whistle was sounded, but very soon after it ran into the freight cars. The freight train had been at the station at Forrest City only about one minute, according to the testimony of the engineer of the freight, when the accident happened. The officers of the freight train, it appears, had no knowledge or information that the special was behind it. The orders for the government of the trains as to how they should run, where they should stop, etc., were given by a train dispatcher, and are required by the rules of the company to be in writing, and verbal orders are not permitted. The testimony shows that it is the train dispatcher's duty to give orders to the different trains; that he controls their movements, and should keep himself informed as to their whereabouts. The only orders given to the conductor and engineer of the special, as shown by the testimony, those mentioned in the testimony of the telegraph operator at Forrest City, which are the following:

"Little Rock & Memphis Railroad. Telegraph Train Order No. 5.

"Memphis, Oct. 26, 1890.

"To C. & E. of Eng. 5, Hopefield; C. & E. No. 5, Forrest City; C. & E. Eng. 4 and No. 6, Brinkley: Engine 5 will run from Hopefield to Argenta extra. When No. 5 is overtaken, pass and run ahead of them. Meet No. 6 and engine 4 at Brinkley. Do not pass Brinkley unless engine 3 is there.

"A. J. W.

"Conductor and engineer must each have a copy of this order.

"Time received 12:23 P. M. O. K. Given at 12:25 P. M.

Conductor.	Train.	Made.	At	Received by.
Heth	Eng. 5.	Complete	12:29 P. M.	G.
Hedrick	No. 5.	"	2:44 P. M.	B.
Fennesseey	Eng. 4.	"	6:30 P. M.	Fl.
Kearns	No. 6.	"	6:45 P. M.	Fl."

It is contended by the appellant that under its rules these orders were sufficient, and by the appellee that under the circumstances of this case they were not sufficient.

The court refused to instruct the jury at the instance of the appellant, as follows, to wit: "You are instructed that the engineer, conductor, and brakeman of the freight train and the train dispatcher were fellow servants of the plaintiff; and if you find that the accident resulted from the negligence of any of them, you will find for the defendant." The court modified this instruction by striking out the words, "and the train dispatcher," and gave it as modified. To this modification the appellant excepted. At the instance of the appellee the court gave to the jury the following instructions: "If you find for the plaintiff, in assessing his damages you may consider the character of the injuries received by him; how far they have disabled him, or may in the future disable him, from pursuing his ordinary occupation; and also the physical pain and suffering to which he has been, or may be in the future, subjected by reason of such injuries; the effect of the injury on his health; the past and prospective expenses of his sickness resulting from his injury,—and allow such damages as in your judgment would be a fair and just compensation for the same, not exceeding the amount sued for." To the giving of which the appellant excepted.

The only question we consider here is, were these instructions obnoxious to the objections urged against them? Did the court err in modifying the third and in giving the fourth? There is an irreconcilable conflict of authority upon the vexed question, who are fellow servants? In Massachusetts it is held that all who are engaged in a common employment, working to accomplish a common result, are to be regarded as fellow servants. Many, and perhaps

a majority, of the states, adopt this rule. But it is said that the tendency of recent decisions is to narrow this rule. In *Railway Co. v. Ross*, 112 U. S. 377-390, 5 Sup. Ct. 184, the court said: "There is a clear distinction to be made in relation to their common principal between the servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of superintendence and discretion." In *Sheehan v. Railroad Co.*, 91 N. Y. 332, a superintendent and assistant superintendent, acting as train dispatchers, were held to be vice principals. In *Smith v. Railway Co.*, 19 Mo. App. 120, it is held that the train dispatcher, in ordering the movement of trains, is to be regarded as the representative of the railroad company, where he has sole and exclusive control in directing their movements. In *Darrigan v. Railroad Co.*, 52 Conn. 285, it is held that it is the duty of the railroad company to devise some suitable and safe method of running special and irregular trains, so as to avoid collision; and, when the method employed is to have the trains controlled by a train dispatcher, the latter, as to employees in charge of trains, stands in the place of the company." The court said: "It is immaterial that these men are hired and paid by a common employer, and that the employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions between those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service." See, also, *Railroad v. McLallen*, 84 Ill. 108. The decisions in Ohio, Kentucky, Illinois, and Tennessee are substantially in harmony with the cases cited. It seems impossible to formulate any general rule for all cases. Each case must, to some extent, be governed by the peculiar circumstances attending it. In *Railroad Co. v. McKenzie* it was held that, under the circumstances of that case, a section boss and night watchman represented the company, the court saying: "Where the injuries are caused by the negligence of a servant, who is charged with the performance of duties which, by law, it is incumbent on the master to perform, such servant is regarded as the representative of the master; and in legal contemplation his negligence is the negligence of the master." 81 Va. 73. Judge Cooley says: "The master is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect of the particular duty then resting upon the negligent employe, the latter so far occupied the position of his principal as to render the principal so far chargeable for

his negligence as for personal fault." Cooley, Torts, 564. Under the circumstances of this case, the movements of the trains being under the direction and control of the train dispatcher, in directing and controlling their movements he was performing the master's duty, and was not a fellow servant with the plaintiff, but the representative of the company, for whose negligence, if any, resulting in injury, the company is liable. There was, therefore, no error in the modification of the third instruction given for the appellant, as modified.

The fourth instruction—as to the measure of damages given for the appellee—is erroneous in this: that it told the jury they might consider as an element of the plaintiff's damages the past and prospective expenses of his sickness resulting from his injury, and allow such damages as in their judgment would be a fair and just compensation for the same, not exceeding the amount sued for. The only evidence in regard to expenses of plaintiff's sickness caused by the injury is his own, which is as follows: "I have paid the doctor all the money I had, after selling everything I had, and still owe him." How much this was is not shown. How, then, could the jury estimate it? They could not find the amount from the testimony, and there was, therefore, no evidence upon which to base this part of the instruction. It was calculated to mislead the jury, and make them think the damages were entirely at their discretion. How far it affected their finding we cannot tell. There were elements of speculative damages in the case contemplated in the framing of the instructions, and the jury were at liberty under it to think they were authorized to speculate as to the amounts of the past expenses of the plaintiff's sickness arising from his injury. For the error in giving the part of this instruction referred to, the judgment is reversed, and the cause is remanded for a new trial.

JAMES v. JAMES.

(Supreme Court of Arkansas. Nov. 11, 1898.)

NEGLIGENCE—PROXIMATE CAUSE.

Failure of the owner of a cotton gin to gin cotton within the time he had contracted so to do is not the proximate cause of the subsequent destruction of the cotton by fire while at the gin, and he is not responsible for such destruction, unless he failed to use ordinary care for its preservation.

Appeal from circuit court, Randolph county; John B. McCaleb, Judge.

Action by John F. James against A. W. James for the destruction of certain cotton at defendant's gin. The cause was originally brought in justice's court, and there was a judgment in plaintiff's favor. Defendant appealed to the circuit court, where plaintiff again recovered judgment. Defendant appeals. Reversed.

The other facts fully appear in the following statement by WOOD, J.:

Appellee filed his complaint before a justice of the peace, alleging that he, as constable, had levied a writ of attachment upon 2,064 pounds seed cotton, which he delivered to appellant upon contract to gin the same immediately; that appellant neglected to gin said cotton according to agreement; and that, by reason of such failure, same was burned. He prayed judgment for \$56.70, and obtained verdict and judgment for that amount, from which appellant appeals. Appellee testified that he delivered the cotton levied upon, under an order of the court, to the appellant, under a special contract that he (appellant) would gin the same on the following Monday, the cotton being delivered on Saturday; that the appellant neglected to gin same on Monday; that on Tuesday he went to the gin to mark the cotton and roll it off the yard, but it had not been ginned; that on Thursday following the cotton was burned; and that it was worth \$56.70. This was all the evidence on behalf of appellee as to the contract, and all that is necessary to state in order to understand the opinion of the court.

J. C. Hawthorne, for appellant. P. H. Orenshaw, for appellee.

WOOD, J., (after stating the facts.) The theory upon which a recovery is sought in this case is presented by the complaint, the testimony of appellee, and the following instruction given by the court upon its own motion: "The jury are instructed that if they believe from a preponderance of the evidence that the plaintiff, while acting as constable, delivered to the defendant or his agent the cotton in controversy, under a contract that the defendant would gin it by a certain time, and that the defendant negligently failed or refused to gin said cotton as agreed, and that the same was thereby destroyed, they would be authorized to find for the plaintiff."

No causal relation is shown between the failure of appellant to comply with his contract to gin, and the fire, which was the direct cause of the loss of the cotton. The appellee does not seek recovery upon the ground that the bailee for hire did not use ordinary care in the preservation of the cotton, or that he negligently destroyed it. The rule of law founded in justice and common sense, and of universal application, as expressed in the maxim "*causa proxima, non remota, spectatur*," makes the first instruction, as above quoted, when applied to the facts, clearly erroneous. This is the only just and reliable measure of liability. True, we might say, if the cotton had been ginned on Monday, and carried away on Tuesday, it would not have been burned on Thursday. To use language similar to that employed by Justice Battle in the case of *Martin v.*

Railway Co., 55 Ark. 521, 19 S. W. 314, "the failure to gin on Monday" was one of a series of antecedent events, without which the loss would not have occurred, but such failure was in no sense the proximate cause of the loss. *Denny v. Railroad Co.*, 13 Gray, 481; *Daniels v. Ballentine*, 23 Ohio St. 532; *Martin v. Railway Co.*, 55 Ark. 521, 19 S. W. 314; *Dubuque Wood & Coal Ass'n v. City and County of Dubuque*, 30 Iowa, 178; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Railroad Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171.

We deem it unnecessary to pass upon other questions raised, for, if the case is presented again in the court below, it must be constructed and tried upon a different theory. Reversed and remanded.

OLARENDON LAND, INVESTMENT & AGENCY CO., Limited, v. McCLELLAND et al.

(Supreme Court of Texas. Nov. 23, 1893.)

SUPREME COURT—REVIEW ON APPEAL—EVIDENCE—ASSIGNMENT OF ERRORS.

1. Act April 13, 1892, § 5, provides that "the judgment of the courts of civil appeals shall be conclusive upon the facts of a case." Rev. St. art. 1033, as amended by Act April 13, 1892, provides that the supreme court, upon the hearing of a case brought up by a writ of error, "may require at any time the original transcript to be sent up." *Held*, that the supreme court, while not empowered to revise the conclusions of fact of the court of appeals, may consider the evidence, in rendering its decision.

2. An assignment of error is sufficient if so specific as to enable the court to see that a particular ruling is complained of, though it does not state the grounds on which the ruling is claimed to be erroneous.

On rehearing. For former opinion, see 23 S. W. 576.

GAINES, J. In this motion for a rehearing, the appellees do not ask a reconsideration of our ruling upon the principles of law which govern the merits of the controversy; but they do insist that the record, as it came to us, did not, under the constitution and laws of the state, and the rules of practice of this court, present for our consideration the questions determined in the former opinion.

It is contended, in the first place, that because our jurisdiction is limited to questions of law, and because the judgment of the courts of civil appeals are made conclusive upon the facts, we are not at liberty to look beyond the conclusions of fact filed in such a court, in determining a case brought before us upon a writ of error. The statutes provide that, in a cause in which a writ of error lies to the supreme court, the court of civil appeals shall file its conclusions of fact and law, and it was doubtless contemplated that these conclusions should embody a full

statement of all the facts established upon the trial of the case. Act April 13, 1892, § 31; Laws 1892, p. 31. It is also true that the fifth section of the same act provides, among other things, that "the judgment of the courts of civil appeals shall be conclusive upon the facts of a case," but the meaning of the provision is clear. To recite the uncontroverted facts of a case demands no act of judgment, in the sense in which that term is used in the statute. What is meant is that the decision of that tribunal upon questions of fact,—that is to say, questions upon which there may be a conflict in the evidence,—shall be final, and not the subject of review in this court. Article 1033 of the Revised Statutes, as amended by the act of April 13, 1892, provides that the supreme court, upon the hearing of a case brought up by a writ of error, "may require at any time the original transcript to be sent up," (Laws 1892, p. 22;) and in pursuance of that authority this court has adopted a rule which directs that the transcript shall be transmitted to this court in every case in which a writ of error shall have been granted, (84 Tex. 696, Rule 5, 20 S. W. v.) If it was intended that the supreme court should decide the case upon the conclusions of law and fact filed in the court of civil appeals, the power conferred by the provision in the statute last cited is nugatory. We think the purpose was to empower this court, not to revise the decision of the court of appeals upon any disputed question of fact, but to enable it to decide all issues presented for the determination of this court in the light of the pleadings, and of every fact established either by the undisputed evidence, or the conclusions of the appellate court upon the conflicting evidence. It is not to be presumed that a court of civil appeals will intentionally omit, in its statement of the case, any fact material to its determination. But, in the view they take of the law, a fact may appear to them immaterial, which, in the opinion of this court, may have an important bearing upon the determination of the cause. If there should be a conflict in the testimony as to the question whether a certain thing be black or white, and the court of civil appeals finds that it was white, the court is bound by that finding. But if the undisputed evidence show that it was black, and that court, not being impressed with the materiality of the fact, should inadvertently state that it was white, it would be an unreasonable rule that would withhold from this court the power to correct the error, and decide according to the evidence, in the event it should deem the fact material to a proper disposition of the cause. This is a strong illustration, and one not likely to occur, but errors less palpable, but equally as prejudicial, may occur, and this court should not be bound by them.

In this case, the court of civil appeals, in their conclusions of fact, find that the appel-

lant's cattle "broke through appellees' fence." But, as stated in the former opinion, one of the appellees testified in the trial court that the cattle "would crawl through the fence;" and the other, that "they were small, and just walked through the fence into our pasture." It is clear that there was no actual breaking, and, viewed in the light of the undisputed testimony, it is also clear that the court did not intend, in its conclusions, to convey that idea. The case itself affords a striking illustration of the injustice of the rule for which counsel contend. There is nothing in the opinion in the case of Meade v. Land Co., 85 Tex. 513, 22 S. W. 514, inconsistent with the views here expressed. In this same connection, it is complained that, even if we had the power to look to the testimony, we were in error in concluding that the plaintiff in error's cattle were less in size than other cattle in the neighborhood. But, if this deduction be not warranted by the testimony, it is unimportant. They were evidently not fence-breaking cattle. We may say, however, that we do not clearly see how the cattle in question "just walked through" a wire fence sufficient to keep out "the ordinary cattle of the country," unless it was by reason of the fact that they were extraordinarily small.

It is contended, in the second place, that the error for which we have held that the judgment should be reversed was not properly assigned in the court of civil appeals, and that, therefore, we were in error in considering the assignment here. That assignment reads as follows: "The court erred in the fifth paragraph of his charge to the jury, which is as follows: 'Every entry of one's own cattle upon the lands or premises of another is a trespass, and the owner of such cattle will be liable for any damages sustained by the owner of such premises, if any, provided such lands or premises were, at the time of such entry, inclosed by a fence sufficient to exclude therefrom such cattle or animals as were accustomed to be used in the country or the range around and about such inclosed premises, and provided, further, that such trespass is effected by a forcible entry through such fence or inclosure.'"

It is insisted that the assignment is too general, under the statute and the rules and practice of this court. The same question has been presented in another case at this term, and it seems to be one upon which the bar are somewhat at sea. It is important that it should be settled; and, with a view to its definite determination, so far as may be practicable, we have examined the decisions of this court from its earliest day. They are very numerous, however, and we can, therefore, hardly claim that none have escaped our attention. The ground upon which the assignment is asserted to be insufficient seems to be that, in addition to pointing out the particular ruling which is

claimed to be erroneous, it should have given the reason upon which that claim is based. We will refer to some of the cases, in order to illustrate the distinction between those in which assignments apparently general have been held good, and those in which such assignments have been held bad: In *Earle v. Thomas*, 14 Tex. 583, an assignment that "the court erred in refusing the charge asked by the defendant" was held good. In *Harper v. Stroud*, 41 Tex. 367, it was held that an assignment that "the court erred in approving the claim"—it being a suit to establish a claim against an estate—was sufficiently specific. In *Norwood v. Cobb*, 20 Tex. 588, it was decided that, when the bill of exceptions showed the objections to evidence, it was not necessary to repeat the objections in the assignment, but that it was sufficient to assign error generally in the admission of such evidence. In *Hillebrant v. Brewer*, 5 Tex. 568, that "the court erred in overruling defendant's exceptions to the petition" was held a good assignment. This, like some other of the very early cases, recognizes too liberal a rule. On the other hand, in *Allen v. Stephanes*, 18 Tex. 670, Judge Hemphill says: "The second assignment, that the court erred in its charge to the jury, specifies no particular error as a ground of complaint. It is objectionable on this ground, the charge being full, and embracing several legal propositions." In *Howard v. Colquhoun*, 28 Tex. 134, an assignment that the court erred in refusing defendant's special instructions, there being 13 of them, was disregarded as being too general. These decisions are sufficient to indicate the rule of practice recognized by the court at the time the present rules upon the subject of assignments were first adopted; and we see nothing in the new rules, so far as this matter is concerned, to indicate that it was the intention to do more than to declare in unmistakable language, and place in established form, the rules of practice already announced in the decisions of the court. The new rules were first formulated and adopted December 1, 1877, (47 Tex. 597,) and are embodied in the same language in the rules for the government of the courts of civil appeals adopted by this court at its last term, (84 Tex. 700, 20 S. W. viii.) They are now numbered, and read as follows: "(24) The assignment of errors must distinctly specify the grounds of error relied on; and a ground of error not distinctly specified, in reference to that which is shown in the record, or not specified at all, shall be considered as waived, unless it be so fundamental as that the court would act upon it without an assignment of errors, as mentioned in rule 23. (25) To be a distinct specification of error, it must point out that part of the proceedings contained in the record in which the error is complained of, in a particular manner, so as to identify it, whether it be

the rulings of the court upon a motion, or upon a particular part of the pleadings, or upon the admission or rejection of evidence, or upon any other matter relating to the cause or its trial, or the portion of the charge given or refused, or the fact or facts in issue which the evidence was incompetent or insufficient to prove, the insufficiency of the verdict or finding of the jury, if special, and the particular matter in which the judgment is erroneous or illegal, with such reasonable certainty as may be practicable, in a succinct and clear statement, considering the matter referred to. (26) Assignments of error, which are expressed only in such general terms as that the court erred in its rulings upon the pleadings, when there are more than one, or in its charge, when there are a number of charges, or the verdict is contrary to law, or to charge of the court, and the like, without referring to and identifying the proceeding, will not be regarded by the court as a compliance with the statute requiring the grounds to be distinctly specified, and will be considered as a waiver of errors, the same as if no assignment of errors had been attempted to be filed." The language in rule 24, that "the assignment of error must distinctly specify the ground of error relied on," gives countenance to the contention that the assignment should not only point out with distinctness the particular ruling complained of, but that it should also state the reason why that ruling is claimed to be erroneous. The ground of error may mean the proposition by which the contention that there is error in the action of the court is intended to be supported. But we are clearly of opinion that the words were not used in that sense. The evident purpose of rules 25 and 26 is to define and illustrate what is meant by rule 24. For example, when rule 25 says that the specification of error must point out "the portion of the charge given or refused," it implies that, if such portion be distinctly specified, it shall be sufficient. It does not say that the assignment must state the reason by which it is sought to be supported. But, to make the meaning more definite, rule 26 specifies that certain assignments shall be deemed bad by reason of their generality; and among the examples given is that of an assignment which complains that the court erred "in its charge, when there are a number of charges." This also implies that an assignment which complains of a component part of a general charge, or of the giving or refusal of a special charge, shall be deemed sufficient. Thus rules 25 and 26 explain rule 24, and the two taken together, by inclusion and by exclusion, clearly define its meaning.

We have found one case in which an opinion contrary to our view is expressed. In *Pearson v. Flanagan*, 52 Tex. 278, the court says: "Each error assigned should contain a distinct ground for the reversal of the judg-

ment, with a specification of the reason why it should be reversed, and should be copied or substantially stated in the briefs." But in that case the question before us was not presented. The assignments which were held bad were that "the court erred in refusing the defendant a new trial for the reasons given in said motion," and that "the court erred in not giving the several special charges to the jury asked by the defendant." The assignments specified no particular error, and were therefore insufficient. They did not call for the determination of the question whether the reasons for alleging error should be stated or not. In *Earle v. Thomas*, supra, the question of the particularity requisite in an assignment was discussed, and, as we think, the true rule laid down. The assignment which was objected to in that case was that "the court erred in refusing the charge asked by the defendant." The court say: "It is objected on behalf of the appellee that the assignment of error in this particular is too general. It is, however, sufficiently specific in respect to the charge refused, and that, we think, sufficiently indicates in what respect the charge given was objected to as erroneous. It would have been better if the assignment in reference to the charge given had been more specific. * * * What shall be a sufficiently special assignment of error is not susceptible of precise definition. It should be such as to draw the mind to the apprehension of the particular error relied on. But what shall be sufficient for the process still remains to be determined upon the particular circumstances of each case." It is to be borne in mind that the statute and rules which require errors to be assigned were intended primarily for the relief of the appellate courts, and to secure a prompt dispatch of the business that should be brought before them. They should be given a reasonable and practical construction, and not one calculated to embarrass suitors in the appellate tribunals by unnecessary restrictions. It is certain that it was never intended to hedge either the courts of civil appeals or the supreme court around with technical and arbitrary requirements, so as to cut off the approach of such parties as seek relief in good faith from the consequences of supposed errors committed to their prejudice in the trial courts. Where an assignment of error is sufficiently specific to enable the court to see that a particular ruling is complained of, it should be held good, although it should fail to state the reason why such ruling is claimed to be erroneous. An assignment may be brief, and yet specific; and brevity, in such cases, is commendable, and accords with good practice. The reasons by which allegations of error are sought to be sustained find their proper place in the propositions, statements, and authorities required to be set forth in the brief under and in support of the respective assignments. We conclude that the assignment in question is sufficient.

We are also of the opinion that the assignment that "the court erred in overruling the defendant's general demurrer to plaintiffs' original petition" should be held good, though we are not prepared to say that the demurrer should have been sustained. The petition alleges that the plaintiffs' land was securely fenced and inclosed, and that the defendant permitted its cattle to break through their inclosure. Under the rule, every reasonable intendment must be indulged in favor of the petition, the demurrer being general. Rule 17, 84 Tex. 711, 20 S. W. xiii. If the fence was secure, and the cattle broke through it, it is a reasonable inference that they were peculiarly vicious in that particular, and were fence-breaking animals. The motion for rehearing is overruled.

STATE *ex rel.* BARRY *v.* CONNOR.

(Supreme Court of Texas. Nov. 16, 1893.)

APPEAL—RECORD—ELECTIONS—NUMBERING BALLOTS—COUNTING—CONSTITUTIONALITY OF STATUTE.

1. An agreed statement of facts, on which a case is tried in the court below, and which the court embodies in its judgment, is sufficient, under Rev. St. art. 1293, to authorize a revision of the judgment on matters growing out of such facts, in the absence of a statement of facts or findings of fact by the court, or an agreed case for appeal, under articles 1333 and 1414.

2. Under Const. art. 6, § 4, relating to elections, and directing the legislature to provide for the numbering of ballots, the legislature enacted Rev. St. arts. 1694, 1697, which, respectively direct a judge of election to write the voter's poll-list number on the ballot, and forbid the counting of an unnumbered ballot. *Held*, that article 1694, is mandatory and that article 1697 is binding on the courts, as well as the officers of election.

3. Act April 12, 1892, § 28, relating to elections in cities, provides that "any elector or anyone who shall, contrary to provisions of this act, place any marks upon or do anything to his ballot by which it may afterward be identified as the one voted by any, particular individual, upon conviction shall be punished." *Held*, that the legislature did not intend to prohibit the numbering of ballots as required by Const. art. 6, § 4, and Rev. St. art. 1694, and that the words, "contrary to the provisions of this act," were intended to except, from the prohibition to mark, the numbers required to be placed on the ballots.

Certified questions from court of civil appeals of fifth supreme judicial district.

Proceeding by the state, on the relation of Bryan T. Barry, against W. C. Connor, to contest an election.

John P. Gillespie, H. P. Lawther, F. M. Etheridge, and Harris & Knight, for petitioner. R. E. Cowart, J. C. Kearby, A. P. Wozencraft, Wm. P. Ellison, G. G. Wright, and J. M. McCormick, for respondent.

BROWN, J. The following questions of law were certified to this court by the court of civil appeals for the fifth supreme district: "First. Is an agreed statement of facts upon which a case was tried in the

court below, and which the court embodied in its judgment, sufficient, in the absence of a statement of the facts or findings of fact by the court, or agreed case for appeal under the statute, to authorize a revision of the judgment upon matters growing out of such facts? Second. Is the statement in regard to the seventeen hundred and forty-seven unnumbered ballots, as contained in the first clause of the said agreement set forth, a sufficiently certain statement of the facts as to show how said ballots were cast and counted as to authorize this court to revise said judgment upon the facts? Third. Is it necessary, under the constitution and laws of Texas, and the charter of the city of Dallas, as set forth in said above agreement, after the adoption by the city council of the city of Dallas of the act of April 12, 1892, commonly known as the 'Australian Ballot System,' that all ballots cast in an election in said city for city officials shall be numbered; and, if so, is such requirement directory or mandatory? Fourth. If such unnumbered ballots can in any event be counted, can this be done by the court, in the absence of testimony showing the bona fides of the ballots?"

1. To the first question, we answer that the agreed statement of facts made and signed by the counsel and parties to the cause, and embodied in the judgment of the court, fully authorizes the court of civil appeals to review that judgment upon any question arising upon the facts therein stated. Article 1293, Rev. St., is as follows: "The parties may in any case submit the matter in controversy between them to the court upon an agreed statement of facts made out and signed by them or their counsel, filed with the clerk, upon which judgment shall be rendered as in other cases; and in such case the statement so agreed to and signed and certified by the court to be correct and the judgment rendered thereon, shall constitute the record of the cause." Incorporating the agreed statement of facts in the record by the court is as much an approval as if the judge had made a certificate under the statute. The object of requiring a statement of facts to be made out is to place before the appellate court all the facts upon which the judgment was rendered. Article 1293 provides the manner in which this may be done before the trial is had. The law was substantially complied with by the agreement made, and the incorporation of that agreement in the record. *Fowler v. Simpson*, 79 Tex. 617, 15 S. W. 682; *Hill v. Baylor*, 23 Tex. 263. Article 1333, Rev. St., provides for the filing by the court of findings of fact and conclusions of law or a special verdict by a jury, in either of which cases an appeal may be taken without other statement of facts. Article 1414, Id., permits the parties to present their case to the court of appeals upon an agreed statement of the facts and proceedings certified by the court after trial. In each of these methods the same

result is reached, of presenting to the appellate court, in condensed form, the material facts upon which the judgment was rendered. In *Salinas v. Wright*, 11 Tex. 578, this court said: "To authorize the revision of a judgment on the merits, a formal statement of facts is not essential, where all the evidence legally and conclusively appears by the record." In that case the fact appeared by bill of exceptions. It conclusively appears from the record in this case that all the evidence which was introduced, and upon which judgment was rendered, is embraced in the agreement signed by counsel and the parties, and embodied in the judgment of the court.

2. The statement contained in the first clause of the agreement, as set forth, is sufficiently explicit to enable the court to revise the judgment on the facts, and to enter judgment in accordance with the agreement. If there was any doubt arising upon the language of the agreement, it refers to the "first amended original information," which alleges that the 1,747 ballots were unnumbered, were counted and included in the aggregate of the vote; that, if they had not been so counted, relator would have received a plurality of all votes cast, and, being counted, the respondent received such plurality. There is no reason why the parties to this character of proceeding may not make agreements as in any other case. If it had been a suit for land, and the agreement had read, "if the court shall hold that the deed from A. to B. is valid and sufficient to pass title to the land, then judgment shall be entered for the plaintiff, but, if the court shall hold that said deed is invalid, then judgment shall be entered for the defendant," no question would be made of the sufficiency of the agreement to authorize a judgment in accordance therewith.

3. The third question propounded embraces two propositions: (1) Did the law require the officers conducting the election in the city of Dallas to number the ballots of the electors in compliance with article 1694, Rev. St.? (2) If so, could the officers who conducted the election legally count the ballots not numbered, and can the court sustain the counting of such unnumbered ballots?

Articles 1694 and 1697 of the Revised Statutes were in force in the city of Dallas at the time of the election in question, and it was the duty of the officers holding the election to number the ballot of each elector in accordance with the requirements of article 1694. The prohibition contained in article 1697 is binding upon all courts, as well as officers of the election. The law is mandatory, and cannot be disregarded. If ballots not numbered were counted in such election, such ballots were illegal, and must be rejected by the court upon an examination and revision of the judgment rendered.

It is claimed on behalf of the respondent that the law of April 12, 1892, entitled "An

act to provide for the registration of all voters in all cities containing a population of ten thousand inhabitants or more, and to protect the purity of the ballot in such cities and to provide penalties for the violation of the same," prohibits the numbering of ballots in accordance with article 1694, above referred to, and by implication repealed said article. The following language of said act, contained in the twenty-eighth section, is relied upon to sustain the contention upon this point: "Any elector or anyone who shall, contrary to the provisions of this act place any mark upon or do anything to his ballot by which it may afterward be identified as the one voted by any particular individual upon conviction shall be punished," etc. By the act of March 16, 1848, the officers of election were required to "write and number the name of each voter. * * * One of the managers shall in every case, at the time of receiving the ticket or ballot, write upon it the voter's number corresponding with the clerk's list. * * * No ticket not thus numbered, shall be counted or noticed in counting out the votes." This continued to be the law in Texas until 1870, when the 12th legislature enacted a statute by which it was provided that one of the judges of election should write upon each ticket one or all of the words, "State," "District," and "Congress," according as the voter might be entitled to cast his ballot for one or all of said offices. It was made a penal offense for any officer of election to place any other mark upon any ballot. Laws 12th Leg. § 19, p. 131. An election for members of congress was held in the state in 1872, and in Brazos county the ballots were numbered as under the Law of 1848. When the returns were to be made up, and certificate of election given, Gov. Davis excluded from the estimate the vote of Brazos county because the ballots were numbered, alleging as his reason that the numbering of the ballots operated to intimidate voters. Note to article 6483, 2 Pasch. Dig. The 13th legislature, which assembled in 1873, repealed the act of 1870, and re-enacted, substantially, the law of 1848 on the point. The constitutional convention which framed the constitution that was adopted in 1876, inserted in that instrument the following provision: "Sec. 4, (art. 6.) In all elections by the people the vote shall be by ballot and the legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box. But no law shall ever be enacted requiring a registration of voters of this state." Two important changes have been made in the manner of conducting elections in this state. The registration of voters was required, and the numbering of ballots had been forbidden. The law requiring the numbering of ballots had been restored, and the registration law had been repealed; but, to make sure that

such laws should not be again enacted, the section quoted was framed and adopted as a part of the constitution. This section or the constitution was framed and adopted in view of the recent changes of the law, and of the action of the governor in the case referred to. The language is such as to manifest the purpose to declare that the numbering of ballots was not calculated to intimidate voters, but was a means necessary to "detect and punish fraud and to preserve the purity of the ballot box." The legislature which assembled in 1876, the first after the adoption of the constitution, promptly enacted articles 1694, 1697, Rev. St. When article 6, § 4, of the constitution, was amended, in 1891, the same language was used, omitting the prohibition against registration, with the addition of the permission to the legislature to enact laws for registration of voters in cities of 10,000 population or more. The purpose to have the ballots numbered was again expressed, and commanded to be observed. The permission given to provide by law for the registration of voters in such cities as had the requisite population was intended as an additional safeguard against fraud in elections. We must presume that the laws in force on the subject of numbering ballots, and the prohibition as to counting the ballots not numbered, were in the minds of the members of the convention and the legislature when these provisions were framed, and the laws were not condemned, but approved. We cannot presume that the legislature, in enacting the law of April 12, 1892, intended to prohibit the doing of an act which was commanded by the constitution, and the law enacted in pursuance thereof. Nothing short of positive and unequivocal words could be so construed.

The legislature did not intend, in passing the act of April 12, 1892, to prohibit the numbering of ballots in accordance with article 1694. Section 28 of that act does not justify any such conclusion. It prohibits officers and others, including the elector, from doing certain acts before the ballot is deposited, and was intended to protect the ballot from marks which would enable any one, without looking into it, to tell by whom it was cast, and to prevent any officer of the election to tell by whom it was voted, without comparison with the poll list. For example, suppose that the elector or other person should place upon the ballot a mark so that the officer of the election or other person looking on while the ballots were being counted could see or determine by whom it was cast, then, in calling the ballot for counting, the vote of such person could be exposed. The object was to prevent the elector from being exposed unlawfully.

Looking to the journals of both houses of the called session of the 22d legislature, we get the history of the passage of this law, which throws light upon the intention of the legislature. The senate passed an act to

govern all elections, framed after the plan of the Australian system, in which was embraced, in substance, section 28 of the law under consideration, with almost the same language as that upon which the appellee's counsel rely to sustain their contention. In other provisions of that bill was the direction to number the ballots as required in article 1694. The first 22 sections of the law of April 12, 1892, constituted the latter part of the senate bill. It was not passed by the house. The house, however, passed a bill to provide for registering voters in cities of 10,000 population or more, being the first 22 sections of the act of April 12, which went to the senate, and there the last sections of the law now being considered were added by way of amendment,—almost literally taken from the bill passed by the senate and sent to the house. The language used in the senate bill was, in substance: "Any elector, or any one who shall, contrary to the provisions of this act, place any distinguishing mark upon, or do anything to, his ballot, by which it may be identified as the one voted by any particular individual," etc. It will be seen that the difference between the language quoted, and that in the law as it passed, consists in omitting the word "distinguishing," and inserting the word "afterward." Any mark by which a ballot could be identified must be a distinguishing mark, and such identification must be at a future time; that is, afterwards. The language in each means the same thing. The words, "contrary to the provisions of this act," referred to the provisions of the senate bill, from which the section was taken and attached to the house bill, and were intended to except, from the prohibition to mark, the marks authorized by that bill, which required the ballots to be numbered. We think that this explains the language upon which the counsel rely for the support of the proposition that it forbids numbering the ballots. The act of April 12th is not in itself a complete system for holding elections in cities of 10,000 population. It does not provide for keeping any poll books or tally sheets, nor for making returns of the election, nor for counting the vote and preserving the ballots. It is evidently intended simply as an additional means of "detecting and preventing fraud, and preserving the purity of the ballot," which any such city may apply if 500 of its citizens petition for it. It does not apply to all cities of 10,000 population, but to those only in which registration may be ordered. The law does not continue beyond the election for which the registration is ordered, but at each election the same steps must be taken, else that law cannot be enforced. If, at the next election in Dallas for municipal officers, no registration should be demanded, this law would not be in force, but the election would be conducted under the general law, and ballots must be numbered. The result of which would be

that the prohibition of numbering claimed to be expressed in the act would be put in force, or not, at the option of 500 citizens of that city. It would be an extraordinary power for the legislature to delegate to so few of the citizens to suspend the operation of a general law of the state.

The right to petition for registration, and thereby put this law into effect, within the cities having the requisite population, applies to elections for state, county, and precinct officers, as well as to those for municipal offices. If the position that the numbering of ballots is forbidden by this law is sound, then, in elections for state and county offices, we would have the general law in force in all precincts in Dallas county outside of the city, and the ballots numbered in them, while in the city no number could be placed upon them. If a contest should occur, and it be charged that persons not qualified as electors were permitted to vote at a precinct outside the city, the ballots could be inspected, and compared with the poll books, to ascertain for which candidate the illegal votes were cast. If the contest was upon the ground that such persons voted inside the city, then no such investigation could be had, for the reason that without the numbers the ballots of the illegal voters could not be identified, and thus a discrimination would exist, for which there can be no sound reason given, and fraud would be promoted in the cities, rather than prevented.

If the elections for state, county, and municipal officers should occur at the same time, and the law of April 12, 1892, is put into force in a city, then, by the terms of section 24 of said act, "all ballots used by the voters at said election shall be furnished by the officers conducting said election, upon which shall be printed the names of all candidates for state, county, precinct or city offices upon one ticket," etc. The general law governing elections for state, county, and precinct offices requires the ballot to be numbered; and if the law governing election for municipal offices forbids such numbering, with the names of each upon the same ticket, what can be done? If not numbered, so far as the state, county and precinct election is concerned, they cannot be counted; and if numbered, under the contention of appellee, so far as municipal officers is concerned, the officer placing the number thereon is liable to a heavy penalty. These embarrassing consequences serve to show more clearly that the construction sought to be placed upon the law is not a correct interpretation of it. No legislature would have enacted a law involving elections in such complications, and introducing such discriminations between citizens of different localities as to the exercise of a right equally sacred to all. It was believed that there was a necessity in cities, that did not exist in towns and country precincts, for additional means of protecting

the voter from undue influence, and to preserve the ballot from the corrupting influence of fraud, and for this purpose the law was enacted.

It is claimed that the legislature has no power to enact any law by which the elector may be deprived of the benefit of his ballot without fault on his part. The right of suffrage is conferred by the constitution, and is not one of the natural and inalienable rights which are excepted out of the powers of government. The elector takes the right subject to limitations imposed by the constitution, and such limitations as the legislature may impose, not inconsistent with the fundamental law. While the right to vote is a valuable right, which should be duly guarded, the public has a right that the ballot shall be protected from fraud; and this right in the public is paramount to the individual right of the citizen to cast his vote. When necessary to preserve the right of the public in a pure ballot, the right of the citizen to have his ballot counted must yield to the needs of the public good, as in many other instances the private right must be subservient to public necessity. But no elector is here claiming the right to have any one or all of the unnumbered ballots counted; and, if it were so, no one of them could enforce it, because the ballot of no elector who cast one of those not numbered could be identified. In form, this is a proceeding in the name of the state, but in fact it is a contest between two opposing candidates for the possession of an office. The exercise of the functions of that office is a right which belongs, under the constitution and laws, to that one who was legally elected, and the right should be determined according to the rules prescribed by law. Articles 1694, 1697, Rev. St., were enacted in pursuance of the commands of section 4, art. 6, of the constitution of this state. It was for the legislature to determine the necessity, and the courts cannot disregard the law. It is consistent with the constitutional requirement that the ballots be numbered, and is perhaps the only means by which fraud perpetrated by persons voting, who are not qualified electors, could be effectually punished, thus depriving the promoter of the fraud of its fruits. It may be that in some instances the failure to number might occur by reason of a misunderstanding of the law, or from negligence in the officer, and the voter might be deprived of the benefit of his ballot without his fault; but the constitution has declared that it is one of the means to be adopted by the legislature to detect, prevent, and punish fraud. The legislature has so enacted, and it must be obeyed.

It is unnecessary to discuss the difference between directory and mandatory statutes. The law commands that the number shall be written on the ballot, and forbids those not numbered to be counted. Taking the two articles together, and especially in con-

nection with section 4, art. 6, of the constitution, there can be no doubt that they are mandatory. "A clause is directory when the provision contains mere matter of direction, and no more, but not so when they are followed by words of positive prohibition." *Bladen v. Philadelphia*, 60 Pa. St. 466; *Pearse v. Morrice*, 2 Adol. & E. 96. Prohibitory words can rarely, if ever, be directory. There is but one way to obey the command "thou shalt not," which is to abstain altogether from doing the act forbidden. The answer to the third question renders it unnecessary to answer the fourth.

FITZGERALD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 8, 1893.)

CRIMINAL LAW—APPEAL—REVIEW.

In misdemeanor cases, where no objections are made to instructions, nor instructions asked, the court of criminal appeals will not review the instructions on appeal from an order denying a new trial.

Appeal from Smith county court; B. B. Beaird, Judge.

D. Fitzgerald, convicted of carrying a pistol on or about his person, appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Conviction for carrying on or about his person a pistol. There is in the record neither statement of facts nor bills of exceptions. In the motion for new trial, several objections are made to the charge of the court. Appellant neither objected to the charge when given, nor requested instructions to the jury upon any matter. This being a misdemeanor, in the absence of objections or requested instructions, this court will not revise the charge of the court. Whether a "woman was at the bottom of it" or not, as some of the jurors were willing to believe she was, may and may not have been prejudicial to appellant. "J. W. Kilpatrick may have been unfortunate in knowing too much about the matter," but whether he knew too much about the woman being at the bottom of it, or about the pistol being carried by the appellant, we know not; and whether his overmuch knowledge "about the matter" was favorable or unfavorable to appellant, we are also unadvised. The judgment is affirmed.

MORGAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 8, 1893.)

DISTURBANCE OF PUBLIC WORSHIP—RECOGNIZANCE ON APPEAL.

Under Pen. Code, art. 180, prescribing a punishment for one who willfully disturbs a religious congregation conducting themselves

lawfully, a recognizance merely reciting that defendant stands charged with the offense of disturbance of religious worship is fatally defective, for failure to recite that the congregation was assembled for religious purposes, was conducting itself lawfully, and that the disturbance was willfully created.

Appeal from Tyler county court; B. E. Moore, Judge.

Jack Morgan, convicted of disturbance of worship, appeals. Appeal dismissed.

L. F. Chester, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. The recognizance recites that defendant "stands charged * * * with the offense of disturbance of religious worship." The offense sought to be recited not being one *eo nomine*, it is necessary that its essential elements be set out in the recognizance; otherwise, the obligation is fatally defective. Without a sufficient recognizance, the jurisdiction of this court cannot attach to the appeal. Acts 1892, pp. 38, 39, §§ 32, 33; *Mullinix v. State*, (Tex. Cr. App.) 22 S. W. 407, and authorities cited. In order to constitute the offense sought to be recited, the congregation must be assembled for religious or other mentioned purpose, must be conducting themselves in a lawful manner, and the disturbance must be willfully created. The motion of the assistant attorney general is well taken, and must prevail. It is therefore granted, and the appeal is dismissed.

CRAIG v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1893.)

HOMICIDE—EVIDENCE—INSTRUCTIONS—SELF-DEFENSE.

1. On a trial for homicide, which defendant seeks to justify on the ground of self-defense, evidence of threats, or any other competent evidence tending to rebut the defense, is admissible, though it may tend to establish the crime of murder, of which defendant has already been acquitted.

2. The court defined a cause justifying homicide as "a serious personal conflict, in which great injury is inflicted by the person killed, by means of a weapon or instrument of violence, or means of great superiority of personal strength, although the person guilty of the homicide was the aggressor, provided such aggression was not made with intent to bring on a conflict for the purpose of killing." *Held* proper.

3. The court charged that "if defendant and deceased willingly engaged in a combat, and fought on equal terms, * * * and defendant killed deceased, then you will find defendant guilty of manslaughter." *Held* proper.

4. Defendant cannot justify a homicide on the ground of threats against his life by deceased, unless, at the time of the homicide, deceased, by some act done, manifested an intention to execute such threats.

Appeal from district court, Hood county; J. S. Straughan, Judge.

James Craig, having been convicted of manslaughter, appeals. Affirmed.

Following is the portion of the instructions to the jury to which defendant assigns error: "Sec. 3. The indictment in this cause which was presented and filed in this court on the 24th day of September, 1891, charges the defendant with the killing, with implied malice aforethought, of Manuel Cavasas, by stabbing the said Cavasas with a knife; said killing being alleged to have occurred in Hood county, Tex., on or about the 21st day of September, 1891. The defendant has heretofore been acquitted of the charge of the killing of Manuel Cavasas with implied malice aforethought. The defendant, Jim Craig, is now on trial in this cause charged with the offense of manslaughter; that is, that the defendant, Jim Craig, in the county of Hood and state of Texas, on or about the 21st day of September, 1891, while under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law, killed Manuel Cavasas by stabbing said Cavasas with a knife. To this charge the defendant has pleaded not guilty. * * *

Sec. 6. The following are deemed adequate causes: (1) An assault and battery by deceased, causing pain or bloodshed. (2) A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict, and for the purpose of killing. (3) Any condition or circumstance which is capable of creating, and does create, sudden passion,—such as anger, rage, sudden resentment or terror,—renders the mind incapable of cool reflection, whether accompanied by bodily pain or not. * * *

Sec. 8. When, in a sudden quarrel, both parties engage in a contest, willingly fight on equal terms, and no undue advantage is sought or taken by the slayer, if death ensue, the killing will be manslaughter. * * *

Sec. 11. Again, if you believe from the evidence that the defendant and Cavasas willingly engaged in a combat, and fought on equal terms, and that the defendant took no undue advantage of Cavasas, and that defendant killed Cavasas, then you will find the defendant guilty of manslaughter, and assess his punishment as before directed for that offense. * * *

Sec. 17. Where a defendant accused of homicide seeks to justify himself on the ground of threats against his own life, he is permitted to introduce evidence of the threats made; but the same afford no justification for the offense, unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threats so made. * * *

Sec. 20. Again, if the defendant had been informed that Cavasas had made a threat against his life, and if the defendant stabbed Cavasas, he was justified in doing so, if it reasonably appeared to the defendant that Cavasas

manifested an intention to execute the threats so made. * * * Sec. 22. If the defendant willingly and voluntarily engaged in a combat with Cavasas, knowing that it would or might result in death, or some serious bodily injury which might produce the death of himself or of Cavasas, then, if he killed Cavasas in such contest, such killing would not be justifiable, but the defendant might yet be convicted of manslaughter. Sec. 23. But if the defendant did not willingly and voluntarily engage in a contest with Cavasas, or if he did agree to engage in such contest, but if the contest was terminated, or did not take place, and if afterwards defendant killed Cavasas, then the defendant would not be deprived of the right of self-defense, and the law of justifiable homicide should be considered by you, so far as you may find it applicable to the facts of the case."

N. L. Cooper, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Upon a former trial, appellant having been convicted of manslaughter, and consequently acquitted of murder of both degrees, he insists that upon this trial it was error for the court to admit evidence, such as threats, tending to prove murder. 18 S. W. 297. Upon this trial the contest was between manslaughter and self-defense. We hold that any competent evidence which tends to defeat the defense is admissible, though it may tend to establish an offense of which the accused has been acquitted.

The charge of the court is in conformity to the rule stated by Judge Willson in Parker's Case, 22 Tex. App. 105, 3 S. W. 100, and is not obnoxious to the criticisms made by counsel for appellant. Judgment affirmed.

SMITH et al. v. POWELL et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

STATUTE OF LIMITATIONS — PARTIES — MARRIED WOMEN—SEPARATE ESTATE—DEED OF HUSBAND—RATIFICATION—ESTOPPEL—DOCUMENTARY EVIDENCE OF TITLE—POWER OF ATTORNEY — PARTITION.

1. In an action to recover land which defendants claimed under a conveyance pursuant to a contract made in 1855 to give it to them for legal services then performed, plaintiff's demurrer, setting up the statute of limitations to a demand for the value of the services in case plaintiff recovered the land, should have been sustained.

2. Where the specific land sued for is claimed by defendants under a deed binding the tenants in common of a tract of which this was part, plaintiff, seeking to recover her interest as one of such tenants, need not make the other tenants in common parties to the action.

3. It being claimed that a married woman had ratified an unauthorized deed of her separate estate executed by her husband, and had estopped herself to deny it, evidence was admissible that, when informed thereof by her husband, she objected to it, and that thereafter she refused the grantee's request that she sign it.

4. After services have been performed for the benefit of a married woman's separate estate, under a contract which did not bind her, her husband cannot ratify it, so as to bind her property.

5. The wife's separate estate is not bound on the theory that the services were necessary, and constituted an equitable charge on the land.

6. Though the deed of the wife's land executed by the husband was not binding on her or her separate estate, it was binding on the husband.

7. Under Rev. St. art. 4799, providing that the documentary evidence of title shall be confined to the matter contained in the abstract of title, defendants cannot give in evidence a power of attorney not contained in the abstract, which they had filed under notice from plaintiff.

8. A power of attorney to sell and convey for money, or such other consideration as may seem to the grantor's advantage, and to receive the consideration, gives no power to convey in satisfaction of a pre-existing moral obligation.

9. A deed from part of the tenants in common of land, to one having no interest therein, of part of the land, does not constitute a partition thereof.

10. A married woman cannot be estopped in pais, except by intentional and fraudulent acts.

11. As against a minor who marries subsequently to the settlement of a person on her land, the statute of limitations begins to run from the time of her marriage.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Action by Francis A. Smith and others against H. W. Powell and others to recover an interest in lands. Emma J. Simpson and her husband intervened, claiming a further interest. Judgment for defendants. Plaintiffs and interveners appeal. Reversed.

H. L. Stone and Lee & Blackmon, for appellants. Frost & Etheridge, for appellees.

LIGHTFOOT, C. J. This suit was brought by appellant Francis A. Smith, joined by her husband, John Smith, for four-fifteenths of about 1,300 acres of land in the Enoch Friar league of land in Navarro county. Francis A. Smith died pending the litigation, and appellants, as her heirs, were made parties. After the institution of the suit, Emma J. Simpson, joined by her husband, A. I. Simpson, intervened, and claimed as against defendants one-tenth of the land in controversy. Defendants, after pleading the general issues, pleaded specially that in 1855 the Enoch Friar league, being owned by the heirs of W. H. Harris, (Francis A. Smith being one of them,) became involved in litigation in the case of Haley v. Powell, and they employed Beaton & Prendergast, attorneys, to represent them, and, in addition to certain other fees, agreed to give them a contingent fee of one-fourth of the league; and that, after the suit was decided, they did convey to them 200 acres for H. W. Powell, to be used in the settlement of said suit, and 1,100 acres of said league as their portion, and ever since April 23, 1860, they and their vendees have held, used, and claimed said land as their own. They also pleaded that plaintiffs were estopped by accepting the terms of the compromise, by deeding off the balance of

the league calling for their deed, which they claim as a partition, and by acquiescence for a great number of years while defendants were making valuable improvements. They also pleaded the statute of limitation of three, five, and ten years, improvements in good faith, and the value of their services in the case of *Haley v. Powell* in 1855, which they claim to be an equitable charge on the land. By supplemental petition, plaintiffs and interveners demurred generally and specially to the matters set up in defendants' answer, and in reply to the statute of limitation pleaded by defendants pleaded their coverage. They denied the allegations in said answer, and pleaded limitations against any moneyed demand for services performed, and stale demand against any recovery on account of any contract or obligation made by the heirs of Harris with Beaton & Prendergast. Defendants, by supplemental answer, demurred generally and specially to the matters set up in the supplemental petitions of plaintiffs and interveners, and denied the allegations therein; and in reply to the plea of stale demand they alleged that the equities relied on by them had never been called in question until the institution of this suit. The cause was tried at the April term of court, 1891, and all demurrers were overruled by the court, and the trial resulted in a judgment for the defendants. Plaintiffs and interveners have appealed.

1. The first error insisted upon by appellants is "that the court erred in overruling the special demurrer of plaintiffs and interveners pleading the statute of limitation against any recovery by defendants for services performed under contract made in 1855." The defendants, in their answer, set up the value of the services of Beaton & Prendergast as attorneys in the case of *Haley v. Powell*, the litigation in which was ended about 1860, and prayed that if the land was recovered they have judgment for a just and reasonable sum for such services, and that the same be adjudged an equitable lien on the land. To this the demurrer of plaintiffs setting up limitation was interposed, and clearly the demurrer should have been sustained.

2. We think the court erred in overruling the special demurrer of plaintiffs to that part of the answer which sets up that defendants and plaintiffs and interveners are tenants in common with all the different owners of the Enoch Friar league, and asking that the suit abate until all of such parties be brought in, because the defendants claim the specific land sued for, and claim under deeds from such parties or their vendors, and have set up no valid claim to any other part of the league, and seem to have made no effort to bring in such parties by cross bill or otherwise. Defendants certainly have no right to delay the plaintiffs' case, or force them to make such useless parties in the contest for the land in controversy.

3. The fifth assignment of error attacks the ruling of the court in excluding the testimony of John Smith: "That after he bought the interest of the joint owners, with his wife, in the Friar league, that in selling off the same he made the trades, and that he requested his wife to join with him in the deeds made to the parties in order to convey the interest inherited by her from her father and mother's estate." The ruling of the court in excluding this testimony was not error. The bill of exceptions does not state the ground of the objection nor the ground of the court's ruling, and is defective; but the deeds from Smith and wife would be the best evidence, and cannot be explained by parol testimony; nor are the reasons of the wife for joining in the conveyances material to any issue in this case.

4. The sixth assignment of error is as follows: "The court erred in refusing to allow plaintiffs to prove by the witness John R. Smith that after he had executed the deed for himself, and as attorney for his wife, to Beaton and Prendergast, while in Navarro county, that on his return to Gonzales county, and informing his wife, F. A. Smith, of his action in the matter, that she objected to it, and that in the next year, when they had moved to Navarro county, that Beaton and Prendergast on their arrival tried to get his wife, F. A. Smith, to join the witness in conveying said land to them, and that she refused to do so, and had continuously refused ever since to make said conveyance." Francis A. Harris married Smith in December, 1852, and remained a married woman until after the suit was brought. Beaton & Prendergast, attorneys, were employed by one William Clark, who claimed to act as the next friend for the minor heirs of W. H. Harris, about 1855, to represent them in the case of *Haley v. Powell*, in which suit the title to the Friar league was involved. They did so, and the litigation was ended about 1860. The bill of exceptions shows that the witness John R. Smith, who then lived in Gonzales county, learned for the first time in 1868 of his wife's interest in the Friar league, and in 1869 he executed a deed to Beaton & Prendergast for himself and as agent for his wife, for the land in controversy. The appellees endeavored to show acts of ratification and estoppel against the wife, and these were issues in the case. The bill of exception shows "that at said time, at the request of Beaton & Prendergast, he [Smith] signed the deed to them, signing his own name and his wife's, Francis A. Smith's, name to said deed." It was proper for plaintiffs to prove that, when the husband reported to Mrs. Smith what he had done, she objected to it, and that when Beaton & Prendergast endeavored to get her to sign the deed she refused to do so, and has ever since refused. This testimony being relevant and material, the court erred in excluding it.

The argument of appellees that the husband was the trustee for his wife's separate estate, and that it was his right and duty to employ counsel for the defense of it, has no application to the facts of this case, because the husband did not know of his wife's interest until eight years after the litigation was ended, and the contract under which the defense was made was executed "by Clark, as the next friend of the minor heirs of Wm. Harris, deceased," in 1855. At that time Francis A. Smith was a married woman, and there was no pretense that such contract was made for her, or on her behalf, or that she was in any manner bound by it. The husband had no authority to "ratify" any such contract, and bind his wife's separate estate, 14 years after it was made, without being joined by her, with privity acknowledgment, as required by law. The argument that the legal services were necessary, and constituted an equitable charge on the land, is equally untenable. We have no doubt that Beaton & Prendergast, under the contract with William Clark, as next friend for the minor heirs of W. H. Harris, deceased, rendered their client valuable service, and there might have been a moral obligation upon each part owner of the Friar league to come in and help to pay them; but from the standpoint of a contract, either express or implied, we can see no legal obligation or equitable charge upon the land which binds the married woman to pay either land or money.

5. Appellants complain in the seventh assignment of the admission of the deed executed by John R. Smith, for himself and wife, to Beaton & Prendergast, October 26, 1869, claiming that it is not admissible as against John R. Smith individually. Although this deed was not binding upon the wife or her separate estate, it was binding upon Smith individually, and was properly admitted in evidence as against him; but the court should have instructed the jury that it was not a valid conveyance of the separate estate of the wife, Francis A. Smith, and was in no sense binding upon her, either as a conveyance or in estoppel.

6. The ninth assignment of error is as follows: "The court erred in admitting in evidence the testimony of Wm. Croft, Esq., and D. M. Prendergast, Esq., as to the value of the services of Beaton and Prendergast in the case of *Haley v. Powell et als.*, because same was immaterial, and because same was not performed at the instance or request of plaintiffs or interveners or their ancestors, and because in no event were the plaintiffs or their ancestors or interveners responsible to said parties for their services, as shown by bill of exceptions No. 5, here referred to and made a part hereof." Under the views we take of the case, the value of the services of Beaton & Prendergast is not material, and this testimony should have been excluded.

7. The tenth assignment of error is upon the admission of the contract between William Clark, as next friend of the minor heirs of W. H. Harris, deceased, and Beaton & Prendergast, dated November 27, 1855, for the services of the latter in the *Haley* suit, whereby Clark guaranties to them one-fourth of the league of land if successful. It appears that Francis A. Smith was at that time a married woman, and intervenor Emma J. Simpson was not one of the heirs of W. H. Harris, nor was she a party to the suit. The agreement did not purport to be made for or on behalf of either of them, and should have been excluded.

8. The eleventh assignment of error attempts to embrace a large number of deeds, and is too general. It cannot be considered under the rules.

9. The twelfth assignment of error objects to the introduction of the power of attorney from E. J. and A. I. Simpson to W. H. Harris, and to the deed made under it, because under proper notice from plaintiffs and interveners the defendants filed an abstract of their title, not including this power of attorney. The statute requires, where an abstract of title has been demanded and filed, that "in all cases, the documentary evidence of title shall at the trial, be confined to the matters contained in the abstract of title." Rev. St. art. 4799. Upon this ground the testimony should have been excluded. But the second ground of objection, that the power of attorney only gave authority to sell and convey for a consideration, and conferred no power upon the agent to make a conveyance without consideration or in satisfaction of some pre-existing moral obligation, presents a serious question. Powers of attorney must be strictly construed, and the principal will not be bound beyond the plain import of the instrument. *Skaggs v. Murchison*, 63 Tex. 353; *Reese v. Medlock*, 27 Tex. 120. In this case the power of attorney of Simpson and wife to Harris gave authority to bargain, sell, and convey land for money, or such other consideration as to the grantor therein may seem to the grantor's advantage, and to receive the pay or consideration therefor, etc. The deed made under it recites as a consideration the contract made by Clark, as the next friend for the minor heirs of W. H. Harris, with Beaton & Prendergast, in 1855, and the services rendered by them thereunder. Clearly, the grantor in the power of attorney contemplated a sale of lands, and a consideration to be paid and received, and not merely a conveyance, without consideration. Mrs. Simpson had no connection whatever with the contract between Clark and Beaton & Prendergast, and it created no legal or equitable claim against her or charge upon her estate. Even if it had, this power of attorney did not grant power to Harris to convey her land in settlement of it. *Frost v. Cattle Co.*, 81 Tex. 509, 17 S. W. 52, and authorities there cited. If

there was any act on the part of E. J. and A. I. Simpson after the execution of this deed which would amount to a ratification or estoppel, and the deed was unobjectionable in other respects, it might have been properly guarded by the court, and considered in connection with such other testimony; otherwise, it should have been excluded. The record before us does not disclose any acts of ratification on the part of Mrs. Simpson which could be binding upon a married woman. "To estop a married woman from asserting her rights to land it is essential that she should be guilty of some positive act of fraud, or else of some act of concealment or suppression, which in law would be equivalent thereto." *Johnson v. Bryan*, 62 Tex. 626.

10. The court correctly charged the jury that William Clark had no power or authority as next friend for the minor heirs of William H. Harris, deceased, to make the contract with Beaton & Prendergast in 1855, agreeing to give them one-fourth of the Friar league of land for their services. The charge, however, was erroneous in that portion which charged that the deed from a portion of the Harris heirs to Beaton & Prendergast was a partition, and upon the subject of the ratification thereof by appellants or their ancestor, Francis A. Smith. The contract of 1855 conveyed nothing whatever, either legal or equitable, and, in so far as the heirs were concerned, was wholly void. The services of such attorneys rendered under that contract were in no sense an equitable charge upon the land, and gave them no right whatever to demand any interest therein. The deed from William H. Harris, Jr., J. B. Harris, Theodore M. Kyle, and Emma I. Simpson and husband to Beaton & Prendergast purported to be an original vesting of title in them to the interest of such parties in the tract so conveyed, and was not a partition of land among original part owners.

Appellees' counsel contend that Beaton & Prendergast had acquired a right to an interest in the Enoch Friar league of land under their contract with William Clark in 1855, and that the subsequent conveyance to them by a portion of the Harris heirs was a partition. But there can be no partition unless the parties to it are part owners in the property. Beaton & Prendergast had no shadow of claim to any part of the Enoch Friar league of land until they procured the same by the deed from a part of the Harris heirs; hence this deed could in no proper sense be called a partition. If this was only a partition deed, it was not effective for any purpose. In the case of *Davis v. Agnew*, 67 Tex. 213, 2 S. W. 43, 378, Judge Stayton says: "A partition of land between one who owns an undivided interest in it and one who owns no interest whatever is necessarily no partition, and neither confers upon one nor takes from the other any right; it matters not what may be the form

of the instrument by which the intent to partition is evidenced. The very basis for partition is co-ownership, and, when this does not exist, the instrument which attempts partition is simply void." See, also, *Dawson v. Lawrence*, 13 Ohio, 546. Neither this deed nor any other introduced in evidence affected in any manner the right of Francis A. Smith, who was a married woman from 1852 up to the time this suit was brought. The three special charges asked by appellants' counsel were sufficient to call the attention of the court to her rights as a married woman, and the court erred in not charging the jury fully upon that subject. There was no testimony showing any act upon her part inconsistent with her claim to her full interest in this property, and nothing authorizing the submission of a charge upon the subject of estoppel against her. The original Clark contract in 1855 had no reference to her. The services rendered under it had no reference to her. It is not claimed that she ever executed or authorized the execution of any conveyance on her part, or ever in any manner consented to it, or for one moment waived her claim to her full interest in the property. As a married woman, she cannot be estopped in pais, unless her acts were intentional and fraudulent. *Steed v. Petty*, 65 Tex. 496; *Johnson v. Bryan*, 62 Tex. 626; *Bigelow, Estop.* 510.

11. This disposes of all the questions which we deem it important to notice, except as to the 200-acre tract claimed and set out by metes and bounds, being the tract claimed by H. W. Powell and his vendee, Rodgers. It appears from the testimony that this tract was settled upon by H. W. Powell on February 22, 1852, (before the marriage of Francis A. Smith); that he first settled there as the tenant of one Prudhome, whose title he purchased; and that he has ever since held, used, occupied, and claimed it. Francis A. Harris was a minor when he first went upon the land, February 22, 1852; but when she married John R. Smith, in December, 1852, the statute of limitation began to run against her. She has long since been barred by limitation as against H. W. Powell and those claiming under him as to said 200-acre tract, and the judgment below is affirmed as to them. As to all the other parties, and the balance of the land sued for, the judgment is reversed, and the cause remanded.

MCCANDLESS v. FREEMAN.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

MORTGAGE—FORECLOSURE—HOMESTEAD.

A defense of homestead will not avail on foreclosure of a mortgage where, at the time of its execution, the land was not part of the homestead.

Error from district court, Ellis county; Anson Rainey, Judge.

Action by P. Freeman against W. W. McCandless and another. Judgment for plaintiff, and McCandless brings error. Affirmed.

E. P. Anderson, for plaintiff in error. D. F. Singleton and M. B. Templeton, for defendant in error.

Conclusions of Fact.

LIGHTFOOT, C. J. In this cause the brief of plaintiff in error presents five assignments of error, but no statement under any of them, and but one proposition, which is made under a brief reference to the 2d, 3d, and 4th assignments, neither one of which is copied into the brief. We cannot from this brief form an intelligent idea of the record, nor the points intended to be presented, and cannot regard it as a compliance with the rules. From the record we find the following: This suit was brought February 10, 1891, by appellee, P. Freeman, against appellant, W. W. McCandless, and J. A. King, upon a promissory note for \$1,000, executed by said McCandless to H. Freeman or order, January 29, 1890, due January 29, 1891, with interest at the rate of 10 per cent. per annum from date until paid, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection after maturity, which said note was indorsed by said H. Freeman on the same day of its date to plaintiff below; and also to foreclose a mortgage executed by said McCandless upon 79 acres of land to J. A. King, as trustee, to secure said note. Defendant McCandless answered, but not under oath, claiming a partial failure of consideration to the extent of \$500, and that the 79 acres of land was a part of his homestead. Defendant King filed a disclaimer. The cause was tried before the court without a jury, and resulted in a judgment for the plaintiff for the amount of his debt, and foreclosing the mortgage upon the 79 acres of land. We find from the record: (1) That plaintiff below was the legal and equitable owner of the note and mortgage described in his petition, and that the land upon which said note was secured by said mortgage is correctly described in said petition and in the judgment; (2) that there was no failure of consideration upon said note, or any part thereof, and that the same was due and unpaid at the time of said suit and judgment; (3) that at the time of the execution of said mortgage the land described therein (and also in plaintiff's petition) was no part of the homestead of appellant, and that the said mortgage was a valid lien upon said property; (4) that the disclaimer of defendant King was duly and properly filed by his authority.

Conclusion of Law.

We find that the judgment was properly rendered by the court below upon the testimony offered, and, there being no error in the judgment, it is affirmed.

MOORE v. PRINCE et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

INFANT DEFENDANTS—FAILURE TO SERVE—GUARDIAN AD LITEM—JUDGMENT—REVERSAL ON APPEAL.

A judgment against infant defendants not served or cited, though represented by a guardian ad litem, will not stand on appeal or writ of error, this being a direct attack.

Error from district court, Ellis county; George N. Aldridge, Judge.

Action by J. E. Prince, Sr., against Rebecca J. Coleman and others, including infant defendants. Judgment for plaintiff, and the infant defendants bring error. Reversed.

M. B. Templeton, for plaintiffs in error.

LIGHTFOOT, C. J. On the 2d day of May, 1879, J. E. Prince, Sr., filed his petition in the district court of Ellis county, making Rebecca J. Coleman and her husband, James W. Coleman, Maggie, Mathew J. and William Moore, parties defendant. The petition alleges, in substance, that in 1870 plaintiff and one Ed H. Moore, deceased, were the joint owners of lot 5, block 15, Waxahachie; that on the — day of November, 1870, petitioner bought from said Moore his half interest in said lot for \$150; that upon payment of said sum said Moore vacated and turned said lot over to petitioner, (J. E. Prince, Sr.,) and that since that time he had possession thereof. It was alleged that at the time of said payment Moore promised to execute and have placed on record a deed conveying his interest in said lot to said J. E. Prince, Sr., and petitioner was fully assured that the same was done until after the death of said Moore, when he discovered that no deed had been placed on record; that the just and equitable title in said lot was in petitioner, J. E. Prince, Sr.; that at the time of such purchase and payment, defendant R. J. Coleman was the wife of said Ed H. Moore, and that Maggie, Mathew J. and William Moore are (at the time of filing said petition) the minor children of Ed H. Moore. Petitioner prays for judgment divesting title, general relief, etc. On this petition is indorsed an acceptance of service, signed "R. J. Coleman" and "James Coleman," and disclaiming any interest in the lot, and they state a willingness for the title to be divested as prayed for. There is no citation among the papers to the minor defendants, and nothing whatever to show any service on them. The fee book contains no charge for citation or service. On May 16, 1879, an order was made appointing J. M. Hawkins guardian ad litem for the minor defendants Maggie, William, and Mathew J. Moore, and requiring a bond in the sum of \$100, which bond was filed and approved June 2, 1879. The oath of the guardian ad litem was also filed June 2, 1879. On June 2, 1879, the guardian ad litem filed his answer, containing a gen-

eral demurrer and general denial. On June 4, 1879, a decree was rendered in accordance with the prayer of the petitioner, divesting title out of defendants and vesting it in plaintiff, and taxing the costs against the plaintiff. The decree does not recite any service. The minors have since become of age, and have brought the judgment up by writ of error for revision. The only points presented by the assignments of error which we deem it necessary to notice is: "Can judgment be rendered against minors without service or citation upon them, even though they may be represented by a guardian ad litem?" The record shows no service of citation upon the minor defendants before the judgment was rendered; nor does the judgment recite that they were served. From an inspection of the transcript it is manifest that they were not served, although they were represented by a guardian ad litem. Upon a collateral attack this would not be fatal to the judgment, but upon appeal or writ of error it is reversible error. *McAnear v. Epperson*, 54 Tex. 220. Counsel for defendant in error, in an able brief and argument, contend that this is a collateral attack upon the judgment below, but this position cannot be maintained. An appeal or writ of error is a direct attack, and brings up for review any errors in the judgment. *Wheeler v. Ahrenbeak*, 54 Tex. 536. In that case the court says: "It is a familiar rule that there is a marked distinction between the right to impeach a judgment in a collateral proceeding and the right to impeach it in a direct proceeding by appeal or error;" citing *Burditt v. Howth*, 45 Tex. 466; *Fitch v. Boyer*, 51 Tex. 344; and *Murchison v. White*, 54 Tex. 78. For the error of the court in rendering judgment against the minors without service of citation, the judgment as to plaintiffs in error is reversed and remanded.

CASEY et al. v. CHAYTOR et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

APPEAL—DELAY—DAMAGES.

Where a party knows that, under the decisions in Texas, the owner of property wrongfully seized and taken from him by a sheriff under an execution can recover its value, though the owner bought the property at the sheriff's sale for a less amount, an appeal taken by him from a judgment so holding will be treated as taken for delay, subjecting him to the penalty for such an appeal.

Appeal from district court, Bowie county; John L. Sheppard, Judge.

Action by D. O. Chaytor against Casey & Swasey and others for conversion for property wrongfully taken under an execution. Judgment for plaintiff. Defendants appeal. Affirmed.

Vaughan & Leary, for appellants. Todd & Hudgins, for appellee D. O. Chaytor.

Conclusions of Fact.

RAINEY, J. Casey & Swasey, appellants, owned a judgment against J. J. Yost. Execution was issued by virtue thereof, placed in the hands of B. F. Hargett, who levied same on property owned by and in the possession of D. O. Chaytor. An indemnity bond was executed by Casey & Swasey, with A. B. Smith and E. B. Chase as sureties, in favor of said B. F. Hargett, sheriff. The property was sold by virtue of said levy, and D. O. Chaytor became the purchaser for the sum of \$930, and the property was turned over to him. Chaytor then brought suit for the conversion of the property against Casey & Swasey and B. F. Hargett, and Hargett vouched in the sureties on the bond of indemnity. The value of the property was \$2,000, and judgment was rendered for that amount in favor of Chaytor. The trial judge charged the jury the measure of damages to be the value of the goods seized at the time of seizing, with interest. Appellants asked a special charge to the effect that the measure of damages in this case "would be the amount paid by plaintiff (Chaytor) for said stock of goods, with interest at 8 per cent. per annum from the date when said stock of goods was seized and levied upon by said B. F. Hargett, sheriff." The refusal to give the special charge as asked is the sole assignment of error, and appellants acknowledge in their brief that they knew of the decision of the supreme court in *Schoolher v. Hutchins*, 66 Tex. 331, 1 S. W. Rep. 266, where the exact doctrine as charged by the court is laid down; and we conclude that said appeal was taken for delay. Appellees suggest delay, and ask an affirmation of the judgment, with damages.

Conclusions of Law.

Where property is wrongfully seized and taken from the owner by the sheriff by virtue of an execution, the owner can recover for the value of same at the time of the seizure; and it is immaterial, as between the judgment creditor and the owner of the property, that the owner bought the property at the sheriff's sale. The action of Chaytor being based upon the conversion of his property, he is entitled to recover the value of same at the time it was taken, with interest. *Schoolher v. Hutchins*, 66 Tex. 331, 1 S. W. 266; *Hart v. Blumm*, 78 Tex. 113, 13 S. W. 181. The principle here announced, we take it, is fully settled as the law of this state, and the same was known to appellants when they appealed. It seems clear to a majority of this court that the appeal was taken for delay. We think the facts justify us in assessing 10 per cent. damages for delay. The judgment of the court below is affirmed, with 10 per cent. damages.

LIGHTFOOT, C. J., (dissenting.) To so much of the opinion and judgment in this

case as awards 10 per cent. damages for delay against appellants, I most respectfully dissent. The discretion given to the higher courts by law to include in their judgments of affirmance a decree for 10 per cent. damages on the amount of the original judgment, as the court may deem proper, was only intended for the protection of the courts against appeals purely for delay, and should be carefully exercised so that injustice may not be done. The adjudicated cases upon the subject in this state have usually been appeals in debt cases, and I have been able to find no case where such damages were awarded in a case diligently prosecuted under an apparently honest claim of right. In this case appellants appealed from what they evidently believed to be an unjust rule, which allowed a claimant of goods to buy them in at public sale for \$930, and then sue the sheriff, and recover the full value of the goods, \$2,000; thus securing the goods themselves at less than half price, and recovering by way of damages their full value, with interest. The appeal was promptly taken and vigorously prosecuted with brief and argument, in which appellants contend for a different measure of damages, as laid down in other states, and, so far as the record shows, they have not attempted a moment's delay. If they believed the rule to be unjust, it was their constitutional right to attack it; and I do not believe that in such a case the appellees have suffered by the delay to the extent of 10 per cent. in addition to the full value of the goods and interest, which they have recovered, or that this court should give additional damages in such a case.

HORSLEY v. MOSS et al.

(Court of Civil Appeals of Texas. Sept. 5, 1893.)

FARMING CONTRACT — INTEREST OF LANDOWNER — BAILMENT TO GINNER — DISOBEYING INSTRUCTIONS — LIABILITY FOR CONVERSION.

1. A contract by which H. was to furnish a farm, tools, team, and feed, and T. was to do the work in making a cotton crop, which was to be divided equally between them, gives H. a specific interest in the crop, and not merely a landlord's lien.

2. Where the cotton is delivered to a public ginner to prepare for market, with notice of H.'s interest, and instructions not to deliver to T.; he becomes a bailee for hire for both H. and T.; and if the cotton is delivered to T., and by him converted, the ginner is jointly liable with him for H.'s interest.

3. Such liability is not removed by the fact that T. accounted for, and H. accepted, part of the proceeds of the cotton first taken away, this not being a satisfaction of the conversion.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Action by William G. Horsley against Moss & Pennington and J. B. Turner for conversion. Judgment for defendants. Plaintiff appeals. Reversed.

Perkins, Gilbert & Perkins, for appellant. Evans & Hargrave for appellee J. B. Turner. R. D. Thompson, for appellees Moss & Pennington.

LIGHTFOOT, C. J. This suit was brought by appellant, Horsley, against appellees, Moss & Pennington and J. B. Turner, the facts being, substantially, that during the year 1890 Horsley made a contract with Turner, whereby the latter furnished the labor and Horsley the farm, tools, team, and feed, and Turner made the crop, which was to be divided equally between them. After the crop was made, the corn was divided equally; and the cotton was carried by Turner to the gin of Moss & Pennington who were public ginner, to be prepared for market, and was entered on their gin books in the joint names of Horsley and Turner. At the beginning of the cotton season Horsley (appellant) notified Moss & Pennington that the cotton was raised on his farm, and was his, and that they must not allow it to be removed by Turner or any one else, without his written order. Shortly afterwards, there were four bales of cotton prepared for market, which Turner promised to haul to Horsley at Greenville, but failing to do so, the latter had it hauled, and sold it. Subsequently the ginner prepared three other bales, which were taken by Turner and sold and by agreement the proceeds of the seven bales were divided, Horsley being paid \$50 upon his claim for advances. Afterwards there were 10 other bales prepared by Moss & Pennington, which they delivered to Turner, who sold the same, and applied the money to his own use. Horsley, after making formal demand upon the parties, sued Turner and Moss & Pennington for conversion of the 10 bales of cotton. There was a verdict and judgment for all the defendants, from which Horsley has appealed.

The charge of the court which was complained of below, and upon which errors are assigned in this court, was substantially this: That if Turner was the tenant of Horsley the jury must find for the defendants; but if Turner was the employee or servant of Horsley, and the latter had notified Moss & Pennington not to deliver the cotton to Turner, then they must find for plaintiff. This charge was excepted to, and several charges asked by the plaintiff below; among others, a charge that if Horsley and Turner, by the terms of the contract, were equally interested in the ownership of the cotton, and the latter appropriated all of the 10 bales to his own use, then plaintiff could recover against him for the value of half of it. Appellant also asked a charge, in substance, that if Moss & Pennington were public ginner, at whose gin the cotton was being prepared for market, and that Horsley was equally interested with Turner in the cotton, and notified the ginner not to deliver the

cotton to Turner, and they did deliver the entire 10 bales to him, and he appropriated the same to his own use, then the said Moss & Pennington would be liable to Horsley for his portion of the cotton. These requested charges were refused. The charge of the court makes the liability of all the defendants depend upon the question whether Turner was a tenant or an employe or servant of Horsley. In so far as appellee Turner is concerned, if he took the 10 bales of cotton, and sold them, and appropriated the proceeds to his own use, and half of it was justly the property of Horsley, he would be liable to appellant, Horsley, for the value of one-half of it, no matter whether Turner went upon the place as a tenant or an employe or servant of Horsley. From the testimony of Horsley and Turner it is evident that, under the farm contract between them for the year 1890, Turner stood in the relationship not merely of a servant or employe, but as a contractor who had a direct interest in the crops. He was to furnish all the labor, and control it, while Horsley was to furnish the land, teams, feed, tools, etc. They were to divide the crops equally. After the cotton had been raised, and by mutual consent hauled to the gin, neither party had the undisputed control over it, and yet both claimed it. Moss & Pennington had full notice of appellant's claim. They were bailees for hire for both parties, and if, against the protest of appellant, they turned the 10 bales of cotton, in which he owned a half interest, over to Turner, who appropriated all of it to his own use and benefit, they are responsible to appellant for the value of his half of the cotton. It has been held that, where there is a rental contract whereby the landlord is to get a part of the crops merely for the rent of his land, the tenant has the right to the possession of the crops, subject to the landlord's lien for his rents; but he cannot remove the same from the rented premises without the consent of the landlord. Sayles, Civil St. art. 3108; Railway Co. v. Bayliss, 62 Tex. 575. Even in a strictly rental contract the removal of the crops by consent of the landlord to the gin for the purpose of preparing them for market would not in any manner waive the lien of the landlord for his rents and advances. Sayles, Civil St. art. 3111. But the landlord and tenant act was not intended to take away the rights of the parties to make any contract they might deem proper in regard to the ownership of the respective parties in the crops raised, or any other matter concerning the same. Sayles, Civil St. art. 3121. There is no doubt that the landowner, if he desires to do so, may by contract reserve a specific interest in the crops grown upon his lands; and such interest will be protected by law, in the very property itself, and not merely a lien upon the same to secure the rents. In such case the landowner may bring suit for his specific

interest in such crops; and, if the same have been placed in the hands of a bailee, who has knowledge of such interest, and who, against the protests of such landowner, delivers the whole of the property to another, and the interest of such part owner is thereby lost, he may bring suit against both the bailee and the other part owner for conversion of the property. *Roberts v. Yarbora*, 41 Tex. 450; *Tinsley v. Craig*, (Ark.) 15 S. W. 897; *Hendricks v. Smith*, (Ark.) 12 S. W. 781; *Hammock v. Creekmore*, (Ark.) 3 S. W. 180; 1 Tayl. Landl. & Ten. § 24; *Heald v. Insurance Co.*, 111 Mass. 38; *Lewis v. Lyman*, 22 Pick. 437; *Wentworth v. Miller*, 53 Cal. 9. In this contract the landowner furnished not only the land, but also the teams, the tools, the feed for the teams, etc., and what he was to get as his portion of the crops was not only for the use of the land, but also for the use of his teams, his tools, and for feeding the teams, etc. He had something more than a landlord's lien on the crops; he had a specific interest in the crops themselves. While there is some conflict in the testimony on other points, yet it was not denied by any of the parties, that Horsley and Turner were each to have one-half the cotton; that the 10 bales in controversy were hauled by Turner to the gin of Moss & Pennington, to be prepared for market; that it was entered upon their gin books in the name of Horsley and Turner; and that Moss & Pennington were notified by Horsley not to deliver the cotton to Turner. Moss & Pennington, according to the undisputed testimony, became the bailees for hire of both Horsley and Turner, and were responsible to each of them for his interest in the cotton; and while, under ordinary circumstances, they might probably have considered a delivery to one as a delivery to both, yet, where there was a dispute between them as to the right of possession, and each claimed the cotton, and they were notified as such bailees not to deliver the same to Turner, if they did so under such protest, and the interest of Horsley was thereby lost, they became responsible to him for his interest in the cotton. *McAnelly v. Chapman*, 18 Tex. 199; *Lockett v. Townsen*, 3 Tex. 119; *Kowing v. Manly*, 49 N. Y. 192; *Schouler*, Bailm. § 117, 118, 501; *Story*, Bailm. (9th Ed.) § 114; 2 Amer. & Eng. Enc. Law, p. 56, subd. 2, note 4, and authorities cited. The right of appellant to hold Moss & Pennington responsible jointly with Turner for his interest in the 10 bales of cotton could not be taken away by his having accepted from the attorney of Turner a part of the proceeds of the three bales previously taken off by Turner. It was in no case a ratification of the conversion of the property. For the errors of the court in its charge, and in refusing to give the above-mentioned charges asked by plaintiff below, the judgment is reversed, and the cause remanded.

STRINGER et al. v. SINGLETERRY et al.
(Court of Civil Appeals of Texas. Sept. 5,
1893.)

STATUTE OF LIMITATIONS—PLEADING—INSTRUCTIONS.

In trespass to try title, when defendant pleads the statute of limitations of 3 and 5 years, it is error to charge on the statute of limitations of 10 years.

Error from district court, Navarro county; Rufus Hardy, Judge.

Trespass to try title by L. S. Stringer and others against Francis Singleterry and others. Judgment for defendants. Plaintiffs bring error. Reversed.

Simkins & Neblett, for plaintiffs in error.

FINLEY, J. This is a suit of trespass to try title, and the controversy is over a boundary line. The pleadings consist of a petition in the usual form on the part of plaintiffs, while defendants plead not guilty, the statute of limitations of three and five years, and long acquiescence in and acts of recognition of the line as claimed to exist by defendants. The court charged the jury upon the statute of limitations of 10 years, and this action is assigned as error. We think the assignment is well taken, and for this reason the case will be reversed. It is possible that this may be an immaterial error; but the case is not briefed by defendants in error, and as it appears material, from the brief of plaintiffs in error, it is our duty to so treat it. There are quite a number of other errors assigned, but, as they are not presented satisfactorily to the court, they will not be considered.

We beg to call attention of counsel to the rules, and insist upon compliance with them in the preparation and presentation of cases to this court. The great volume of business in this court makes it imperative that we shall strictly adhere to the rules, as the compliance with them will enable the court to more rapidly dispose of the business. Judgment reversed and remanded.

NUNN v. TOWNES et al.¹

(Court of Civil Appeals of Texas. Dec. 6,
1893.)

BROKERS—COMMISSIONS—CONTRACTS—EXPRESS AND IMPLIED—PLEADING AND PROOF.

The owner of property made an oral contract with a broker to negotiate a sale, and subsequently made a written contract therefor. *Held*, in an action on the oral contract for commissions for a sale to a person sent to the owner, after the written contract had expired and the owner had refused to renew it, that the oral was merged in the written contract, which had expired, and that, the action being on an express contract, recovery could not be had on an implied contract.

Appeal from district court, Uvalde county; T. M. Paschal, Judge.

Action by N. D. Townes and another

against S. H. Nunn for broker's commissions. Judgment for plaintiffs. Defendant appeals. Reversed.

Clark, Fuller & Garner, for appellant. Ellis & Archer, for appellees.

FLY, J. This suit was brought upon an express contract by appellees to enforce the collection of \$750 commissions on a land sale alleged to have been made through the instrumentality of appellees for appellant. Appellant pleaded general denial, and alleged that, if there ever was a contract made by him to pay the commissions, it was abrogated by the execution by the parties of a written contract, which expired in a definite time, without appellees having procured a purchaser for the land. The case was tried before the court without a jury, and judgment was rendered in favor of appellees for the amount sued for. The judge filed his conclusions of fact as well as law. There is also a statement of facts, and we find the following conclusions of fact from the statement of facts: (1) On October 20, 1890, after the formation of the partnership of Townes & Collier, a written contract was entered into between N. D. Townes and S. H. Nunn, in which it was agreed that Townes should sell 1,900 acres of land, together with 1,000 cattle, 25 horses, and whatever jacks and jennets there might be on the land, for the net sum of \$50,000, in consideration that the sale should be perfected within 30 days from the date of contract; and he should receive as commission all over the amount of \$50,000 that he might receive for the property. It was also agreed that Nunn should have the right to sell, and, if he secured the purchaser, Townes should receive 1 per cent. of the amount that the property sold for. Townes and Collier were real-estate brokers. (2) Under this contract no sale was effected, and after its expiration appellant entered into no contract with the appellees to make sale of the land. (3) That appellees, in January, 1891, sent a man named Smythe to appellant, but no trade was made at this time; but some three weeks afterwards Smythe came back, and Nunn sold him one half interest in the land and stock for \$25,000. (4) That, prior to the time that the half interest in the property was sold to Smythe, appellant went to appellee Collier, and told him that if he expected to get commissions he must look to Smythe for any commissions. (5) That after the written contract, herein mentioned, had expired by limitation, appellees tried to get appellant to make another contract with them, and he had refused to do it. (6) That there was no contract existing between appellant and appellees when the property was sold to Smythe by appellant. (7) That there was a verbal contract for the sale of the property between Townes and Nunn made in April, 1890, but no sale

¹ Rehearing pending.

was made under it, and it was never in any manner revived after the written contract expired.

Conclusions of Law.

Appellees declared upon an express contract, and there is no plainer rule of law than that they must be held to their allegations, and proof of an implied contract will not sustain the allegations. *Shiner v. Abbey*, 77 Tex. 1, 13 S. W. 613; *Krohn v. Heyhn*, 77 Tex. 319, 14 S. W. 130; *Reese v. Medlock*, 27 Tex. 120. There was no contract between the parties after the expiration of the written one, and to recover at all appellees must recover upon a quantum meruit, which, under the elementary rule that the allegations and proof must correspond, cannot be permitted with the pleadings filed by appellees.

It is unnecessary to notice the other errors assigned, as the case is disposed of by the above view of the law and facts. There are quite a number of legal propositions set forth in the brief of appellees, some of which are sound and tenable as abstract principles, but they are not fitted to the testimony in this case. There is no doubt, as said by appellees, that when a real-estate agent, who is authorized to sell at a certain fixed price, procures a purchaser, and introduces him to his principal, who sells a part of the property at a reduced price, the agent is entitled to his agreed commission on the property sold. That is true, but there is no evidence in this record of an authority given an agent to sell at a fixed price, or any agreement to pay commission, save and except the written one, which was not in force when the sale was made. If there was a verbal contract made between Townes and Nunn before the written contract was signed, (which is strenuously denied by appellant, and which, following the findings of the lower court, we find to be true in our conclusions of fact,) it was merged in the written contract, and there is no pretense that the first contract or any other kind was entered into after the expiration of the written one. The argument of appellees, which is strong from the standpoint of a quantum meruit, is not applicable to a case where there has been a declaration of an express contract. There is quite a conflict between the testimony of Townes and Nunn; the former swearing that a verbal contract was made in April, which continued until the written contract was executed; the latter swearing that no contract was entered into between him and Townes & Collier, and that the only contract ever executed in connection with the land was the one dated October 20, 1890, which was reduced to writing, and expired in 30 days. The trial judge, in his findings of facts, concludes that the written contract expired within 30 days, and also finds that appellant refused to renew the written contract, but

finds further that, after the expiration of the written contract, appellees, with the knowledge and acquiescence of appellant, renewed their efforts to sell said property upon the terms of the original contract. There is nothing in the record to sustain this finding, but, on the other hand, there was a distinct refusal upon the part of appellant to renew any contract with appellees; and if they labored to sell the land after the lapse of the written contract their right to recover can be predicated upon no other ground than that of an implied contract. Even if appellant recognized the agency of appellees, and by his acts acquiesced in their demand, this would not revive an old contract, and appellees could only recover as for a quantum meruit. The petition is based, not upon the written contract, but upon a contract alleged to have been made six months before the written contract was executed; and when the sale took place the facts show that there was no contract in existence. The judgment of the lower court will be reversed, and judgment here rendered for appellant.

BATTAGLIA v. THOMAS.

(Court of Civil Appeals of Texas. Dec. 6, 1893.)

IMPLIED WARRANTY—PLEADING.

In an action for merchandise sold and delivered, defendant cannot prove an implied warranty, in the absence of an allegation thereof or of facts from which it would necessarily be implied, especially where he alleges an express warranty.

On rehearing.

For former report see 23 S. W. 385.

NEILL, J. A general denial has the effect of requiring the plaintiff to establish the allegations he has made, which are materially in his case. *Altgelt v. Emillenburg*, 64 Tex. 150; *Guess v. Lubbock*, 5 Tex. 535. It is not necessary that he should prove an allegation which he may unnecessarily have made. For example, in suits for debt it is common for the plaintiff to allege that no payment has been made, yet it would not be contended that in such case the defendant would be allowed, under his general denial, to disprove the averment by proving payment. It is our opinion that, if redress is sought for the breach of an implied as well as an express warranty, the defendant must plead it specially. A general denial will not avail him, although the plaintiff may have needlessly alleged facts which, if proved, would show compliance with a warranty. In this case no implied warranty is claimed, nor is any fraudulent conduct on the part of plaintiff alleged, in the delivery of the goods, either of which would have afforded defendant like ground for redress, and are subject to the same rules of pleading, when sought to be used. Nor is there anything in

defendant's pleadings—as, for instance, an allegation that the produce was sold and bought directly for consumption—from which a warranty would necessarily be implied. On the contrary, an express warranty is alleged by the defendant to have been given, viz. that the goods should be delivered in good condition at San Antonio, which of course would involve their being in good condition when shipped, and this view of the case clearly excludes the existence of an implied warranty. The verdict of the jury in

this case, to whom was submitted the issue concerning the express warranty, was a finding against such warranty having been made, and, as stated by this court in its opinion, this event renders immaterial errors the court may have committed in respect to testimony concerning the condition of the goods in California when shipped. We see no reason to reverse the conclusion arrived at in our opinion rendered in this case. The question concerning jurisdiction has no merit. The motion for rehearing is overruled.

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END OF CASES IN VOLUME 28.

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Death of party—Substitution of heirs.

2. Where, during the pendency of an action by a husband and wife against a sheriff for damages for the seizure under an order of sale of a certain pair of horses, the husband dies, a plea in abatement on the ground that the children of the deceased were necessary parties was properly overruled, inasmuch as the property seized was exempt from execution.—*Steel v. Metcalf*, (Tex. Civ. App.) 23 S. W. 474.

ABDUCTION.

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1. On a trial of defendant for taking away a female under 18 years old for the purpose of concubinage, the state need not prove defendant's purpose in taking her away by positive testimony, if it be shown that he took her away; it being sufficient that such purpose be shown by facts and surrounding circumstances in evidence.—*State v. Richardson*, (Mo. Sup.) 23 S. W. 769.

2. If defendant took her away for the purpose of concubinage, he was guilty whether or not he actually had sexual intercourse with her.—*State v. Richardson*, (Mo. Sup.) 23 S. W. 769.

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1. Where land is conveyed to a married woman "with full power and authority as a feme sole to sell and mortgage, devise by will, or convey in any manner she may see proper," a privy acknowledgment by her is not essential to the validity of a title bond to such land, executed by her and her husband.—*Peterson v. Reichman*, (Tenn.) 23 S. W. 53.

Sufficiency of certificate.

2. Pasch. Dig. arts. 5007, 5008, 5010, did not require the certificate of the officer before whom a deed and power of attorney were proven to state that the witnesses were known to him.—*Cook v. Cook*, (Tex. Civ. App.) 23 S. W. 927.

3. Where the acknowledgment of a deed under which plaintiffs claim title states that there personally appeared before the notary "Leon & H. Blum, by Sylvan Blum, partner of said firm, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same," such acknowledgment is sufficient; it appearing on the face of the deed that Sylvan Blum was a member of the firm whose act it purported to be.—*Leon & H. Blum Land Co. v. Dunlap*, (Tex. Civ. App.) 23 S. W. 473.

4. A certificate of acknowledgment of a deed, which states that the person named therein as acknowledging it "personally appeared" before the officer taking it, substantially complies with the statute, which requires the certificate to state that such person is "personally known" to such officer.—*Warder v. Henry*, (Mo. Sup.) 23 S. W. 776.

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1. One B., to whom butter had been consigned over defendant's road, turned it over to plaintiffs, with a request that they sell it for his account, and sue defendant for damages through delay in delivery. *Held*, that plaintiffs had no cause of action; the claim of B. not having been assigned to them, and they not having been his factors, and entitled to possession of the butter, when the cause of action accrued.—*Gulf, C. & S. F. Ry. Co. v. Wolston*, (Tex. Civ. App.) 23 S. W. 233.

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2. An action for forcible entry and detainer for holding over under a lease cannot be consolidated with a suit in trespass to try title to the same property.—*Texas-Mexican Ry. Co. v. Cahill*, (Tex. Civ. App.) 23 S. W. 232.

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1. Declarations of a person in possession of lands, made to others than the owner, are to be considered in determining whether his possession is adverse to the owner.—*Lachausen v. Laughter*, (Tex. Civ. App.) 23 S. W. 513.

Character of possession.

2. Testimony by defendant that the land in controversy had been in her possession for 10 years, and that she had paid taxes thereon for that time, but had never seen it, and did not know how it was inclosed, if inclosed at all, and that she did not know what sort of possession her tenants had, but that she knew she had possession of it by tenants who paid the rents regularly every year, does not show the "actual and visible appropriation of the land" required by Sayles' Civil St. art. 8198, to constitute adverse possession.—*Brymer v. Taylor*, (Tex. Civ. App.) 23 S. W. 635.

Of public land.

3. Possession of land under the impression that it is a part of the public domain is not adverse.—*Beaumont Lumber Co. v. Ballard*, (Tex. Civ. App.) 23 S. W. 920.

Of land dedicated for highway.

4. A person who dedicated land to a city for use as streets had the right to use such land for any purpose consistent with the right of the city, until its authorities determined to open the streets, and the fact that the land remained inclosed and obstructed after the dedication, and was used by such person for pasturage or the growth of crops, did not show adverse possession, as against the city.—*City of Little Rock v. Wright*, (Ark.) 23 S. W. 876.

Extent of possession—Limits of grant.

5. Where a junior patent interferes with a senior, and the senior patentee is not in possession, the junior patentee's actual possession of a part of the interference, and claim to the extent of his patent boundary, is an adverse possession of the whole interference.—*Whitley County Land Co. v. Lawson*, (Ky.) 23 S. W. 369.

Length of possession.

6. In trespass to try title, where the defendant pleading the three-years statute of limitations fails to show title, it is error to submit to the jury the issue raised by such plea.—*Bailey v. Baker*, (Tex. Civ. App.) 23 S. W. 454.

Tacking.

7. Where, in partition, certain parties were held to have no title, any right they had acquired by possession prior to such judgment was thereby canceled, and such possession cannot be tacked to their subsequent possession, so as to make any statute of limitations available.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

Color of title.

8. A deed having on its face the essentials of a duly-registered conveyance is admissible for the purpose of prescribing land under the five-years statute of limitations, without proof of its execution, though an affidavit of forgery has been made against it.—*Chamberlain v. Showalter*, (Tex. Civ. App.) 23 S. W. 1017.

9. In an action by L. for partition, a decree was rendered in favor of M., intervener, for 440 acres, and in favor of defendant W. for 200 acres, as his homestead, and provided that, if they failed to agree on the boundaries of the homestead within a certain time, "then — are hereby appointed commissioners" to allot the land. Plaintiff and other defendants were decreed to take nothing. Before any agreement was made, or any commissioners were appointed, W. died. In the mean time L. and M. agreed on an equal division between them of the land decreed to the latter, and that, if they failed to agree, the division should be made by arbitrators, and deeds passed. Thereafter M. conveyed one-half of his remaining interest to S. & J., and afterwards conveyed to B. all the interest in such land decreed to him in such action. *Held*, in trespass to try title and for partition, commenced by L. more than three years after such decree, against all the other parties claiming an interest in such land, that the judgment in the former suit was res judicata of the title at that time, and that the defeated parties therein in possession could not set up the three-years statute of limitations, since their possession was without title or color of title.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

Under void patent.

10. Adverse possession under a patent void for want of authority of the officer issuing it gives no prescriptive title under the three-years statute of limitation.—*Texas Land & Mortg. Co. v. State*, 23 S. W. 258, 1 Tex. Civ. App. 616.

Payment of taxes.

11. The payment of taxes by the claimant of land under the statute of limitations cannot be assumed from the fact that the taxes were assessed to claimant, and no default in payment was proved, since claimant in such case must show affirmatively that he paid the taxes, and that the payments were concurrent with possession. — *Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; Id. 1015.

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Trespassing animals.

1. While an owner of uninclosed land cannot recover damages done by stock ranging over it, yet one who opens a division fence, even on his own land, at a time and under circumstances that would naturally cause his stock to go into his neighbor's pasture, and there remain, is a trespasser, and is liable for the injury that resulted to his neighbor therefrom. — *Claunch v. Osborn*, (Tex. Civ. App.) 23 S. W. 937.

2. In an action to recover for injuries sustained by plaintiff's cattle while being ejected by defendant from his pasture, the court refused to charge, at defendant's request, that if defendant had a fence around his pasture, though not a legal one, and there were gaps down at times, and defendant endeavored to keep up the fence, he had the exclusive right to the pasture, and the right to remove any cattle therefrom. *Held* not prejudicial error, where it charged that, to entitle plaintiff to recover, the cattle must have been lost or destroyed by the direct act of defendant in ejecting them from his premises; such charge being more favorable to defendant than the one refused. — *Jobe v. Houston*, (Tex. Civ. App.) 23 S. W. 408.

3. Where defendant's cattle entered through the fence around plaintiffs' range, and communicated a disease to their cattle, defendant is not liable, there being no law in Texas compelling the owner of cattle to restrain

them. 21 S. W. 170, reversed. — *Clarendon Land, Investment & Agency Co. v. McClelland*, (Tex. Sup.) 23 S. W. 576.

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APPEAL.

- I. APPELLATE JURISDICTION.
- II. REQUISITES.
- III. PRACTICE.
- IV. REVIEW.
- V. DECISION.

See, also, "Error, Writ of;" "Exceptions, Bill of;" "New Trial."

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Waiver of defects in pleading, see "Pleading," 23-28.

I. APPELLATE JURISDICTION.

Appealable judgments and orders.

1. A judgment not disposing of the subject-matter of controversy as to some of the parties who appeared is not a final judgment, from which an appeal will lie. — *Gulf City St. Railway & Real-Estate Co. v. Becker*, (Tex. Civ. App.) 23 S. W. 1015.

2. Nine separate suits having been begun against the same defendant, the court, before trial, ordered them consolidated. After trial, four of the nine were disposed of by separate verdicts and judgments. The record showed that these four were tried together, and that the consolidation continued in force, but did not show that the other five had been disposed of. *Held*, that the judgments entered were not final, so as to support a writ of error, while said five cases remained open. — *Mills v. Paul*, (Tex. Civ. App.) 23 S. W. 395; Same v. Bassett, Id. 396; Same v. Cameron, Id.

Jurisdictional amount.

3. Under Act April 5, 1889, (Gen. Laws 1889, p. 131,) providing for the recovery of claims of less than \$50 against railroad companies, and fixing the measure of damages recoverable as the claim sued for and an attorney's fee, to be assessed by the court or jury, which must be reasonable, and not over \$10, and which can be recovered only in case certain formalities are complied with in the presentation of the claim, such attorney's fee is part of the matter in controversy, and not costs, within Const. art. 5, § 16; Rev. St. art. 1165, — giving the county court appellate jurisdiction of cases from justice courts when the judgment appealed from or the amount in controversy exceeds \$20, exclusive of costs. — *Gulf, C. & S. F. Ry. Co. v. Werchan*, (Tex. Civ. App.) 23 S. W. 30.

4. In a suit for damages less than \$20, when the pleadings are in writing, the justice's failure to enter on his docket the amount claimed in reconviction, being more than \$20, will not deprive the county court of jurisdiction of defendant's appeal. — *Texas & P. Ry. Co. v. Hayes*, (Tex. Civ. App.) 23 S. W. 443.

II. REQUISITES.

In general.

5. Acts Called Sess. 22d Leg. art. 1387, provides that an appeal to the court of civil

appeals is perfected by notice of appeal within two days of final judgment, or judgment refusing a new trial, and filing an appeal bond conditioned (article 1400) to pay all costs below "and which may accrue in the court of civil appeals and the supreme court." A clerk's certificate showed notice a month after judgment, and a bond conditioned to pay all costs accrued below "or which may accrue in the civil court of appeals." *Held*, that such certificate gave the court no jurisdiction to grant appellee's motion for affirmance.—*Schloss v. Atchison, T. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 392.

6. Plaintiff sued defendant in her own right and as next friend of her minor son. Judgment was rendered for plaintiff as to the cause of action in her own right and for defendant as to the cause of action of the minor. Defendant appealed, filing a bond payable to plaintiff alone. Plaintiff filed no bond, and gave no notice of appeal. *Held*, that there was no appeal from the judgment as to the son.—*Texas & N. O. Ry. Co. v. Skinner*, (Tex. Civ. App.) 23 S. W. 1001.

Time of taking.

7. Rev. St. art. 1389, enacted before the creation of the court of civil appeals, provided that a writ of error might be sued out at any time within two years after final judgment. Act 1892, taking effect September 1st, (Gen. Laws 1892, c. 15,) provided that a writ of error to the court of civil appeals might be sued out at any time within 12 months of final judgment. *Held*, that this latter act should be so construed as to allow a writ of error to such court, from a judgment rendered before the date of the taking effect of the act, to be sued out at any time within 12 months of such date, provided that it be done within 2 years from the rendition of the judgment.—*Compton v. Ashley*, (Tex. Civ. App.) 23 S. W. 487.

Bond.

8. The fact that an appeal bond given by plaintiff on appeal from a justice's court is signed by one of the defendants as surety is no ground for dismissing the appeal, since the approval of the bond by the justice determines the sufficiency of the surety.—*Voss v. Feurmann*, (Tex. Civ. App.) 23 S. W. 936.

9. Where a judgment rendered by a justice of the peace is transferred by the judgment plaintiff to third persons before an appeal is taken, an appeal bond afterwards made to such plaintiff, and not to the transferees, is sufficient.—*Wells-Fargo Exp. Co. v. Holliday*, (Tex. Civ. App.) 23 S. W. 91.

10. An appeal bond is not insufficient because there is only one surety.—*Long v. Cruger*, (Tex. Civ. App.) 23 S. W. 242.

11. A surety on a bond for costs is not, by the rendition of judgment in the action against his principal, disqualified from becoming a surety on the appeal bond. *Trammell v. Trammell*, 15 Tex. 291; *Saylor v. Marx*, 56 Tex. 90; *Sampson v. Solinsky*, 13 S. W. 67, 75 Tex. 603, —followed.—*Long v. Cruger*, (Tex. Civ. App.) 23 S. W. 242.

12. Act April 18, 1892, requires supersedeas bonds to be conditioned that appellant, in case the judgment of the supreme court or court of civil appeals be against him, shall perform such judgment, and pay all damages awarded thereby; and cost bonds that appellant shall pay all costs accrued in the court below, and which may accrue in the court of civil appeals and supreme court. An appeal bond obligated appellant, in case the judgment of "the appellate court" should be against him, to perform its judgment, and pay damages and costs accrued in the court below, or which might accrue in "the appellate court." *Held*, that the phrase "appellate court" sufficiently described whatever court might give final judgment in the case.—*Prewitt v. Day*, (Tex. Sup.) 23 S. W. 982.

13. In a suit to foreclose a mortgage, it appeared that the land had been conveyed by the

original mortgagor, and the title had successively passed to each of several defendants, each one of whom had, in turn, assumed payment of the mortgage. G., in whom the title last vested, pleaded over against his grantor, asking that his purchase be canceled for fraud. A demurrer to this answer was sustained, and judgment rendered against defendants for the amount of the mortgage, and making each of defendants liable to his predecessor in title for such part thereof as the latter should be compelled to pay. G. appealed, assigning as error the sustaining of the demurrer to his answer. *Held*, that his appeal bond should be made payable to the other defendants, as well as to plaintiff, since they all were interested adversely to him.—*Grant v. Collins*, (Tex. Civ. App.) 23 S. W. 994.

14. Under Gen. Laws Called Sess. 22d Lex. p. 44, art. 1404, prescribing as the condition of an appeal bond "that appellant shall prosecute his appeal with effect, and, in case the judgment of the supreme court or the court of civil appeals shall be against him, he shall perform its judgment," a bond conditioned that appellant "shall prosecute this appeal with effect, and, in case the judgment of the said court of civil appeals shall be against the defendants herein, they shall perform the judgment," etc., of said court, and pay damages awarded, is not so defective as to deprive the court of civil appeals of jurisdiction to affirm the judgment below on motion of the appellee.—*Davis v. Estes*, (Tex. Civ. App.) 23 S. W. 411.

15. Where a bond states that defendant gave notice of appeal, but the language thereof and the record show that it was intended to describe the plaintiff as appellant, the variance is not material.—*Brown v. Shelton*, (Tex. Civ. App.) 23 S. W. 483.

16. On an appeal to the county court from a judgment of a justice's court in favor of defendant, a bond which recites that the judgment was against plaintiff for the costs of the suit sufficiently describes the judgment, though it fails to recite the further provisions of the judgment that the plaintiff take nothing by his suit, and that defendant go hence without day, and fails to give the number of the cause in the justice's court.—*Brown v. Shelton*, (Tex. Civ. App.) 23 S. W. 483.

Defective bond—Right to file new one.

17. Act April 13, 1892, (organizing the court of civil appeals,) § 39, provides that where there is a defect "in any appeal or writ of error bond," on motion to dismiss the same for such defect, the court may allow a new bond to be filed. Rules Ct. Civ. App. 8 (20 S. W. Rep. vii.) provides that all motions relating to informalities in bringing a case to the court shall be filed and entered in the motion docket on or before the Tuesday next before the day on which the case is subject to be called for submission, otherwise the ground of objection shall be waived; and such filing and docketing will be sufficient notice of the motion. *Held* that, where the motion to dismiss the appeal because of a defective bond is entered at the proper time, to entitle the appellant to file a new bond, the same should be presented before the hearing of the motion.—*Texas Mexican Ry. Co. v. Cahill*, (Tex. Civ. App.) 23 S. W. 45.

Necessity of exceptions.

18. Under Rev. St. art. 1318, providing that the court's charge shall be filed, and shall constitute part of the record, and be deemed excepted to, and subject to revision, without a bill of exceptions, an instruction on a matter not in issue is ground for reversal, when it was assigned below on motion for new trial, though it was not excepted to, nor a countercharge requested.—*Atchison, T. & S. F. Ry. Co. v. Click*, (Tex. Civ. App.) 23 S. W. 833.

19. Where a case is before the appellate court on a full statement of facts, as well as the conclusions of the trial judge, the rule requiring exceptions to have been taken to the

Findings does not apply.—*Connelle v. Roberts*, 23 S. W. 187, 1 Tex. Civ. App. 363.

Necessity of motion for new trial.

20. In an action to recover taxes the court of appeals will review the legal question arising on defendants' plea of a statute exempting them from taxation, though there had been no motion for a new trial, or a separation of the law and the facts in the decision of the trial court.—*Commonwealth v. Owensboro, F. of R. & G. R. R. Co.*, (Ky.) 23 S. W. 808; *Same v. Louisville & N. R. Co.*, Id.; *Same v. Elkton & G. R. Co.*, Id.; *Same v. Mammoth Cave R. Co.*, Id.; *Same v. Burnside & C. R. R. Co.*, Id.; *Same v. Hodgenville & E. Ry. Co.*, Id.; *Same v. Louisville Southern R. Co.*, Id.; *Same v. Louisville, H. & W. R. Co.*, Id.; *Same v. Ohio Val. Ry. Co.*, Id.; *Same v. Louisville, St. L. & T. Ry. Co.*, Id.; *Same v. Kentucky & I. Bridge Co.*, Id.; *Same v. Kentucky Midland Ry. Co.*, Id.; *Same v. Kenesee Coal Co.*, Id.; *Same v. Owensboro & N. R. Co.*, Id.

III. PRACTICE.

Assignment of errors.

21. An assignment of error that "the court erred in sustaining exceptions to the two special answers of defendant" is too general to require consideration, it appearing that there were two special exceptions and two special answers.—*Evans v. Texas Printing & Lithographing Co.*, (Tex. Civ. App.) 23 S. W. 476.

22. An assignment of error is sufficient if so specific as to enable the court to see that a particular ruling is complained of, though it does not state the grounds on which the ruling is claimed to be erroneous.—*Clarendon Land, Invest. & Agency Co. v. McClelland*, (Tex. Sup.) 23 S. W. 1100.

23. An assignment of error, that "the court should have granted to the plaintiff below a new trial because the verdict of the jury was contrary to and against the evidence," is too general.—*Robinson v. Melver*, (Tex. Civ. App.) 23 S. W. 915.

24. An assignment of error that "the verdict is against the evidence, which largely preponderates against the finding of the jury," presupposes that there is evidence to support the verdict, and is not well taken.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

25. An assignment of error to the rendering of judgment against defendant because plaintiff was guilty of contributory negligence, which was the cause of the accident, is specific enough to require consideration where the evidence going to show contributory negligence was pertinently directed to one act.—*Texas & N. O. R. Co. v. Hare*, (Tex. Civ. App.) 23 S. W. 42.

26. A general assignment of error addressed to the refusal of four special instructions, containing distinct propositions of law, will not be considered on review.—*Campbell v. Cornelius*, (Tex. Civ. App.) 23 S. W. 117.

27. An assignment of error, merely stating that the verdict is not supported by evidence, is insufficient to be considered on appeal.—*Texas & P. Ry. Co. v. Raney*, (Tex. Civ. App.) 23 S. W. 340.

28. Where there are a number of objections in the record, an assignment which assigns error in reference to them generally, and does not inform the court of the nature of the point intended to be raised, will not be considered.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

29. An assignment of error which states that "the evidence in this case shows that defendants did not violate" the contract, and that plaintiff did violate it, "and by a subsequent contract made with" a third person "did put himself in a position directly antagonistic to defendants' interest, and did thereby forfeit and violate the said contract," is sufficient to present the question as to whether or not plaintiff's subsequent contract of partnership with such

third person was ipso facto a violation of his contract with defendants.—*Bender v. Peyton*, (Tex. Civ. App.) 23 S. W. 222.

30. An assignment of error, though briefed, will be presumed to have been waived by counsel for failure to comply with either of court of civil appeals rules 24, 25, or 31, (20 S. W. viii.) which respectively require that the assignment specify the grounds of error relied on, and point out that part of the proceedings contained in the record in which the error is, and that there should be subjoined to each proposition in the brief a statement of such proceedings contained in the record as will be sufficient to explain and support the proposition, with a reference to the pages of the record.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

31. An assignment of error that the court erred in overruling specified exceptions to plaintiff's petition is not itself a proposition, within the meaning of rule 30 of the courts of civil appeals, (20 S. W. Rep. viii.) which requires assignments of error to be followed by appropriate propositions or statements, unless the assignment of errors is itself in the shape of a proposition to be maintained.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

32. An assignment that there was error in sustaining the special exceptions to defendant's answer is not sufficiently definite to be noticed, there being several exceptions, some of which, at least, were well taken.—*Texas & P. Ry. Co. v. Donovan*, (Tex. Civ. App.) 23 S. W. 735.

33. An assignment that "the court erred in refusing to give the three special instructions requested by defendants, numbered 1, 4, and 6," is too general, when the instructions bear upon different and distinct issues.—*Waggoner v. Daniels*, (Tex. Civ. App.) 23 S. W. 735.

34. An assignment of error based on "the refusal of special charges numbered 1 to 4, inclusive," is bad, where each charge relates to distinct and separate questions.—*Texas & P. Ry. Co. v. Donovan*, (Tex. Civ. App.) 23 S. W. 735.

Copying assignments of error in brief.

35. Where appellant's assignments of error are not copied in his brief, as required by amended rule 29 of the supreme court and by the rules adopted by that court for the court of civil appeals, such assignments cannot be considered.—*Harris v. Crabtree*, (Tex. Civ. App.) 23 S. W. 474.

36. Assignments of error copied into appellant's brief, without being supported by propositions or statements as required by the rules, will not be considered.—*Parker County v. Jackson*, (Tex. Civ. App.) 23 S. W. 924.

Record.

37. The fact that appellants were pressed for time, after getting the transcript, to get it filed within the required time, and did not discover the absence of the judge's certificate of approval of the statement of facts, though they examined it carefully, is not a sufficient excuse for failure to have the omission corrected and the record complete before the cause was submitted on appeal, where it was not submitted until about eight months after the transcript was filed.—*Caswell v. Greer*, (Tex. Civ. App.) 23 S. W. 1002.

38. 1 Sayles' Civil St. art. 1379a, provides that when a statement of facts is filed after time, and the party filing it shows that he used due diligence to obtain the judge's approval and signature and to file it in time, and that the delay resulted from causes beyond his control, the court shall allow said statement as part of the record. *Held*, that an affidavit that the statement was before adjournment presented to the judge, who agreed to approve and file it, but failed to do so, showed no sufficient diligence on the part of appellant, nor any reversible error of the judge, since appellant could have compelled him by mandamus to settle and sign the statement. *Osborne v. Prather*, 18 S.

W. 613, 83 Tex. 208, followed.—*Worley v. McIntire*, (Tex. Civ. App.) 23 S. W. 996.

39. An agreed statement of facts, on which a case is tried in the court below, and which the court embodies in its judgment, is sufficient, under Rev. St. art. 1293, to authorize a revision of the judgment on matters growing out of such facts, in the absence of a statement of facts or findings of fact by the court, or an agreed case for appeal, under articles 1333 and 1414.—*State v. Connor*, (Tex. Sup.) 23 S. W. 1103.

40. Where the record shows an order consolidating nine causes, directing that they be tried as one cause under the file number of one of the causes, and that thereafter four only of the causes were tried, and separate verdicts returned, and separate judgments entered in each, the transcript will be stricken from the files, and the appeal dismissed, on the ground that no final judgment is shown to have been rendered in the consolidated cause.—*Mills v. Paul*, 23 S. W. 189, 1 Tex. Civ. App. 419.

41. Appellees, by consenting to the filing of a transcript after time allowed by rules, are not precluded from moving to have the transcript stricken from the files on the ground that it does not show a final judgment.—*Mills v. Paul*, 23 S. W. 189, 1 Tex. Civ. App. 419.

42. A motion to file the transcript out of time must be supported by facts in excuse of the default, either verified or apparent of record.—*Davis v. Estes*, (Tex. Civ. App.) 23 S. W. 411.

43. Defendant employed counsel to represent it throughout the cause, and paid their fee. After trial and judgment against defendant, said counsel perfected an appeal, and received the transcript in due time. They failed to file it, however, believing that their services were no longer desired. The time having expired, plaintiff asked affirmance of judgment on certificate, when defendant, having employed other counsel, obtained the transcript, and asked leave to file it. Defendant had never discharged its first counsel, and supposed they were prosecuting the appeal until after the certificate for affirmance had been filed. *Held*, that they should be allowed to file the transcript.—*Western Union Tel. Co. v. Walker*, (Tex. Sup.) 23 S. W. 380.

44. Under *Sayles' Civil St. arts. 1411, 1412*, providing that the transcript on appeal shall contain the citation and return, if the pleadings or judgment do not show an appearance in person or by attorney, it is not enough that the judgment recite that service was had.—*McMickle v. Texarkana Nat. Bank*, (Tex. Civ. App.) 23 S. W. 428.

45. The exclusion of evidence will not be reviewed on appeal where the testimony sought to be introduced is not preserved by bill of exceptions.—*Gulf, C. & S. F. Ry. Co. v. Rowland*, (Tex. Civ. App.) 23 S. W. 421.

46. The refusal to allow a witness to answer a question cannot be considered on appeal when it does not appear what appellant desired or hoped to prove by the answer, or what the answer would have been.—*Reed v. Lilly's Ex'r*, (Ky.) 23 S. W. 955.

47. The admission of evidence will not be reviewed on appeal where the bill of exceptions does not state the objections made.—*Gulf, C. & S. F. Ry. Co. v. Rowland*, (Tex. Civ. App.) 23 S. W. 421.

48. A recital in a bill of exceptions that objection to the introduction of a deposition in evidence was made because "neither the caption nor certificate disclose in what case it was taken," and that "written notice of the objection was served on the adverse counsel before trial," sufficiently shows the nature of the objection made, and the service of written notice thereof on the adverse counsel before trial.—*Southern Pac. R. Co. v. Royal*, (Tex. Civ. App.) 23 S. W. 316.

49. The court of civil appeals has no jurisdiction to try a case where the transcript fails

to show that notice of appeal was given in the court below, as required by Rev. St. art. 1387.—*Luckey v. Warren*, (Tex. Civ. App.) 23 S. W. 617.

50. An assignment of error on a point on which there is no bill of exceptions in the record cannot be considered on appeal.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

Record—Bringing up the evidence.

51. Loose documents found among the papers on appeal, not identified as evidence used in the lower court, cannot be noticed as such.—*Eastin v. Ferguson*, (Tex. Civ. App.) 23 S. W. 918.

Conflict in record.

52. A recital in a judgment and in a bill of exceptions that the court dismissed an action as to all the members of a firm except the one through which it had been served, and that a motion to dismiss as to the firm itself had been denied, will control a statement in the charge to the jury that the action had been dismissed as to all parties except the individual partner served; and it is improper to permit the record on appeal, which contains no final disposition of the action as to the firm itself, to be amended nunc pro tunc so as to show that the court at the trial term dismissed as to the firm itself.—*Frank v. Tatum*, (Tex. Civ. App.) 23 S. W. 311.

Contradicting record.

53. When the transcript on appeal shows that a certain deed was dated 1888, the affidavit of an attorney in the case, showing that it is a clerical mistake, and that the date was 1878, cannot be considered.—*Dempsey v. Taylor*, (Tex. Civ. App.) 23 S. W. 220.

Hearing.

54. On appeal in summary proceedings for the disbarment of an attorney, tried to the court without a jury, the cause will be tried de novo in the supreme court.—*State v. Davis*, (Tenn.) 23 S. W. 59.

Rehearing.

55. A rehearing in the appellate court, on the ground that there was error in the transcript filed by the other party, will not be granted, as either party has a right to have it corrected, but this right ceases on submission of the cause for decision.—*McMickle v. Texarkana Nat. Bank*, (Tex. Civ. App.) 23 S. W. 428.

Appeals from inferior court.

56. Under Rev. St. art. 316, providing that, on appeal from a justice's court to the county or district court, either party may plead any new matter, except that no new cause of action shall be set up by plaintiff, nor counterclaim by defendant, not pleaded in the court below, though defendant allows judgment by default in the justice's court, he may answer in the district court on appeal.—*Texas & N. O. R. Co. v. Jones*, (Tex. Civ. App.) 23 S. W. 424.

57. Though a county court, on dismissing an appeal from a justice of the peace, is not authorized to award a writ of procedendo, an order in its judgment that "the justice court proceed with the execution of its judgment" is mere surplusage, and harmless error, and does not vitiate the rest of the judgment.—*Llano Improvement & Furnace Co. v. White*, (Tex. Civ. App.) 23 S. W. 594.

IV. REVIEW.

In general.

58. On appeal from dismissal, on demurrer, of an injunction against an issue of municipal bonds, complainant, in his motion for rehearing, admitted that pending the appeal the bonds had been issued, but prayed that as the judgment against him was for costs, and was an adjudication in any suit by the city against him for damages, the court should either reverse, or, admitting the fact that the bonds were issued, modify the judgment on that

ground, and grant complainant costs in both courts. *Held*, that the court could not take complainant's facts as admitted by the demurrer in the court below, and, the bonds being issued, the question was narrowed to one of costs, which could not be considered.—*Bolton v. City of San Antonio*, (Tex. Civ. App.) 23 S. W. 279.

59. Where defendant filed no motion for a new trial, and his motion to set aside the judgment for alleged error in refusing to strike out the amended and supplemental petition was not filed within the time required by statute, the motion to set aside the judgment cannot be treated as a motion for a new trial, and the alleged error is not brought up for review by an appeal from the decision denying the motion.—(*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

60. The grounds of the motion to the effect that the petition states no cause of action may, however, be considered on such appeal, since the failure of the petition to state facts constituting a cause of action is an error appearing upon the face of the record proper.—*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

Estoppel to allege error.

61. Inconsistency in instructions given at appellant's request is no ground for reversal.—*Church v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 1056.

Adhering to theory pursued below.

62. Where an action against a carrier for loss of goods shipped is tried on the theory that the bill of lading issued by a connecting carrier was adopted by defendant, an objection that the evidence fails to show that the bill of lading was executed by or on behalf of the defendant will not be considered.—*Gulf, C. & S. F. Ry. Co. v. Ramey*, (Tex. Civ. App.) 23 S. W. 442.

Review of decision of intermediate court.

63. The district court has the power, on appeal from a justice's court, to determine whether a counterclaim set up by defendant was fictitious, and made for the purpose of conferring jurisdiction on the district court, and its determination, in the absence of a statement of facts in the record, is final, and not subject to the revision of the court of civil appeals.—*Galveston, H. & S. A. Ry. Co. v. Fussell*, (Tex. Civ. App.) 23 S. W. 932.

Presumptions.

64. In trespass to try title by the heirs of a deceased owner of a head-right certificate against the purchaser thereof at an administrator's sale, where the findings of the trial court identify this certificate as the one on which a patent for the land in dispute was subsequently issued to the purchaser by the estate, the court of civil appeals will presume, in the absence of the patent from the record, that it contained the usual showing that it was issued by virtue of a location of the head-right certificate purchased at the administrator's sale.—*Fletcher v. Walker*, (Tex. Civ. App.) 23 S. W. 1029.

65. It appearing by the decree that oral testimony was heard at the trial, and this not having been brought into the record, it will be presumed that the findings were correct.—*Carpenter v. Ellenbrook*, (Ark.) 23 S. W. 792.

66. On appeal from a decision as to whether certain land was detached and isolated from other public land, so as to be salable to persons not actual settlers thereon, as provided by Act April 8, 1839, the record showed that a map was introduced presenting the situation of the land in question with reference to other public lands, but it did not appear what was shown by this map, which was not a part of the record. *Held*, that the map would be presumed to have shown facts sustaining the decision of the

lower court.—*Eastin v. Ferguson*, (Tex. Civ. App.) 23 S. W. 918.

67. The action of the court in refusing instructions will not be considered on appeal when the instructions which were given are not set out in appellant's abstract.—*Dardanelle Pontoon Bridge & Turnpike Co. v. Shinn*, (Ark.) 23 S. W. 584.

Weight and sufficiency of evidence.

68. In an action for money alleged to have been deposited with defendant, plaintiff testified that he left it with defendant for safe-keeping merely: that it belonged to him as guardian of his minor children, and that defendant knew this fact, and had refused to pay the money over to plaintiff on demand. Defendant testified that the money had been left with him to be used in the business of an association of which he was manager, and which had since become insolvent. *Held*, that a finding by the trial court in plaintiff's favor would not be disturbed on appeal, where it further appeared that no credit had ever been given plaintiff for such sum on the books of the association.—*Lipscomb v. Parker*, (Tex. Civ. App.) 23 S. W. 1006.

69. Where, in an election contest between the opposing candidates for the office of county judge, on the ground that illegal votes were cast for the contestee, both the contesting board and the court of common pleas decide in favor of the contestant on conflicting evidence, the judgment of such court will not be disturbed on appeal.—*Lunsford v. Culton*, (Ky.) 23 S. W. 946.

70. The finding of the jury will not be disturbed on appeal unless there is no evidence to support it, or it is palpably against the weight of the evidence.—*Texas & N. O. Ry. Co. v. Ludtke*, (Tex. Civ. App.) 23 S. W. 82.

71. When two findings of fact by the trial court lead to contradictory conclusions, the appellate court will examine the evidence to ascertain which is correct.—*Kneeland v. McLachlen*, (Tex. Civ. App.) 23 S. W. 309.

Matters not apparent of record.

72. A finding by the court that defendant is liable as a partner on a note executed by a firm will be reversed on appeal, where there is no evidence in the statement of facts that he was a member of the firm.—*Nunn v. McCausland*, (Tex. Civ. App.) 23 S. W. 418.

73. On appeal from a judgment in a justice court to the county court, defendants moved to strike out the oral pleadings of plaintiff, on the ground that no such cause of action was pleaded below, which was overruled. *Held*, that where the transcript fails to disclose what the pleadings were in either court, the judgment will be affirmed.—*Patty v. Gibson*, (Tex. Civ. App.) 23 S. W. 392.

74. In the absence of a statement of facts, the charge of the court cannot be reviewed.—*McCormick Harvesting Mach. Co. v. Gilkey*, (Tex. Civ. App.) 23 S. W. 325.

75. An order refusing a new trial for newly-discovered evidence cannot be reviewed in the absence of a statement of facts to show the importance of such evidence.—*Worley v. McIntire*, (Tex. Civ. App.) 23 S. W. 996.

Harmless error.

76. Where, in an action against a railroad company for killing plaintiffs' mule, it appears that the mule was struck by defendant's engine at a place where the track should have been, but was not, fenced, a judgment for plaintiff will not be reversed on account of errors committed on the trial, since no other judgment could have been rendered than was rendered.—*Gulf, C. & S. F. Ry. Co. v. Koska*, (Tex. Civ. App.) 23 S. W. 1002.

77. Error in submitting to the jury elements of damage, as to which there was no allegation or evidence, cannot be regarded as harmless, in the absence of anything in the record to show on what the verdict rendered for plain-

tiff was based.—*Gulf, C. & S. F. Ry. Co. v. Darton*, (Tex. Civ. App.) 23 S. W. 80.

78. Where, under the uncontradicted evidence, no other judgment could have been rendered than that which was rendered, it is immaterial whether or not errors were committed by the giving and refusal of instructions.—*Smith v. Adams*, (Tex. Civ. App.) 23 S. W. 49.

79. An error in the conclusions of the trial court is no ground for reversal where the same judgment as the one rendered would necessarily follow correct conclusions.—*Morgan v. Turner*, (Tex. Civ. App.) 23 S. W. 284; *Turner v. Morgan*, Id.

80. A mere failure to charge as to a particular point, if error, is one of omission, and does not require a reversal.—*Gulf, C. & S. F. Ry. Co. v. Humphries*, (Tex. Civ. App.) 23 S. W. 556.

81. An error in submitting the auditor's account to the jury for statement, in disregard of Rev. St. art. 1473, making such report conclusive unless contradicted by exceptions filed before trial, is not ground for complaint by defendant, when the verdict of the jury for all the items concluded by the report does not aggregate so much as the balance shown by the report to be due plaintiff.—*Aransas Pass Land Co. v. Hanaford*, (Tex. Civ. App.) 23 S. W. 566.

Harmless error—Rulings on evidence

82. The evidence being such that it must have been found that there was a ratification of a certain deed alleged to have been obtained by undue influence, the admission of improper evidence to this effect was harmless error.—*Ellis v. Ellis*, (Tex. Civ. App.) 23 S. W. 996.

83. Error in excluding testimony is harmless when the record shows that the party objecting subsequently got the benefit of the testimony.—*Illinois Cent. R. Co. v. Spence*, (Tenn.) 23 S. W. 211.

84. In an action to foreclose a chattel mortgage, to render the exclusion of the mortgage harmless error, defendants must affirmatively show that under no state of facts which plaintiff could have established under his pleading could he have succeeded in maintaining a right against them under the mortgage.—*Wynne v. Admire*, (Tex. Civ. App.) 23 S. W. 418.

85. Exclusion of evidence is harmless error where there is other uncontradicted testimony to the same effect.—*Jones v. Malvern Lumber Co.*, (Ark.) 23 S. W. 679.

— Error in appellant's favor.

86. A party cannot, on appeal, take an advantage of an error in an instruction in his own favor.—*International Bldg. & Loan Ass'n v. Fortassain*, (Tex. Civ. App.) 23 S. W. 496.

Objections waived.

87. Under rule 29 of the court of civil appeals, (20 S. W. viii.) assignments of error not copied into the brief of appellant will be disregarded.—*Blankenship & Blake Co. v. Kelly*, (Tex. Civ. App.) 23 S. W. 27.

88. An assignment of error which is not copied in the briefs cannot be considered on appeal.—*Haney v. Franco-Texas Land Co.*, (Tex. Civ. App.) 23 S. W. 414.

V. DECISION.

Affirmance.

89. Where the assignments of errors are all as to the admission or exclusion of evidence, and the statement of facts is not signed or approved by the trial judge, the judgment will be affirmed.—*Caswell v. Greer*, (Tex. Civ. App.) 23 S. W. 331.

Penalty for vexatious appeal.

90. Where a party knows that, under the decisions in Texas, the owner of property wrongfully seized and taken from him by a sheriff under an execution can recover its value, though the owner bought the property at the sheriff's sale for a less amount, an appeal taken

by him from a judgment so holding will be treated as taken for delay, subjecting him to the penalty for such an appeal.—*Casey v. Chaytor*, (Tex. Civ. App.) 23 S. W. 1114.

Dismissal.

91. When the only assignment of error is based on a statement of the judge below, contained in a certificate which has been stricken from the record, there is nothing left to review, and the appeal will be dismissed.—*City of El Paso v. Dickens*, (Tex. Civ. App.) 23 S. W. 283.

Reversal.

92. In an action for services, and for the rental of certain boats, defendant reconvened for damages for failure of plaintiff to furnish certain other boats, as he had agreed to do, and also pleaded the statute of limitations. There was a judgment against plaintiff on the plea of limitation, and in his favor on the plea in reconvention. He appealed from the judgment against him, but defendant did not appeal from the judgment against him on the plea in reconvention. *Held*, that the reversal of the judgment on such appeal, without restriction, worked a reversal as to all issues, and the judgment on the plea in reconvention was not a bar to the claim for damages thereon on a second trial.—*Watkins v. Junker*, (Tex. Civ. App.) 23 S. W. 802.

Rendering such judgment as lower court should have rendered.

93. The statute (Called Sess. 22d Leg. p. 31) provides that on reversal of the judgment: below the court of civil appeals shall render such judgment as the court below should have rendered, except when some matter of fact must be ascertained, or damages assessed, or the matter is uncertain, when the cause shall be remanded for new trial. An action for breach of warranty having been tried without a jury, and judgment rendered for plaintiff, defendant appealed. Plaintiff confessed one of the errors assigned, and moved to reverse, and remand for new trial, to allow him to make certain proof necessary to support a judgment, which he had failed to make below. *Held*, that the court was bound to render judgment, and, his motion being denied, plaintiff might withdraw his confession of error.—*Maverick v. Routh*, (Tex. Civ. App.) 23 S. W. 596.

Modification of judgment.

94. A judgment for the recovery of land, which does not provide in express terms for the issuance of a writ of possession, will be reformed on appeal.—*Willburn v. Tow*, (Tex. Civ. App.) 23 S. W. 853.

95. Where one has prosecuted an action to have a trust declared in land, she cannot on appeal, after reversal of a favorable decree, have a decree therein to enforce a vendor's lien on the theory of a sale.—*McDonald v. Hooker*, (Ark.) 23 S. W. 678.

96. An error as to the amount of a judgment, owing to an improper computation of interest, will be corrected on appeal, though it is in appellee's favor, where he calls it to the attention of the court by cross assignments of error.—*Morgan v. Turner*, (Tex. Civ. App.) 23 S. W. 284; *Turner v. Morgan*, Id.

When new trial had.

97. While cases tried by the court without a jury will ordinarily be finally disposed of on appeal, such disposition will not be made where the court has erroneously ordered a nonsuit at the close of plaintiff's evidence; and the case will be remanded for a new trial, to enable defendant to make his defense.—*Perry v. Blakey*, (Tex. Civ. App.) 23 S. W. 804.

98. Where a judgment on a verdict for plaintiff on two items distinctly separable on the pleadings and proof is reversed solely on the ground that plaintiff, as a matter of law, was not entitled to recover on one of the items, and

that the jury should have been directed to find for defendant on that item, and the cause is remanded "for further proceedings consistent with this opinion," the trial court is not required to retry the issues, but may render judgment for the item as to which there was no error.—*Garnett v. Farmers' Nat. Bank*, (Ky.) 23 S. W. 866.

Excessive judgment—Affirmance on remitting excess.

99. Where, on a motion by defendant for new trial, the court rules that certain instructions were erroneous as to one of plaintiff's causes of action, and the latter undertakes to avoid a new trial by entering a remittitur, but fails to remit enough, plaintiff will be permitted to remit in the supreme court the balance of the amount improperly recovered.—*Warder v. Henry*, (Mo. Sup.) 23 S. W. 776.

100. Such remittitur will not be refused, on objection of the sureties on the appeal bond, because defendant has become insolvent since the appeal was taken.—*Warder v. Henry*, (Mo. Sup.) 23 S. W. 776.

101. Where plaintiff's injuries are external and obvious to the jury, and their permanency has been testified to by his doctors as well as by himself, the verdict being for less than one-third of the amount sued for, the court will allow plaintiff to remit the amount he has wrongfully been allowed to testify to as his expense incurred for drugs, and will refuse to reverse for that error.—*Railway Co. v. Wesch*, 22 S. W. 957, 85 Tex. 594, distinguished.—*Galveston, H. & S. A. Ry. Co. v. Duell*, (Tex. Civ. App.) 23 S. W. 596.

Mandate and proceedings below.

102. Where the supreme court remands a case, with directions to the lower court to ascertain the amount of certain taxes paid by plaintiff, and to enter judgment in his favor, defendant, who failed to question the legality of the taxes on the first trial, cannot raise that objection on the retrial in the court below.—*Pitkin v. Shacklett*, (Mo. Sup.) 23 S. W. 884.

103. Where a case is reversed for failure of the court to give a requested instruction, on a second trial the refused instruction is the law of the case.—*Texas & P. Ry. Co. v. Nix*, (Tex. Civ. App.) 23 S. W. 328.

104. Where, on appeal, the judgment is reversed, and the cause merely remanded for a new trial, without directions, trial should be had as if the cause had never been tried at all.—*Ogden v. Bosse*, (Tex. Civ. App.) 23 S. W. 730.

APPEARANCE.

General appearances.

1. Excepting after judgment by default, and giving notice of appeal, does not constitute an appearance, so as to cure defective return of service of process.—*Llano Improvement & Furnace Co. v. Watkins*, (Tex. Civ. App.) 23 S. W. 612; *Same v. Eubanks*, Id. 613.

Effect as waiver of objections.

2. Where nonresidents, who are served, where they reside, with summons in a personal action, voluntarily appear and answer, they thereby waive objection to jurisdiction, and the court may set aside an order made on the previous day of the same term, discharging such nonresidents from the suit.—*Bartley v. Conn*, (Tex. Civ. App.) 23 S. W. 332.

Application.

For new trial, see "New Trial," 1.

Appointment.

Of administrator, see "Executors and Administrators," 1.

Of guardian, see "Guardian and Ward," 1, 2.

Of receiver, see "Receivers," 1.

ARBITRATION AND AWARD.

Power of guardian to submit to, see "Guardian and Ward," 4.

Validity of submission.

1. District court rule No. 47, providing that no agreement between attorneys or parties touching any suit pending will be enforced unless in writing and filed as part of the record, does not forbid an oral agreement for arbitration of matters in controversy in a pending suit.—*Faggard v. Williamson*, (Tex. Civ. App.) 23 S. W. 557.

2. A testator having divided his estate equally among his children, portions thereof were set apart to some of the devisees in partial satisfaction of their interests. Thereafter the devisees and legatees, together with the executor, who had a claim against the estate, agreed "to submit to arbitration all matters in dispute between them, or either of them," and the executor, and to "determine the amount received by each legatee, and the amount that each is now entitled to out of the estate." *Held*, that as the submission involved a controversy between the devisees and legatees themselves, as well as between them and the executor, if the submission was invalid as to any of them it was invalid as to all. 21 S. W. 946, reversed.—*Fortune v. Killebrew*, (Tex. Sup.) 23 S. W. 978.

Award.

3. When arbitrators have made an award according to the terms of the submission, and have afterwards assumed to make a supplemental award not within said terms, the first award is not impaired, though the second be void.—*Eddy's Ex'r v. Northup*, (Ky.) 23 S. W. 353.

4. On certiorari, devisees and legatees, together with the executor, who had a claim against testator's estate, agreed to submit to arbitration matters in dispute relating to the distribution of the estate. The agreement for submission gave the arbitrators authority only to ascertain the share which each devisee or legatee was entitled to receive, and the amount to be charged on each share in favor of the executor. *Held*, that the arbitrators had no power to award land belonging to the estate to the executor in part payment of the debt due him. 21 S. W. 986, reversed.—*Fortune v. Killebrew*, (Tex. Sup.) 23 S. W. 978.

Judgment on award.

5. Since the power conferred upon the district court to enter a judgment upon an award in a case not pending before it is purely statutory, and the award is void if there be no agreement binding on all parties to the submission, or necessary parties do not join therein, or if the arbitrators determine matters not submitted, or fail to determine those that are submitted, a judgment entered on such award is also void. 21 S. W. 986, reversed.—*Fortune v. Killebrew*, (Tex. Sup.) 23 S. W. 978.

6. Such judgment is not rendered valid by the fact that the parties failed to object to its rendition. 21 S. W. 986, reversed.—*Fortune v. Killebrew*, (Tex. Sup.) 23 S. W. 978.

Argument of Counsel.

See "Criminal Law," 25-30; "Trial," 9-18.

Arms.

See "Carrying Weapons."

ARREST.

On criminal charge—Warrant.

When a lawful warrant for an arrest has been issued, and placed in the hands of a marshal or sheriff, the fact that his deputy makes the arrest without having the warrant

in his possession does not render the principal civilly liable to the person arrested. 22 S. W. 62, reversed.—*Cabell v. Arnold*, (Tex. Sup.) 23 S. W. 645.

Assault and Battery.

With intent to kill, see "Homicide," 28, 29.

Assessment.

For improvements, see "Municipal Corporations," 16, 17.

Assets.

See "Executors and Administrators," 6.

ASSIGNMENT.

See, also, "Assignment for Benefit of Creditors."

Of errors, see "Appeal," 21-34.

Of judgment, see "Judgment," 39.

Of lease, see "Landlord and Tenant," 5.

What constitutes.

1. In an action against a railroad company for damages from fires set on its right of way, it appeared that one fire occurred while a tenant was holding over after the expiration of his lease; that two months thereafter plaintiff and such tenant made a new lease, dated on the day the prior lease expired, which contained new provisions; that it stipulated that plaintiff relinquished all claims for fire from the railroad after the date of execution of such lease. *Held*, that such lease was equivalent to an assignment to plaintiff of the tenant's claim, if he had any, against defendant for damage caused by such fire.—*Gulf, C. & S. F. Ry. Co. v. Cusenberry*, (Tex. Civ. App.) 23 S. W. 851.

Of unearned salary by government employe.

2. An assignment of his unearned salary by a government employe is void, as against public policy.—*State v. Williamson*, (Mo. Sup.) 23 S. W. 1054.

Equitable assignment.

3. One R., who was indebted to plaintiff, executed to him the following instrument: "I have in trust for [plaintiff] \$325, which money I have left at Messrs. C. & B." At that time, C. & B. owed R. \$332. *Held*, that the instrument operated as an equitable assignment to the extent of \$325 of R.'s claim against C. & B., though not accepted by them, and plaintiff was not affected by a garnishee process afterwards served by a judgment creditor of R.—*Stillson v. Stevens*, (Tex. Civ. App.) 23 S. W. 322.

Equities enforceable against assignee.

4. Contractors who have taken a subscription list in aid of the railroad from the company by assignment subject to the conditions of the contract between the company and the subscriber's committee, to which said contractors too are parties, cannot enforce a subscription against the defense of nonperformance by the company.—*McFarland v. Lyon*, (Tex. Civ. App.) 23 S. W. 554.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Fraudulent Conveyances."

Assignment or mortgage.

1. An instrument executed by an insolvent, purporting to convey absolutely all his property to a trustee, and which states that it is "to secure," and is "intended as a mortgage to secure," debts due a part only of his creditors, and authorizes the trustee to sell the property, and prefer certain of such creditors, is a valid

mortgage with a power of sale, and not a general assignment.—*Laird v. Weis*, (Tex. Sup.) 23 S. W. 864.

Consent of creditors to assignment.

2. Acceptance of a deed of trust for the benefit of certain creditors, by the trustee, will, in the absence of a repudiation of the deed by them, inure to their benefit.—*Bank of California v. Marshall*, 23 S. W. 246, 1 Tex. Civ. App. 704.

Effect on land previously conveyed by unrecorded deed.

3. The fact that an assignor for the benefit of creditors conveyed away land, by a deed not recorded, before executing the deed of assignment, does not divest the assignee of the legal title, so as to enable a judgment creditor of the assignor to fix a lien on the land by the subsequent record of his judgment.—*Von Stein v. Trexler*, (Tex. Civ. App.) 23 S. W. 1047.

Necessity of recording.

4. Though Gen. St. c. 24, § 10, provides that no deed of trust or mortgage conveying a legal or equitable title shall be valid against creditors until acknowledged and lodged for record, a general assignment for benefit of creditors, duly executed and delivered to the assignee, vests in him an equitable title, though not yet recorded; and a creditor then attaching acquires only an equitable right, to which an equity prior in point of time is superior.—*First Nat. Bank v. D. Keefer Milling Co.*, (Ky.) 23 S. W. 675.

5. Creditors, beneficiaries of their debtor's deed of trust of his property to secure his debts to them, need not accept the deed in order to make it effective against a subsequent attachment lien, since the trustee's acceptance inures to their benefit. *Bank v. Marshall*, 23 S. W. 246, followed.—*Alliance Milling Co. v. Eaton*, (Tex. Civ. App.) 23 S. W. 455.

Rights of creditors—Claiming under and against assignment.

6. A judgment creditor of an insolvent, who has made an assignment for the benefit of creditors, cannot accept dividends from the assignee, and at the same time subject to the lien of his judgment lots conveyed away by the insolvent, by an unrecorded deed, before making the assignment, but for which the assignee received the purchase money.—*Von Stein v. Trexler*, (Tex. Civ. App.) 23 S. W. 1047.

Associations.

See "Corporations."

ASSUMPSIT.

See, also, "Evidence," 63, 64.

Evidence.

1. In an action by a lumber broker against lumber manufacturers for commissions and money advanced under a contract with defendants to exert himself to sell all the lumber cut at their mill during a certain year, defendants claimed damages for breach of contract, in that plaintiff failed to sell all the lumber cut by them, and became the managing partner in a firm operating a competing mill, while plaintiff claimed that defendants sold their best lumber, and were unable and failed to fill his orders. *Held*, that it was not error to admit evidence to show the amount and different classes of lumber that should be carried in stock by a mill to enable it to fill the usual run of orders.—*Bender v. Peyton*, (Tex. Civ. App.) 23 S. W. 222.

2. In an action by a lumber broker against lumber manufacturers for commissions, plaintiff testified that he and one of defendants had an accounting; that they agreed to all matters except commissions claimed by defendants on sales made by them during the latter half of such year, and on lumber on hand

at the end of the year; and that a memorandum was made out at the time as a basis to act on. *Held*, that it was not error to admit such memorandum in evidence, with instructions to the jury that it was admitted as bearing on the question of general indebtedness, and not as an account stated.—*Bender v. Peyton*, (Tex. Civ. App.) 23 S. W. 222.

Assumption of Risks.

See "Master and Servant," 35-41.

ATTACHMENT.

See, also, "Execution;" "Garnishment."

Liability of sheriff for unlawful seizure, see "Sheriffs and Constables."

When authorized.

1. Plaintiff's right to attachment is not impaired by the fact that he has collateral security for part of his debt.—*Branshaw v. Tinsley*, (Tex. Civ. App.) 23 S. W. 184.

Issuance of second writ.

2. Under Sayles' Civil St. art. 161, providing that several writs of attachment may be issued at the same time, or in succession, and sent to different counties, a second attachment may be issued two months after the filing of the petition and affidavits, without the filing of a new petition and affidavits.—*Branshaw v. Tinsley*, (Tex. Civ. App.) 23 S. W. 184.

Bonds.

3. Where a debt is alleged against only one defendant, and an attachment sought against his property, the attachment bond is properly made payable to him alone.—*Branshaw v. Tinsley*, (Tex. Civ. App.) 23 S. W. 184.

Levy on homestead.

4. A levy of attachment, void because the property levied on is defendant's homestead, is not given validity by a subsequent abandonment of the homestead.—*Myers v. Paxton*, (Tex. Civ. App.) 23 S. W. 284.

Lien.

5. A leasehold estate is not personal property, but a special estate in land, and an attachment lien obtained in the county court is not lost by failure to have it foreclosed in the judgment therein, since Sayles' Civil St. art. 180a, dispenses with foreclosure of attachment liens on land in such courts, making the mere recital of the issuance of attachment and levy sufficient to preserve the lien.—*Le Doux v. Johnson*, (Tex. Civ. App.) 23 S. W. 902.

Motion to vacate.

6. Rev. St. art. 159, declaring that an attachment issued without the bond and affidavit, as the statutes provide, "shall be abated on motion of defendant," does not give a claimant of the property levied on the right to move in abatement.—*Roos v. Lewyn*, (Tex. Civ. App.) 23 S. W. 450.

Attempt.

To kill, see "Homicide," 28, 29.

ATTORNEY AND CLIENT.

Argument of counsel, see "Criminal Law," 25-30; "Trial," 9-18.

Power of attorney, see "Powers," 1-5.

Provision in note for attorney's fees, see "Negotiable Instruments," 1, 2.

Disbarment.

1. Since Mill. & V. Code, § 4745, provides that "the several courts of this state may strike from their rolls * * * any practicing attorney or counsel upon evidence satisfactory to the court, that he has been guilty of such misdemeanor, or acts of immorality or impropriety as are inconsistent with the character or incompatible with the faithful discharge of

the duties of his profession," an attorney may be disbarred for misconduct independent of the provisions of sections 4360 and 4363, which provide summary proceedings for striking from the roll of attorneys one who fails to account for money received in his professional capacity, on motion of the aggrieved client, after securing a judgment, and the return of an execution thereon unsatisfied.—*State v. Davis*, (Tenn.) 23 S. W. 59.

Compensation.

2. Where attorneys are employed to procure an injunction pending an appeal, the fact that they are unable to carry out their contract owing to the advancement of the cause on the docket and its speedy decision by the court of appeals in their client's favor, due largely to their advice and efforts, does not prevent them recovering for the value of their services, though not the fees prescribed in the contract for procuring the injunction.—*Hargis v. Louisville Gas. Co.*, (Ky.) 23 S. W. 790.

Attorney's Fees.

Recovery by garnishee, see "Garnishment," 2.

Attornment.

By tenant, see "Landlord and Tenant," 3.

Award.

See "Arbitration and Award," 3, 4.

BAIL.

Lien of bail bond, see "Liens."

Right to bail.

1. Where a person indicted for murder is admitted to bail, and the cause is afterwards dismissed, he is, in case he is again indicted, entitled to bail, even in the absence of any statute on the subject, since his right to bail is *res judicata*.—*Augustine v. State*, (Tex. Cr. App.) 23 S. W. 689.

2. Code Crim. Proc. art. 187, provides that where, after indictment found, the cause of defendant has been investigated on habeas corpus, and an order made, admitting him to bail, he shall not be subject to be again placed in custody, except when surrendered by his bail, or when the trial of his cause commences before a petit jury. *Held* that, after a person has once been admitted to bail, the state cannot again arrest and incarcerate him for the same offense.—*Augustine v. State*, (Tex. Cr. App.) 23 S. W. 689.

3. Whether he was admitted to bail on account of the facts developed by such investigation, or because of ill health, is immaterial.—*Augustine v. State*, (Tex. Cr. App.) 23 S. W. 689.

Recognizance on appeal.

4. Under a statute requiring a recognizance to bind appellant to abide the judgment of the "court of criminal appeals" it is not sufficient when binding him to abide the judgment of the "court of appeals."—*Horton v. State*, (Tex. Cr. App.) 23 S. W. 691.

5. On appeal from conviction under an indictment charging the selling and giving intoxicating liquor to a minor without the written consent of persons authorizing him so to do, a recognizance reciting that defendant was charged and convicted of selling and giving whisky to a minor is insufficient. *McDaniel v. State*, (Tex. Cr. App.) 20 S. W. 1108, followed.—*Blevins v. State*, (Tex. Cr. App.) 23 S. W. 688.

6. A recognizance, on appeal from a conviction for selling goods on Sunday, merely reciting that defendant stands charged with the offense of selling goods on Sunday, is insufficient, as failing to recite an offense, since the sale, to constitute an offense, must be made by

a person belonging to one of the classes enumerated in Pen. Code, art. 186, declaring the offense.—*Henderson v. State*, (Tex. Cr. App.) 23 S. W. 692.

7. A recognizance requiring appellant to abide the judgment of the "court of appeals," instead of the "court of criminal appeals," is insufficient, and the appeal will be dismissed.—*Farmer v. State*, (Tex. Cr. App.) 23 S. W. 795.

8. Where, on an appeal to the court of criminal appeals, the recognizance binds the appellant to "abide the judgment of the court of appeals," instead of to "abide the judgment of the court of criminal appeals," as required by Act 1892, § 32, the recognizance is fatally defective.—*Powers v. State*, (Tex. Cr. App.) 23 S. W. 705.

9. Under Pen. Code, art. 180, prescribing a punishment for one who willfully disturbs a religious congregation conducting themselves lawfully, a recognizance merely reciting that defendant stands charged with the offense of disturbance of religious worship is fatally defective, for failure to recite that the congregation was assembled for religious purposes, was conducting itself lawfully, and that the disturbance was willfully created.—*Morgan v. State*, (Tex. Cr. App.) 23 S. W. 1107.

Liability on bond.

10. The sureties on a recognizance for the appearance of defendant in a criminal case are not relieved from liability either by the insufficiency of the indictment, or because of a variance, as to the description of the offense, between the indictment and the scire facias issued on the failure of defendant to appear.—*State v. Livingston*, (Mo. Sup.) 23 S. W. 766.

BAILMENT.

See, also, "Carriers."

Liability of public cotton ginner.

Where the cotton is delivered to a public ginner to prepare for market, with notice of the landowner's interest, and instructions not to deliver to the cropper, he becomes a bailee for hire for both the landowner and the cropper; and if the cotton is delivered to the cropper, and by him converted, the ginner is jointly liable with him for the landowner's interest.—*Horsley v. Moss*, (Tex. Civ. App.) 23 S. W. 1115.

Ballots.

See "Elections and Voters," 1, 2

Bankruptcy.

See "Assignment for Benefit of Creditors."

Banks and Banking.

Collections, what constitutes payment, see "Payment," 1.

Best and Secondary Evidence.

See "Evidence," 1-9.

Betting.

See "Gaming," 2.

Bill.

Of exceptions, see "Exceptions, Bill of."
Of lading, see "Carriers," 6.

Bills and Notes.

See "Negotiable Instruments."

Bona Fide Purchasers.

See "Sale," 17; "Vendor and Purchaser," 19-32.

BONDS.

See, also, "Bail;" "Principal and Surety."

For purchase money on execution sale, see "Execution," 19, 20.

Of administrator, see "Executors and Administrators," 3, 4.

Of liquor dealer, see "Intoxicating Liquors," 3-9.

On appeal, see "Appeal," 8-16.

— in criminal cases, see "Bail," 4-9.

On attachment, see "Attachment," 3.

To keep peace, see "Breach of the Peace."

Who may sue on official bond.

1. It being the duty of the tax collector to turn over to the county treasurer the taxes collected by him, and the treasurer being entitled to retain his commissions out of such funds, the treasurer can, on failure of the collector so to do, sue the collector and his bondsmen for such commissions, though the statute requiring the bond provides for no such suit, and this though the county attempts to release the bondsmen.—*Carothers v. Presidio County*, (Tex. Civ. App.) 23 S. W. 491.

2. A tax collector's bond to the county court, that he will collect the taxes named, and pay them over to said court, may be sued on by the court without joining the county, under Civil Code, § 21, empowering persons who have made contracts as agents, and for the benefit of others, to sue on them without joining the beneficiaries.—*Hardy v. Logan County Court*, (Ky.) 23 S. W. 661.

Pleading.

3. It is not necessary, in an action on a liquor dealer's bond, to set out the bond in *hæc verba*, but it is sufficient to set out the substance of the condition alleged to have been broken, and on which recovery is sought.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

4. In an action to recover statutory penalties on the bond of a retail liquor dealer, an allegation in the petition that the breach occurred on a certain day in July, 1891, "and on divers other days thereafter during the month of July and August, 1891," is sufficiently definite as to time.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

BOUNDARIES.

Agreement as to, see "Frauds, Statute of," 2.
Establishment, see "Courts," 13.

Conflicting surveys—Evidence.

1. Where, in a conflict as to the boundaries between two surveys, it appears that the later survey was not made on the ground, but in the surveyor's office, and from his memory of a former survey, and that it called for certain trees as an established corner of an adjoining survey, while in fact the trees were not on such survey, the former survey must control.—*Fenley v. Flowers*, (Tex. Civ. App.) 23 S. W. 749.

2. On an issue as to whether there was a vacancy between the east line of the A. survey and the west line of the C. T. R. R. Co. surveys Nos. 1 and 2, which lay contiguous,—one north of the other,—it appeared that the south line of the A. survey, in terms, ran "east 1,866 varas to the west line of the C. T. R. R. Co. survey No. 2, thence north 3,670 varas to the northwest corner of the C. T. R. R. Co. survey No. 1," and the field notes of the A. survey stated that the east line of that survey and the west line of the C. T. R. R. Co. surveys were coincident. It further appeared that the existence of a vacancy between the two lines would involve a violation of the west call of the A. survey, while the absence of such vacancy would harmonize with the surrounding surveys. Held, that a verdict finding such a vacancy to exist was against the weight of the evidence, and should be set aside.—*Waggoner v. Daniels*, (Tex. Civ. App.) 23 S. W. 738.

Establishment by agreement.

3. Where adjoining landowners agree on a disputed division line, and such line is acted on and acquiesced in by them, it is binding on them, and those claiming under them, without regard to the length of time it was so acted on and acquiesced in.—*Bailey v. Baker*, (Tex. Civ. App.) 23 S. W. 454.

—Estoppel.

4. The purchaser of land desiring it to be surveyed, and then conveyed to him by notes and bounds, the son of an adjoining landowner was employed to make the survey. During the survey the seller and this adjoining landowner differed as to the running of a certain line, but finally the latter prevailed, and he himself marked the line through the woods. The deed was made by such line, and it was recognized as the boundary for 13 years by such adjoining landowner. *Held*, that his heirs were estopped to deny that the line so marked and recognized was the true boundary line.—*Chadwell v. Chadwell*, (Tenn.) 23 S. W. 973.

5. Where a party to an action to establish a boundary line claimed title to land by adverse possession within his inclosure for over 15 years, his statements to uninterested persons that he claimed to a certain interior line, and, after a survey, that he intended to move back his fence, do not work an estoppel, but may be introduced in evidence to show an absence of adverse claim of title.—*Critchlow v. Beatty*, (Ky.) 23 S. W. 960.

Sufficiency of evidence.

6. A boundary line is sufficiently established by evidence that it was plainly marked over 75 years before; that those from whom the parties derived title recognized it as the boundary, and that it was surveyed and recognized by those in possession over 20 years before; though it differs from the original patent in not running to an established point, and is junior in date, and though the surveyor thinks there was a mistake in the survey.—*Critchlow v. Beatty*, (Ky.) 23 S. W. 960.

BREACH OF THE PEACE.**Bond to keep peace—Action on.**

1. Under Code Crim. Proc. art. 96, declaring that no error in the prior proceeding shall be a defense in an action on a peace bond, the fact that the order requiring a bond that the obligor would keep the peace towards the person threatened failed to add the words "and towards others," as required by Code Crim. Proc. art. 95, is no defense to an action on the bond.—*State v. San Miguel*, (Tex. Civ. App.) 23 S. W. 389.

2. A petition alleged that a complaint was filed against M., charging that he had threatened to do J. serious bodily injury, and was about to make an assault on her person as he had before; that the judge ordered M. to give bond in \$200 to keep the peace towards J. for a year; that M., as principal, and S. and L., as sureties, gave bond in \$200, conditioned that said M. had been accused of having threatened to assault J. and do her bodily injury, and, being about to do so, would not commit such offense, and would keep the peace towards said J. and all other persons for a year; that said M. did assault said J. with intent to murder her, etc.; and prayed for judgment for \$200. *Held*, that there was no such variance between the bond and the prior proceedings, and no such duplicity or uncertainty in the bond, as set out in the petition, as to afford ground for demurrer, in view of Code Crim. Proc. art. 96, declaring that no error of form shall vitiate such a bond, and no error in the prior proceeding shall be a defense to an action thereon.—*State v. San Miguel*, (Tex. Civ. App.) 23 S. W. 389.

3. A petition to forfeit a peace bond is not demurrable on the ground that the bond shows

that the principal was bound to appear and answer charges, neither of which constitutes an offense against the laws of the state, and does not bind him to answer any offense known to the state, and that the bond is void as showing that he was not charged with any offense against the laws.—*State v. San Miguel*, (Tex. Civ. App.) 23 S. W. 389.

BUILDING AND LOAN ASSOCIATIONS.

Right to mechanics' liens, see "Mechanics' Liens," 3.

Usury, release of right to recover back, see "Usury," 5-8.

Interest and usury.

1. Where a member of a building and loan association, holding seven shares of stock, on which he pays \$1 per month on each share, borrows \$700 from the association, and gives his note for \$1,400, payable at maturity of the stock, with interest at 6 per cent. per annum, and providing for the payment of a "further sum of \$14 per month," with nothing to show for what the latter sum is payable, the contract is usurious, the legal rate of interest being 12 per cent.—*International Bldg. & Loan Ass'n v. Biering*, (Tex. Civ. App.) 23 S. W. 621.

2. Without considering the payment of \$14 per month, the note is usurious for the further reason that, although the interest provided for amounts to the highest legal rate on the \$700 actually borrowed, the note is made for \$1,400.—*International Bldg. & Loan Ass'n v. Biering*, (Tex. Civ. App.) 23 S. W. 621.

3. A member of a building and loan association, in consideration of a loan of \$1,440 made to him by the association, gave it his note for \$2,600, payable on or before the maturity of a certain series of the association's stock, with interest at 6 per cent. until paid. *Held*, that, as the date of maturity was not fixed, the aggregate of the excess of principal, together with interest, might not exceed the legal rate of 12 per cent. on the loan made, and the contract was not usurious.—*Abbott v. International Bldg. & Loan Ass'n*, (Tex. Civ. App.) 23 S. W. 629.

4. A member of a building and loan association borrowed \$700, and gave his note to the association for \$1,280, the \$580 being a bonus. The note provided for the monthly payment of \$6.50 on his stock, and \$6.25 as interest on the note, this being less than the legal rate of 12 per cent. on the \$700, and was payable on the maturity of that series of stock. *Held*, that the note was not usurious, as the time of payment was uncertain, and the difference in the interest paid and the lawful rate might, at the time of maturity, exceed the \$580 bonus.—*International Bldg. & Loan Ass'n v. Biering*, (Tex. Civ. App.) 23 S. W. 621.

Withdrawal of stockholder—Credits.

5. The by-laws of a building and loan association provided that any stockholder wishing to withdraw unpledged stock should give 30 days' written notice; that at the end of such 30 days such stockholder should be entitled to receive the amount actually paid in on such stock, with such interest or profits as the directors should determine, deducting all dues and fines against him; and that, if the interest on any loan or any dues remain unpaid more than three months, the directors may compel payment of principal, interest, and fines by proceeding on the securities according to law. *Held*, that where the association proceeded under the latter clause of such by-laws to compel payment, the stockholder was entitled to have credit for the withdrawal value of his stock under the provisions of the prior clause.—*International Bldg. & Loan Ass'n v. Biering*, (Tex. Civ. App.) 23 S. W. 1025.

tion of Actions," 30; "Malicious Prosecution," 3.

Of contributory negligence, see "Master and Servant," 48, 49.

BURGLARY.

Indictment.

An indictment for burglary need not describe the property stolen.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 687.

Cancellation.

Of contracts, see "Equity" 1-4.

Of insurance policy, see "Insurance," 1.

CARRIERS.

I. IN GENERAL.

II. OF GOODS.

III. OF PASSENGERS.

See, also, "Horse and Street Railroads;" "Railroad Companies."

Action against, see "Torts."

Authority of station agent, see "Principal and Agent," 2.

Bill of lading, contradiction by parol evidence, see "Evidence," 59-62.

Liability for ejecting passenger, see, also, "Damages," 18.

I. IN GENERAL.

Interstate commerce act.

1. A shipment of freight over connecting lines from Missouri to a point in Texas by a bill of lading which provides that the receiving carrier shall only be liable for damage occurring on its own line, and which guaranties a through rate of freight to such point, is an interstate shipment, within the interstate commerce act; and, though the entire haul of the last connecting line is within the state of Texas, an overcharge by it on such shipment is a matter to be adjusted under the interstate commerce act, and not under the laws of Texas.—*Texas & P. Ry. Co. v. Clark*, (Tex. Civ. App.) 23 S. W. 693.

2. A shipment of freight over connecting carriers which have no contract for joint through rates is not within the interstate commerce act, § 6, as amended by Act March 2, 1889, authorizing, but not requiring, connecting carriers to agree upon joint rates, and providing a penalty for failure of a carrier to enforce such rates when agreed on.—*Gulf, C. & S. F. Ry. Co. v. Nelson*, (Tex. Civ. App.) 23 S. W. 732.

II. OF GOODS.

Contract of carriage.

3. A bill of lading given by an express company, undertaking to forward to point nearest destination reached by the company, (which was the point of destination,) subject to condition that the company should not be liable except as forwarders only within their own line of communication, does not fix the route of shipment over the company's line, but leaves the company free to choose the route.—*Wells, Fargo & Co.'s Express v. Fuller*, (Tex. Civ. App.) 23 S. W. 412.

4. Though a contract of a carrier to transport goods, which does not expressly designate the route, gives the carrier the right to fix it, he must select a usual and reasonably safe and direct route.—*Wells, Fargo & Co.'s Express v. Fuller*, (Tex. Civ. App.) 23 S. W. 412.

5. Where a carrier selects a roundabout route it is a question for the jury whether the carrier was negligent in so doing.—*Wells, Far-*

or signing of bill of lading.

6. Where cattle have been delivered to and accepted by a railroad company for immediate shipment, the railroad company is liable as a common carrier for damages to the cattle from the time of delivery to it, though Rev. St. Tex. art. 283, provides that the shipment shall be considered as having commenced from the time of signing the bill of lading, and that the liability of the common carrier shall attach as at common law from after such signing. *Railway Co. v. Hall*, 64 Tex. 615, followed. *Railway Co. v. Nicholson*, 61 Tex. 495, and *Railway Co. v. McCorquodale*, 9 S. W. 80, 71 Tex. 46, distinguished.—*International & G. N. R. Co. v. Dimmitt County Pasture Co.*, (Tex. Civ. App.) 23 S. W. 754.

Failure to accept goods — Demurrage and storage.

7. A consignee who refuses to accept the goods on the ground of delay in delivery by the carrier cannot be held liable for demurrage and storage fixed by the rules of the carrier, of which he had no notice, unless the rates of demurrage and storage are shown to be reasonable.—*Baumbach v. Gulf, C. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 693.

Misdelivery — Damages.

8. In a suit for injury to property by fault of a carrier, the measure of damages is the difference between its value when delivered at its destination and what its value would have been if it had not been damaged in course of transportation, and not between its value when received and its value when delivered; and, in the absence of evidence of what its value would have been at its destination had it been properly transported, a verdict cannot stand.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

Delay in transportation.

9. Mere delay of a carrier in delivering goods is not a conversion thereof, and the consignee cannot refuse to accept them, and recover their total value, though at the time of delivery he had no use for the goods.—*Baumbach v. Gulf, C. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 693.

10. In order to charge a carrier with such special damages for delay in transportation as the rental value of machinery intended for immediate use, special notice of the intention must be given at the time of shipment, and not afterwards. 22 S. W. 760, reversed.—*Gulf, C. & S. F. Ry. Co. v. Gilbert*, (Tex. Civ. App.) 23 S. W. 320.

Live-stock shipments.

11. In an action against a railroad company for damage to live stock, caused by failure to properly feed and water them en route, an instruction cannot be complained of by defendant because it confined the alleged negligence in feeding and watering the stock to one station, where the proof showed that the only attempt that was made, and the only opportunity given, to water the stock, was at such station.—*Galveston, H. & S. A. Ry. Co. v. Thompson*, (Tex. Civ. App.) 23 S. W. 930.

12. In an action against a railroad company for damages to cattle in transit on defendant's road by delaying them at certain places, and not unloading and feeding and watering them properly, evidence as to the number of cars on defendant's tracks at and before the time plaintiff's cattle were in transit, for the purpose of showing an unprecedented rush of business, is irrelevant, as the action was not brought on account of anything occurring along the line.—*International & G. N. R. Co. v. Lewis*, (Tex. Civ. App.) 23 S. W. 323.

out affording any opportunity for feeding or watering the stock, though requested by the shipper, is liable for any damage to the stock by reason of failure to do so.—*Galveston, H. & S. A. Ry. Co. v. Ivey*, (Tex. Civ. App.) 23 S. W. 321.

14. Where cattle accepted by a carrier for immediate shipment were damaged by failure of the carrier to feed and water them during a delay of 24 hours before shipment, the measure of damages was the difference between the market value of the cattle in the damaged condition at the place of delivery and what their fair market value would have been at the same time and place if they had been delivered in a sound condition.—*International & G. N. R. Co. v. Dimmitt County Pasture Co.*, (Tex. Civ. App.) 23 S. W. 754.

Limiting liability.

15. A stipulation in a carrier's contract of shipment requiring any action to recover a claim against it by virtue of the contract to be commenced within 40 days after the damage shall occur is reasonable, and binding on the shipper.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

16. Where a shipper, having a claim for damages against a carrier, which by the contract of shipment was required to be sued upon within 40 days, presented his claim before the expiration of that time to the carrier's agent, who forwarded it to the general offices, and afterwards, within the 40 days, when asking the agent about the claim, was requested to wait, and told that the carrier had written that it would pay the claim, the court properly refused to charge that the fact that the agent received the claim to be forwarded to the general offices would not be a waiver or estoppel on the part of the carrier, but that the shipper must have been deprived of his right to sue by the willful acts and promises of the carrier.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

17. A stipulation in the bill of lading that a shipper of cattle accepts the cars furnished cannot prevent his showing that the cars were not suitable, as this would be an attempt to limit the carrier's duty.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

18. Bills of lading issued by the Morgan Steamship Company for the shipment of goods via defendant's railroad and the Morgan line of steamers to New Orleans, provided that the goods should be conveyed on the steamship direct to New Orleans, the acts of God and the country's enemies, fire at sea, etc., excepted, neither the ship nor owners thereof being liable for loss from such causes. *Held*, that the limitations of liability contained therein applied only to carriage by ship.—*Rio Grande R. Co. v. Cross*, (Tex. Civ. App.) 23 S. W. 529, 1004; *Same v. Munoz' Successors*, *Id.* 531; *Same v. Petitpain*, *Id.*

19. In answer to an action for damages to horses shipped over defendant's railroad, defendant pleaded a written contract requiring, as a condition precedent to plaintiff's recovery, notice, in writing, of his claim, to some officer of defendant, or its nearest station agent, before the stock was removed from its destination. *Held*, that the answer was defective in failing to allege the name of the agent to whom the notice was to be given, or whether or not he was accessible, or conveniently located at the point of destination.—*Galveston, H. & S. A. Ry. Co. v. Thompson*, (Tex. Civ. App.) 23 S. W. 930.

Connecting lines.

20. Rev. St. art. 4251, obliges railroad companies, for a reasonable compensation, to draw over their road the merchandise and cars which may enter and connect with their railroad. Plaintiff showed that the bill for his goods was

ment, but that rates were made over its line and connecting lines to and from that point; that said company issued an expense bill, when the goods arrived, for the exact amount called for by the bill of lading; that the car containing the goods came through from the place of shipment. *Held*, that these facts were not enough to prove conclusively a contract of agency or partnership between the companies, nor a ratification by the delivering company, so as to bind it to the freight rate named in the bill of lading.—*Ft. Worth & D. C. Ry. Co. v. Johnston*, (Tex. Civ. App.) 23 S. W. 827.

21. Where a horse transported by successive carriers has been injured in transit, in the absence of evidence to the contrary, the injury is presumed to have been caused through the fault of the last carrier.—*Texas & P. Ry. Co. v. Barnhart*, (Tex. Civ. App.) 23 S. W. 801.

22. Under a contract stipulating that after defendant's delivery of the goods to a connecting line it should not be liable for injuries, the evidence showing that a large part of the damages were sustained after such delivery, the court should have instructed that defendant was not liable therefor.—*Gulf, C. & S. F. Ry. Co. v. Allcorn*, (Tex. Civ. App.) 23 S. W. 186.

23. In an action against a railroad company for damages to cattle in transit on defendant's road by delaying them at certain places, the fact that defendant had a great rush of business at such points will not relieve it of liability, unless it also shows that it exhausted its resources for providing for the cattle.—*International & G. N. R. Co. v. Lewis*, (Tex. Civ. App.) 23 S. W. 323.

24. Where a shipment of live stock over a railroad is delayed by a washout on its main line, and the railroad company has a way around the washout, by use of which the delay would be avoided, it is liable to the shipper for damages caused by the delay.—*Receivers of Missouri, K. & T. Ry. Co. v. Olive*, (Tex. Civ. App.) 23 S. W. 526.

25. A shipping contract stipulated that defendant carrier should not be liable for injury to the stock shipped, after it left its road, and that no suits should be sustainable for damages, unless brought within 40 days after the damage occurred. *Held*, that a connecting carrier, the use of whose road was necessary to complete the shipment, did not become, by such use, the agent of defendant, to such extent that it had the power to waive for defendant the 40-day rule.—*Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex. Civ. App.) 23 S. W. 626.

26. Defendant having limited its liability to its own line, as it had a right to do, the connecting line was not the agent of defendant, even for the purpose of forwarding the shipment.—*McCarn v. Railroad Co.*, 19 S. W. 547, 84 Tex. 352, followed.—*Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex. Civ. App.) 23 S. W. 626.

27. It was error to admit in evidence plaintiff's statement that it was the duty of the agents of the connecting line in question to investigate and settle all claims, for, if such a relation existed between the roads, it should have been proven, and its legal effect left to the court and jury.—*Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex. Civ. App.) 23 S. W. 626.

28. Plaintiff's testimony that the two roads in question "were connecting lines, and that they were acting together at the time of the shipment," was too indefinite to establish a partnership or other relation between them, such as to enable the agents of one to bind the other.—*Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex. Civ. App.) 23 S. W. 626.

29. The receipt of freight by one carrier from another, to forward to point of destination, does not bind the receiving carrier to the terms of the contract made by the first carrier with the shipper; such terms not being known by the receiving carrier, and there being no

partnership relation between the carriers.—*Missouri, K. & T. Ry. Co. v. Stoner*, (Tex. Civ. App.) 23 S. W. 1020.

80. Where freight is shipped over connecting lines, which have agreed on a joint tariff of rates, in compliance with the interstate commerce act, the delivering line must collect the interstate commerce rate, and not that named in the bill of lading.—*Missouri, K. & T. Ry. Co. v. Stoner*, (Tex. Civ. App.) 23 S. W. 1020.

81. Where a carrier makes a contract for shipment of goods for a rate less than the interstate rate of the other lines over which it is forwarded, the delivering carrier may collect, not only the interstate rate, but the charges of the contracting line; such charges having been advanced to it by the connecting lines at the regular rates, in ignorance of the special contract.—*Missouri, K. & T. Ry. Co. v. Stoner*, (Tex. Civ. App.) 23 S. W. 1020.

Penalty for detaining goods after tender of freight designated in bill of lading.

82. In an action to recover the statutory penalty for detaining goods after the amount of freight has been tendered, the party seeking recovery must bring himself strictly within its terms; and, since the statute bases the amount of penalty recoverable on the amount of freight designated in the bill of lading, there can be no recovery where there are no figures or data given in the bill, and none referred to, from which the amount of freight can be calculated.—*Texas & P. R. Co. v. Wood*, (Tex. Civ. App.) 23 S. W. 744.

83. An expense account, furnished by the carrier, and showing the amount of freight, constitutes no part of the bill of lading, and cannot be used in aid of it unless referred to therein.—*Texas & P. R. Co. v. Wood*, (Tex. Civ. App.) 23 S. W. 744.

84. Where, in an action to recover the penalty authorized by Gen. Laws Called Sess. 17th Leg. p. 35, for failure to deliver freight on tender of the amount shown to be due by the bill of lading, it was admitted by both parties that the bill contained the words, "Weight subject to correction," and it was claimed by defendant that more was due than tendered, the court erred in charging that the jury could only consider evidence as to the true weight if they believed that such words were in the bill, as the burden of proof was on plaintiff to show that he tendered the full amount.—*Gulf, C. & S. F. Ry. Co. v. Nelson*, (Tex. Civ. App.) 23 S. W. 732.

85. An exception is properly sustained to that part of a petition which seeks to recover of a railroad company the statutory penalty for failure to deliver freight at the place of destination, the penalty being fixed by the amount of charges due as shown by the bill of lading, when the petition alleges, and the bill of lading shows, that there were no charges due.—*Alderson v. Gulf, C. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 617.

III. OF PASSENGERS.

Contract of carriage.

86. Where a carrier places on sale excursion tickets, good for a limited time, at reduced rates, over its own and connecting lines, to induce purchasers to visit a distant place for a specific purpose, a purchaser has a right to presume, without further inquiry, that the time limited is sufficient for the purpose.—*Texas & P. Ry. Co. v. Dennis*, (Tex. Civ. App.) 23 S. W. 400.

Who are passengers.

87. A provision in a contract of shipment of live stock that the shipper, to whom a shipper's pass on the same train was given, should feed and water the animals on the way, is not void as an attempt by the carrier to relieve

itself of its duty in that respect, but is a license to the shipper to look after his stock; and he does not, by exercising such license, lose his status as a passenger, so as to preclude him from recovering for injuries, while so engaged, caused by the carrier's negligence.—*Receivers International & G. N. Ry. Co. v. Armstrong*, (Tex. Civ. App.) 23 S. W. 236.

88. Evidence that a person who was on a train at the time of an accident thereto, sitting among the passengers, without any attempt at concealment, was on the train without the knowledge or consent of the conductor, does not show her to have been a trespasser, though at the station, before boarding the train, the conductor had refused her request that she be carried free, as the wife of an employee of the road.—*Galveston, I. & S. A. Ry. Co. v. Snead*, (Tex. Civ. App.) 23 S. W. 277.

Carrying past destination.

89. A train must be stopped at a station long enough to allow passengers to alight safely, and, if not, and they are carried past, the train should, if necessary, be backed; and in the case of a woman traveling with four children, all less than six years old, it was negligence to set them down six hundred yards beyond the station, in a wet place, at 5 A. M., in cold winter weather.—*Fordyce v. Dillingham*, (Tex. Civ. App.) 23 S. W. 550.

40. A passenger on defendant's train was carried half a mile past his station on a dark and damp night. The conductor told him it was a short distance back, but that he could go on to the next station, whence, however, he could not return till the next day. The conductor refused to back the train to the station, saying that he was behind time. The passenger was unwell, but failed to tell the conductor so. *Held*, that the passenger could recover for the exposure, fatigue, and mental distress caused by his walk back to the station.—*Texas & P. Ry. Co. v. Mansell*, (Tex. Civ. App.) 23 S. W. 549.

41. A passenger on defendant's train was carried half a mile past his station on a dark and damp night. In walking back to his station plaintiff had to cross two trestles on his hands and knees, owing to the darkness, and his knees were consequently sore and stiff for some days. He had been sick with jaundice, and the exposure gave him a cough which lasted for some time, and in crossing one of the trestles he was frightened by the sound of an approaching train. *Held*, that a verdict in plaintiff's favor for \$1,000 was excessive, and should be reduced to \$500.—*Texas & P. Ry. Co. v. Mansell*, (Tex. Civ. App.) 23 S. W. 549.

Injuries to passengers.

42. In an action against a railroad company for injuries to a passenger who fell from the car platform owing to the alleged sudden starting of the train, evidence by the plaintiff and her son that she started to leave the car just as soon as the train stopped at a station, and before it started, will support a finding by the jury in her favor, though a number of witnesses for defendant testified that plaintiff did not get up to go out until after the train had started, and though it is proven that the place where she fell from the car platform is one-fourth of a mile from the station platform.—*Smith v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 784.

43. The rule that a person who is on a train of cars through courtesy of the railroad company cannot recover for injuries resulting from the negligence of its employees does not obtain in Texas.—*Campbell v. Harris*, (Tex. Civ. App.) 23 S. W. 35.

44. Whether the circumstances rendered the carrier negligent by the omission to assist a passenger to alight from the train is a question for the jury.—*Campbell v. Alston*, (Tex. Civ. App.) 23 S. W. 33.

45. Where a train is in charge of a conductor, a brakeman is not authorized to make statements to passengers as to the movements

by paying on such statements cannot recover from the company.—*Receivers International & G. N. Ry. Co. v. Armstrong*, (Tex. Civ. App.) 23 S. W. 236.

40. Where a trainman in authority tells a shipper of live stock that the train will remain standing for some time at a certain point, and directs him to look after the stock at that time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for their stock.—*Receivers International & G. N. Ry. Co. v. Armstrong*, (Tex. Civ. App.) 23 S. W. 236.

47. A railroad company is liable to a passenger who is injured while getting on a moving train; he having been induced to leave it by the assurance of the conductor that it would stop at the station five minutes, and the conductor having, before the expiration of that time, given the signal to start, with knowledge that the passenger had left the train, and while he was so far away that he could not board the train before it started.—*Foreman v. Missouri Pac. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 422.

48. An instruction that it is the duty of a railroad company to use the greatest care and skill in constructing its road, "in order to transfer over it safely its passengers, and in like manner to use such care in keeping" it "in repair as to secure its passengers a safe travel, as the nature of the business reasonably requires to protect the traveling public," does not make the company an insurer of the safety of passengers.—*Galveston, H. & S. A. Ry. Co. v. Sneed*, (Tex. Civ. App.) 23 S. W. 277.

49. A railroad train must stop, at stations where passengers get on the cars, a sufficient length of time to enable them to get on, and get seats in the cars. *Railway Co. v. Copeland*, 60 Tex. 328, followed.—*Gulf, C. & S. F. Ry. Co. v. Powers*, (Tex. Civ. App.) 23 S. W. 325.

50. The duty of a carrier to a passenger being to exercise the highest degree of care, it could not complain of the failure of the court to define "negligence," as relating to its duty.—*Gulf, C. & S. F. Ry. Co. v. Brown*, (Tex. Civ. App.) 23 S. W. 618.

51. Plaintiff, a passenger alighting from defendant's train on its regular depot platform, stepped from the last step of the car onto a railroad spike. The head of the spike had a thin, sharp edge, which injured the ball of plaintiff's foot. *Held*, that defendant was liable for the injury.—*Ft. Worth & D. C. Ry. Co. v. Davis*, (Tex. Civ. App.) 23 S. W. 787.

— Contributory negligence.

52. In an action for injuries received in leaping from a derailed train, an instruction requiring plaintiff to have believed himself in imminent peril of his life is erroneous; well-grounded fear of serious bodily injury being sufficient cause for his action.—*La Frelle v. Fordyce*, (Tex. Civ. App.) 23 S. W. 453.

53. Whether it was contributory negligence for a passenger, at the direction of a brakeman, to jump off a train at a station, in the dark, while the train was moving, is a question for the jury, the speed of the train not being such as to make apparent the danger of jumping from it.—*Gulf, C. & S. F. Ry. Co. v. Brown*, (Tex. Civ. App.) 23 S. W. 618.

Ejection of passengers.

54. Where an intruder on a train of cars refuses to pay his fare on demand by the conductor, the latter is authorized to remove him; and, after such removal has been begun, an offer to pay the sum demanded may be accepted or not, at the discretion of the conductor.—*Galveston, H. & S. A. Ry. Co. v. Turner*, (Tex. Civ. App.) 23 S. W. 83.

55. Plaintiff, a passenger on a street car, not having the exact change, gave the driver a 50-cent piece. The driver returned to him a package of nickels marked "50 cents." The

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plaintiff refused to give the driver 50 cents. The driver refused to give plaintiff another 5 cents, referring him to the office from which he had received the package as containing 50 cents. The plaintiff refused to pay his fare, and was ejected. *Held*, that the street-railway company was liable.—*Curtis v. Louisville City Ry. Co.*, (Ky.) 23 S. W. 363.

56. An auction sale of land in a distant city had been advertised by the owners of the land. A railroad company placed excursion tickets to the city and return in the hands of its agents, good for a certain limited time, at reduced rates. *Held*, that a purchaser of one of those tickets, who used all diligence after the sale to make the return trip, could not be lawfully expelled from one of the railroad company's trains, though the limited time had expired.—*Texas & P. Ry. Co. v. Dennis*, (Tex. Civ. App.) 23 S. W. 400.

57. The passenger was under no obligation to avoid expulsion from the train, to pay the extra fare demanded, and then sue to recover it back.—*Texas & P. Ry. Co. v. Dennis*, (Tex. Civ. App.) 23 S. W. 400.

58. The rules of a railroad company required passengers without tickets to pay 25 cents extra fare, to be refunded on presentation to a ticket agent of a "rebate check" to be furnished to the passenger by the conductor when he collected the cash fare. *Held*, that a passenger who, with knowledge of such regulation, enters a train without purchasing a ticket when he has opportunity so to do, cannot recover for his expulsion from the train, without rudeness or violence, for his failure to pay the extra fare.—*Snellbaker v. Paducah, T. & A. R. Co.*, (Ky.) 23 S. W. 509.

59. Where a passenger could have purchased a round-trip ticket at the station where he took the train, the fact that there was no ticket station at his point of destination, thus preventing him from buying a ticket home, does not excuse his refusal to pay the extra 25 cents.—*Snellbaker v. Paducah, T. & A. R. Co.*, (Ky.) 23 S. W. 509.

60. In an action for damages for wrongful ejection from defendant's street car, the evidence showed that plaintiff was put off with the use of but little force; that he received no physical injury, and sustained no pecuniary loss,—so that his sense of shame was the only result of the alleged wrongful act. *Held*, that a charge that the jury were to consider plaintiff's sense of shame, "or other disagreeable emotions of the mind, resulting to him from such wrongful acts, if shown to be wrongful," gave the jury too much latitude in estimating the damages.—*Houston City St. Ry. Co. v. Jageman*, (Tex. Civ. App.) 23 S. W. 628.

— Mitigation of damages.

61. Where a passenger, after a dispute with the driver of a street car as to payment of his fare, is ejected, the request of the driver to adjust the matter at the office is competent mitigation of damages.—*Curtis v. Louisville City Ry. Co.*, (Ky.) 23 S. W. 363.

— Excessive damages.

62. Where a passenger was unlawfully expelled from a train by the conductor, who was acting in good faith, for refusal to pay an extra fare demanded, at a point about 12 miles from his destination, without force, a verdict for \$500 damages is excessive.—*Texas & P. Ry. Co. v. Dennis*, (Tex. Civ. App.) 23 S. W. 400.

Sleeping-car companies—Liability for passengers' effects.

63. A sleeping-car company is liable for money stolen from a passenger by the porter of the car on which he is traveling.—*Pullman Palace-Car Co. v. Gavin*, (Tenn.) 23 S. W. 70.

64. Plaintiff, when about to go on a journey, was given some money by the parents of a lady who had been put in his care, to pay her traveling expenses. It was stolen by the porter of

the sleeping car. *Held* that, the money being rightfully in plaintiff's possession, he was entitled to bring an action for its loss.—*Pullman Palace-Car Co. v. Gavin*, (Tenn.) 23 S. W. 70.

CARRYING WEAPONS.

On one's own premises.

1. It is no offense to carry a pistol on one's own premises.—*Wortham v. State*, (Tex. Cr. App.) 23 S. W. 797.

Evidence.

2. In a prosecution for carrying a pistol, evidence that defendant separated from the witnesses on arriving at his pasture, he going through the same, while the witnesses went around it, to the place of second meeting, where he was seen with a pistol in his possession, on his own premises, does not prove that he had it in his possession before the separation, where he testifies that he went to his residence, secured the pistol, and carried it with him to the place of second meeting.—*Wortham v. State*, (Tex. Cr. App.) 23 S. W. 797.

Cattle.

See "Animals."

Certificate.

See "Acknowledgment," 2-4.

CERTIORARI.

Petition.

1. Plaintiff's petition alleged that he was the owner of certain property; that he borrowed \$7.50 from defendant, and then got very drunk, and while drunk was induced, as he was informed, to sign a bill of sale of his property; that he could not read or write, and, if he signed said bill, he was so drunk that he could not remember it; that said bill was obtained through fraud, and plaintiff never parted with possession of said property; that later defendant took it by force, and kept it; that plaintiff tendered defendant what he owed him, and tried to get his property, but could not; that plaintiff sued before a certain justice to recover it; that the cause was not tried on the day set, but in some way passed on nine days, when it was tried, and judgment rendered for defendant for all said property, and costs; that, at and before the time of trial, plaintiff was very sick in another town,—unable to come to the trial; that the cause was set without plaintiff's knowledge or consent; that injustice had been done him; and that he had a meritorious cause. *Held*, that the petition showed, prima facie, that an injustice had been done plaintiff, without his negligence, as required by Rev. St. art. 303.—*Nelson v. Hart*, (Tex. Civ. App.) 23 S. W. 831.

2. The petition for certiorari to a justice of the peace need not, in every case, set out the entire evidence produced before said justice. It is enough if it show that injustice has been done petitioner, or that he was deprived of a legitimate prosecution or defense without fault on his part.—*Nelson v. Hart*, (Tex. Civ. App.) 23 S. W. 831.

Dismissal.

3. On motion to dismiss a certiorari to a justice of the peace because the bond fails to show in what county or before what justice the judgment was rendered, the court may look to the petition, writ, and transcript; and where the petition fully describes the court and suit, and there is no variance between the description of the judgment in the bond and the transcript,—the latter being merely more detailed, though failing to name the sureties on the bond,—the dismissal will be refused.—*Nelson v. Hart*, (Tex. Civ. App.) 23 S. W. 831.

Change of Venue.

See "Criminal Law," 7-9; "Venue in Civil Cases," 3, 4.

Character.

Evidence as to, see "Criminal Law," 36; "Seduction," 2.

CHARITIES.

Indefiniteness of devise.

Testator devised land to trustees, to manage to the best advantage. Although expressing a preference for some educational purpose, it was left to the trustees to divert the property to any other charity, should they deem it desirable. *Held*, that effect could not be given to the devise, because too indefinite.—*Johnson v. Johnson*, (Tenn.) 23 S. W. 114.

CHATTEL MORTGAGES.

Time of filing.

1. Sayles' Civil St. art. 3190b, § 1, provides that a chattel mortgage without change of possession shall be void against subsequent purchasers in good faith, unless the instrument or a true copy "be forthwith deposited" in the office of the county clerk. *Held*, that purchasers are charged with notice of a mortgage filed before their purchase, though more than three months after it was given.—*Vickers v. Carnohan*, (Tex. Civ. App.) 23 S. W. 338.

Recording.

2. Rev. St. art. 4341, requires a mortgagee of chattels who after registration permits the removal of the chattels to another county to record his mortgage in the latter county within four months, or lose his lien as against creditors and bona fide purchasers. *Held* not to apply in case of a removal without the mortgagee's consent.—*Vickers v. Carnohan*, (Tex. Civ. App.) 23 S. W. 338.

Priorities between mortgagees—Notice of verbal agreement.

3. A verbal agreement between a mortgagor and mortgagee of chattels, that property acquired by the mortgagor after the execution of the mortgage, and not covered by it, should also be subject to the mortgage, does not affect a subsequent mortgagee of such after-acquired property for value without notice; and, though the subsequent mortgagee had notice, or advanced no consideration sufficient to protect him, an assignee of the note, purchasing from such mortgagee before maturity for value and without notice, would take the mortgage unaffected by the verbal agreement.—*Wynne v. Admire*, (Tex. Civ. App.) 23 S. W. 418.

4. A recital in a bill of sale that the property is subject to a chattel mortgage of a particular date, is not notice of a verbal agreement between the seller and the mortgagee, entered into before the sale, extending the mortgage to property not described therein, so as to bind a subsequent mortgagee of such property under a mortgage executed by the purchaser.—*Wynne v. Admire*, (Tex. Civ. App.) 23 S. W. 418.

City.

See "Municipal Corporations."

Claim and Delivery.

See "Replevin."

Claims.

Against decedents' estates, see "Executors and Administrators," 8-12.

Cloud on Title.

See "Quieting Title."
Decree in trespass to try title, canceling deed,
see "Trespass to Try Title," 19.

Collateral Attack.

On judgment, see "Judgment," 24-31.
On order allowing claim, see "Counties," 4.

Collection.

Of taxes, see "Taxation," 5.

Color of Title.

See "Adverse Possession," 8, 9.

Commerce.

Interstate commerce act, see "Carriers," 1, 2.
Regulation of, see "Constitutional Law," 3.

Commission.

Of broker, see "Factors and Brokers."
Of executors and administrators, see "Execu-
tors and Administrators," 13.

Common Carrier.

See "Carriers."

Community Property.

See "Husband and Wife," 12-29.

Competency.

Of jurors, see "Jury," 1, 2.

Complaint.

See "Pleading."

COMPROMISE.

See, also, "Accord and Satisfaction;" "Family
Settlements;" "Release and Discharge."

Effect.

Where the undisputed evidence in a case
shows that while it was pending in justice's
court the parties agreed on a compromise, it
is error not to render judgment according to the
terms of such compromise.—*Irwin v. Huey*,
(Tex. Civ. App.) 23 S. W. 324.

Concealed Weapons.

See "Carrying Weapons."

Condemnation Proceedings.

See "Eminent Domain."

Condition.

In deed, see "Deed," 7.
Of policy, see "Insurance," 3, 4.

Conduct of Trial.

See "Criminal Law;" "Trial."

Confession.

See "Criminal Law," 42-44.

Confirmation.

Of judicial sale, see "Judicial Sales," 1, 2.

CONFLICT OF LAWS.

Contracts.

1. Where defendant agreed to buy of plain-
tiff one car of bacon "f. o. b. Kansas City," and
afterwards refused to take the bacon because of
a disagreement as to the number of pounds con-
stituting a car load, the admission of evidence
to show a usage in Texas, where defendant
lived, as to the number of pounds in a car load,
was error, since the contract was to be executed
in Kansas City.—*Wolert v. Arledge*, (Tex. Civ.
App.) 23 S. W. 1052.

Death by wrongful act.

2. An action for injuries causing death
will not lie, though the death occurred within
the state, unless the law of the jurisdiction
where the injuries were received recognizes
such action.—*De Ham v. Mexican Nat. Ry. Co.*,
(Tex. Sup.) 23 S. W. 381.

Connecting Lines.

See "Carriers," 20-31.

Consideration.

For modifying contract, see "Contracts," 10.
Of contract, see "Contracts," 2.
Of conveyance, see "Fraudulent Conveyan-
ces," 8.
Of guaranty, see "Guaranty."
Of release, see "Release and Discharge," 1.

Consolidation.

Of actions, see "Actions," 2.

Constable.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Due process of law, see "Eminent Domain," 3.
Intoxicating liquor laws, see "Intoxicating Liq-
uors," 1, 2.
Power of eminent domain, see "Eminent Do-
main," 1.

Self-executing provisions.

1. The amended judiciary article of the
constitution, (Gen. Laws 1891, p. 201,) provid-
ing that "when the judge of the county court
is disqualified in any case pending in the county
court the parties interested may by consent ap-
point a proper person to try said case, or upon
their failing to do so, a competent person may
be appointed * * * in such manner as may
be prescribed by law," does not require legis-
lation to put in force that part which authorizes
appointment by consent, and such appointment
may be made, instead of transferring the case
to the district court.—*Parker County v. Jack-
son*, (Tex. Civ. App.) 23 S. W. 924.

Local and special laws.

2. A special act, regulating the practice in
a discontinued circuit court held in terms, is
not inconsistent with the provision of the new
constitution (section 59) that the general as-
sembly shall not pass local or special acts "to
regulate the practice of courts of justice; but
the practice in circuit courts in continuous ses-
sion may, by a general law, be made different
from the practice in circuit courts held in
terms," since such constitutional provision is
prospective in its operation, and under it the
special act remains in force till the passage of
a general law regulating practice in circuit
courts held in terms.—*Piper v. Guenther*, (Ky.)
23 S. W. 872.

Regulation of commerce.

3. Gen. Laws Called Sess. 17th Leg. p. 35,
imposing a penalty on a carrier for refusing to
deliver freight on tender of the charges specified

police regulation, which the state has a right to pass.—*Gulf, C. & S. F. Ry. Co. v. Nelson*, (Tex. Civ. App.) 23 S. W. 732.

Compelling accused to furnish evidence against himself.

4. Rev. St. 1889, §§ 4621, 4622, prohibiting a druggist from selling liquor except on the prescriptions of a physician, and declaring that such prescriptions shall be carefully preserved, and produced in court, or before any grand jury, whenever required, and that, on the failure of the druggist to produce the same, he shall be deemed guilty of a misdemeanor, are not in conflict with Const. art. 2, § 23, providing that no person shall be required to furnish evidence in a criminal case against himself.—*State v. Davis*, (Mo. Sup.) 23 S. W. 759.

Construction.

Of wills, see "Wills," 9-16.

CONTEMPT.

Punishment—Striking out scandalous pleading.

1. Where a petition filed in a court contains scandalous matter reflecting on the integrity of the judge and the master in chancery of the court, it may be stricken from the files without notice, though it sets up a good cause of action. *Pleasants, J., dissenting.*—*Herndon v. Campbell*, (Tex. Civ. App.) 23 S. W. 558.

2. Where the petition of a plaintiff in the district court states a good cause of action, but also contains matter so impertinent or scandalous as to amount to a contempt, the court may expunge the objectionable matter, but cannot strike the petition from the files. 23 S. W. 558, reversed.—*Herndon v. Campbell*, (Tex. Sup.) 23 S. W. 980.

Contest.

Of wills, see "Wills," 6-8.

Contingent Remainder.

See "Deed," 8.

CONTINUANCE.

In criminal cases, see "Criminal Law," 10-18.

Absence of witness.

1. It is not an abuse of discretion to refuse a continuance for the absence of a witness, the materiality of whose testimony was known to counsel six weeks before trial, but who had left the state two weeks before trial, when counsel intended to issue a subpoena, though the witness had promised to be present and testify.—*Campbell v. McCoy*, (Tex. Civ. App.) 23 S. W. 34.

2. Where nonresidents voluntarily appear in a personal action, it is error to force them to trial on the day following such appearance, and refuse a continuance on the ground of the absence from the county of material witnesses.—*Bartley v. Conn*, (Tex. Civ. App.) 23 S. W. 382.

Surprise.

3. In trespass to try title, where a witness called by defendant to prove the execution of a deed refused to testify to its authenticity, a motion to continue the case on the ground of surprise is properly denied where there is no offer to connect the deed with any defense, or to show that it could not be established by other testimony.—*Dempsey v. Taylor*, (Tex. Civ. App.) 23 S. W. 220.

See, also, "Assignment;" "Assignment for Benefit of Creditors;" "Assumpsit;" "Bonds;" "Carriers;" "Chattel Mortgages;" "Deed;" "Frauds, Statute of;" "Fraudulent Conveyances;" "Guaranty;" "Insurance;" "Interest;" "Landlord and Tenant;" "Master and Servant;" "Mortgages;" "Negotiable Instruments;" "Partnership;" "Payment;" "Principal and Agent;" "Principal and Surety;" "Sale;" "Specific Performance;" "Subrogation;" "Subscription;" "Usury;" "Vendor and Purchaser."

Agreement to submit to arbitration, partial invalidity, see "Arbitration and Award," 2.

Antenuptial contracts, see "Husband and Wife," 5.

By what law governs, see "Conflict of Laws," 1.

Consideration for note given to indemnify surety, see "Negotiable Instruments," 3.

Damages for breach, see "Damages," 8-15.

Establishment of boundaries, see "Boundaries," 3-5.

Of cities, see "Municipal Corporations," 8.

Of corporations, see "Corporations," 2-5.

Of receiver, see "Receivers," 6.

Power of guardian to contract, see "Guardian and Ward," 3, 4.

Public policy, assignment of unearned salary by government employe, see "Assignment," 2.

Rescission and cancellation in equity, see "Equity," 1-4.

— of land contract, see "Vendor and Purchaser," 6-9.

Sunday contracts, see "Sunday."

To deliver telegram, see "Telegraph Companies," 1, 2.

What constitutes—Meeting of minds dependent on usage.

1. Plaintiff telegraphed defendant at what prices he would furnish him February and March bacon, "f. o. b. Kansas City," and defendant telegraphed back: "Will take one car February and March bacon. Forward contracts, and draw for margins." Contracts were sent, stipulating for the purchase of 25,000 pounds, to be delivered in February, and a like quantity to be delivered in March. Defendant refused to sign the contracts, alleging that by usage of trade a carload of bacon was 20,000 pounds. *Held*, in an action for breach of contract, that it was error to instruct that if the parties contemplated that, before the agreement as expressed in the telegram should be regarded as binding, its terms should be reduced to writing, and signed, and margin put up, then the telegrams would not constitute a contract, since the telegrams did constitute a contract if by usage of trade in Kansas City a car load of bacon was 25,000 pounds.—*Wolert v. Arledge*, (Tex. Civ. App.) 23 S. W. 1052.

Validity—Consideration.

2. An agreement to extend a note on payment of the accrued interest is without consideration.—*Helms v. Crane*, (Tex. Civ. App.) 23 S. W. 392.

— Public policy.

3. A lease made with the knowledge of the lessor that the premises are to be used for purposes of prostitution is contrary to public policy, and no rent can be recovered.—*Hunstock v. Palmer*, (Tex. Civ. App.) 23 S. W. 294.

4. The fact that one was a county surveyor when he made a contract to locate a head right, in consideration of a compensation other and greater than his official fees, does not invalidate said contract, when the land located was in another county, and not located by the contractor himself.—*Ellis v. Stone*, (Tex. Civ. App.) 23 S. W. 405.

Joint and several liability.

5. A joint and several liability of two contractors for materials furnished was shown by evidence that one of the contractors ordered

1. Where a person agrees with a certain firm to exert himself to sell all the lumber cut at their mill during a certain year, the fact that he, during such time, becomes the managing partner in a firm which operates a competing mill, does not of itself constitute a breach of his contract with the former firm, in the absence of an agreement to give his entire services to either firm.—*Bender v. Peyton*, (Tex. Civ. App.) 23 S. W. 222.

Performance.

6. Where a person agrees with a certain firm to exert himself to sell all the lumber cut at their mill during a certain year, the fact that he, during such time, becomes the managing partner in a firm which operates a competing mill, does not of itself constitute a breach of his contract with the former firm, in the absence of an agreement to give his entire services to either firm.—*Bender v. Peyton*, (Tex. Civ. App.) 23 S. W. 222.

7. A contract to construct and maintain a railroad between certain points in consideration of contributions by citizens, being entire in its nature, a failure of complete performance entitles a contributor to recover the amount paid, unless an excuse for the failure be shown, or that the part performance is beneficial.—*Batsell v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 552.

8. Defendants agreed, in consideration of plaintiffs' transfer to them of the right to sell a patented article over a specified territory of 56 counties, that they would pay plaintiff \$25 for each county named; "payment to be made when we sell a county,—that is, on each county when sold." Plaintiffs sued for \$1,400 as damages for nonperformance, but their own testimony showed that defendants, at considerable expense, had honestly tried to sell the articles, but had only disposed of one. *Held*, that defendants' obligation to pay \$25 per county named was not absolute, but only became so as the counties were "sold." No cause of action could therefore arise unless sales were made, or defendants had failed or refused to sell when they could, for a reasonable length of time.—*Cowart v. Edwards*, (Tex. Civ. App.) 23 S. W. 569.

9. A party to a contract, who causes a delay in the time of its performance, cannot claim that time was of the essence of the contract, and that he is no longer bound by the contract because of the delay.—*McLane v. Elder*, (Tex. Civ. App.) 23 S. W. 757.

Modification—Consideration.

10. February 1st plaintiff agreed to deliver defendant so much wood, at an agreed price per cord, by April 1st; plaintiff not to be responsible for the railroad's failure to supply cars, nor for delays beyond human control. No cars were furnished till April 10th or 11th. March 28th plaintiff wrote to defendant that, in view of the wages he had then to pay, he must ask for a better price for the wood. Defendant answered that he would pay him a certain advanced price per cord, and requested him to hurry his shipments. *Held*, that the modification of the contract was not without consideration.—*Foley v. Storrie*, (Tex. Civ. App.) 23 S. W. 442.

Merger of oral in written contract.

11. The owner of property made an oral contract with a broker to negotiate a sale, and subsequently made a written contract therefor. *Held*, in an action on the oral contract for commissions for a sale to a person sent to the owner, after the written contract had expired and the owner had refused to renew it, that the oral was merged in the written contract, which had expired.—*Nunn v. Townes*, (Tex. Civ. App.) 23 S. W. 1117.

Right to terminate.

12. A contract to teach school, which reserves to both parties the right, after the present school year has expired, to terminate the contract by giving three months' notice, "otherwise the foregoing contract will be binding for the ensuing scholastic year," cannot be terminated before the expiration of the first

934.

Pleading and proof.

13. Where plaintiff declares on an express contract, he cannot recover on an implied contract.—*Nunn v. Townes*, 23 S. W. 1117.

CONTRIBUTION.

Between joint obligors.

Where one of three joint obligors pays the debt, he is not entitled to recover of the other two obligors, jointly and severally, two-thirds of the amount paid by him, but may recover of each of such other obligors one-third, only, of such amount.—*Graves v. Smith*, (Tex. Civ. App.) 23 S. W. 608.

Contributory Negligence.

See "Negligence," 7-10.

Conversion.

Liability of sheriff for unlawful seizure, see "Sheriffs and Constables."
Release of joint tortfeasors, see "Release and Discharge," 2.

Conveyances.

See "Chattel Mortgages;" "Deed;" "Fraudulent Conveyances;" "Mortgages;" "Sale;" "Vendor and Purchaser."

By husband, joinder of wife, see "Husband and Wife," 3.

Of homestead, see "Homestead," 14-17.

CORPORATIONS.

See, also, "Carriers;" "Horse and Street Railroads;" "Insurance;" "Municipal Corporations;" "Railroad Companies;" "Telegraph Companies."

Evidence of corporate existence.

1. On a prosecution under *Manuf. Dig. § 1638*, for embezzlement from a corporation, evidence of the general reputation of corporate existence of the injured party is sufficient.—*Fleener v. State*, (Ark.) 23 S. W. 1.

Contracts.

2. Where the promoter of a corporation is indebted to plaintiff for procuring a bonus for the corporation, the latter, on its organization, on accepting the bonus with knowledge of the claim for services, assumes the indebtedness also.—*Weatherford, M. W. & N. W. R. Co. v. Granger*, (Tex. Civ. App.) 23 S. W. 425.

3. Representations and declarations made by the director of a railroad company, while acting in the performance of his duty to procure a bonus from the citizens of a town, are ratified by the acceptance of the bonus by the company, though he may have exceeded his authority in making the declarations and representations.—*Gulf, C. & S. F. Ry. Co. v. Pittman*, (Tex. Civ. App.) 23 S. W. 318.

4. A bank loaning a corporation more money than the latter's recorded articles empower it to borrow does so at its peril, and its claim against the assignee will be allowed only to the amount which the corporation was entitled to borrow.—*First Nat. Bank v. D. Keefer Milling Co.*, (Ky.) 23 S. W. 675.

5. A national bank, having joined with other persons in a partnership to operate a mill owned among them, cannot be prevented from recovering moneys loaned to the firm, on the ground that it has no power to become a partner in a mill.—*Cameron v. First Nat. Bank*, (Tex. Civ. App.) 23 S. W. 334.

veyed to his grantor by deed of a corporation's president, reciting the taking of a third person's note in full payment of the greater part of the purchase money, has notice from such deed that the president has waived the vendor's lien of the corporation without any authority under the by-laws of the corporation, or under his power to make deeds.—*Franco-Texan Land Co. v. McCormick*, (Tex. Sup.) 23 S. W. 123.

Variance in name of corporation.

7. On appeal from a justice of the peace to the district court, taken by the "Southern Pacific Railroad Company," the district court has no jurisdiction to render judgment against the "Southern Pacific Company," since the presumption from the difference in names is that the two companies are separate and distinct entities.—*Southern Pac. Co. v. Burns*, (Tex. Civ. App.) 23 S. W. 288.

Liability on subscription to stock—Evidence.

8. Where, in an action on a subscription contract to the capital stock of a corporation, the petition alleged that defendant, acting through his father and agent, executed the contract, it was not error to reject evidence offered by defendant to prove that the other subscribers to the capital stock of plaintiff knew the stock was subscribed as a gift by his father to defendant.—*Evans v. Texas Printing & Lithographing Co.*, (Tex. Civ. App.) 23 S. W. 476.

9. Plaintiff having alleged that defendant approved and adopted the acts of his father in signing his name to the contract, it was not error to admit the subscription list in evidence.—*Evans v. Texas Printing & Lithographing Co.*, (Tex. Civ. App.) 23 S. W. 476.

— Right to withdraw subscription.

10. A subscriber to the stock of a corporation to be formed can withdraw his subscription before the organization thereof, and before its acceptance, and before the expenditure of any money, and with the consent of the payee.—*Patty v. Hillsboro Roller-Mill Co.*, (Tex. Civ. App.) 23 S. W. 336.

11. A person who subscribes money to assist a proposed corporation to erect a roller mill may, before the whole amount necessary is subscribed, or any liabilities or expenses have been incurred, or any organization has been perfected, withdraw his subscription, by notifying the person having charge of such matter.—*Lewis v. Hillsboro Roller-Mill Co.*, (Tex. Civ. App.) 23 S. W. 338.

Appointment of receiver.

12. Rev. St. art. 1461, authorizing a judge of any court of competent jurisdiction to appoint a receiver for an insolvent corporation, does not empower a stockholder or lien creditor of an insolvent corporation, which is still a going concern, to have a receiver appointed to take charge of the entire assets and convert them into money for general distribution, on the sole ground of insolvency.—*Espuela Land & Cattle Co. v. Bindle*, (Tex. Civ. App.) 23 S. W. 819.

13. The application of a few persons owning comparatively small interests in an insolvent but going corporation is not sufficient to induce a court of equity to appoint a receiver therefor, and to order a speedy sale of its property during a period of great financial stringency.—*Espuela Land & Cattle Co. v. Bindle*, (Tex. Civ. App.) 23 S. W. 819.

Foreign corporation.

14. The statute of 1887, relating to foreign corporations, having been declared unconstitutional, there was from its date, until the act of 1889 went into operation, no effective statute

Corroboration.

Of witness, see "Witness," 15.

COSTS.

Attorney's fees in garnishment, see "Garnishment," 2.

Effect of disclaimer, see "Trespass to Try Title," 20.

On accounting by trustees, see "Trusts," 8, 9.

Right to costs.

1. Where, in an action, defendant pleads a larger claim as a set-off, and recovers judgment for the excess, he is entitled to costs, under Rev. St. art. 648, providing that where a counterclaim is pleaded the party in whose favor final judgment is rendered shall recover costs.—*McCormick Harvesting Mach. Co. v. Gilkey*, (Tex. Civ. App.) 23 S. W. 325.

On appeal.

2. An appellant who, on proper motion, could have had the judgment corrected below, and thus rendered the appeal unnecessary, will be taxed with the costs of the appeal, in addition to those rendered against him below.—*Montrose v. Fannin County Bank*, (Tex. Civ. App.) 23 S. W. 706.

— From justice's court.

3. A county court, on dismissing an appeal from a justice of the peace for want of jurisdiction, has power to adjudge costs of the appeal against the appellant.—*Llano Improvement & Furnace Co. v. White*, (Tex. Civ. App.) 23 S. W. 594.

In criminal cases.

4. Acts 1889, p. 120, § 1, provides that within 30 days after termination of any cause in any circuit court, that was tried on change of venue from another county, the clerk of such court shall make out an itemized list of "all the expenses incurred" by his county in the trial of the cause, and present it to the county court of the county where the cause originated. Section 2 provides that the county court to whom "any such bill of costs" is presented, properly authenticated, shall allow the same as though the case had terminated in its own county. *Held*, that the word "costs" in section 2 should be interpreted as "expenses," and that the county in which an action was begun was liable, on change of venue, for all the expenses incurred by the trial court by reason of the change, including "current expenses of the court," as well as those for which it was already liable,—the costs in the cause.—*Hempstead County v. Royston*, (Ark.) 23 S. W. 650.

Execution for costs.

5. Rev. St. art. 1420, provides that "each party to a suit shall be responsible to the officers of the court for the costs incurred by himself." Article 1420a provides that clerks may demand payment of costs in cases pending in their courts up to the adjournment of each term. Article 1420b provides that, if costs are not paid within 10 days after demand therefor, the clerk may issue execution, and that the taking of an appeal shall not prevent the issuance of such execution. *Held* that, after an appeal bond has been filed, execution for costs against appellant can be issued only for such costs as appellant has incurred.—*Extence v. Stewart*, (Tex. Civ. App.) 23 S. W. 295.

Cotenancy.

See "Tenancy in Common."

Cotton Ginner.

See "Bailment."

Counsel.

Argument of counsel, see "Criminal Law," 25-30; "Trial," 9-18.

Counterclaim.

See "Set-Off and Counterclaim."

COUNTIES.

See, also, "Highways;" "Municipal Corporations."

Liability for costs, see "Costs," 4.

Public ferries, see "Ferry," 1, 2.

Who may sue on bond of tax collector, see "Bonds," 1, 2.

Ratification of unauthorized contract.

1. An unauthorized contract of a county judge to purchase county bonds for the school fund may be ratified by the county court.—*Boydston v. Rockwall County*, (Tex. App.) 23 S. W. 541.

County treasurer—Rights against county.

2. Where the tax collector fails to turn over taxes to the county treasurer, and the latter is thereby entitled to sue the collector and his bondsmen for commissions which he failed to realize, he has no cause of action against the county by reason of an attempted release of the bondsmen, and of the county's refusal to compel the collector to pay to the treasurer the taxes collected.—*Carothers v. Presidio County*, (Tex. Civ. App.) 23 S. W. 491.

Allowance and payment of claims.

3. As the statutes require some claims against counties to be paid out of the treasury on the certificate of the county judge, and some on the certificate of the clerk, the word "or" will not be read "and," in Rev. St. art. 986, providing that all warrants or scrip issued against the county treasurer by any judge or clerk shall be signed, and attested by the clerk "or" judge of the court issuing the same; and, as there is no statute requiring the county judge to sign warrants issued on claims audited and allowed by the county commissioners' court, a warrant issued by the clerk, on an order of said court allowing a claim, and directing its payment, need not be signed by the county judge.—*Callaghan v. Sallaway*, (Tex. Civ. App.) 23 S. W. 837.

Collateral attack.

4. As Rev. St. art. 1514, gives the commissioners' court power to audit and settle all accounts against the county and direct their payment, an order allowing an account and directing a warrant to be drawn is conclusive, unless set aside by the district court, and cannot be collaterally attacked by the county judge in mandamus proceedings to compel him to sign the warrant.—*Callaghan v. Sallaway*, (Tex. Civ. App.) 23 S. W. 837.

Compelling auditor to issue warrant.

5. Where one has presented a claim against the county to the commissioners' court, as authorized by law, and they have allowed the same, and ordered a warrant to be drawn, a petition for a writ of mandamus to compel issuance of the warrant cannot be defeated on the ground that there is an adequate remedy by suit against the county, as under Rev. St. art. 677, the commissioners' court must have refused to allow a claim before an action thereon can be brought against the county.—*Callaghan v. Sallaway*, (Tex. Civ. App.) 23 S. W. 837.

County Courts.

See "Courts," 12, 13.

COURTS.

See, also, "Judge."

Discontinuance, scope of statute, see "Statutes," 5.

Jurisdiction of court to which venue is changed, see "Venue in Civil Cases," 4.

Ex parte proceedings without controversy.

1. Consts. 1866 and 1869, by what are termed "general jurisdiction clauses," provided that the district court had jurisdiction to try "all suits, complaints, and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, one hundred dollars, exclusive of interest." *Held*, that to give such court jurisdiction the pleading must disclose an adversary, and assert a right against him which is not shown to be conceded by him; and therefore it did not have jurisdiction of an ex parte proceeding in partition, wherein all the parties in interest were perfectly agreed, and there was nothing for the court to decide.—*Blagge v. Moore*, (Tex. Civ. App.) 23 S. W. 466.

Jurisdiction by consent.

2. The fact that a defendant filed an answer in the district court does not confer jurisdiction upon the court, where the amount in controversy is not within the original jurisdiction of the district court.—*Southern Pac. Co. v. Burns*, (Tex. Civ. App.) 23 S. W. 288.

Of appellate jurisdiction.

3. To overturn decisions of the supreme court, that court itself must overrule them, and, until then, they must be regarded as authority by the court of civil appeals. *Fisher, C. J.*, dissenting.—*Jones v. Gulf, C. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 186.

4. Act April 13, 1892, § 5, provides that "the judgment of the courts of civil appeals shall be conclusive upon the facts of a case." Rev. St. art. 1033, as amended by Act April 13, 1892, provides that the supreme court, upon the hearing of a case brought up by a writ of error, "may require at any time the original transcript to be sent up." *Held*, that the supreme court, while not empowered to revise the conclusions of fact of the court of appeals, may consider the evidence, in rendering its decision.—*Clarendon Land, Invest. & Agency Co. v. McClelland*, (Tex. Sup.) 23 S. W. 1100.

Special terms.

5. Under Act June 10, 1893, authorizing special terms of the circuit court on orders of the judges, or on notices signed by the judge and posted, and providing that the order or notice shall specify the day on which the term is to commence, and shall give the style of each case to be heard, compliance with the provisions as to the order and notice is essential to the validity of proceedings at the special term.—*Toler v. Commonwealth*, (Ky.) 23 S. W. 347.

Jurisdictional amount.

6. The fact that no salary was attached to the office of mayor of a city when plaintiff was voted for and qualified for that office does not deprive the district court of jurisdiction of an action brought by him against an alleged intruder, where, before the action was brought, the city council, as empowered by the charter, fixed the salary for the unexpired term in an amount exceeding \$500, the jurisdictional limit of the district court.—*Krakauer v. Oaples*, (Tex. Civ. App.) 23 S. W. 1036.

7. Under Acts 1891, pp. 199, 200, granting the district court jurisdiction of all suits in behalf of the state to recover penalties and for-

the amount claimed in the petition determines the jurisdiction of the court, unless the question of jurisdiction is raised by an allegation that plaintiff fraudulently alleged an excessive amount for the purpose of giving the court jurisdiction.—*Sozaya v. Patterson*, (Tex. Civ. App.) 23 S. W. 746.

9. A creditor agreed to buy his debtor's cotton crop and pay one-quarter or one-half cent per pound more than any one else would give, and credit the amount on the debt, which was due. At the time only part of the cotton was gathered. The debtor was to pick the balance of the cotton, and haul it all to S.'s gin, to be held by him subject to such creditor's order. This was done, but, while the cotton was at S.'s gin, other creditors of the same debtor levied on it. In an action against them by the creditor who had arranged to buy the cotton, for conversion, he set up a mortgage held by him as assignee on the property converted and other property, and asked that the same be foreclosed. *Held*, that it was error to charge that the value of the property in the mortgage was the test of jurisdiction.—*Baker v. Guinn*, (Tex. Civ. App.) 23 S. W. 604.

10. The amount claimed in the petition, and not the amount of the verdict, will be deemed the amount in controversy, unless it appears from the petition that the case is not within the jurisdiction, or unless it otherwise appears that plaintiff, in framing his petition, has improperly sought to give jurisdiction where it does not belong.—*Baker v. Guinn*, (Tex. Civ. App.) 23 S. W. 604.

11. Where a city charter vests the council with power to judge of the election and qualification of its members, including the mayor, and no salary is attached to the office of mayor, a decision of the city council that the person receiving the highest number of votes has not the qualifications prescribed by the charter for the office is conclusive, and not subject to review by the district court, which, prior to the constitutional amendment of 1891, had no jurisdiction in such cases unless the amount involved exceeded \$500 in value.—*Krakauer v. Caples*, (Tex. Civ. App.) 23 S. W. 1036.

County courts—Recovery of land.

12. Where an action was brought in the county court to establish title to an unlocated land certificate, and, while the suit was pending, a portion of it was located, a judgment as to that portion was void, the court being without jurisdiction, under the constitution, of suits "for the recovery of land."—*Meyers v. Jones*, (Tex. Civ. App.) 23 S. W. 562.

—Establishment of boundary.

13. The fact that the position of a division fence between plaintiff's and defendant's pastures is incidentally inquired into in action for damages caused by defendant's opening the fence, and turning his cattle into plaintiff's pasture, does not deprive the county court of jurisdiction.—*Claunch v. Osborn*, (Tex. Civ. App.) 23 S. W. 937.

Coverture.

See "Husband and Wife."

Credibility.

Of witnesses, see "Witness," 4-15.

CRIMINAL LAW.

See, also, "Arrest;" "Bail;" "Extradition;" "Indictment and Information;" "Jury;" "Witness."

icating Liquors;" "Larceny;" "Libel and Slander," 5, 6; "Rape;" "Seduction." Accessories to manslaughter, see "Homicide," 12.

Compelling druggists to produce prescriptions for sale of liquor, see "Constitutional Law," 4. Evidence of character, see "Seduction," 2. Instruction, credibility of witness, see "Witness," 4-6.

Liability for costs, see "Costs," 4. Recognizance on appeal, see "Bail," 4-9. Repeal of statute, release of offenders, see "Statutes," 9.

What is a crime.

1. It is no defense to a prosecution for embezzlement by an employee that defendant's bondsmen have made good to his employer all losses suffered by reason of the alleged embezzlement.—*Fleener v. State*, (Ark.) 23 S. W. 1.

Drunkenness as excuse for crime.

2. Drunkenness being by Pen. Code, art. 40a, declared no excuse for crime, a charge on a prosecution for rape that, if the jury believed defendant's mind was so far overcome from the recent use of intoxicants as to be incapable of forming an intent, they should not infer the intent from his acts, is properly refused.—*Crew v. State*, (Tex. Cr. App.) 23 S. W. 14.

Felonies and misdemeanors.

3. An offense that is a felony because it may be punished by imprisonment in the penitentiary is not, by reason of a less punishment being inflicted, reduced to a misdemeanor.—*State v. Melton*, (Mo. Sup.) 23 S. W. 889.

Jurisdiction.

4. As the criminal district court of Harris county has appellate jurisdiction, under Rev. St. arts. 1496, 1497, of all criminal cases tried and determined by justices of the peace, its "original and exclusive jurisdiction" cannot extend to the trial of an indictment for a misdemeanor cognizable by the justices' courts.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 892.

Principal and accessory.

5. Where defendant made preparations for killing and dressing hogs while his confederates were stealing them, he is guilty as principal in the theft. *Watson v. State*, 1 S. W. 451, 17 S. W. 550, 21 Tex. App. 598, followed.—*Montgomery v. State*, (Tex. Cr. App.) 23 S. W. 603.

6. Except where it is plain from the nature of an offense made a felony by statute that the provisions of the statute were intended to affect only the party actually committing the offense, aiders and abettors of statutory offenses are punishable as principals. *Stamper v. Com.*, 7 Bush, 612, overruled.—*Commonwealth v. Carter*, (Ky.) 23 S. W. 344.

Change of venue.

7. Where the court believes that a fair and impartial trial cannot be had in the county where defendant is indicted, it may change the venue to another county, of its own motion.—*Adams v. State*, (Tex. Cr. App.) 23 S. W. 691.

8. Where defendant has had a change of venue, and, after disagreement of the jury, has moved to have the cause remanded to the original county, which is done without objection by the state, and at the next term, in the latter county, has moved to have the order for change of venue set aside, which is done, and he is tried and convicted, he cannot move for arrest of judgment for lack of jurisdiction, under Gen. St. c. 12, which forbids more than one change of venue in each case.—*Hourigas v. Commonwealth*, (Ky.) 23 S. W. 355.

9. The order changing the venue need not recite the arraignment of defendant.—*Adams v. State*, (Tex. Cr. App.) 23 S. W. 691.

Continuance.

10. Setting a case for a day later in the term instead of continuing it to the succeeding term is, at most, harmless error, the persons whose attendance was wanted having been present at the trial, and it not appearing that defendant was otherwise prejudiced.—*Vaughn v. Commonwealth*, (Ky.) 23 S. W. 371.

Absence of witness.

11. It is error to refuse an application by defendant for a continuance of a trial for robbery in order to procure the attendance of a witness by whom defendant expects to prove an alibi, where the witness is too ill to attend court or to have her deposition taken, and the principal question in the case is the identification of defendant as the robber.—*State v. Maddox*, (Mo. Sup.) 23 S. W. 771.

12. On a prosecution for aggravated assault, no error is committed in refusing an application for a continuance for an absent witness by whom defendant expects to prove self-defense, where the evidence at the trial shows that the fight was voluntarily entered into by both combatants, and that the expected testimony was, therefore, not probably true.—*Hastings v. State*, (Tex. Cr. App.) 23 S. W. 797.

13. A continuance because of absent witnesses was properly denied where the facts as to which they would testify were shown by other evidence.—*Nelson v. Commonwealth*, (Ky.) 23 S. W. 350.

14. A criminal case will not be continued on account of the absence of a witness who can be used only to impeach a witness for the adverse party.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

15. A continuance in a capital case on the ground of the absence of a witness is properly denied where four years have elapsed between the finding of the indictment and the trial, and the affidavit as to what the absent witnesses would testify is admitted as a deposition.—*Johnson v. Commonwealth*, (Ky.) 23 S. W. 507.

16. Where, before the instructions to the jury, an absent witness is brought into court, and leave is given defendant to examine him, he cannot complain of the refusal of the court to grant a continuance on account of the absence of that witness.—*State v. Banks*, (Mo. Sup.) 23 S. W. 1079.

17. It is not error to overrule a motion for a third continuance on the ground of the absence of material witnesses, if defendant has not used proper diligence in trying to obtain their depositions or attendance.—*State v. Banks*, (Mo. Sup.) 23 S. W. 1079.

Affidavit.

18. A motion for a continuance is properly denied when not supported by an affidavit.—*Mitchell v. State*, (Tenn.) 23 S. W. 68.

Time of trial.

19. The order remanding a case for trial to the court from which it had been changed fixes the time for trial, there is no reason why the rule in civil cases, that a cause does not stand for trial in the court to which it is removed unless the record has been filed 10 days before the first day of the next term, should apply by analogy.—*Houigan v. Commonwealth*, (Ky.) 23 S. W. 355.

Separate trial of joint defendant.

20. An application for a severance by joint defendants is properly denied when not supported by an affidavit.—*Mitchell v. State*, (Tenn.) 23 S. W. 68.

Conduct of trial.

21. On a trial for larceny, one of defendant's counsel was grossly insulting to a witness and to the court, and the court imposed a fine on him, and refused to allow him to proceed until it was paid, and defendant's other counsel then finished the argument. *Held*, that error could not be predicated of the action of the

court.—*Goldstein v. State*, (Tex. Cr. App.) 23 S. W. 686.

Reception of evidence.

22. In a prosecution for betting at dice, it is error for the court to reject a witness by whom defendant proposes to prove that he did not play or bet at the game, on a statement by the county attorney that the witness was indicted for playing in the same game and at the same time with defendant, without proof of this fact.—*Traylor v. State*, (Tex. Cr. App.) 23 S. W. 798.

23. A witness for defendant, on being asked by the district attorney if he had ever made a certain statement to E., denied it. E., who was under rule, was brought in and pointed out to witness, and the statement was again repeated, and defendant asked if he had made it to E., which he denied. *Held* not a violation of the rule; the statement which witness denied making being the only part of his testimony that E. heard.—*Goldstein v. State*, (Tex. Cr. App.) 23 S. W. 686.

24. Acts and declarations of another may, in the discretion of the court, be admitted against defendant prior to evidence of a conspiracy between them.—*State v. Flanders*, (Mo. Sup.) 23 S. W. 1086.

Remarks and arguments of counsel.

25. Remarks of the district attorney should be promptly called to the attention of the trial court when uttered, and it is too late for defendant's attorney to present the matter to the court for the first time by bill of exception.—*Jones v. State*, (Tex. Cr. App.) 23 S. W. 798.

26. If remarks of the prosecuting attorney are not authorized by the evidence, defendant should ask the court to stop him, and to instruct the jury to disregard them.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 794.

27. It is error for counsel, in the presence of the jury, to state what he expected to prove by a witness, where such evidence is incompetent, and has already been rejected for that reason.—*Flint v. Commonwealth*, (Ky.) 23 S. W. 346.

28. Where an objection to improper remarks of the county attorney has been promptly sustained, the attorney being admonished to keep within the record, and the defense has failed to request an instruction to the jury to disregard such remarks, and defendant has received the lowest term of punishment for his offense, the court's failure to give such instruction is no ground for reversal.—*Matheus v. State*, (Tex. Cr. App.) 23 S. W. 690.

29. Where, in a prosecution for seduction, the prosecuting attorney, in argument to the jury, remarked that the return of the writs by the officers showed that defendant ran away, and skipped out, and the prosecuting witness had to work in a factory to support herself and child, and the court rebuked him, there is no error, as it will be presumed that the rebuke warned the jury to disregard the statement.—*State v. Brandenburg*, (Mo. Sup.) 23 S. W. 1080.

30. It is within the discretion of the court to refuse to require the prosecuting attorney to close his argument before the jury immediately following the close of the argument for the defense, though there may be ample time to do so.—*State v. Lewis*, (Mo. Sup.) 23 S. W. 1082.

Evidence.

31. Evidence is admissible that, pending an appeal from a conviction on a previous trial for the same offense, defendant attempted to escape from jail.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

32. The fact that on a previous trial the state and defendant stipulated that a certain person, if present, would testify as to the existence of a certain state of facts, is not ground for rejecting the evidence of such witness at

of the peace interlined the date of rendition and affixed his official signature to a judgment for petit larceny after the prosecution of an indictment for petit larceny, second offense, was commenced, was harmless error where the portion of the judgment lawfully entered at the proper time was sufficient to show a conviction of petit larceny; since, under Rev. St. 1889, § 6299, an undated and unsigned justice's judgment is not void.—*State v. Griffie*, (Mo. Sup.) 23 S. W. 878.

84. The admission of testimony of a nonexpert witness that defendant's overcoat had blood stains on it is not error where such witness qualified the statement by saying the spots were such as he would have taken to be blood spots; it being unnecessary that the witness be an expert to testify what the spots on the overcoat looked like.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

85. Where defendant told a person that a bundle which he was seen to carry on the evening the crime was committed was tobacco which he had purchased from G., testimony of G. that he did not sell defendant any tobacco on that evening was competent.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

Evidence—Character.

86. In a prosecution for keeping a disorderly house, a witness who swears that he knows the general reputation of the women who frequented the house in question is competent to testify to such reputation, though he has no personal acquaintance with them.—*Downs v. State*, (Tex. Cr. App.) 23 S. W. 684.

— Other crimes.

87. On a trial of an indictment for robbery, evidence that defendant first raped the prosecuting witness and then forcibly took money from her is admissible as part of the *res gestae*.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 684; *Id.* 685.

88. On indictment for larceny, evidence that defendant at the same time stole other money, not charged in the indictment, is admissible.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 794.

89. On trial for a misdemeanor, where the information contains but one count, and a witness has given evidence of facts constituting the crime, it is not error to refuse to exclude the testimony of another witness to the commission by defendant of a similar offense at a different time and place from those stated by the former witness, when defendant does not ask that the state be required to elect on which transaction it will rely for conviction; since to exclude such evidence would be to allow defendant to elect on which transaction he would be tried.—*Bradshaw v. State*, (Tex. Cr. App.) 23 S. W. 892.

— Best and secondary evidence.

40. Evidence that the deed, the signature to which defendant was charged with having obtained by false pretenses, had been destroyed, was sufficient foundation for the introduction of a certified copy of the record.—*State v. Flanders*, (Mo. Sup.) 23 S. W. 1086.

— Hearsay.

41. Defendant cannot prove by third persons that another, and not he, was pointed out as the person who had been seen at a certain place, as the evidence is hearsay.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 796.

— Confessions

43. On a prosecution for burglary, it appeared that a detective, who had a description of the stolen property, met a boy with a stolen coat, and, on asking where he got it, was taken to defendant, who had on clothes stolen from the place burglarized. Without telling defend-

made the confession, though the detective went to him with the purpose of arresting him if the boy identified him as the one who stole the coat, and that the confession was admissible.—*Holmes v. State*, (Tex. Cr. App.) 23 S. W. 687.

43. The statement, made by one while in jail on the charge of burglary, that a certain article with which the building was broken into, and a certain article taken therefrom, would be found in a certain place under a building, is, in connection with evidence that they were so found, admissible against him, under Code Crim. Proc. art. 750, making the confession of one in confinement admissible, where, in connection therewith, he made statements of facts, that are found to be true, which conduce to establish his guilt.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 687.

44. The court, on the withdrawal of the jury, investigated the circumstances under which a confession to a sheriff was made, and all the statements of the accused were denied by the sheriff, who stated that he used no persuasion, promise, or force, but cautioned accused that what he said would be used against him, and could not be used for him. The accused did not take the stand before the jury or introduce evidence questioning the sheriff's testimony. *Held*, that it was not error to permit the sheriff to testify before the jury to the confession.—*Nichols v. State*, (Tex. Cr. App.) 23 S. W. 680.

— Declarations and admissions.

45. Where a substantial defense is in issue, evidence that defendant had admitted that he was in fear of persons against whom he had agreed to turn state's evidence in certain criminal cases involving both him and them is prejudicial. *Letts v. State*, (Tex. Cr. App.) 21 S. W. 371, distinguished.—*Burge v. State*, (Tex. Cr. App.) 23 S. W. 692.

— Self-accusing declarations of third persons.

46. On a trial for murder, evidence that a certain person, on his deathbed, confessed to witness to having himself killed deceased, is inadmissible.—*Davis v. Commonwealth*, (Ky.) 23 S. W. 585.

47. On a trial for larceny, evidence that a person other than defendant admitted that he stole the goods is hearsay.—*State v. Hack*, (Mo. Sup.) 23 S. W. 1089.

Instructions.

48. Rev. St. 1889, § 4219, providing that defendant's failure to testify shall not be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place, does not warrant an instruction that defendant's failure to testify shall not create any presumption against him.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

49. An instruction based on the theory that the prosecution relied solely on circumstantial evidence was properly refused where, in addition to circumstantial evidence, there was a confession of defendant admitting his guilt.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

50. Error cannot be predicated of the court's refusal to explain the term "reasonable doubt," it being difficult to explain the term so as to make it plainer.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

51. It is not necessary that the word "feloniously," used in an instruction, be defined.—*State v. Cantlin*, (Mo. Sup.) 23 S. W. 1091.

52. Where, on a prosecution for theft of hogs, the defense was that defendant was not connected with the original theft of the property, a charge by the court, after defining "principals," that defendant must be acquitted

unless the evidence satisfied the jury that defendant took the hogs, or that some other person took the hogs, and that defendant was so connected with such taking as would make him a "principal," as before defined, is sufficient.—*Tucker v. State*, (Tex. Cr. App.) 23 S. W. 682.

53. Where, on a trial for theft, the evidence was circumstantial, and based on the fact that defendant was found with the stolen property some months after the theft, an instruction as to the law of circumstantial evidence should have been given.—*Alderman v. State*, (Tex. Cr. App.) 23 S. W. 685.

54. A requested instruction singling out a certain fact need not be given.—*State v. Cantlin*, (Mo. Sup.) 23 S. W. 1091.

55. On a prosecution for murder, it is not error for the court to refuse to repeat an instruction that the law presumes defendant innocent, and that the burden of proving his guilt beyond a reasonable doubt rests on the state.—*State v. Reed*, (Mo. Sup.) 23 S. W. 886.

— On what points necessary.

56. Where defendant's testimony is immaterial, it is not necessary to instruct the jury as to his competency.—*State v. Brandenburg*, (Mo. Sup.) 23 S. W. 1080.

57. Where the evidence relied on to sustain a conviction is wholly circumstantial, the court's failure to charge on the law relating to that kind of evidence is reversible error.—*Montgomery v. State*, (Tex. Cr. App.) 20 S. W. 926, followed.—*Scott v. State*, (Tex. Cr. App.) 23 S. W. 685.

— Invading province of jury.

58. On a trial for forgery, an instruction that if the jury believe certain circumstances to have been clearly shown, such circumstances strongly indicate the commission of the crime charged, is fatally erroneous, in that the jury are directed what weight they shall give the evidence in making up their verdict.—*Boyer v. State*, (Tenn.) 23 S. W. 971.

59. On the trial of a perjury case, an instruction to the jury to convict on the state's case as made by a letter in evidence, in which defendant admitted his guilt, and the evidence of a certain witness, unless it is overcome by other evidence, is on the weight of evidence, and erroneous.—*Hughes v. State*, (Tex. Cr. App.) 23 S. W. 891.

— Credibility of defendant's testimony.

60. An instruction that while defendant's declarations are competent evidence, and that the law presumes to be true what a defendant may say against himself, the jury need not believe as true what he may have said in his own behalf, because proven or drawn out by the state, is not objectionable.—*State v. Richardson*, (Mo. Sup.) 23 S. W. 769.

Custody and conduct of jury.

61. It is not ground for a new trial in a murder case that while the jury were on the street in charge of the sheriff a juror called across the street to a relative to ask about the physical condition of his mother, and with the sheriff walked partially across the street in view of the other jurors, and, in a voice loud enough for them and the sheriff to hear, spoke of the possible death of his mother.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

Separation of jury.

62. In a prosecution for keeping a disorderly house, it was not error to allow the jury to separate pending the trial, such action being authorized by Code Crim. Proc. art. 688, allowing separation in case of misdemeanors.—*Stewart v. State*, (Tex. Cr. App.) 23 S. W. 683.

Verdict.

63. A verdict finding defendant guilty of an "assault to commit rape" is sufficient.—*State v. Yocum*, (Mo. Sup.) 23 S. W. 765.

64. Where on a criminal trial the jury, in assessing the fine, agree to average the several assessments of each juror, but disagree to the amount so found, and impose a fine larger in amount than that determined by lot, there is no such error as will justify a new trial.—*Reineke v. State*, (Tex. Cr. App.) 23 S. W. 684.

Judgment and sentence.

65. On a trial for robbery, the record of a previous conviction of defendant was read in evidence for the purpose of increasing the punishment. Such record showed that the indictment charged in separate counts an assault with intent to kill and a felonious wounding; that the first count was quashed, and that defendant was convicted of the wounding, as charged in the second count. *Held*, that there was no evidence to support an instruction as to the degree of punishment in case the jury should find that on the former prosecution defendant was convicted of an assault with intent to kill.—*State v. Maloney*, (Mo. Sup.) 23 S. W. 1084.

66. The Penal Code declares that every offense punishable by death or imprisonment in the penitentiary, either absolutely or alternatively, is a felony. Seduction is punished by imprisonment in the penitentiary or by fine. Rev. St. art. 3002, provides that any one convicted of a misdemeanor or petty offense may be hired out to liquidate his fine and costs. *Held*, that one convicted of seduction, and punished by fine, could not be so hired out.—*Ward v. White*, (Tex. Sup.) 23 S. W. 981.

Fine and imprisonment—Security given.

67. Mansf. Dig. § 1213, provides that, when one is convicted of a misdemeanor, the judgment shall direct that he be put at work till the fine and costs shall be paid, not exceeding a day for each 75 cents thereof. Act April 5, 1887. "An act to facilitate the collection of fines and costs in criminal cases," provides that when one is convicted of a misdemeanor, and shall give security for the fine and costs, the officer taking it shall forthwith file it, and, if it be not satisfied at maturity, execution shall issue against defendant and his sureties. *Held*, that the giving of the security ended the criminal prosecution, and, though it was not paid, defendant could not be taken into custody to work out his fine.—*State v. Pignuese*, (Ark.) 23 S. W. 792.

Youth of defendant—Confinement in reformatory.

68. Where, on a trial for burglary, the only evidence as to defendant's age was that of defendant himself, who testified that he was 15 years old, but that he did not know the year he was born in, the court did not err in failing to submit the question of his age, and consequent punishment in the reformatory, if found to be 16 years old or under, as his testimony does not suggest his age to be 16 years or under.—*Marques v. State*, (Tex. Cr. App.) 23 S. W. 686.

New trial.

69. A new trial in a homicide case, for newly-discovered evidence, as to which only a convict makes affidavit, will not be granted on the chance that he may be pardoned, and thus made a competent witness.—*Williams v. State*, (Tex. Cr. App.) 23 S. W. 14.

— Grounds.

70. A motion for new trial, based on the ground that a juror took notes during the trial, was properly overruled where it did not affirmatively appear that defendant had no knowledge of such fact before the jury retired to consider their verdict.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

71. Two of the jurors in a trial of defendant for burglary stated, on oath, that before they reached a verdict of guilty it was agreed to recommend defendant for pardon, and that

agreement on the verdict. *Held* not to authorize a reversal of the judgment.—*Hendrickson v. State*, (Tex. Cr. App.) 23 S. W. 690.

New trial—Disqualification of jurors.

72. The action of the lower court in refusing a new trial in a murder case on account of prejudice on the part of certain jurors will not be disturbed when such jurors deny any such prejudice, and there are conflicting affidavits as to their reputations for veracity.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

— Newly-discovered evidence.

73. On conviction of adultery the affidavit of the codefendant, who was acquitted after the trial of defendant, denying that one of the state's witnesses saw her sleeping or having intercourse with defendant, is no ground for a new trial where there was evidence that they occupied the same room for two years, and other witnesses testified that they saw them in bed together.—*Jones v. State*, (Tex. Cr. App.) 23 S. W. 798.

74. A motion for a new trial on the ground of newly-discovered evidence was properly denied when the proposed new testimony was merely cumulative, and such that the trial court was justified in concluding that, if admitted, it would not probably change the result.—*Screws v. State*, (Tex. Cr. App.) 23 S. W. 796.

75. A new trial, on the ground of newly-discovered evidence, is properly denied, where the evidence was known to defendant before the trial.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 798.

76. A new trial cannot be had on newly-discovered evidence which is the testimony of one a witness for defendant on the first trial.—*State v. Cantlin*, (Mo. Sup.) 23 S. W. 1091.

77. A new trial will not be granted merely to enable defendant to impeach a witness.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

Appeal—Notice.

78. Jurisdiction of appeal, in a criminal case, will not be entertained, where no notice of appeal is entered on the minutes of the lower court.—*Demint v. State*, (Tex. Cr. App.) 23 S. W. 892.

— Record.

79. When, in a motion for a new trial, it is shown to the trial court that the indictment is lost, it is the duty of the prosecution to substitute the lost indictment; and, on failure so to do, the court of criminal appeals will reverse the case.—*Wolff v. State*, (Tex. Cr. App.) 23 S. W. 799.

— Statement of facts.

80. A statement of facts will not be considered on appeal, when filed after adjournment of court, without the necessary order therefor being incorporated in the record.—*Hendrickson v. State*, (Tex. Cr. App.) 23 S. W. 690.

— Bill of exceptions.

81. While a trial judge has the right to indorse on a bill of exceptions the reasons explanatory of his ruling, he has no right to contradict the bill; and if it is incorrect, and the attorney does not agree to the proposed correction, the judge should prepare his own bill, as required by Rev. St. art. 1366.—*Jones v. State*, (Tex. Cr. App.) 23 S. W. 793.

82. An alleged error in refusing a special charge will not be reviewed in the absence of a bill of exceptions.—*Screws v. State*, (Tex. Cr. App.) 23 S. W. 796.

83. Where defendant in a criminal case does not file his bill of exceptions within the time allowed by the court, nor during such time obtain from the court an order, or from the parties a written stipulation, extending the time,

84. The bill of exceptions must set out the grounds of objection to the introduction of another instrument purporting to be signed with the name which defendant is accused of forging.—*Burge v. State*, (Tex. Cr. App.) 23 S. W. 692.

85. The refusal of a continuance will not be reviewed, in the absence of a bill of exceptions.—*Mattheus v. State*, (Tex. Cr. App.) 23 S. W. 690.

86. Alleged errors in admitting certain testimony, and in permitting a re-examination of a certain witness, will not be reviewed, when exceptions to such rulings are not preserved by the bill of exceptions.—*Stewart v. State*, (Tex. Cr. App.) 23 S. W. 683.

— Review.

87. In a criminal case, exception should be saved at the time the court fails to give all needful instructions, and the point should be preserved in the motion for a new trial.—*State v. Cantlin*, (Mo. Sup.) 23 S. W. 1091.

88. In misdemeanor cases, where no objections are made to instructions, nor instructions asked, the court of criminal appeals will not review the instructions on appeal from an order denying a new trial.—*Fitzgerald v. State*, (Tex. Cr. App.) 23 S. W. 1107.

89. It cannot be objected, on appeal, that a witness between 10 and 11 years old did not show that she understood the nature of an oath, where no exception was taken to the ruling of the trial court that the witness was competent.—*Nichols v. State*, (Tex. Cr. App.) 23 S. W. 680.

90. Refusal to admit evidence in support of a special plea as to the illegality of the grand jury that drew the indictment cannot be considered on appeal, no exception having been saved, but the question having been raised for the first time on motion for new trial.—*State v. Flanders*, (Mo. Sup.) 23 S. W. 1086.

91. Where, on a murder trial, no objections were made nor exceptions saved to the admission in evidence of defendant's confession, the question of alleged error in its admission cannot be raised on motion for new trial or on appeal.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1086.

92. On a prosecution for the killing of a person while present at a fight, the exclusion of a conversation between deceased and one of those engaged in the fight occurring prior thereto cannot be treated as error in the absence of evidence as to the nature of the conversation.—*State v. Hermann*, (Mo. Sup.) 23 S. W. 1071.

93. Where the testimony for the prosecution, on a charge of theft, if true, makes a strong case against defendant, his conviction will not be disturbed on appeal, though the testimony for defendant, if true, establishes an alibi.—*Montgomery v. State*, (Tex. Cr. App.) 23 S. W. 693.

94. Where, in a criminal case, the inference of guilt can be reasonably drawn from the evidence, the verdict will not be interfered with on the ground of the insufficiency of evidence.—*State v. Banks*, (Mo. Sup.) 23 S. W. 1079.

95. The verdict of the jury in a criminal case cannot be reviewed on appeal if there is any evidence to sustain it.—*Gambill v. Commonwealth*, (Ky.) 23 S. W. 960.

96. Since the supreme court is confined on criminal appeals to the review of errors of law which occurred on the trial, it cannot consider the action of the lower court in refusing a motion for a new trial based on newly-discovered evidence.—*Gambill v. Commonwealth*, (Ky.) 23 S. W. 960.

— Presumption.

97. Every reasonable presumption is indulged in behalf of the action of the trial court

in refusing a continuance.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

98. Where an indictment is found in one county charging the crime to have been committed there, and the trial was had in a different county, the court of appeals will presume, in the absence of anything to the contrary in the record, that all the steps required by statute to obtain a change of venue were taken, and that all the papers, together with a transcript of the record, had been transmitted to the clerk of the court in the trial county.—*McHargue v. Commonwealth*, (Ky.) 23 S. W. 349.

99. There being nothing in the record showing that trial was at a special term, it will be presumed that the action of the court was proper, and that the trial was at a regular term.—*Vaughn v. Commonwealth*, (Ky.) 23 S. W. 871.

100. Where the record on appeal shows that a motion for a new trial and a motion in arrest of judgment were filed and disposed of the same day, the appellate court will presume that the motion for a new trial was filed first and disposed of first. *Bank v. Bayliss*, 41 Mo. 274, followed.—*State v. Griffie*, (Mo. Sup.) 23 S. W. 878.

101. Where, after the jury had returned their verdict, defendant offered certain evidence, it not appearing on what ground it was excluded, it will be presumed that it was offered out of time.—*State v. Richardson*, (Mo. Sup.) 23 S. W. 769.

— Harmless error.

102. Where defendant's counsel objects to remarks of the prosecuting attorney, who thereupon desists, and the court instructs the jury to disregard such remarks, there is no error of which defendant can complain.—*State v. Hack*, (Mo. Sup.) 23 S. W. 1069.

103. Refusal to submit to defendant his testimony taken before the committing magistrate, before interrogating him in regard thereto, is no ground for reversal, when the questions were immaterial, and the answers confirmatory to what he testified to in chief, and in no way tended to prejudice the jury.—*State v. Lewis*, (Mo. Sup.) 23 S. W. 1082.

104. A conviction will not be reversed on appeal for error of the trial court in permitting the state to impeach a witness for defendant who had testified to no fact injurious to the state, where there was no statement of facts showing that defendant was injured thereby, and defendant received the lowest punishment.—*Stringfellow v. State*, (Tex. Cr. App.) 23 S. W. 898.

105. The withdrawal of evidence from the jury in a criminal case cures a doubtful error in its admission.—*Jones v. State*, (Tex. Cr. App.) 23 S. W. 798.

106. The fact that defendant was cross-examined in regard to matters that he did not testify to in his examination in chief is no ground for reversal, where the cross-examination was upon immaterial matters, not calculated to prejudice the jury.—*State v. Lewis*, (Mo. Sup.) 23 S. W. 1082.

107. Evidence that defendant was engaged in selling liquor, while immaterial, was not prejudicial.—*Nelson v. Commonwealth*, (Ky.) 23 S. W. 350.

108. Overruling defendant's motion for a continuance for absence of a witness cannot have injured him, where the facts to which affidavit is made that he would testify do not meet the case made by the state.—*Davis v. State*, (Tex. Cr. App.) 23 S. W. 687.

109. Even if testimony of a witness as to the conduct of parties coming to his house by mistake for the house of defendant was inadmissible, yet, where the circumstances as shown by the record were so conclusive as to the character of defendant's house that no honest jury could find any other verdict than they did, the

appellate court will not reverse.—*Downs v. State*, (Tex. Cr. App.) 23 S. W. 684.

110. Though declarations of a co-conspirator, made after the common enterprise is at an end, are inadmissible, they being immaterial, their admission is not reversible error.—*State v. Flanders*, (Mo. Sup.) 23 S. W. 1068.

— Dismissal because of escape of accused.

111. Where a person convicted of crime escapes from jail pending the appeal, and does not return to custody voluntarily within 10 days, the appeal will be dismissed.—*Hamilton v. State*, (Tex. Cr. App.) 23 S. W. 683.

112. Where, pending an appeal in a criminal trial, appellant escapes, and is still at large when the appeal comes on for hearing, the appeal must be dismissed.—*Zardenta v. State*, (Tex. Cr. App.) 23 S. W. 684.

113. Where the affidavits on motion to dismiss an appeal because of defendant's escape from jail after his conviction show that, after getting out of the jail, defendant fled, and hid himself in a place about 400 yards from the jail, and that he was pursued and captured by the constable, and brought back to the jail, after being out about 30 minutes, there is a sufficient showing of an escape.—*Owens v. State*, (Tex. Cr. App.) 23 S. W. 968.

— Mandate.

114. Civil Code, § 760, which provides that no mandate shall issue, nor decision become final, until after 30 days from the day on which the decision was rendered, applies only to civil cases; and under Crim. Code, § 336, subd. 3, which provides that an appeal shall suspend the execution of the judgment only "until the decision of the appeal," the mandate may issue immediately on an affirmation of a judgment of conviction.—*Nelson v. Commonwealth*, (Ky.) 23 S. W. 348.

Crops.

Destruction, see "Damages," 20.

Crossings.

Accidents, liability of railroad, see "Railroad Companies," 11-21.

Curators.

See "Executors and Administrators;" "Guardian and Ward;" "Infancy."

CURTESY.

See, also, "Dower."

Right to curtesy.

In 1845 land adjoining a tract belonging to E.'s father was conveyed to her, and in 1847 she married defendant. In 1848 a child was born to them, and a year later E. died. E. and defendant never lived on the land, nor occupied it by tenants, but E.'s father occupied a house on his adjoining tract, and his widow after him, during E.'s coverture, and during such occupancy the two tracts appeared to have been "all in the same field." There was no evidence of an adverse holding to E., and she alone had a deed of record thereto. Held to show that the possession of E.'s father and his widow was E.'s possession, and sufficient to entitle defendant to a life estate in the land, within Gen. St. c. 52, art. 4, § 1, providing that, where there is issue of the marriage born alive, the husband shall have a life estate in all land owned and possessed by the wife at the time of her death.—*Ellis v. Dittay*, (Ky.) 23 S. W. 863.

When evidence of admissibility.

In an action by a brakeman against a railroad company for personal injuries while coupling the engine to a car in a switch yard, and caused by a hole in the track between the rails, it is not error to exclude evidence as to how such track compared with the other yard railroad tracks in the state, and with other yard tracks generally.—*Bonner v. Hickey*, (Tex. Civ. App.) 23 S. W. 85.

DAMAGES.

Caused by public improvements, see "Municipal Corporations," 13-15.

Excessive, ejection of passengers, see "Carriers," 62.

—judgment, affirmance on remitting excess, see "Appeal," 99-101.

—reduction and remittitur by court, see "New Trial," 2, 3.

For conversion, see "Trove and Conversion," 5, 6.

For death by wrongful act, see "Death by Wrongful Act."

For fires, see "Railroad Companies," 32.

For negligence in transmitting telegrams, see "Telegraph Companies," 5.

For trespass, see "Trespass," 6; "Trespass to Try Title," 17.

From alteration of highway, see "Highways," 3.

Interest on, see "Interest," 1-4.

Liability of sheriff for unlawful seizure, see "Sheriffs and Constables."

Measure, in condemnation proceedings, see "Eminent Domain," 5, 6.

Mitigation, see "Carriers," 61.

On misdelivery of goods, see "Carriers," 8.

Exemplary damages.

1. In an action for turning defendant's live stock into plaintiff's pasture, where there is no evidence as to any damages sustained by plaintiff, except that he "was all tore up about it," and that he would not have consented to defendant's live stock being in his pasture for \$200, a verdict for both actual and exemplary damages cannot be sustained.—*Claunch v. Osborn*, (Tex. Civ. App.) 23 S. W. 937.

2. A petition for the value of coal shipped to and used by defendant, alleging that the shipment was to plaintiff's order, plaintiff drawing his draft on defendant for the value thereof, with bill of lading attached, on which was indorsed, "Delivered to" S., (defendant,) that the draft was presented, and not paid, but that defendant appropriated it to its use, without plaintiff's consent,—states an action in tort for conversion, in which exemplary damages can lie, provided the conversion was attended with circumstances of fraud, malice, or wanton disregard of plaintiff's rights.—*San Antonio & A. P. Ry. Co. v. Kniffin*, (Tex. Civ. App.) 23 S. W. 457.

3. In an action for conversion of certain coal, the evidence showed that the coal was allowed to go onto defendant's road on the promise of its auditor, in the presence of its general manager, that it would not be used by defendant till paid for; plaintiff refusing to allow it thus to get into defendant's hands, except on this promise. The coal was used by defendant without payment, on orders of the auditor from its main office, it claiming an offset against the coal by reason of a prior transaction, which claim was found baseless. *Held*, that the jury were warranted in concluding that there was a wanton disregard of plaintiff's rights, authorizing exemplary damages.—*San Antonio & A. P. Ry. Co. v. Kniffin*, (Tex. Civ. App.) 23 S. W. 457.

4. Where a sheriff willfully and oppressively seizes property under execution void on its

5. In an action against a carrier for personal injuries by a fall in alighting from a train, admitting evidence to sustain the allegation of the complaint that plaintiff, while trying to keep from falling, "was laughed at by other passengers," is reversible error.—*Campbell v. Alston*, (Tex. Civ. App.) 23 S. W. 83.

6. In an action for breach of contract to permit plaintiff to obtain water for his stock at defendant's well, the value of certain horses, which, it was alleged, being unable to obtain water, and urged on by thirst, attempted to break into another watering place, and injured themselves so that they could not be driven to water, and died, could not be recovered as damages, the cause of death being too remote.—*Westfall v. Perry*, (Tex. Civ. App.) 23 S. W. 740.

7. There can be no recovery of damages under an allegation that, by reason of defendant's failure to deliver lumber, plaintiff was unable to build a house for which she would have received certain rent, this being too remote.—*Alderson v. Gulf, C. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 617.

Measure for breach of contract.

8. Defendant cannot recover, as damages for failure to furnish dredge boats, as agreed, to enable the former to perform a contract for building revetments for the United States, the value of revetments built by defendant, but not paid for by the government because the dredging required by its contract had not been done, where it is not alleged that plaintiff knew that payment for their construction depended on the dredging, nor that such was the contract, though plaintiff knew that defendant could not procure such dredge boats elsewhere.—*Watkins v. Junker*, (Tex. Civ. App.) 23 S. W. 302.

9. Where the purchaser of a harvesting machine executes his note therefor, he cannot, in a suit against the seller to rescind the sale on account of failure of the machine to work, and for damages, recover as damages the costs and attorney's fees paid by him in an action against him on such note by the indorsee thereof before maturity.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Hancock*, (Tex. Civ. App.) 23 S. W. 384.

10. In an action for breach of contract to permit plaintiff to obtain water for his stock at defendant's well, the expense sustained by being compelled to hire a man to drive his stock 12 miles to water, and the loss arising from the depreciation in value of the stock of \$1 per head by being driven so far, were proper elements of damages.—*Westfall v. Perry*, (Tex. Civ. App.) 23 S. W. 740.

Mental anguish.

11. Damages for mental suffering of a mother, caused by breach of contract of an express company to ship the corpse of her child, cannot be recovered, the contract having been made by another child of hers in the name of his father, and she not having been named in the contract, and even her existence not having been disclosed to the company.—*Wells, Fargo & Co.'s Express v. Fuller*, (Tex. Civ. App.) 23 S. W. 412.

Contract of sale.

12. In an action for breach of an agreement by defendant to buy of plaintiff one car of bacon "f. o. b. Kansas City," the measure of damages, if plaintiff were entitled to recover, would be the difference between the contract price and the market value of the bacon in Kansas City at the time it was to be delivered, together with the cost of putting it on the cars for shipment.—*Wolert v. Arledge*, (Tex. Civ. App.) 23 S. W. 1062.

13. Where one who agreed to buy an article to be manufactured, repudiates the contract without cause before delivery, the measure of damages is the difference between the contract price and the value of the article when the seller received notice that the buyer repudiated the contract. *Tufts v. Lawrence*, 14 S. W. 165, 77 Tex. 526, followed.—*Tufts v. Stuart*, (Tex. Civ. App.) 23 S. W. 834.

— Failure to deliver bonds.

14. On a subscription to mortgage bonds of a railroad extension to be built, the measure of damages for a breach of contract to deliver said bonds is their highest market value at any time from the completion of the extension to the time of trial, with interest. The fact that such bonds do not bear interest for three years does not warrant a deduction of three years' interest from the damages, since to that extent the market value must have been impaired already. 21 S. W. 164, modified.—*San Antonio & A. P. Ry. Co. v. Busch*, (Tex. Civ. App.) 23 S. W. 308.

15. Where a railroad company fails to deliver first mortgage bonds to a subscriber who has paid therefor, according to the terms of the contract of subscription, the measure of such subscriber's damages is the highest market value of such bonds between the date of the breach of the contract and the date of the trial of an action for such breach.—*San Antonio & A. P. Ry. Co. v. Wilson*, (Tex. Civ. App.) 23 S. W. 282.

Measure for torts.

16. For seizing plaintiff's property under execution against a third person, the measure of damages is the market value of the property at the time and place of the levy, with 8 per cent. interest thereon.—*Richardson v. Jankofsky*, (Tex. Civ. App.) 23 S. W. 815.

17. Where plaintiff's horses were unlawfully seized at a time when plaintiff could not procure other means of cultivating his crop, and thereby it was damaged in excess of the value of the use of the horses, the damage to the crop was the proper measure; but, if plaintiff could have procured other horses, the measure of recovery would be the value of the use or hire of the horses during the time he was deprived of them.—*Steel v. Metcalf*, (Tex. Civ. App.) 23 S. W. 474.

18. In an action against a railroad company for the wrongful ejectment of plaintiff from a train several miles from his place of destination, when he was ill, it is error to refuse to charge that if he was wrongfully ejected, and he walked to such place through rain and darkness, and sustained greater injury than he would if he had sought shelter nearer where he was ejected, as a reasonably prudent person would have done, then his injuries occasioned by his walk are the proximate result of his own negligence, for which he cannot recover, and he can recover only such sum as will compensate him for the actual injury which he must have sustained had he acted as an ordinarily prudent person would have done.—*Galveston, H. & S. A. Ry. Co. v. Turner*, (Tex. Civ. App.) 23 S. W. 83.

— For overflowing land.

19. Where an overflow of land only damages the crops thereon, and causes no permanent injury to the land, except as showing a liability on its part to further similar overflows, it is error to instruct the jury that they may compensate the owner for permanent injury to his land by estimating its value before and after the overflow.—*Gulf, C. & S. F. Ry. Co. v. Haskell*, (Tex. Civ. App.) 23 S. W. 546.

— Destruction of growing crop.

20. The measure of damages for the destruction of a crop by an overflow is the value of such a crop at or near the place where it was grown, subject to estimates and allowances for the contingencies and expense attend-

ant on its cultivation and care till maturity.—*Gulf, C. & S. F. Ry. Co. v. Haskell*, (Tex. Civ. App.) 23 S. W. 546.

— Injuries to land from fire.

21. In an action against a railroad company to recover damages caused by a fire which burned posts and grass on plaintiff's land, the measure of damages is the value of the posts and of the grass destroyed, and the injury caused to the land by the destruction of the turf, and not the difference in the value of the land caused by the burning of the grass.—*Gulf, C. & S. F. Ry. Co. v. Matthews*, (Tex. Civ. App.) 23 S. W. 90.

— Personal injuries.

22. In an action for personal injuries, defendant may show that the injury was enhanced by plaintiff's continued use of intoxicating liquors.—*Bogges v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 159.

23. The fact that plaintiff used, and applied to his hurts, a patent medicine, is not evidence of a want of care in treating his injury, there being no evidence as to the curative qualities of the medicine.—*Gulf, C. & S. F. Ry. Co. v. Brown*, (Tex. Civ. App.) 23 S. W. 618.

— Injuries to wife.

24. In an action by a husband for personal injuries to his wife, the mental suffering of the wife is a proper element of damages.—*Campbell v. Harris*, (Tex. Civ. App.) 23 S. W. 35.

25. Loss of earnings is a proper element of damages for personal injuries to a married woman, since the statute provides that the wages due her for her separate labor shall constitute her separate estate.—*Smith v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 784.

Excessive damages.

26. A verdict of \$6,500 will not be set aside as excessive where it appears that plaintiff received several cuts and bruises by falling from a moving train; that she was confined to her bed for three months; that she is incapacitated from following her vocation as seamstress; and that an injury to her head has produced paralysis of one side of her body.—*Smith v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 784.

27. A verdict against a railroad company for \$1,250, as damages for running over the hand of a laborer, is not excessive.—*Ft. Worth & D. C. Ry. Co. v. Bell*, (Tex. Civ. App.) 23 S. W. 922.

28. A verdict for \$2,500 is not excessive where the little finger of a brakeman was so mashed as to require amputation, and the next finger was drawn halfway to the palm of the hand, and cannot be straightened.—*Campbell v. McCoy*, (Tex. Civ. App.) 23 S. W. 84.

29. In an action for personal injuries, where it appears that plaintiff is 74 years of age, and is not wholly disabled by the injuries, a judgment for \$7,800 is excessive.—*Campbell v. Cornelius*, (Tex. Civ. App.) 23 S. W. 117.

30. Where it appeared that defendants' train did not stop at plaintiff's destination; that the conductor used rough and insulting language to plaintiff in the presence of his family when asked to go back to their destination; that his conduct was such as would have precipitated a fight but for the interference of a passenger; that plaintiff's conduct was quiet and peaceable, —a verdict of \$1,000 was not excessive.—*Forde v. Nix*, (Ark.) 23 S. W. 967.

Inadequate damages.

31. In an action for an injury to plaintiff's ankle, alleged to have resulted from defendant's negligence, where the evidence as to the extent of the injury is conflicting, a judgment for \$1,000 will not be reversed because so inadequate as to indicate that it was the result of passion or prejudice. *Barclay, J., dissenting.*—*Bogges v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 159.

complaint of was done unlawfully, wantonly, and maliciously, and with the fraudulent intent to deprive plaintiff of the value of certain coal, was sufficient, without stating the circumstances showing it to have been so done.—*San Antonio & A. P. Ry. Co. v. Kniffin*, (Tex. Civ. App.) 23 S. W. 457.

83. In an action for personal injuries, an averment that "the injury is permanent, and will render plaintiff a cripple for life," without any allegation as to damage from loss of time occasioned thereby, does not justify the introduction of evidence as to loss of time and earnings.—*Slaughter v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 760.

84. Where the petition in an action for personal injuries does not allege a loss of time as the basis of special damages, and there is no evidence from which the jury can estimate the damage resulting from such loss, it is error to permit them to consider such loss in fixing the amount of plaintiff's damages.—*Slaughter v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 760.

85. The ordinary measure of damages for delay in transporting goods is the depreciation suffered; and, to charge the carrier with the rental value of the goods for the time of the delay, these damages must be specially pleaded and proven. 22 S. W. 760, reversed.—*Gulf, C. & S. F. Ry. Co. v. Gilbert*, (Tex. Civ. App.) 23 S. W. 820.

86. In an action for personal injuries, proof of loss of earnings is admissible under an allegation in the petition that plaintiff has been deprived of the means of support.—*Smith v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 784.

Matters provable under general issue.

87. In an action for personal injuries, defendant may show, under the general issue, that the injury was enhanced by plaintiff's continued use of intoxicating liquors.—*Bogges v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 159.

Evidence.

88. Evidence is admissible as to the value of grass destroyed by fire as hay as well as for pasture.—*Gulf, C. & S. F. Ry. Co. v. Matthews*, (Tex. Civ. App.) 23 S. W. 90.

89. In an action for damages to cattle shipped over defendant's railroad, testimony that a person told witness before the shipment that he would give a certain amount for the cattle is no evidence of their value, and is inadmissible.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

40. Where the only evidence as to the expenses of plaintiff's sickness resulting from the injuries caused by defendant is plaintiff's testimony that he paid the doctor everything he had, and still owed him, without stating any amount, it is error to instruct the jury that they may consider as an element of damages the past and present expenses of the sickness.—*Little Rock & M. R. Co. v. Barry*, (Ark.) 23 S. W. 1097.

41. Where there is evidence, in an action for personal injuries, that plaintiff had used drugs and medicines, but no proof of the cost of them, a charge to the jury to consider the expense of medicines, in estimating damages, is prejudicial error.—*Atchison, T. & S. F. Ry. Co. v. Click*, (Tex. Civ. App.) 23 S. W. 833.

42. In an action for personal injuries, where there is no evidence as to the value of the time lost or expenses incurred by plaintiff because of the injuries, it is error to submit to the jury such elements of damages.—*Campbell v. Alston*, (Tex. Civ. App.) 23 S. W. 83.

43. Where plaintiff's injuries are external and obvious to the eyes of the jury, his testimony as to the probable amount of his doctor's bill, though wrongfully admitted, is ren-

A. Ry. Co. v. Duell, (Tex. Civ. App.) 23 S. W. 596.

Instructions.

44. A charge that the jury might allow plaintiff punitive damages, "not exceeding the amount sued for," though erroneous, because it might mislead the jury to believe that they would be justified in finding an excessive verdict, was error without prejudice, the jury having assessed the damages at less than half the amount asked for.—*Fordyce v. Nix*, (Ark.) 23 S. W. 967.

45. Where there is evidence that the animal killed had a market value, and also that it had not, it is proper for the court to instruct the jury on the measure of damages in each case.—*Gulf, C. & S. F. Ry. Co. v. Rowland*, (Tex. Civ. App.) 23 S. W. 421.

46. A charge directing the jury to separate their findings of actual and exemplary damages, "in order that the amount of either or both may be known," is not open to the construction that the jury are expected to find both actual and exemplary damages.—*San Antonio & A. P. Ry. Co. v. Kniffin*, (Tex. Civ. App.) 23 S. W. 457.

Allowing remittitur.

47. There is no error in allowing one who has recovered verdict for a certain amount, and interest thereon, as exemplary damages, to remit the interest.—*San Antonio & A. P. Ry. Co. v. Kniffin*, (Tex. Civ. App.) 23 S. W. 457.

Dangerous Premises.

See "Negligence," 5, 6.

Death.

Of party, see "Abatement and Revival," 2.

DEATH BY WRONGFUL ACT.

By what law governed, see "Conflict of Laws," 2.

Liability of receiver of railroad, see "Railroad Companies," 5.

Damages.

1. In an action by husband and wife for the wrongful death of his stepson and her son, evidence is not admissible to show that plaintiffs and deceased were negroes, for the purpose of reducing damages, on the hypothesis that family ties are not strong with the negro race.—*Texas & P. Ry. Co. v. Moody*, (Tex. Civ. App.) 23 S. W. 41.

2. In an action by a widow for the death by wrongful act of her husband, it is error to charge on the measure of damages that the jury must decide what deceased would have earned during his "expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during the expectancy of life from the time of his death."—*Illinois Cent. R. Co. v. Spence*, (Tenn.) 23 S. W. 211.

3. In an action by a father for the death of his minor son, where there is evidence to support it, it is not error to charge that the jury shall assess plaintiff's damages "at such sum as may be calculated from plaintiff's expectation of pecuniary aid from his son after arriving at 21 years of age, considering his disposition and ability to contribute to his wants and necessities during the father's probable duration of life, at the same time taking into consideration the father's age, occupation, health, and pecuniary condition, and probable wants."—*Galveston, H. & S. A. Ry. Co. v. Davis*, (Tex. Civ. App.) 23 S. W. 301.

4. For killing a traveler at a railroad crossing the amount of damages is fixed by statute at \$5,000, and evidence as to the social or business standing or relationship of the widow is not admissible.—*Weller v. Chicago, M. & St. P. Ry. Co.*, (Mo. Sup.) 23 S. W. 1061.

— Excessive.

5. Deceased was a common laborer, 20 years of age, and earning \$1.10 per day. He was in robust health, and his parents were dependent on him for support. *Held*, that a verdict for \$3,000 was not excessive damages.—*Galveston, H. & S. A. Ry. Co. v. Arispe*, (Tex. Civ. App.) 23 S. W. 928.

Decedents.

See "Descent and Distribution;" "Executors and Administrators;" "Wills."

Deceit.

See "False Pretenses;" "Fraud;" "Fraudulent Conveyances."

Declarations and Admissions.

As evidence, see "Evidence," 13-23; "Homicide," 40, 41.

Dying declarations, "Homicide," 42.

Decree.

See "Judgment."

DEDICATION.

Adverse possession of land dedicated for street, see "Adverse Possession," 4.

Of street as incumbrance of homestead, see "Homestead," 18.

To nonexistent city.

1. A dedication of land by a county to the public use as a public square will not fail because the city for whose benefit it was intended was not in existence at the time of the dedication, since the city, on springing into existence as a municipal corporation, is by operation of law invested with the control, for the use of the public, of all highways and public grounds within the corporate limits, subject to such reserved rights as may exist in favor of the county.—*City of Llano v. Llano County*, (Tex. Civ. App.) 23 S. W. 1008.

Of streets and highways.

2. Though the partition deeds of land which was platted in anticipation of the extension of a city to such land, expressly provided that a street named in the deeds should not be considered as dedicated to the city or to the public, a dedication of such street could be implied from the use of the street by the partitioners and their vendees, the extension of the street after the city had extended beyond the land, the construction by the city of an expensive bridge where the street crossed a stream, the improvement of the street by the city more than 20 years after the partition, and the failure of the partitioners or their vendees to institute legal proceedings to restrain the construction of the bridge and improvements as trespasses, and their availing themselves of the benefits of the improvements.—*Caperton v. Humplek*, (Ky.) 23 S. W. 875.

Acceptance of dedication.

3. Land was laid off into blocks and lots, with streets, which were dedicated to the public, and the land was annexed to a city by Act April 28, 1873, which provided that land laid off into lots and blocks shall "be subject to all the power, authority and jurisdiction of the city." *Held*, such act accepted the dedication of streets for the city, as the statutory "power, authority and jurisdiction of the city" extended to the control and supervision of

streets.—*City of Little Rock v. Wright*, (Ark.) 23 S. W. 878.

4. The mere fact that, after a fence dividing a strip of land from the street disappeared, a private individual, not the owner of the land, for his own purposes, laid a sidewalk thereon, which was used by the public, is not sufficient to show an acceptance by the city of the strip as part of the street, assuming that there had been a dedication.—*City of San Antonio v. Sullivan*, (Tex. Civ. App.) 23 S. W. 307.

Effect—Rights reserved.

5. A dedication by a county of a public square in a city for the use of the public, with a right reserved in the county to use it for courthouse purposes, gives the county no right to erect thereon a jail and a cesspool, and the city has the right to abate such use of the square by the county as a purpresture and public nuisance.—*City of Llano v. Llano County*, (Tex. Civ. App.) 23 S. W. 1008.

DEED.

See, also, "Acknowledgment;" "Escrow;" "Fraudulent Conveyances;" "Mortgages;" "Vendor and Purchaser."

Absolute when held to be a mortgage, see "Mortgages," 3.

By husband, joinder of wife, see "Husband and Wife," 3.

By trustee, see "Trusts," 5, 6.

Estoppel, by, see "Estoppel," 1.

Of homestead, see "Homestead," 14-17.

Of partition, see "Partition," 1, 2.

Description.

1. A deed conveying a head-right survey cannot be excluded from evidence for imperfect description of the land because it appears that the number of acres which would seem to be included in the field notes considerably exceeds the number called for in the body of the deed.—*Leon & H. Blum Land Co. v. Dunlap*, (Tex. Civ. App.) 23 S. W. 473.

2. Where a call in a deed was for "a survey in the name of Meader," and in subsequent deeds for "a survey in the name of Meadows," the bad orthography in the name, with no other facts, could not produce uncertainty in the description of the land, the other calls being correct and proper.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

3. The board of land commissioners of R. county issued to the assignee of M. a head-right certificate for a league and labor of land, but in a subsequent conveyance by such assignee it was described as "one-half league of land, being the headright claim of M., * * * issued by the board of land commissioners of R. county." Under the constitution and laws of Texas at the time the certificate to M. was issued, a headright certificate could be issued only for a league and a labor, or for one-third of a league. *Held*, that the land's being described as a half a league instead of a league and labor would not vitiate the deed, for, when the headright claim of M. was referred to, it would show what the quantity was, and, by rejecting the inconsistent word "one-half," and giving the other words the only meaning possible without rendering the deed nugatory, the true meaning was evident.—*Peterson v. Ward*, (Tex. Civ. App.) 23 S. W. 637.

Delivery.

4. The fact that an unrecorded deed of partition was found among the papers of a decedent does not raise a presumption against the delivery of the deed, where deceased was as much entitled to its possession as the other parties thereto.—*Smith v. Adams*, (Tex. Civ. App.) 23 S. W. 40.

Recording.

5. Where a married woman acquires the legal title to land, though it be through conveyance from her husband, she must register

subsequent purchasers or creditors without notice. 20 S. W. 1006, affirmed.—*Russell v. Nall*, 23 S. W. 901, 2 Tex. Civ. App. 60.

Fee simple.

6. A deed to a bishop of the Roman Catholic Church for the benefit of the church, "and to his successors and assigns forever," vests a fee-simple title in such bishop, in trust for the church, in the absence of any conditions subsequent, either expressed or implied. 22 S. W. 286, affirmed.—*Gabert v. Olcott*, (Tex. Sup.) 23 S. W. 985.

Conditions subsequent.

7. Conditions subsequent will not be implied from the fact that the consideration the deed was merely nominal, where it does appear that the use of the property for the purpose specified in the deed was a matter specially advantageous to the grantor.—*Gabert v. Olcott*, (Tex. Sup.) 23 S. W. 985.

Vested on contingent remainder.

8. Land was conveyed to a trustee to pay the grantor's debts, and then to his children for advancements, with a direction that one-half of what was coming to each should be paid in money, and the other vested in land, title to be taken to each for life, remainder to his heirs. The deed provided that the surplus, after settlements, should be divided into parts, corresponding to the number of grantor's children, "and invested for and for the benefit of them "in the same manner as provided in the accounts of equalization." Each child took a vested interest in one-half of his share of the surplus, interest in the other half, and the right to the enjoyment of each child's right to the enjoyment was postponed until after the payment of the grantor's debts and the equalization, if advancements did not make his interest sufficient.—*Moore v. Offutt*, (Ky.) 23 S.

Default.

Judgment by, see "Judgment," 4.

Defective Appraisement.

See "Master and Servant," 15

Defective Streets.

See "Municipal Corporations,"

Delay.

In transportation of goods, see

Delivery.

Of deed, see "Deed," 4.

Demurrer.

On failure to accept goods

Demurrer.

See "Pleading," 3-5.

DEPOSITIONS.

Return—Indorsement.

1. Where a deposition of "H. vs. Knoxville" interrogatories and the deposition is returned to Knoxville Ins. Co., though the statute providing the deposition should be signed by the names of the parties.—*Co. v. Hird*, (Tex.)

before or after the death of the testator, not provided for nor disinterested, but only pretermitted, in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate." *Held*, that the disinheritance of a posthumous child, not provided for in the will nor by settlement in testator's lifetime, cannot be shown by parol evidence of testator's intent, but must appear on the face of the will.—*Burns v. Allen*, (Tenn.) 23 S. W. 111.

4. A testator and his wife were divorced two months prior to his death and five months prior to the birth of their child. After the divorce, testator made to the wife a deed, which recited that, whereas a divorce had been granted, "this is in settlement of all demands for homestead, alimony, and support of child;" and vested in her all the powers of a feme sole to dispose of the property by will, deed, or mortgage, etc. *Held*, that such deed did not constitute such settlement in favor of the child as is contemplated in Mill. & V. Code, § 3033, which provides that a posthumous child, not provided for nor disinherited, but only pretermitted in the will of a parent, "and not provided for by settlement made by testator in his lifetime," shall take as if testator had died intestate.—*Burns v. Allen*, (Tenn.) 23 S. W. 111.

5. The decree of divorce settled on the wife the property conveyed by such deed, with the reservation "that it should not be construed, accepted, or taken in any way to militate against the rights of the yet unborn child of complainant." *Held* that, if such deed was intended as a settlement on the child, testator had no power to make it in respect to the property described in such decree.—*Burns v. Allen*, (Tenn.) 23 S. W. 111.

Rights and liabilities of heirs.

6. Where defendants claim title to land under a sale of a land certificate by the widow of decedent, the administrator, to establish his claim to the land, must show that it is necessary to pay debts of decedent.—*Meyers v. Jones*, (Tex. Civ. App.) 23 S. W. 562.

7. Where a widow transfers her interest in an unlocated land certificate, she and her privies alone, and not her husband's administrator, have the right to question the validity thereof.—*Meyers v. Jones*, (Tex. Civ. App.) 23 S. W. 562.

— Actions.

8. Though no letters of administration have been granted on the estate of a decedent, his heirs cannot sue to recover a debt due the estate, when it is not alleged that there are no debts against the estate, and it does not appear that any emergency exists which renders suit by the heirs necessary to preserve the claim. 22 S. W. 1112, affirmed.—*Richardson v. Vaughan*, (Tex. Sup.) 23 S. W. 640.

— Liability for decedent's debts.

9. Sayles' Civil St. art. 2035, provides that the owner of a claim against a decedent's estate may, after partition and distribution, sue the heirs and devisees, who shall be bound only to the amount received by each from the estate. *Held*, that the estate being solvent, and plaintiff's the only claim, administration was needless, and he could sue the heirs directly.—*Buchanan v. Thompson's Heirs*, (Tex. Civ. App.) 23 S. W. 328.

Description.

In deed, see "Deed," 1-3.

Detinue.

See "Replevin."

Devise and Legacy.

See "Wills."

Directing Verdict.

See "Trial," 59.

Disbarment.

Of attorney, see "Attorney and Client," 1.

Discharge.

See "Release and Discharge."

Of garnishee, see "Garnishment," 1.

Of servant, see "Master and Servant," 2-4.

Discontinuance.

See "Practice in Civil Cases," 2.

Dismissal.

See "Certiorari," 8; "Practice in Civil Cases," 2.

Of appeal, see "Appeal," 91; "Criminal Law," 111-113.

DISORDERLY HOUSE.

Indictment.

The use of the word "avocation" for "vocation" in an indictment charging defendant with keeping a disorderly house is not such error as will vitiate the indictment, where there is no doubt of the meaning of the pleader.—*Peters v. State*, (Tex. Cr. App.) 23 S. W. 683.

Disqualification.

Of judge, see "Judge," 1-4.

Of jurors, see "Jury," 1, 2.

Dissolution.

Of injunction, see "Injunction," 8.

Of partnership, see "Partnership," 6-10.

Distress.

For rent, see "Landlord and Tenant," 7.

DIVORCE.

Grounds—Adultery of husband after wife's desertion.

1. Under Rev. St. art. 2861, subd. 3, which gives the wife a right to a divorce where her husband "has abandoned her and lived in adultery with another woman," the wife is not entitled to a divorce on the ground of adultery committed by the husband after she had without cause abandoned him.—*Johnson v. Johnson*, (Tex. Civ. App.) 23 S. W. 1022.

Presumption of.

2. After the lapse of over 40 years, a divorce will be presumed from the fact that a husband separated from his wife, going to another state, and that, several years later, each married again.—*Harvey v. Carroll*, (Tex. Civ. App.) 23 S. W. 713.

Appeal—Review.

3. A judgment of divorce will not be reversed because it recited that it was taken by default, and the allegations of the petition were taken as confessed, if it nevertheless appears from further recitals therein that the decree was granted on full proof of the grounds alleged in the petition.—*Young v. Young*, (Tex. Civ. App.) 23 S. W. 83.

Alimony.

4. The statute which provides that if the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable, does not deprive the wife of alimony merely because she did not institute the suit for divorce. When, therefore, a

that defendant had given him no cause to desert her, and was herself entitled to bring suit, she may be allowed alimony.—*Lacey v. Lacey*, (Ky.) 23 S. W. 673.

5. The wife was beyond middle age, and the husband 10 years younger. The separation was caused by no fault of hers. Her estate was about \$700, and she had been allowed \$75 pendente lite. The husband had had several hundred dollars of her separate property, and was worth \$2,500 to \$3,000. *Held*, that she should be allowed \$1,000 as alimony.—*Lacey v. Lacey*, (Ky.) 23 S. W. 673.

6. When a wife sues for alimony, and the husband pleads his suit pending against her for divorce, and the suits are thereupon consolidated and heard together, the court may in the consolidated suit decree the divorce, and allow her alimony, though alimony be only allowable to a plaintiff, or to a defendant pleading it as a counterclaim.—*Lacey v. Lacey*, (Ky.) 23 S. W. 673.

7. Alimony may be allowed a defendant, though her answer is not styled a counterclaim, when plaintiff has replied, and joined issue on the matter pleaded.—*Lacey v. Lacey*, (Ky.) 23 S. W. 673.

Division of property.

8. Rev. St. art. 2864, providing that neither party in a divorce proceeding shall be compelled "to divest him or herself of the title to real estate," does not forbid a decree adjudging to one party the whole of certain lots held as community property in satisfaction of his or her interest in the entire estate.—*Young v. Young*, (Tex. Civ. App.) 23 S. W. 83.

9. Where a judgment in a divorce proceeding adjudges to plaintiff property which it specifies only as lots described in deeds to plaintiff, without further identifying the deeds or the lots, the judgment will be reversed.—*Young v. Young*, (Tex. Civ. App.) 23 S. W. 83.

Custody of children.

10. Rev. St. art. 2871, empowers the district court, in case of separation between man and wife, to give the custody of the children to either the father or mother, as it shall deem proper. *Held*, that the award made by said court in divorce proceedings is conclusive on the parents, so that neither of them can thereafter petition the county court for guardianship of the person of a child whose custody was awarded to the other.—*Jordan v. Jordan*, (Tex. Civ. App.) 23 S. W. 531.

Rights of divorced persons.

11. Where land is owned by husband and wife by entireties, and they are afterwards divorced, they thereby become tenants in common, and the entire estate does not vest in the survivor of them by right of survivorship.—*Hopson v. Bowlikes*, (Tenn.) 23 S. W. 55.

Documents.

See "Evidence," 34-48.

DOWER.

See, also, "Curtesy."

Right to dower.

1. Where a remainder-man dies before the life tenant, his widow is not entitled to dower, as he never was in possession of the remainder interest.—*Young v. Morehead*, (Ky.) 23 S. W. 511.

2. Where there is no seisin in fact or in law by the husband at any time during marriage in a remainder or reversionary interest, his widow is not entitled to dower therein.—*Carter v. McDaniel*, (Ky.) 23 S. W. 507.

3. Possession by a son of a portion of his father's land at the time of its allotment to

23 S. W. 507.

How divested.

4. Where a wife does not join her husband in an assignment of lands for the benefit of creditors, but afterwards, by separate deed, relinquishes her dower in the lands, except the homestead, in consideration of the reconveyance by the assignees of the homestead, she cannot afterwards claim dower in the lands described in her deed because the homestead was reconveyed to the husband, and not to her and him jointly, as previously agreed between them and the assignees, in the absence of fraud.—*Shinkle's Assignees v. Bristow*, (Ky.) 23 S. W. 670; Same v. Bishop, Id.

5. Gen. St. c. 63, § 22, art. 1, provides that no sale of real estate by a trustee under a deed to secure payment of debts shall be valid, nor shall the conveyance by him pass title, unless the sale is under a judgment of court, or the maker of such deed shall join in the writing evidencing the sale. Chapter 24, § 20, relating to conveyance of real estate by married women, provides that the conveyance may be by joint deed of husband and wife, or by separate instrument, but in the latter case the husband must first convey. *Held*, that where a wife, after her husband alone executed a deed of assignment of real estate for benefit of creditors, relinquished her dower therein by separate deed, her potential right passed to the assignees, though the latter have no power to sell except as provided by statute.—*Shinkle's Assignees v. Bristow*, (Ky.) 23 S. W. 670; Same v. Bishop, Id.

Druggists.

Sale of liquor, production of prescription before grand jury, see "Constitutional Law," 4.

Drunkenness.

As excuse for crime, see "Criminal Law," 2.

Dying Declarations.

See "Homicide," 42.

EASEMENTS.

By prescription.

A road through plaintiff's woodland, by which he had to travel to reach the public road, had been used by him for that purpose for 50 years, and by defendant for 20 years, during which time defendant had kept it up as his passway. During the whole time of its use the road had been in substantially the same place and had a well-defined bed, and any change therein had been such as resulted from the fall of a tree across it, or other similar obstructions. *Held*, that the road was used by defendant as a matter of right, and not of permission, and that he had a right to its continued use.—*Hansford v. Berry*, (Ky.) 23 S. W. 665.

Ejection.

Of passengers, see "Carriers," 54-62.

EJECTMENT.

See, also, "Adverse Possession;" "Quieting Title;" "Trespass to Try Title."

Between cotenants, see "Tenancy in Common," 2.

Defenses.

1. A mere right of redemption in a third person, after foreclosure, is not such an outstanding title as will defeat a recovery in eject-

ment by the purchaser against the mortgagor.—*Lanier v. McIntosh*, (Mo. Sup.) 23 S. W. 787.

Evidence.

2. On the issue whether plaintiffs' testator ever conveyed to the grantor of defendants in possession, the grantor's deeds to defendants, though made after said testator's death, are competent to show the boundaries of their possession and the nature of their claim of title, and to support the presumption that testator did convey.—*Dunn v. Eaton*, (Tenn.) 23 S. W. 163.

Election of Remedies.

By seller, see "Sale," 14.

ELECTIONS AND VOTERS.

Ballots.

1. Under Const. art. 6, § 4, relating to elections, and directing the legislature to provide for the numbering of ballots, the legislature enacted Rev. St. arts. 1694, 1697, which, respectively, direct a judge of election to write the voter's poll-list number on the ballot, and forbid the counting of an unnumbered ballot. *Held*, that article 1694 is mandatory, and that article 1697 is binding on the courts, as well as the officers of election.—*State v. Connor*, (Tex. Sup.) 23 S. W. 1103.

2. Act April 12, 1892, § 28, relating to elections in cities, provides that "any elector or anyone who shall, contrary to provisions of this act, place any marks upon or do anything to his ballot by which it may afterward be identified as the one voted by any particular individual, upon conviction shall be punished." *Held*, that the legislature did not intend to prohibit the numbering of ballots, as required by Const. art. 6, § 4, and Rev. St. art. 1694, and that the words, "contrary to the provisions of this act," were intended to except, from the prohibition to mark, the numbers required to be placed on the ballots.—*State v. Connor*, (Tex. Sup.) 23 S. W. 1103.

Notice of contest—Waiver of objection.

3. Though a notice of contest of an election is so indefinite that an objection would lie if made in proper time, it is sufficient if the parties take issue without objection, and try the case.—*Lunsford v. Culton*, (Ky.) 23 S. W. 946.

EMBEZZLEMENT.

See "Larceny."

What constitutes.

1. In *Mansf. Dig.* § 1638, providing that if any officer, agent, clerk, or servant of a corporation shall embezzle, or convert to his own use without the consent of his master or employer, any money or goods belonging to any other person, which shall come into his possession by virtue of such employment or office, he shall be deemed guilty of larceny, "other person" means one other than the person guilty of the embezzlement, and not one other than the master.—*Fleener v. State*, (Ark.) 23 S. W. 1.

2. To show the felonious intent, some kind or degree of concealment, or acts calculated to mislead the employer, should be proven.—*Fleener v. State*, (Ark.) 23 S. W. 1.

Indictment.

3. In an indictment for embezzlement, an allegation that defendant was "the agent of the P. Express Company" is a sufficient allegation of his agency.—*Fleener v. State*, (Ark.) 23 S. W. 1.

4. In an indictment for embezzlement, where the money embezzled is described merely as "current money of the United States," a

more particular description is excused by a recital that the particular denomination and kind is to the grand jury unknown.—*Fleener v. State*, (Ark.) 23 S. W. 1.

EMINENT DOMAIN.

Necessity of taking land, *res judicata*, see "Judgment," 6.

The power.

1. Rev. Civil St. art. 4367, requires the county commissioners' court, in proceedings to establish a highway, to appoint a jury consisting of five freeholders, to be sworn as prescribed. Articles 4368-4371 require the jury to issue and serve notice of the proceedings on the landowner, to assess damages on presentation of a written claim by the landowner, and to lay out and mark the road, and report to the commissioners' court. Article 4372 requires the commissioners' court, on approving the report of the jury, to allow the landowner adequate compensation for the taking of his land, and, when paid or secured, to order the road opened. *Held*, that these provisions do not contemplate a taking of private property for a public use without adequate compensation being first made or secured, or otherwise than by due course of law.—*Vogt v. Bexar County*, (Tex. Civ. App.) 23 S. W. 1044.

What constitutes taking of property.

2. The construction of a viaduct in a street by a street-railway company, which prevents the use of the street by the abutting lot owner, is a taking of private property for public use, for which Const. 1875, art. 2, § 21, requires just compensation to be made.—*Spencer v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 126.

Condemnation proceedings.

3. Due process of law requires that a landowner be given notice of proceedings whereby it is sought to condemn his property to a public use, and also an opportunity to protect his rights.—*Vogt v. Bexar County*, (Tex. Civ. App.) 23 S. W. 1044.

4. The notice required to be served on the landowner by Rev. Civil St. art. 4370, is a jurisdictional fact, which should affirmatively appear in the record; and, if the giving of such notice is not affirmatively shown, the proceedings are void.—*Vogt v. Bexar County*, (Tex. Civ. App.) 23 S. W. 1044.

Compensation—Measure of damages.

5. On an issue as to the amount of damages due an owner for land appropriated for a public road, and injuries to his remaining land resulting therefrom, it appeared that about three acres had been appropriated. By reason of the laying out of the road, the owner was compelled to put up a half mile of fence on his remaining land. The land taken was shown to be worth about \$12 or \$15 per acre, and the necessary fencing could be done for about \$136. There was no depreciation in the value of the remaining land, which had in fact more than doubled in value since the laying out of the road. *Held*, that the measure of damages was the value of the land, taken together with the cost of the additional fence thus necessitated, and that an award of \$600 was excessive.—*Bexar County v. Herff*, (Tex. Civ. App.) 23 S. W. 409.

6. Where a railroad company builds a road and operates it for 11 years on land to which it has no title, the mere fact that the owner knew and did not object to such occupation does not show assent on his part, and, in the absence of any proof that he did assent to such occupation, he is entitled not only to the value of the land estimated as of the date of the first entry by the company, but also to its rental value during the time of such occupancy.—*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

showed on land condemned for depot purposes and no abandonment thereof, it appearing that the land adjoined the depot, and was improved and used for beautifying the depot grounds.—*Muhle v. New York, T. & M. Ry. Co.* (Tex. Civ. App.) 23 S. W. 809.

Employee.

See "Master and Servant."

Entirety, Estate by.

See "Husband and Wife," 4.

Equitable Assignment.

See "Assignment," 3.

Equitable Estoppel.

See "Estoppel," 2-10.

EQUITY.

See, also, "Fraudulent Conveyances;" "Injunction;" "Mortgages;" "Partition;" "Partnership;" "Quieting Title;" "Specific Performance;" "Subrogation;" "Trusts."

Relief against judgment, see "Judgment," 33-38.

Rescission of land contract, see "Vendor and Purchaser," 6-9.

Rescission and cancellation of contracts.

1. Whether a contract alleged to have been obtained by defendant through fraud was ratified by plaintiff after discovery of the fraud is a question for a jury, and in an action to rescind such contract an instruction as to what acts of plaintiff would constitute a ratification is erroneous.—*Evans v. Goggan*, (Tex. Civ. App.) 23 S. W. 854.

2. A chattel mortgage given to secure the price of a stock of goods sold by the mortgagee to the mortgagor cannot be set aside on the ground that the sale was procured by the fraud of the mortgagee, where no attempt is made to rescind the sale itself.—*Brill v. Rack*, (Ky.) 23 S. W. 511.

3. After the execution of a deed to his wife, and her subsequent death, the grantor, as guardian of her children, treated the land as theirs; asked lawyers if the deed was sufficient to give them title, stating that, if it was not, he wanted to make it so. *Held* that, even if the deed was obtained by undue influence, there was a ratification of it.—*Ellis v. Ellis*, (Tex. Civ. App.) 23 S. W. 996.

— Failure to perform conditions of contract.

4. Where an instrument, in form a deed, conveys certain property in consideration of a promise to locate car works thereon, parol evidence is inadmissible to show, in an action to cancel the deed, that the shops were never built, when no ground for equitable relief is shown in the circumstances surrounding the execution of the deed.—*Beaumont Car Works v. Beaumont Imp. Co.*, (Tex. Civ. App.) 23 S. W. 274.

Laches.

5. In 1879 one side of a mutual account was submitted to arbitration. *Held*, that it was inferred that the parties agreed as to the other side, and it was too late to attack it in 1890, the original parties to that side of the account having died in the mean time.—*Eddy's Ex'r v. Northup*, (Ky.) 23 S. W. 353.

6. Patents issued in the names of persons who have conveyed their interest in the "tract which is or may be located" to their ancestor,

stale, and is superior to the legal title.—*Franklin v. Piper*, (Tex. Civ. App.) 23 S. W. 942.

ERROR, WRIT OF.

See, also, "Appeal;" "Certiorari;" "New Trial." When lies.

1. Where appellee is entitled to an affirmance, on a certificate, of the judgment appealed from, because of appellant's failure to file the transcript in time, such right cannot be defeated by appellant bringing error on the judgment after such failure.—*Davidson v. Ikard*, (Tex. Sup.) 23 S. W. 379.

2. Right to a writ of error on superadeas bond within the time limited by Rev. St. art. 1389, is not defeated by an appeal on superadeas bond to a prior term, which was dismissed for failure to file brief.—*Texas & N. O. R. Co. v. Hare*, (Tex. Civ. App.) 23 S. W. 42.

Sufficiency of writ.

3. A writ of error citing defendant to appear "before the court of civil appeals in the city of Austin, Texas, at the next term thereof to be holden in the city of Austin, Texas, within sixty days from the date of the service of this citation," is not bad for the addition of the words "at the next term," etc., since the court and time are otherwise clearly designated.—*Mills v. Paul*, (Tex. Civ. App.) 23 S. W. 395; *Same v. Bassett*, Id. 396; *Same v. Cameron*, Id.

Escape.

Of accused pending appeal, effect, see "Criminal Law," 111-113.

ESCROW.

What constitutes.

Where a deed of land to a car company, in consideration that it construct its car shops thereon, is executed to enable the grantee to secure the bonds, which it proposes to negotiate, and is delivered by the grantor to the trustee of the bonds on condition that it is not to take effect unless the bonds are negotiated, it is an escrow, and the fact that the trustee recorded the deed does not constitute a delivery, the bonds not being in fact negotiated.—*Beaumont Car Works v. Beaumont Imp. Co.* (Tex. Civ. App.) 23 S. W. 274

Estates.

See "Curtesy;" "Dower;" "Homestead."

By entireties, see "Husband and Wife," 4.

Creation by will, see "Wills," 16.

Sale in action by life tenant against infant remaindermen, see "Partition," 6.

ESTOPPEL.

Claiming under and against assignment by creditor, see "Assignment for Benefit of Creditors," 6.

Effect of filing bill of exceptions, see "Exceptions, Bill of," 4.

Election of remedies by seller, see "Sale," 14.

Ratification by accepting benefits, see "Principal and Agent," 8-11.

To allege error, see "Appeal," 61.

To deny agency, see "Principal and Agent," 7.

To dispute boundaries, see "Boundaries," 4, 5.

To plead limitation, see "Mortgages," 10.

By deed.

1. Though a deed of the wife's land executed by the husband was not binding on her or her separate estate, it was binding on the husband.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

In pais.

2. M., for the purpose of controlling cotton on which he and H. had liens, indorsed a note from G., the owner of the cotton, to H. This note had been given as part of the consideration for a contract by which G. agreed to purchase land of H., to be conveyed on payment of the purchase price. At the time the contract was made there was a verbal agreement that G. might elect not to purchase, and the note should be treated as an obligation for rent. This election was made, and the contract was considered by G. and H. as rescinded. H. desired payment of the note before its maturity, and M., not knowing of the rescission of the contract or of the agreement giving the right to rescind, offered to pay it then, if H. would transfer it to him with the vendor's lien, which was agreed to, and the transfer made, G. being present, and saying nothing of the rescission. *Held*, that G. and H. were precluded from denying the existence of the vendor's lien, the payment of the note by M. before its maturity being a consideration for the agreement that he should have the lien.—*Grace v. Miller*, (Tex. Civ. App.) 23 S. W. 444.

3. Declarations of a person in possession of land, as to his acquisition of it, and his arrangements for obtaining title, are binding on his wife, though they occupy the land as a homestead.—*Lachausen v. Laughter*, (Tex. Civ. App.) 23 S. W. 513.

4. Simultaneously with the execution of a note obtained by fraud, a paper was also obtained from the maker, giving assurance that the maker had no offset or defense to the note, and that it would be paid to any assignee. *Held*, that the two instruments being in effect but a single transaction, and the assurance in the one being the same as in the other, the maker was not estopped to defend against the note in the hands of an assignee. *Bennett, O. J.*, dissenting.—*Hill v. Thixton*, (Ky.) 23 S. W. 947.

5. Mere knowledge by the owner of land of the existence of a forged title on the records of the county in which the land is situated, and delay in asserting his right, will not constitute an estoppel, in the absence of evidence by the person claiming the estoppel of some affirmative act of the owner, or an omission of some duty devolving upon him.—*Chamberlain v. Showalter*, (Tex. Civ. App.) 23 S. W. 1017.

—Of married women.

6. A married woman cannot be estopped in pais, except by intentional and fraudulent acts.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

7. The facts that a wife, who owns an interest in lands, joins her husband and the other joint owners in an ex parte application to the district court for partition, and that the attorney for all the parties bought in the land in trust for one of them, and accounted to such husband for his wife's interest in the proceeds of the sale, all with the wife's knowledge, do not estop her from afterwards denying the validity of the sale, where the wife did not conceal any facts, and no part of the proceeds were used to discharge any lien on, or otherwise benefit, her separate property.—*Blagge v. Moore*, (Tex. Civ. App.) 23 S. W. 466.

—Acquiescence.

8. A mortgagor who accepts the surplus arising from a foreclosure sale of land, and who requests a resale to correct an error in the first sale, and who enters into a contract with the purchaser whereby the latter is to reconvey the land on being reimbursed for the purchase money advanced, is estopped to attack the validity of the resale.—*Lanier v. McIntosh*, (Mo. Sup.) 23 S. W. 787.

9. The makers of a note conditioned that the payee shall construct a railroad into a town are not estopped from canceling the same because they did not sue immediately after knowledge that the payee would not comply with its agreement, or because they suffered

the payee to build the road several miles from the town without protest.—*Gulf, C. & S. F. Ry. Co. v. Pittman*, (Tex. Civ. App.) 23 S. W. 318.

10. The fact that defendant knew plaintiff was making improvements on land owned by him, for one in possession under a parol contract of purchase, does not estop defendant from denying plaintiff's right to a mechanic's lien, where defendant did not know plaintiff was in ignorance of the condition of the title.—*Smith v. Huckaby*, (Tex. Civ. App.) 23 S. W. 397.

EVIDENCE.

See, also, "Deposition;" "Witness."

Best and secondary, see "Criminal Law," 40.

Burden of proof, see "Fraudulent Conveyances," 17; "Limitation of Actions," 30; "Malicious Prosecution," 3; "Master and Servant," 48, 49.

Contradicting entry of judgment by minutes of court, see "Records," 2.

Declarations, see "Homicide," 40, 41.

Documents, admissibility of partnership account books, see "Partnership," 6, 7.

Dying declarations, see "Homicide," 42.

Evidence of character, see "Seduction," 2.

Harmless error, see "Appeal," 82-85.

Hearsay, see "Criminal Law," 41.

In action for injuries caused by defective streets, see "Municipal Corporations," 12.

In criminal cases, see "Abduction;" "Carrying Weapons," 2; "Criminal Law," 31-47; "Homicide," 35-42; "Rape," 1, 2.

In particular actions, see "Assumpsit;" "Ejectment," 2; "Malicious Prosecution," 3, 4; "Trespass to Try Title," 14-16.

Objections to, see "Trial," 5-8.

Of adverse possession, see "Adverse Possession," 1.

Of agency, see "Principal and Agent," 5, 6.

Of corporate existence, see "Corporations," 1.

Of custom, see "Custom and Usage."

Of damages, see "Damages," 38-43.

Of fraud in conveyance, see "Fraudulent Conveyances," 15-18.

Of liability on subscription to stock, see "Corporations," 8, 9.

Of negligence, see "Negligence," 13-17.

Of ratification of agent's acts, see "Principal and Agent," 10, 11.

Opinion, see "Criminal Law," 34.

Parol, to construe wills, see "Wills," 9.

Pleading and proof, see "Pleading," 14-22.

Presumption of divorce from lapse of time, see "Divorce," 2.

—on execution sale, see "Execution," 13.

Reception, see "Criminal Law," 22-24; "Trial," 1-3.

Weight and sufficiency, see "Appeal," 68-71.

Best and secondary.

1. Evidence by the land commissioner as to the contents of an archive on file in his office is not admissible, but the proper method of proving such a paper is either by a certified copy or by a certificate from the commissioner stating its contents.—*Meyer v. Hale*, (Tex. Civ. App.) 23 S. W. 990.

2. To render admissible evidence of a written transfer of land made to a person long since deceased, it is not necessary to show a search among the papers of such deceased, or inquiry of his heirs or administrator, where the paper is last traced into the custody of a nonresident of the state.—*Meyer v. Hale*, (Tex. Civ. App.) 23 S. W. 990.

3. In an action against a railroad company for injuries to an employee, resulting from a collision, secondary evidence of a telegram sent by the train dispatcher, without an affidavit showing its loss, is inadmissible, it having been proved that it was last seen in the hands of a former attorney of the road, who was near enough to be easily accessible by ordinary pro-

merely on his possession as evidence of title, he may, for the purpose of showing that his possession is legal, give parol evidence of a purchase thereof by him, though a bill of sale was given to him.—*First Nat. Bank v. Brown*, (Tex. Sup.) 23 S. W. 862.

5. A power of attorney recited that the makers were the only heirs of H. and I. T., deceased. *Held*, that the recitals were not admissible to prove either the death of H. T. or the heirship under him, where it did not appear that better evidence was not obtainable.—*Davidson v. Senior*, (Tex. Civ. App.) 23 S. W. 24.

6. In a prosecution against an attorney for appropriating to his own use money received from a client to be paid on a certain judgment, defendant denied receiving the money. The complaining witness testified that he gave the money to defendant on a certain day, but received no receipt therefor. Another witness for the prosecution testified that he was present, and that defendant gave a receipt to complainant for the money. *Held*, that parol evidence of the payment to defendant was admissible, without further accounting for the absence of the receipt.—*State v. Davis*, (Tenn.) 23 S. W. 59.

7. Rev. St. 1889, § 4861, provides that when a deed is lost, or not in the power of the party, a certified copy of the record may be received in evidence. *Held*, that one not a party to the deed, and unable to produce it, may put in evidence such a copy.—*Baum v. Sauer*, (Mo. Sup.) 23 S. W. 147.

8. A note which recites that it is given for the price of described land sold by the payee to the maker, thus showing a vendor's lien, independent of an express acknowledgment contained therein, is original evidence, and as good evidence of the lien as the deed.—*Behrens v. Dignowity*, (Tex. Civ. App.) 23 S. W. 288.

9. Copies of letters written by plaintiff to defendant, which had been read on a former trial of the case without objection, and are on file with the papers, are admissible in evidence, where the originals are in defendant's possession, and notice was given to defendant on the trial to produce them.—*Battaglia v. Thomas*, (Tex. Civ. App.) 23 S. W. 385.

Evidence as to entry of judgment.

10. In trespass to try title, where defendant relies on a sheriff's deed under an execution issued under a judgment of a justice of the peace, the docket in which the justice must enter the record of the judgment under Pasch. Dig. (Act 1948,) art. 1182, is the proper evidence whether such judgment was rendered or not; and evidence of the justice, 30 years after, as to its rendition, and the issue of execution thereon, is inadmissible.—*Holt v. Maverick*, (Tex. Civ. App.) 23 S. W. 751.

Hearsay.

11. Testimony based on daily market reports from a commercial center comes from a public, authentic source, and is not hearsay.—*International & G. N. R. Co. v. Dimmitt County Pasture Co.*, (Tex. Civ. App.) 23 S. W. 754.

12. Rumors that a person had become insane are not competent to prove insanity.—*McLane v. Elder*, (Tex. Civ. App.) 23 S. W. 757.

Declarations and admissions.

13. A son may testify to declarations made by his mother, since deceased, as to her father's family, the number of his children, the date of his death and that of some of the children, where there are deeds in evidence showing the relationship of declarant to her father.—*De Leon v. McMurray*, (Tex. Civ. App.) 23 S. W. 1038.

ant, and there pointing out the stick with which he claimed the assault was committed, and the tree from which he claimed it had been broken, are not admissible in evidence against defendant.—*Pool v. State*, (Tex. Cr. App.) 23 S. W. 891.

15. In an action by an employee for personal injuries, evidence that some time after the accident the plaintiff had stated that he had often applied for the rules as to his work, and had been unable to get them, is incompetent for any purpose. 22 S. W. 110, reversed.—*Gulf, C. & S. F. Ry. Co. v. Kizziah*, (Tex. Sup.) 23 S. W. 578.

16. Letters written by defendant tending to prove plaintiff's claim are admissible against him.—*Price v. Horton*, (Tex. Civ. App.) 23 S. W. 501.

17. Recitals in deeds by the common grantor, deceased, though said deeds do not convey the land in question, are competent as the grantor's admissions that he had sold the land in question, in favor of persons claiming under his alleged vendee.—*Dunn v. Eaton*, (Tenn.) 23 S. W. 163.

18. In an action by remainder-men against persons in possession under conveyances from a person other than plaintiff's testator, who had originally owned a large tract, including the land in question, the record of the partition suit of testator's estate in 1848 showed that it was based on a map of the tract made in testator's lifetime for him. The map was found in the files of the partition suit, and showed that the land in question had been sold to defendants' grantor, as well as other lots to others. *Held* competent as an admission by testator.—*Dunn v. Eaton*, (Tenn.) 23 S. W. 163.

19. In an action for possession of land, founded on a contract with a guardian, the records being destroyed, statements of wards of the alleged guardian that she was their guardian, and had authority to make said contract, and that the court ratified her contract, and authorized her to deed the land in question in pursuance thereof, are competent as admissions.—*Ellis v. Stone*, (Tex. Civ. App.) 23 S. W. 405.

20. Where the statute of limitations is pleaded in an action to recover land, declarations of one in possession of the land are admissible in explanation of his possession.—*Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; *Id.* 1015.

21. On a prosecution for assault and battery committed on a boy, while the statements made by him to his father on coming home wounded and crying are admissible as part of the res gestae, his subsequent statements, made to a witness sent for by the father, are not thus admissible.—*Pool v. State*, (Tex. Cr. App.) 23 S. W. 891.

22. Where probate records have been burned, long acquiescence of wards in their guardian's conveyance is competent evidence of her alleged authorization to make such conveyance.—*Ellis v. Stone*, (Tex. Civ. App.) 23 S. W. 405.

23. In an action for possession of land, founded on a contract with a guardian, declarations of said alleged guardian as to her having been so appointed are incompetent.—*Ellis v. Stone*, (Tex. Civ. App.) 23 S. W. 405.

Opinion testimony.

24. Where a shipper of live stock stands on the drawhead of a car while caring for the animals in the car, and is injured, the question as to whether it was necessary for him to assume that position is one of fact, and is not the subject of opinion evidence.—*Receivers International & G. N. Ry. Co. v. Armstrong*, (Tex. Civ. App.) 23 S. W. 236.

25. Opinion evidence as to defendants' motive in the alleged malicious prosecution is competent.—*Hurlbut v. Boaz*, (Tex. Civ. App.) 23 S. W. 446.

26. In an action for injuries received by collision with a train at a highway crossing, it being in evidence that the engineer did not try to stop the train, it is proper to exclude his evidence that he could not have stopped it after he saw plaintiff on the track, 150 feet away.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 596.

27. In an action for injuries received by collision with a train at a highway crossing, eye-witnesses may testify that they thought the train was running at an unusual speed, and that, if any signals had been given, they believe they would have heard them.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 596.

28. A witness may testify that she was on the train, and that it was running so fast that it frightened her; that she knew it was running very fast, and thought so before the collision, because it frightened her.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 596.

29. In an action against a railroad company for causing an overflow of plaintiff's land by the construction of an embankment, it is proper to allow witnesses familiar with the region and the flow of water therein to testify that the overflow was caused by the embankment.—*Gulf, C. & S. F. Ry. Co. v. Haskell*, (Tex. Civ. App.) 23 S. W. 546.

— Values.

30. In an action to recover for injuries to mules by defendant's negligence in transportation, plaintiff testified that there was a market value at Cleburne for mules, and that he was acquainted with it; that the mule killed in transportation would have been worth \$100 in Cleburne in good condition; that the other mules, by reason of their haggard condition on arrival at Cleburne, were worth \$5 less per head than if carefully transported. On cross-examination he testified that Cleburne was not a place to which such stock were shipped for sale; that he had seen a span of mules of about the same grade as his sell for \$200 at private sale; that he saw an old mule sell there for between \$50 and \$75; that he had never sold or tried to sell stock at Cleburne; that a few days after his stock reached Cleburne he drove them off without selling any of them. *Held*, that a motion to exclude the evidence as to market value of the mules, on the ground that plaintiff had shown on cross-examination that there was no sale for mules at Cleburne, and, if there was, he was not acquainted with it, was properly overruled.—*Gulf, C. & S. F. Ry. Co. v. Russell*, (Tex. Civ. App.) 23 S. W. 527.

31. Where, in an action to recover for a loss sustained through defendant's alleged negligent delay in transporting plaintiff's sheep over its road to Chicago, it appeared that plaintiff had sold sheep in Chicago for nine years, and that during the whole time he had received daily accounts of sales and current prices, and private telegrams, from persons interested with him in Chicago in such business, it was competent for him to testify as to the market value of sheep in Chicago on certain days, months prior to the institution of the suit.—*Texas & P. Ry. Co. v. Donovan*, (Tex. Civ. App.) 23 S. W. 735.

Expert testimony.

32. Where a witness qualifies as an expert, and states that certain indentations on a draw-bar were made by a round instrument, he should be allowed to state what, in his opinion, that instrument was.—*Galveston, H. & S. A. Ry. Co. v. Briggs*, (Tex. Civ. App.) 23 S. W. 503.

Examination of experts.

33. In an action for personal injuries sustained by falling from a moving train, it is not error to assume that plaintiff had fallen on rocks along the roadbed, in framing hypothetical questions to an expert witness, where plaintiff's wounds show that she must have fallen on some hard, blunt objects.—*Smith v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 784.

Documents.

34. Where, in trespass to try title, an affidavit is made, attacking the deed under which plaintiff claims as a forgery, after plaintiff proves his deed, and there is some evidence raising the question of the grantor's identity, the court may properly make a general charge that the burden of proof is on plaintiff, but cannot confine it to the single issue of identity.—*Steiner v. Jester*, (Tex. Civ. App.) 23 S. W. 718.

35. Where the proper affidavit is filed, charging that a deed offered in evidence is forged, the party offering the deed must establish by prima facie evidence the execution of the deed by the person whose act it purports to be, and then the burden of proof shifts to the person assailing the genuineness of the deed.—*Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; *Id.* 1015.

36. The law requiring the vendees of a colonist to contract with the colonist to perform the conditions on which the land was granted does not render inadmissible in evidence a deed by a colonist which the vendees did not sign.—*Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; *Id.* 1015.

37. A protocol remaining in the office of the notary is competent proof that the testimonio was delivered to the grantees when the protocol was executed; and such protocol may be proved without producing the testimonio, or accounting for its nonproduction.—*Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; *Id.* 1015.

38. On an issue of adverse possession, an alleged written acknowledgment of J. that he was in possession as tenant of the vendor is not sufficiently proved, to be admissible for the vendee, by testimony of the vendee that he received it with other title papers of the vendor, and was told that J. executed it.—*Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; *Id.* 1015.

39. One of the parties to a lease and bond for title having died, the instrument was admissible in evidence on proof of deceased's handwriting, and testimony by the other party that the instrument was executed by the deceased, and that one of the witnesses was dead, and the other not to be found after diligent inquiry.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

40. Under Rev. St. art. 2252, authorizing county clerks to give certified copies of their records, a certificate of a county clerk that no claims had been filed against an estate is inadmissible in evidence.—*Meyers v. Jones*, (Tex. Civ. App.) 23 S. W. 562.

41. Under Rev. St. art. 4790, providing that the documentary evidence of title shall be confined to the matter contained in the abstract of title, defendants cannot give in evidence a power of attorney not contained in the abstract, which they had filed under notice from plaintiff.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

— Proof of judgment.

42. A justice's judgment may be proven by the original docket containing it, and need not be proven by a certified copy.—*Willis v. Nichols*, (Tex. Civ. App.) 23 S. W. 1025.

— Records of former suits.

43. In an action for possession of land, plaintiffs claiming as remainder-men under the will of their grandfather, D., the original

owner of a large tract of which this was a part, and defendants under conveyances from D.'s alleged vendee, it appeared that after D.'s death, in 1848, his devisees had judicial partition of his land, not including this tract. *Held*, that the record of the partition suit was not incompetent as against plaintiffs, who were not parties, or as not including the land in question, but was good evidence that the life tenants, devisees, did not claim said tract as belonging to D. at his death.—*Dunn v. Eaton*, (Tenn.) 23 S. W. 163.

Ancient documents.

44. The presumption that a document over 30 years old was executed by the person whose name is signed to it, applies even though the document has been lost, where witnesses who have seen it testify that it appears to be regular on its face.—*Meyer v. Hale*, (Tex. Civ. App.) 23 S. W. 990.

45. An indorsement on a land certificate made in 1839 by a county surveyor, with whom, there was evidence, the certificate was deposited at that time, is admissible in evidence as an ancient instrument, though the indorsement was canceled, apparently, by the surveyor.—*Holt v. Maverick*, (Tex. Civ. App.) 23 S. W. 751.

46. Where the record of the transfer of a land certificate in 1854 failed to show how or when such transfer came into the custody of the land office prior to the location of the certificate in 1874, it was necessary for the party offering such transfer in evidence as an ancient instrument to show how or when it came into the land office, or to explain its custody prior to the time it was known to be in such office, since the land office was not the proper depository of the transfer before the location of the certificate.—*Chamberlain v. Showalter*, (Tex. Civ. App.) 23 S. W. 1017.

47. In the absence of such evidence, it was error to submit to the jury the question whether such transfer was the deed of the alleged grantor, as the court should have assumed that the transfer had not been executed by such grantor.—*Chamberlain v. Showalter*, (Tex. Civ. App.) 23 S. W. 1017.

48. An ancient instrument is admissible in evidence, notwithstanding an affidavit of forgery has been filed in relation thereto, if it comes from the proper custody and is free from suspicion.—*Chamberlain v. Showalter*, (Tex. Civ. App.) 23 S. W. 1017.

Parol evidence.

49. In trespass to try title to a tract of 519 acres, it appeared that, on partition of an estate embracing two tracts, one abstract, No. 195, containing 519 acres, the other abstract, No. 196, containing 477, one of the tracts was set apart to plaintiff, the other to defendant, the report of the commissioners and the decree of the court describing them as abstract No. 195 containing 477 acres, and abstract No. 196 containing 519 acres. *Held* that, there being a latent ambiguity in the descriptions, parol evidence was admissible to explain the decree by showing which tract was intended for plaintiff and which for defendant.—*Barclay v. Stuart*, (Tex. Civ. App.) 23 S. W. 799.

50. In an action, by one of many persons who subscribed and paid money to enable a railroad company to build its road, against such company, for failure to deliver to plaintiff first mortgage bonds in accordance with the terms of the written contract of subscription, which is unambiguous, it is not error to refuse to permit a witness for defendant to state what he understood the contract to be.—*San Antonio & A. P. Ry. Co. v. Wilson*, (Tex. Civ. App.) 23 S. W. 282.

51. In an action to cancel a note conditioned that the payee shall construct "a railroad" to a town by a specified date, parol evidence is admissible to show that the payee, as

part of the consideration, had agreed to build its main road into the town, and that it had constructed only a branch connecting with the main road four miles away, since such evidence is not inconsistent with the written instrument, but merely explains what is incomplete and uncertain.—*Gulf, C. & S. F. Ry. Co. v. Pittman*, (Tex. Civ. App.) 23 S. W. 818.

52. A contract for shipment of stock provided that the party of the first part would transport the stock to J. City, the end of its line, on the route over which such stock was waybilled to be transferred to the railway company over which the stock was waybilled for further transportation by said railway company, the stock being waybilled through and consigned to S. at J. City; that, as the stock was to be transported over the roads of other railway companies, and as the party of the first part was only to transport the stock to the aforesaid station, at the end of its line, it was only to be bound for the transportation of the stock to said station, and should not be liable for injuries to the stock after it had left its line; and that the other railway lines over which the stock was billed should not be liable for injuries beyond their respective lines. *Held* that, the provision that J. City was the end of the line operated by the party of the first part being inconsistent with the provisions stating that the stock must go over other lines to reach its destination, parol evidence was admissible to show that S. was the terminus of the line of the party of the first part.—*Swank v. San Antonio & A. P. Ry. Co.*, 23 S. W. 249, 1 Tex. Civ. App. 675.

53. A defendant seeking, on the ground that the contract sued on is ambiguous, to introduce parol evidence as to the true intention of the parties, should, by a special plea, indicate the ambiguity and allege the true intent.—*Morgan v. Turner*, (Tex. Civ. App.) 23 S. W. 284; *Turner v. Morgan*, *Id.*

54. Where plaintiff holds a written contract for the conveyance of land on making certain payments, he cannot show by parol that under the terms of the contract the title vested in him before compliance with its terms.—*Heflin v. Campbell*, (Tex. Civ. App.) 23 S. W. 596.

55. As between the original parties to a note the maker is not bound by the consideration expressed in the note, but will be allowed to show the real consideration thereof.—*Branch v. Howard*, (Tex. Civ. App.) 23 S. W. 478.

56. An indefinite description of land on the face of a vendor's lien note may be cured by parol evidence.—*Grant v. Ennis*, (Tex. Civ. App.) 23 S. W. 998.

57. On an issue whether plaintiffs' testator, deceased more than 40 years, had conveyed to defendants' grantor, testimony of an old neighbor that said grantor had been in possession, and had made improvements and fenced, during testator's lifetime, was competent, and not objectionable as a parol proof of title.—*Dunn v. Eaton*, (Tenn.) 23 S. W. 163.

— To show contents of court records.

58. On a trial of defendant for taking away a female under 18 years old for the purpose of concubinage, the father of prosecutrix could not testify as to whether there was an order of court giving the care of his daughter to her grandmother, to show that at the time of the commission of the offense she was not in his legal care, verbal testimony being inadmissible to show the contents of a record of court.—*State v. Richardson*, (Mo. Sup.) 23 S. W. 760.

— Contradicting bill of lading.

59. A bill of lading given by an express company, though signed by the express company only, constitutes a contract, which cannot be varied by parol.—*Wells, Fargo & Co.'s Express v. Fuller*, (Tex. Civ. App.) 23 S. W. 412.

60. Where plaintiff claims that he entered into a verbal agreement with a railroad com-

pany for the shipment of cattle at a fixed rate, parol evidence is admissible to show what that agreement was, though plaintiff signed a bill of lading showing a different rate, both parties testifying that plaintiff received the bill of lading just as the train with the cattle, which he was to accompany, was leaving, and that he signed it on the assurance of defendant that it was all right.—Galveston, H. & S. A. Ry. Co. v. House, (Tex. Civ. App.) 23 S. W. 332.

61. Except in the recital of the receipt of the goods, and of their quantity and condition, bills of lading are strictly written contracts, within the rule prohibiting parol evidence to contradict or vary such contracts—Galveston, H. & S. A. Ry. Co. v. Silegman, (Tex. Civ. App.) 23 S. W. 298.

62. Not only is parol evidence inadmissible to vary the express terms of the contract contained in a bill of lading, but it is inadmissible to vary the obligations as to which the contract is silent, but which are implied from its nature; and therefore, as a bill of lading for shipment of cattle raises an implied obligation to furnish suitable cars, and to transport the cattle within a reasonable time, parol evidence is inadmissible to show a parol agreement prior to the bill of lading to furnish "bedded" cars, and to make close connection with another line of carriers, though it could be shown that bedded cars were the only suitable cars to be used, and that transportation with reasonable dispatch would have made the close connection.—Galveston, H. & S. A. Ry. Co. v. Silegman, (Tex. Civ. App.) 23 S. W. 298.

Competency and relevancy.

63. In an action for services as an architect, in drawing plans, the issue being as to the amount agreed to be paid, the introduction of the plans in evidence was, at most, harmless error.—Cooper v. Gordon, (Tex. Civ. App.) 23 S. W. 608.

64. In an action for services as an architect, in drawing plans, testimony of a witness that he had obtained good plans of an architect for a less sum than that proved by plaintiff to be the customary rate of charges of architects was properly excluded.—Cooper v. Gordon, (Tex. Civ. App.) 23 S. W. 608.

Evidence made competent by that of adverse party.

65. When evidence has been introduced to show that heirs have laid no claim to certain land, the judgment of a district court in a suit of certain of said heirs for possession of the land is competent in rebuttal.—Ellis v. Stone, (Tex. Civ. App.) 23 S. W. 405.

66. The fact that a witness has been directly examined as to a conversation with a party, competent against the latter, does not admit his cross-examination as to the rest of the conversation, if that be impertinent to the first part, and objectionable otherwise.—Huribut v. Boaz, (Tex. Civ. App.) 23 S. W. 446.

Proof of handwriting.

67. In an action on a note alleged to have been executed by a deceased person, a finding that the signature is genuine will not be disturbed where 10 or 12 witnesses, who were familiar with the handwriting of deceased, testified that it was his signature, and the only evidence to the contrary was that of four or five experts, based on a mere comparison of the disputed signature with other genuine signatures shown them for the first time at the trial.—Mullikin v. Mullikin, (Ky.) 23 S. W. 352.

68. In proof of handwriting by comparison, a paper proposed to be used as a standard cannot be proved to be an original and genuine signature by the opinion of a witness, derived solely from his general knowledge of the handwriting of the person whose signature it purports to be.—Steiner v. Jester, (Tex. Civ. App.) 23 S. W. 718.

Examination.

Of witness, see "Witness," 3.

EXCEPTIONS, BILL OF.

See, also, "Appeal," 37-53; "Criminal Law," 81-86.

Time for preparation and filing.

1. Civil Code, § 772, declares that the Louisville chancery court has "such control over its judgments, for 60 days, as circuit courts have over their judgments during the term in which they are rendered." Section 334 provides that "time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court." It is also provided that the Jefferson court of common pleas shall have power over its judgments for the same time as the Louisville chancery court. *Held*, that neither of such courts has power to extend the time for preparing a bill of exceptions beyond 120 days after an order overruling a motion for a new trial.—Johnson v. Stevens, (Ky.) 23 S. W. 957.

2. The amendment of Civil Code, § 334, providing that if the judge does not preside, or court is not held, then time shall be given until the next term to prepare the bill, does not apply, when there was nearly a month in said period of 120 days during which court was held.—Johnson v. Stevens, (Ky.) 23 S. W. 957.

3. Under Mansf. Dig. § 5157, providing that time to reduce exceptions to writing may be extended to the end of the succeeding term, where an extension to a certain day in that term is given, in which to prepare and tender bill of exceptions, "which, when approved, signed, and filed, * * * shall be and become a part of the record," the bill of exceptions must not only be presented to the judge, but must be filed, within the time specified in the extension, there being no implied extension to the end of the term for filing.—Stinson v. Schafer, (Ark.) 23 S. W. 651.

Effect of filing—Estoppel.

4. The attorney who accepts a bill of exceptions, with the qualifications indorsed thereon by the trial judge, and files the same, estops himself from claiming it to be unfair and injurious to his client.—Jones v. State, (Tex. Cr. App.) 23 S. W. 793.

Excessive Damages.

See "Damages," 26-30; "Death by Wrongful Act," 5.

Excusable Homicide.

See "Homicide," 13-27.

EXECUTION.

See, also, "Attachment;" "Garnishment."

Against executor, see "Executors and Administrators," 24.

—partnership, see "Partnership," 17.

For costs, see "Costs," 5.

Liability of sheriff for unlawful seizure, see "Sheriffs and Constables."

Sale to judgment creditor, priority over unrecorded deed, see "Judgment," 18.

Time of issuance.

1. Under Rev. St. art. 1632, allowing an execution, in less than 10 days after rendition of judgment, on the filing of an affidavit that defendant "is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding creditors," it is not necessary to state that the property is being removed with intent to defraud creditors.—Clifford v. Lee, (Tex. Civ. App.) 23 S. W. 843.

unless plaintiffs were about to remove all their property out of the county, the execution was wrongful, as the execution is warranted if a large portion of the property is about to be removed.—*Clifford v. Lee*, (Tex. Civ. App.) 23 S. W. 843.

Variance from judgment.

8. Where the pleadings in an action show that it was against "Gilbert L. M.," and the judgment shows that it was rendered against the M. who was a defendant in the action, the judgment is not insufficient to support an execution sale thereunder because entered against "Gabriel L. M." 21 S. W. 777, affirmed.—*Halsell v. McMurphy*, (Tex. Sup.) 23 S. W. 647.

Levy—On chattels or land.

4. The fact that an execution on a justice's judgment orders a sale of specified chattels in the first instance does not invalidate a sale of the judgment debtor's land, where it appears that the chattels could not be found.—*Willis v. Nichols*, (Tex. Civ. App.) 23 S. W. 1025.

Effect of appointment of receiver.

5. Where a sheriff has made a levy on property before the appointment of a receiver, a sale by him after a receiver therefor is appointed is unauthorized, and passes no title; the proper procedure being for the person in whose favor the levy was made to enforce his lien in the court wherein the whole estate is being administered.—*Ellis v. Vernon Ice, Light & Water Co.*, (Tex. Sup.) 23 S. W. 858.

Description of property.

6. A levy, sale, and sheriff's deed of "all the right, title, and interest of defendant * * * in and to league No. 6, Galveston county, originally granted to B., and known as the 'Virginia Point League,'" is sufficient to convey whatever interest defendant has in such league. 22 S. W. 1042, affirmed.—*Smith v. Crosby*, (Tex. Sup.) 23 S. W. 10.

Return.

7. The fact that a sheriff's return on execution does not describe the land levied on with sufficient certainty will not invalidate the title of the purchaser at the execution sale, as against subsequent creditors of the judgment debtor, where the debtor pointed out the land to be levied on, and executed a deed to the purchaser to cure the defective description in the sheriff's levy.—*Willis v. Nichols*, (Tex. Civ. App.) 23 S. W. 1025.

Claims by third persons—Judgment.

8. In a trial of right of property, evidence of the value of the use of the property from the time it was received by claimant under his bond is properly admitted, as the judgment should show such value to enable claimant to choose between the provisions of Rev. St. art. 4845, allowing him to return the property, and pay for the use thereof, or to pay for the property, with interest on its value.—*Keating v. Julian*, (Tex. Civ. App.) 23 S. W. 607.

Sale.

9. Where defendant's title to the land in controversy was acquired by mesne conveyance from a purchaser at an execution sale under a judgment against O., the owner of the land, the judgment and sale being valid, such conveyance vests in defendant a good title, as against a subsequent conveyance from O. to plaintiffs. 21 S. W. 52, followed.—*Meade v. Bartlett*, 23 S. W. 186, 1 Tex. Civ. App. 342.

10. Where a judgment for costs included items for which the party was not liable, and no bill of costs was presented, a sale for \$10 of land of such party, worth \$7,000, under execution issued on the judgment, made without the personal knowledge of the party, will be

after the return day thereof, is void.—*Terry v. Cutler*, (Tex. Civ. App.) 23 S. W. 539.

12. Where an alias execution is directed to the sheriff of C. county, a sale thereunder by the sheriff of G. county is void, and conveys no title.—*Terry v. Cutler*, (Tex. Civ. App.) 23 S. W. 539.

Presumptions.

13. A sheriff's sale 50 years old was contested as not made at the courthouse door. A witness who lived in the county at the time testified that, as far as he remembered, the sale was made at a log 160 feet west of the courthouse; that he was satisfied it was not at the courthouse; that he was not at the sale, but was at the place a few minutes afterwards, and was told that defendant's grantors had bought the land in question; that many sales were made at that log. It appeared that plaintiffs' ancestor, the original grantee of the land, lived in the town several years after the sale, and then moved away, having never claimed the land. Held, that plaintiffs' evidence was not enough, after such a lapse of time, to overthrow the presumption that the sheriff made a legal and regular sale.—*Fuller v. East Texas Land & Imp. Co.*, (Tex. Civ. App.) 23 S. W. 571.

What passes.

14. A vendor's equitable lien does not pass by sale under execution of the land on which the lien exists.—*Davis v. Wheeler*, (Tex. Civ. App.) 23 S. W. 435.

Title of purchaser.

15. A purchaser of land at execution sale acquires no priority over a vendor's equitable lien, of which he had notice at the time of the sale.—*Davis v. Wheeler*, (Tex. Civ. App.) 23 S. W. 435.

16. The facts that in 1840 the original grantee lived on a league which was then sold on execution against another, and that in 1842 it was levied on as belonging to said original grantee, do not prove that in 1840 it did not belong to the other.—*Fuller v. East Texas Land & Imp. Co.*, (Tex. Civ. App.) 23 S. W. 571.

17. Persons claiming under an execution sale on process issued on a bond for purchase price given by a purchaser of the same property at a former execution sale need not defend the title conveyed at such original sale, the second levy being against the land as belonging to a surety on the bond.—*Fuller v. East Texas Land & Imp. Co.*, (Tex. Civ. App.) 23 S. W. 571.

Setting aside.

18. December 3d suit for \$41.50 was begun in justice's court, and citation issued for defendant to B. county, returnable January 6th, but was never returned. December 17th the justice issued another to M. county, returnable January 6th, and it was served there on defendant December 21st. Both purported to be original citations. Defendant at once wrote to his customary attorney to represent him, but January 6th the latter declined to act, and handed to plaintiffs' attorney certain pleadings which defendant had sent him, and he gave them to the justice. Judgment was rendered for plaintiff that day, apparently on a new cause of action, and on the 17th execution was issued, without the certified bill of costs annexed, as required by statute. Although defendant had \$600 worth of personality in the county, the constable levied on land worth over \$3,000. March 4th the land was sold for \$85. Defendant returned home about April 1st, and April 17th began suit to set aside the sale. Held, that the irregularities were calculated to prevent a sale for an adequate price, and that defendant, having tendered full reimbursement to the purchaser, was entitled to relief.—

Martin v. Anderson, (Tex. Civ. App.) 23 S. W. 280.

Bond for purchase money—Issue of execution thereon.

19. A league of land having been levied on and sold under execution, the sheriff made a deed for the league, less an undefined 800-acre tract. The price being insufficient to satisfy the execution, another writ was issued, and levied on the 800 acres, and the sheriff, without any further sale, deeded said 800 acres to the purchasers at the sale of the whole league. *Held* that, while the sheriff presumably had no right to reserve the 800 acres from the first sale, the whole proceedings had the effect to convey the entire league, as the levy, sale, and payment of the purchase money gave the purchasers the equitable title to the whole league, and gave the sheriff power to pass title thereto.—*Fuller v. East Texas Land & Imp. Co.*, (Tex. Civ. App.) 23 S. W. 571.

20. Act Dec. 22, 1840, repealed so much of Act Feb. 5, 1840, as permitted execution sales on credit and the giving of bonds for the price, but did not take away the remedies under Act Feb. 5, 1840, § 17, on bonds executed before its passage; and a bond for 12 months, given in November, 1840, was properly treated as a judgment to support an execution issued in January, 1842.—*Fuller v. East Texas Land & Imp. Co.*, (Tex. Civ. App.) 23 S. W. 571.

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution;" "Wills." Action against heirs without administration, see "Descent and Distribution," 9. New promise by executor, see "Limitation of Actions," 25.

Appointment.

1. The appointment of an administrator de bonis non by the county court cannot be collaterally attacked where the records of the court do not affirmatively show the appointment to be illegal.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

Marriage of executrix—Effect.

2. Where the duties of a widow are purely executorial, and not those of a trustee, they are avoided by her marriage, under Gen. St. c. 30, art. 1, § 16.—*Tribble's Ex'rs v. Broadus*, (Ky.) 23 S. W. 349.

Bonds.

3. The final settlement of a decedent's estate in the county court is not prerequisite to the maintenance of a suit in the district court to recover the property, or its value, misappropriated by the administrator.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

4. In an action against an administrator and the sureties on his bond for wasting the assets of the estate, the district court has power to determine whether claims of the administrator against the estate for compensation and expense of administration are just, though they have not been approved by the county court.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

Qualification and inventory.

5. Pasch. Dig. art. 5574, provides that, where not otherwise provided, a bond shall be given by executors and administrators, and an oath taken. Article 5626 allows a will to direct that no action be had in the district court in administering the estate, except to prove the will and return an inventory, and that the executor be not required to give bond. Article 5628 provides that, where a will contains such directions, no other provision of the act shall apply to the estate, but it shall become like any other property to be administered under a power, chargeable in the hands of a trustee, and liable to execution in any court having ju-

risdiction. *Held* that, where a will contains such directions, the executor's qualification is complete on probate of the will, and his acceptance, with the return of an inventory, where required by law, and it is not essential that he take an oath. *Roberts v. Connellee*, 8 S. W. 626, 71 Tex. 14, explained.—*Connellee v. Roberts*, 23 S. W. 187, 1 Tex. Civ. App. 363.

Assets.

6. Land devised by testator to his wife for life, remainder to his heirs, on being turned over to the life tenant ceases to be part of the estate, and does not on the death of the life tenant become part of the estate, to be administered as property belonging thereto.—*Blackwell v. Blackwell*, (Tex. Civ. App.) 23 S. W. 31.

Powers and duties.

7. The rule that all the executors named must join in a sale does not apply to executors in whom no power of sale is vested by their appointment, but who obtain the power only from the court; and, though there may be two executors when proceedings for sale of a decedent's lands are had, an order for one of them to sell, and a sale reported by him, and confirmed by the court, is sufficient to pass title, as against a collateral attack.—*Corley v. Anderson*, (Tex. Civ. App.) 23 S. W. 839.

Allowance of and payment of claims.

8. The fact that plaintiff qualified as administrator with the will annexed of decedent does not affect his claim to a part interest in the property standing in decedent's name, the will not having indicated of what decedent's property consisted.—*Lucas v. Cooper*, (Ky.) 23 S. W. 959.

9. Gen. St. c. 30, art. 2, § 53, forbidding the allowance of interest on claims against estates unless demanded of the administrator within a year of his appointment, does not require such demand where, within said year, the administrator files his bill in equity to settle the estate, and the case is referred to a commissioner to audit claims.—*Richardson's Adm'x v. Banta*, (Ky.) 23 S. W. 350.

Priorities.

10. Rev. St. 1879, art. 2037, classifies secured claims against an estate as claims of the third class, so far as they can be paid out of the proceeds of the property subject to such lien; and provides that when more than one mortgage or lien shall exist on the same property the oldest shall be first paid, but no preference shall be given to such claim further than regards the property subject to such mortgage or other lien. *Held*, that a mortgage on decedent's homestead, ordered by the probate court to be paid as a fourth-class claim, should be paid out of the proceeds of such homestead in preference to a prior judgment against decedent, ordered paid as a third-class claim.—*Kioldbass v. Raley*, 23 S. W. 253, 1 Tex. Civ. App. 105.

11. Since, under such statute, a claim against an estate may be a claim of the third class as to a portion of the property, because secured by a lien thereon, and of the fourth class as to the remainder of the estate, in ordering such judgment to be paid as a third-class claim the probate court did not declare it to be a lien on the homestead, but that, if there was any of decedent's estate to which such judgment lien would attach under the law, then, as to such property, the judgment would be a third-class claim.—*Kioldbass v. Raley*, 23 S. W. 253, 1 Tex. Civ. App. 105.

12. In the absence of a showing that the homestead was subject to a forced sale at the time or before such mortgage was executed, it does not appear that the former is a third-class claim and the latter a fourth-class claim.—*Kioldbass v. Raley*, 23 S. W. 253, 1 Tex. Civ. App. 105.

Commissioners.

13. While an administrator who has wasted or mismanaged the estate should be allowed

commissions to the extent to which the estate has been properly administered, and on the amount which he or his sureties pay, yet, where judgment is obtained against him for money which he has collected, but for which he has failed to account, commissions should not be allowed him in offset to such judgment.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

Liability for conversion.

14. An administrator who, without authority from the county court, surrenders a note belonging to the estate, and substitutes another in its stead, executed by only one of the parties to the original note, is guilty of a conversion of the assets of the estate; and his liability and that of his sureties for such misappropriation cannot be discharged by showing that the new note is in existence, and has not been paid.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

Sales under order of court.

15. In a collateral attack on an administrator's deed, a recital in the order of sale by the probate court that an application to sell has been made is sufficient proof of such application, though it does not appear in the records of the probate court.—*Perry v. Blakey*, (Tex. Civ. App.) 23 S. W. 804.

16. Where the probate court orders a sale of all the land of an estate to pay debts, and there are several purchasers of the different tracts, the fact that the order confirming the sale does not identify the land sold to each purchaser will not render the sale void, so as to subject it to collateral attack, but it will be presumed that the confirmation related to the land conveyed to each purchaser by the administrator's deed, which had been previously executed.—*Perry v. Blakey*, (Tex. Civ. App.) 23 S. W. 804.

17. The fact that the administrator violated the terms of sale prescribed by law and the order of court, by conveying part of the land to a creditor in payment of his claim, does not render the sale void, so as to subject it to collateral attack.—*Perry v. Blakey*, (Tex. Civ. App.) 23 S. W. 804.

18. An administrator who sells land of the estate to another person, and before the confirmation of such sale buys it himself from such person, is guilty of purchasing at his own sale, and the transaction will be treated as fraudulent.—*Bland v. Fleeman*, (Ark.) 23 S. W. 4.

19. An order confirming an administrator's sale of 1,800 acres of a certain league and labor of land, and directing a deed to be made to the purchaser for the 1,800 acres, "it being the upper part of the survey," and a deed made in pursuance thereof, in which the land is described as "being the upper part of the league and labor of land granted to the heirs of Mary Bird, situated on the waters of Pecan bayou, in Travis," are void for uncertainty of description of the land.—*Harris v. Shafer*, (Tex. Sup.) 23 S. W. 979.

20. As a certificate to some extent located would naturally be in the surveyor's office, an executor's sale thereof under order of the court is not invalid because it was not in his possession at the time of the sale.—*Corley v. Anderson*, (Tex. Civ. App.) 23 S. W. 839.

Collateral attack.

21. An administrator's sale to pay debts is not subject to collateral attack on the ground that deceased was a volunteer in the Texas army from a foreign country, and that his estate was therefore exempt from administration by creditors, under Act Jan. 14, 1841, where the evidence leaves it uncertain as to whether deceased was a resident of Texas at the date of the declaration of independence, March 2, 1836, and hence a citizen of the republic, under section 10 of the "General Provisions" of the constitution.—*Flenner v. Walker*, (Tex. Civ. App.) 23 S. W. 1029.

22. The facts that administration on an estate was not granted until after the expiration of 10 years from decedent's death, and that the records of the probate court fail to show whether decedent was a resident of the county or had property there, or whether any claim against the estate was ever presented, allowed, or filed, are not sufficient to invalidate the administrator's sale of land for payment of debts on collateral attack by the heirs.—*Flenner v. Walker*, (Tex. Civ. App.) 23 S. W. 1029.

Allowance to widow.

23. In Mill. & V. Code, § 3128, providing that exempt personal property on the death of the head of a family, who leaves a wife or children surviving, shall go to the widow for herself and in trust for the benefit of her children of the deceased, or of the widow, or of both, the word "children" means the young sons or daughters of either deceased or his widow, who may form part of the family of which deceased was the head, and in default of such children the widow takes the exempt property absolutely.—*Compton v. Perkins*, (Tenn.) 23 S. W. 66.

Execution against—Collateral attack.

24. A sale under execution on a judgment against an executor of land which was properly included in his inventory cannot be collaterally attacked because the inventory was not complete as to other property. *Roberts v. Connelley*, 8 S. W. 628, 71 Tex. 14, explained.—*Connelley v. Roberts*, 23 S. W. 187, 1 Tex. Civ. App. 363.

Exemplary Damages.

See "Damages," 1-4.

Liability of sheriff for unlawful seizure, see "Sheriffs and Constables."

EXEMPTIONS.

See, also, "Homestead."

From taxation, see "Railroad Companies," 7, 8; "Taxation," 2, 3.

What is exempt.

1. The amount due a person for services under a contract by which he agrees to nurse another during an attack of sickness, and by which the latter agrees to pay him well, is "current wages for personal services," within the meaning of the exemption law, though neither the compensation to be paid nor the time of payment is fixed.—*Dempsey v. McKennell*, (Tex. Civ. App.) 23 S. W. 525.

Insurance on exempt property.

2. Money due from a policy of fire insurance, taken by a debtor for his own protection, for loss of personal property which is exempt from execution, is not subject to garnishment, even where the creditor has a lien on the property destroyed.—*Ward v. Goggan*, (Tex. Civ. App.) 23 S. W. 479.

Claim as against set-off.

3. Under the statutory provision that certain property, including current wages for personal services, "shall be exempt from attachment or execution, or every other species of forced sale for the payment of debts," an employer sued for such wages cannot set off a debt due from the employee to a third person, and assigned to him.—*Dempsey v. McKennell*, (Tex. Civ. App.) 23 S. W. 525.

Expert Testimony.

See "Evidence," 32.

Express Trusts.

See "Trusts," 1, 2.

EXTRADITION.

Habeas corpus—Questions determined.

Where one is arrested on an executive warrant in extradition proceedings, the validity of the indictment under which he is charged by the demanding state will not be tried on habeas corpus.—*Pearce v. State*, (Tex. Cr. App.) 23 S. W. 15.

FACTORS AND BROKERS.

See, also, "Principal and Agent."

Right to commissions.

1. When a real-estate agent has procured a purchaser able, ready, and willing to buy the land on the terms prescribed by the principal, the fact that such purchaser was acting in behalf of another does not affect the agent's right to commissions.—*Gelatt v. Ridge*, (Mo. Sup.) 23 S. W. 882.

2. A real estate agent is entitled to his commissions when he procures a purchaser ready, able, and willing to buy on the terms authorized by the principal, and no binding, written contract of sale is required when the principal is in a situation to execute it himself.—*Gelatt v. Ridge*, (Mo. Sup.) 23 S. W. 882.

3. The fact that the terms of sale made by an agent varied from the terms of his authority is immaterial where the principal ratified the sale as made.—*Gelatt v. Ridge*, (Mo. Sup.) 23 S. W. 882.

4. A departure of a real-estate agent from the terms of his authority in effecting a sale becomes, on ratification by the principal, a part of the original contract of employment, and the compensation fixed therein controls.—*Gelatt v. Ridge*, (Mo. Sup.) 23 S. W. 882.

5. Where a broker is employed to sell land for cash only he is not entitled to commissions on procuring a person who agrees to take the land, having already resold it to third persons, who are to pay half cash and give notes for the balance, it being the intention of such first purchaser to immediately negotiate the notes given by the second purchasers, and with the money thus obtained comply with the requirement of "all cash."—*O'Brien v. Gilliland*, (Tex. Civ. App.) 23 S. W. 244.

— Trades closed with principal.

6. A real-estate broker is not entitled to commissions on a sale of land where the purchaser bought solely upon his own information, after negotiating with the owners, and was not influenced by the broker, though the broker made efforts to sell the land to such purchaser.—*Brown v. Shelton*, (Tex. Civ. App.) 23 S. W. 483.

7. A written contract by which a landowner places land in the hands of real-estate agents for sale for eight months, and agrees to send to the agents any purchaser who might apply to him, vests the agents with exclusive authority to make the sale, and the landowner has no right to personally make a sale within the period.—*Stringfellow v. Powers*, (Tex. Civ. App.) 23 S. W. 313.

8. Where a landowner vests real-estate agents with exclusive authority to sell his land during a specified period, and agrees to pay them all over \$1,000 realized on the sale, the agents are entitled to recover, on a sale by the owner personally, any sum over \$1,000 which they prove they could have realized for the land but for the owner's breach of contract.—*Stringfellow v. Powers*, (Tex. Civ. App.) 23 S. W. 313.

FALSE PRETENSES.

See, also, "Fraud."

Indictment.

1. An indictment which charged that defendant obtained \$400 from complainant "by

means and use of a cheat, a fraud, trick, deception, false and fraudulent representations and statements, and false promises," is insufficient, though in the form prescribed by Rev. St. 1889, § 3826, as such section violates Const. art. 2, § 22, which declares that "in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation." *State v. Cameron*, (Mo. Sup.) 22 S. W. 1024, followed.—*State v. Kain*, (Mo. Sup.) 23 S. W. 763.

2. An indictment charged that defendant did "unlawfully and feloniously, with intent to cheat and defraud, obtain from one F. \$14.60, lawful money of the United States, of the value of \$14.60, the money of F., by means and by use of a cheat, a fraud, a trick, a deception, a false and fraudulent representation and statement and false pretense, a bogus written instrument." *Held*, that the indictment was defective, as not informing defendant of the nature of the charge against him.—*State v. Chapel*, (Mo. Sup.) 23 S. W. 760.

3. An indictment for false pretenses charged that defendant and his codefendants represented themselves as agents for a lightning-rod company, and desired to contract with one R. to rod his house, agreeing to give him 100 feet of rod, and to charge him only for their labor and the excess over 100 feet, and assuring him that it would not amount to more than \$5; and that he was induced to sign a contract by which he was obligated to pay \$195 for rodding his house, instead of \$5. *Held*, that the indictment was insufficient to support a conviction, especially where it appeared that R. paid defendant the \$195 without protest.—*State v. Cameron*, (Mo. Sup.) 23 S. W. 767.

4. An indictment under Rev. St. 1889, § 3564, providing that one who, with intent to defraud another, shall by false pretense obtain the signature of any person to a written instrument, shall be punished as for stealing the property or thing so obtained, which alleges that defendant, with intent to defraud C. of a certain lot, by false pretenses obtained of him the execution of a deed and all his interest in the lot, is not double, the gist of the offense being the obtaining of the signature, and the allegations as to the property being surplusage.—*State v. Flanders*, (Mo. Sup.) 23 S. W. 1086.

5. Gen. St. c. 29, art. 13, § 2, provides that if any one, by false pretenses, with intention to commit a fraud, obtain the signature of another to a writing, the false making whereof would be a forgery, he shall be confined in the penitentiary. *Held*, that an indictment charging that defendant obtained a signature to a note by falsely representing that it was a renewal of a note on which defendant was liable as principal, and the person signing it was liable as surety, and that said original note was due, did not charge an offense under the statute, as the gist of the charge was that defendant obtained the note by the promise that he would use it in renewal of the old note, and a false promise to do something is not a "pretense," within the statute.—*Commonwealth v. Warren*, (Ky.) 23 S. W. 193.

False Representations.

See "Fraud."

FAMILY SETTLEMENTS.

Conclusiveness.

Family settlements will be sustained in courts of equity unless it clearly appear that there is manifest error, and even in case of persons under disability a settlement will not be disturbed after a long lapse of time, and the accrual of other rights.—*Robinson v. Boyd*, (Tenn.) 23 S. W. 72; *Same v. Robinson*, *Id.*

Fees.

Of attorneys, see "Attorney and Client," 2.

Fee Simple.

See "Deed," 6.

Fellow Servant.

See "Master and Servant," 25-29.

Felony.

See "Criminal Law," 3.

Feme Covert.

See "Husband and Wife."

FERRY.

Power to create and operate public ferry.

1. Rev. St. art. 1514, empowering and requiring the county commissioners' court to establish public ferries whenever the public interest may require, authorizes it to create and operate a ferry.—*Burrows v. Gonzales County*, (Tex. Civ. App.) 23 S. W. 829.

2. Rev. St. tit. 87, c. 6, authorizing the county commissioners' court to grant licenses for ferries, does not take away its power, under article 1514, to create and operate a ferry.—*Burrows v. Gonzales County*, (Tex. Civ. App.) 23 S. W. 829.

License—Action for refusal to renew.

3. One to whom a license for a ferry has been granted has no cause of action because the county commissioners' court refused to renew it.—*Burrows v. Gonzales County*, (Tex. Civ. App.) 23 S. W. 829.

Findings of Fact.

See "Trial," 65.

Fires.

Caused by railroad, see "Railroad Companies," 30-32.

FIXTURES.

Between landlord and tenant.

A new stairway erected by a tenant in place of an old one removed by him is a fixture, which he cannot remove on the termination of the lease, in the absence of an agreement with the landlord giving him the right; and hence the landlord's refusal to permit such removal does not render him liable to the tenant for the value of stairway.—*Bovet v. Holzgraft*, (Tex. Civ. App.) 23 S. W. 1014.

Following Trust Funds.

See "Trusts," 11.

FORCIBLE ENTRY AND DETAINER.

Judgment.

In forcible entry and detainer a judgment against a tenant for the possession of a certain lot, and damages for its detention, is erroneous, where the evidence shows that a small fraction of the lot, only, was leased.—*Texas-Mexican Ry. Co. v. Cahill*, (Tex. Civ. App.) 23 S. W. 232.

Foreclosure.

See "Mortgages," 7-10.

Foreign Corporations.

See "Corporations," 14.

FORGERY.

What constitutes.

1. Where the figure 3 is wrongfully inserted between the dollar mark and the figures 70 in the upper margin of a check, thus making it appear to be a check for \$3.70, instead of 70 cents, it is forgery, though the amount was written "Seventy cts." in the body of the check, and was unaltered.—*Commonwealth v. Hide*, (Ky.) 23 S. W. 195.

Sufficiency of evidence.

2. Where, on a trial for forging a check, where the figure 3 is wrongfully inserted between the dollar mark and the figures 70 in the upper margin of a check, thus making it appear to be a check for \$3.70, instead of 70 cents, there was no evidence that any person except defendant had possession of it from the time of its execution until he received the money on it, it was error to direct an acquittal.—*Commonwealth v. Hide*, (Ky.) 23 S. W. 195.

FRAUD.

See, also, "Fraudulent Conveyances"

In antenuptial contract, see "Husband and Wife," 5.

Sale induced by, rights and remedies, see "Sale," 15, 16.

What constitutes.

When a surety who has discharged his obligation by paying a less sum than its full amount, by falsely representing that he has paid more, induces his principal to pay him the larger amount, the principal may recover back the excess.—*Price v. Horton*, (Tex. Civ. App.) 23 S. W. 501.

FRAUDS, STATUTE OF.

Agreements relating to land.

1. Plaintiff alleged that, by oral agreement between them, defendant bought land for \$700, defendant paying \$650 and plaintiff \$50; that defendant was to take the deed to herself, and allow plaintiff two years to pay her the \$650, with interest, and on payment was to convey him the land. *Held*, that such agreement was void under the statute of frauds.—*Benge v. Benge*, (Ky.) 23 S. W. 668.

— **As to boundaries.**

2. An agreement between adjoining owners, establishing the boundary line between their lands, is not within the statute of frauds.—*Ferguson v. Crick*, (Ky.) 23 S. W. 668.

Agreements not to be performed in a year—Part performance.

3. Plaintiff, defendant, and another agreed to erect a windmill at a well on the land of a third person, in consideration of which they were to have the use of the machinery and water for three years for their stock, and were to share equally the expense of the machinery. Plaintiff alleged that, after the mill had been erected and the water used about a year, defendant fenced in the well, and cut off plaintiff's stock from the use of it. *Held*, that the contract was not obnoxious to the statute of frauds because not to be performed within a year; the consideration having been paid, and action having been taken on the contract.—*Westfall v. Perry*, (Tex. Civ. App.) 23 S. W. 740.

FRAUDULENT CONVEYANCES.

Sale induced by fraud, rights of buyer's transferee, see "Sale," 16.

What constitutes.

1. A provision in a conveyance of a stock of goods in trust for certain creditors empowering the trustee to sell the goods at retail until the stock shall be so reduced as not to justify further retail sales, and then to sell the remainder in bulk, does not of itself render the instrument void, though the grantor was insolvent, and all his property was conveyed, the property conveyed not being in excess of the amount of the valid debts intended to be secured.—*Rainwater-Boogher Hat Co. v. Weaver*, (Tex. Civ. App.) 23 S. W. 914.

2. A provision in a conveyance of a stock of goods in trust for certain creditors, that attorneys' fees for services rendered in preparing and defending the conveyance shall be secured, does not render the conveyance void, since the grantor had a right to employ counsel for that purpose.—*Rainwater-Boogher Hat Co. v. Weaver*, (Tex. Civ. App.) 23 S. W. 914.

3. A trust deed authorizing the trustee to sell the property conveyed at wholesale or retail, to pay certain creditors, is not void on its face where it does not show that the assignors were insolvent, nor that they owed other debts than those secured by it, nor that the property conveyed was all that they possessed.—*Blankenship & Blake Co. v. Kelly*, (Tex. Civ. App.) 23 S. W. 27.

4. A conveyance by an insolvent debtor, by deed of trust, for the benefit of certain creditors, of all the debtor's property, the value of which is less than the amount of the debts secured, is not void, as hindering and delaying the other creditors, by reason of a provision allowing the trustee to sell the property, consisting of merchandise, in the regular course of trade.—*Bank of California v. Marshall*, 23 S. W. 244, 1 Tex. Civ. App. 704.

5. A deed of trust for the purpose of preferring certain creditors of the grantor, when acted on by the trustee and beneficiaries, constitutes a contract resting on mutual promises, and it is therefore supported by a consideration.—*Butler v. Sanger*, (Tex. Civ. App.) 23 S. W. 487.

6. Where a debtor, for the purpose of securing certain debts, conveys in trust property less in value than the amount of such debts, a provision in the trust deed authorizing the trustee to sell at either public or private sale, and to employ clerks and attorneys to assist and advise him, will not affect the validity of the trust deed as to unsecured creditors, since they could not be injured by it.—*Butler v. Sanger*, (Tex. Civ. App.) 23 S. W. 487.

7. A provision in a trust deed for the benefit of creditors, directing payment of a stated sum to an attorney for services in drawing the deed and in the execution of the trust, is valid unless such sum is unreasonable in amount.—*Butler v. Sanger*, (Tex. Civ. App.) 23 S. W. 487.

Consideration.

8. A surety is a creditor of his principal, and where the principal becomes insolvent before the debt matures he may prefer the surety to the amount thereof.—*Butler v. Sanger*, (Tex. Civ. App.) 23 S. W. 487.

Knowledge of grantee.

9. Where a vendor owed the debts recited in the bill of sale of his property, and the property transferred was no more than sufficient to pay them, and the purpose of the vendees in purchasing was to collect their debts, even though the vendor was insolvent, and though his purpose was to defraud his other creditors, and the vendees knew that such would be the result of the sale, the sale was not fraudulent as to the other creditors.—*Hamilton-Brown Shoe Co. v. Whitaker*, (Tex. Civ. App.) 23 S. W. 520; *Same v. Kellam*, Id. 524; *Same v. Cameron*, Id. 525; *Same v. Sanger*, Id.

10. Though a creditor may take security, even when he knows that it will delay the

debtor's other creditors, and that the debtor's purpose is to hinder such other creditors, provided the creditor does not participate in the fraudulent purpose of his debtor, still there was no error in instructing, if the debtor gave a note and trust deed to the creditor with intent to hinder his creditors, and the creditor knew of such intent, and aided or "in any manner" assisted him in carrying out such fraudulent intent, the security would be void. *Black, O. J.*, and *Brace and Macfarlane, JJ.*, dissenting.—*Alberger v. White*, (Mo. Sup.) 23 S. W. 92.

11. There is no error in an instruction that if the debtor made the instruments with intent to hinder, delay, or defraud his creditors, and the secured creditor knew this, and "participated in such intent," in any manner, the instruments would be void, though the creditor had a valid debt secured thereby. *Black, C. J.*, and *Brace and Macfarlane, JJ.*, dissenting.—*Alberger v. White*, (Mo. Sup.) 23 S. W. 92.

Confidential relations.

12. Plaintiffs, judgment creditors of the firm of S. & R., sued to set aside a deed from S. and his wife to her granddaughter, R.'s daughter. S. & R., merchants, had been closed up on attachments in 1882, having bought largely on credit and sold for cash, of which some deal was unaccounted for. The same year these lots had been bought in the name of Mrs. S., and S. & R. had built on them a dwelling, which they occupied with their families. Just before judgment in the attachment suits Mrs. S. and S. gave a deed of trust on the lots to R.'s sister G., who admitted that she took it to protect the house from the creditors. The dwelling and S. & R.'s storehouse were sold under the judgments, and bid in in G.'s name by one acting under instructions from S., who told him where to get the money. S. had deposited this money himself. Thereafter S. & R. occupied the house without rent, rented out the storehouse, and controlled it. In 1883, G., without actual consideration, conveyed the house to Mrs. S. The deed was recorded in 1887, when G., for like value, released the trust deed. Soon after, the S.'s, without consideration, made the deed in suit. It appeared that since their failure, both S. and R. had done business, requiring capital, in other people's names; that all the transactions with G. were arranged by them, G. signing, as she said, without asking questions. *Held*, that a finding for plaintiffs was supported by the evidence.—*Baum v. Sauer*, (Mo. Sup.) 23 S. W. 147.

13. Where a husband receives money from his wife under an agreement to invest it in land for her benefit, which he does not do, and he afterwards conveys land to a third person, in consideration that the grantee pay certain indebtedness of the grantor, and under an agreement that the grantee, when reimbursed for the money paid out on such indebtedness, will convey such land to the wife, the land cannot, as against the wife, be subjected to the payment of a judgment against the husband, though he repaid the grantee the money paid out by the latter for his benefit.—*Blair v. Matthews*, (Ky.) 23 S. W. 874.

14. One of the vendees in the bill of sale of an insolvent vendor was a ward of the vendor, who had used her funds in his business, and had made no return to the probate court since his appointment. The vendees were required to give full receipt for their entire claims, and the guardian attempted to pay off his ward in that way, though the property was not sufficient to pay the full amount of the claims. There was no proof that any probate court had passed on and approved the acts of the guardian, but when the ward came of age he adopted all acts done by his guardian in the matter in his behalf. *Held*, that the sale to the ward was illegal, and that he acquired no title. *Cabell v. Shoe Co.*, 16 S. W. 811, 81 Tex. 104, followed.—*Hamilton-Brown Shoe Co. v. Whit-*

aker, (Tex. Civ. App.) 23 S. W. 520; Same v. Kellam, Id. 524; Same v. Cameron, Id. 525; Same v. Sanger, Id.

Evidence.

15. In an action for damages for wrongful attachment plaintiffs claimed title under a bill of sale by defendant in attachment suit. One of plaintiffs, wife of such vendor, claimed that her husband owed her for money loaned him from her separate estate. The evidence showed that after her marriage she sold 200 acres of land, that the proceeds were loaned to her husband, and that the consideration for the conveyance to her by the bill of sale was the debt thus contracted. *Held*, that the record of the will of the wife's father was admissible to show that the land in question was devised to her by the will.—Hamilton-Brown Shoe Co. v. Whitaker, (Tex. Civ. App.) 23 S. W. 520; Same v. Kellam, Id. 524; Same v. Cameron, Id. 525; Same v. Sanger, Id.

16. In an action by creditors of M. to set aside conveyances of land by M. to L. and by L. to F., plaintiffs alleged that such parties, all of whom were defendants, had conspired together to defraud M.'s creditors. Plaintiffs had levied an attachment on the land, and on three mules belonging to M., and one of the mules was missing at the time of the sale, which occurred a few months after the conveyance to L. It was stated by M. that L. had borrowed such mule and ridden it off. There was evidence of fraudulent dispositions of property by M. previous to his failure. *Held*, that evidence was admissible to show that about the time the mule was missing L. had it in his possession in another county, and sold it to the witness.—Farr v. Willis, (Tex. Civ. App.) 23 S. W. 90.

—Burden of proof.

17. In an action for the value of goods seized by defendants under attachment against one from whom plaintiff had purchased them, in which defendants answer that the sale was in fraud of creditors, plaintiff may rest on his bill of sale until defendants have proven facts showing fraud, the burden of proof being on them.—Greathouse v. Moore, (Tex. Civ. App.) 23 S. W. 226.

—Sufficiency.

18. The assignment of a contract with a city will not be set aside on the ground that it is fraudulent as to the assignor's creditors, where assignee, who was surety on the assignor's bond to the city for faithful performance, testifies without contradiction that he took the assignment solely to protect himself from loss, the assignor having been unable to perform the contract, and no evidence of fraud is given except an attempt to show that the assignor was insolvent at the time of the assignment.—Alamo Cement Co. v. City of San Antonio, (Tex. Civ. App.) 23 S. W. 449.

Instructions.

19. In an action to set aside deeds to defendant on the ground that they were in fraud of the grantor's creditors, there was evidence that the grantor had acted honestly, and there was also evidence of a state of facts which, if established, would show constructive fraud. Plaintiff propounded special issues as to such facts. The court submitted the special issues, and also charged that, unless the jury should find that the deeds were made for the purpose of defrauding the grantor's creditors, and defendant knew it at the time he took the deeds, they must find for defendant. *Held*, that the charge was erroneous, as leading the jury to believe that they must first find the fraudulent purpose on the grantor's part, before the facts contained in the special issues could have any effect.—Weiss v. Dittman, (Tex. Civ. App.) 23 S. W. 220.

20. Where the court properly charges that if the grantors of a leasehold interest were in failing circumstances, and made the transfer with intent to defraud their creditors, and their in-

tent was known, or could have been known, to the grantees, the transfer is void, it is misleading to add that "on this question you should find" against the grantees, "although said transfer was made for good and valuable consideration."—Le Doux v. Johnson, (Tex. Civ. App.) 23 S. W. 902.

21. C. sold to W. his business. W. paid some cash, gave his note, agreed to assume existing obligations, turned over the accounts due, and agreed to pay half the loss on the accounts not collected. As collateral security for these obligations, W. gave to C. a note secured by deed of trust on the stock. It was contended by creditors that there was fraudulently included in the note more than the amount of all these obligations. *Held*, that an instruction that though C. had a right to take a note, secured on the property of W., for "any bona fide debt of W. to him," whether due or to become due, yet if, at the time the note and deed were executed, W. was indebted to others, and the note was for a larger amount than W. owed, or was liable for, to C., and both knew this, then the note and deed were fraudulent as to such creditors, was not open to the construction that C. could not be secured by such note and mortgage against the old obligations which W. had assumed.—Alberger v. White, (Mo. Sup.) 23 S. W. 92.

GAMING.

Criminal prosecution—Indictment.

1. An indictment for permitting a game of dice to be played at a storehouse in defendant's control need not allege that defendant knowingly permitted the game to be played.—Stringfellow v. State, (Tex. Cr. App.) 23 S. W. 893.

Wagers—Liability of stakeholders.

2. A wager on the result of an election is illegal, null, and void as between the parties; and the stakeholder, who is notified by one of the parties not to pay over the money to his adversary, after the result of the election has become known, but before an actual payment has been made, cannot defeat an action by such party for its recovery, since in such case there is a disaffirmance of the wagering contract before it has become executed.—Lewy v. Crawford, (Tex. Civ. App.) 23 S. W. 1041.

GARNISHMENT.

See, also, "Attachment;" "Execution."

Discharge of garnishee—On defendant's answer.

1. The answer of a corporation, as garnishee in an action, stated facts showing that certain shares of corporate stock were community property of defendant and his wife, and defendant's answer denied this, and averred that the stock was the separate property of his wife. *Held*, that it was error to discharge the garnishee on defendant's answer, without hearing evidence in support thereof.—Waco State Bank v. Stephenson Manufg Co., (Tex. Civ. App.) 23 S. W. 234.

Attorney's fees.

2. Where the answer of a garnishee admits an indebtedness to the principal defendant, and judgment is rendered therefor, the garnishee is not entitled to recover an attorney's fee from plaintiff, as Sayles' Civil St. art. 219, provides for such recovery only when the garnishee is discharged on his answer.—Llano Improvement & Furnace Co. v. Castanola, (Tex. Civ. App.) 23 S. W. 1016.

GIFTS.

Inter vivos.

A mere declaration by a minor, since deceased, that he wanted his stepmother to have all his father's land, is not sufficient to

show a gift by the minor to her of an unlocated land certificate owned by the father at his death.—*Harvey v. Carroll*. (Tex. Civ. App.) 23 S. W. 713.

Grand Jury.

Compelling druggists to produce prescriptions for sale of liquor, see "Constitutional Law," 4. Powers, subpoena duces tecum, see "Witness," 16.

GUARANTY.

Consideration.

The consideration passing between the payee and the maker of a note is not sufficient to uphold a guaranty of the note, made, at the solicitation of the payee, several weeks after the execution of the note, where such guaranty was no part of the inducement to its execution.—*Baker v. Wahrmond*, (Tex. Civ. App.) 23 S. W. 1023.

GUARDIAN AND WARD.

See, also, "Infancy."

Declaration of guardian as to appointment, see "Evidence," 23.

Appointment of guardian.

1. The jurisdiction of the county court to appoint guardians for minors does not accrue until the death of one or both of the minor's parents, his natural guardians.—*Jordan v. Jordan*, (Tex. Civ. App.) 23 S. W. 531.

2. Rev. St. art. 2506, permits a minor of 14 or more to select a guardian, except where the surviving parent has appointed a guardian; and article 2510 permits such minor to change his guardian, with the same exception. *Held*, that such a minor's expressed desire to exchange the guardianship of one parent for that of the other does not authorize the county court to grant guardianship of his person to the former, after the district court, in its decree of divorce between the parents, has awarded him to the latter.—*Jordan v. Jordan*, (Tex. Civ. App.) 23 S. W. 531.

Power of guardian—To contract.

3. Under Act Tex. May 20, 1848, making it the duty of a guardian to take care of and manage his ward's estate as a prudent man would his own, a guardian had a right to employ a person to hunt up and locate her wards' ancestor's head-right certificate, in consideration of an interest in the land located, without special authority from the probate court. Following *Wren v. Harris*, 14 S. W. 696, 78 Tex. 349.—*Ellis v. Stone*, (Tex. Civ. App.) 23 S. W. 405.

Submission to arbitration.

4. A guardian has no power to make a submission to arbitration for his wards when he is interested adversely to them in the subject-matter of the arbitration.—*Fortune v. Kilbrew*, (Tex. Sup.) 23 S. W. 976.

Claims against ward—Presentation.

5. A claim against the ancestor of minor heirs need not be verified and presented to the guardian as a precedent to suit against him.—*Buchanan v. Thompson's Heirs*, (Tex. Civ. App.) 23 S. W. 328.

Sale of ward's realty.

6. One for whom land was devised in trust for life, with remainder for his children, after qualifying as their guardian, with the trustee petitioned for sale of part of the land to obtain means to repair the homestead on the remaining tract, the remainder-men not being made parties to such proceeding. *Held*, that the sale of such part under the judgment of the chancellor was void as to the remainder-men, since the chancellor was authorized by statute to order sale on the petition of a guard-

ian only for purposes of reinvestment.—*Hays v. Bradley*, (Ky.) 23 S. W. 372.

Setting aside.

7. Though the sale was void as to the remainder-men; still, the value of the remainder interest in the remaining tract having been enhanced by the expenditure thereon of the proceeds of the part sold, and they having received the full benefit of this by selling the remaining tract, they should not be allowed to recover the part sold under the void judgment of the chancellor without accounting to the purchaser for the amount his money enhanced the value of their interest.—*Hays v. Bradley*, (Ky.) 23 S. W. 372.

Habeas Corpus.

In extradition proceedings, see "Extradition."

Handwriting.

Proof of, see "Evidence," 67, 68.

Harmless Error.

See "Appeal," 76-86; "Criminal Law," 102-110.

Hearsay Evidence.

See "Evidence," 11, 12.

HIGHWAYS.

See, also, "Easements."

Adverse possession of land dedicated for street, see "Adverse Possession," 4.

Dedication of, see "Dedication," 2.

—incumbrance of homestead, see "Homestead," 18.

Defective streets, see "Municipal Corporations," 6-12.

User and prescription.

1. The mere fact that, after a fence dividing a strip of land from the street disappeared, a private individual, not the owner of the land, for his own purposes, laid a sidewalk thereon, which was used by the public, does not show adverse user, so that the city can claim by prescription where it never made any claim to the property, and exercised no control or management of it.—*City of San Antonio v. Sullivan*, (Tex. Civ. App.) 23 S. W. 307.

Establishment by statutory proceedings.

2. Where a road is opened through private land, in arriving at the damage to the land, the benefits and injuries which the owner sustains in common with the community generally, and which are not peculiar to the land, should not be considered.—*Parker County v. Jackson*, (Tex. Civ. App.) 23 S. W. 924.

Damages caused by alteration.

3. Where a road of the third class through a person's land is changed to one of the second class, the measure of damages is the value of the additional land taken, and the depreciation in value of the remainder caused by the change; and it is error to charge that the jury shall ascertain, as elements of damage, the reasonable cost of erecting fences, and providing facilities for watering stock, that may be rendered necessary by the change, the evidence of such necessity being only admissible to show the lessened value of the land.—*Parker County v. Jackson*, (Tex. Civ. App.) 23 S. W. 924.

HOMESTEAD.

Homestead donations, see "Public Lands," 12-15.

Levy of attachment on homestead, see "Attachment," 4.

Mechanics' liens, see "Mechanics' Liens," 4.

chased the lot for the purpose of a homestead, and that he immediately took possession thereof, and inclosed it with a good and substantial fence, and planted shade trees, cleared the lot preparatory to building a house thereon, and caused the plans and specifications to be made by an architect, are sufficient, as against a demurrer, to show that the lot was plaintiff's homestead, the facts, if true, not being insufficient as a matter of law to show intention to occupy the same as a homestead.—*Gallagher v. Keller*, (Tex. Civ. App.) 23 S. W. 296.

Enforcement of right—Pleading.

2. A petition to enforce a homestead right in a lot as against a purchaser at an execution sale is not fatally defective because it does not allege that its value did not exceed \$5,000.—*Gallagher v. Keller*, (Tex. Civ. App.) 23 S. W. 296.

3. A petition to remove a cloud on the title to land claimed by plaintiff as a homestead, created by a sheriff's deed to a purchaser at an execution sale, is not demurrable on the ground that it fails to disclose in what manner the existence and record of the deed constitute a cloud.—*Gallagher v. Keller*, (Tex. Civ. App.) 23 S. W. 296.

Property in which right may be claimed.

4. The owner of a homestead pulled down the old residence thereon, and in part with the material thereof built a new residence. *Held*, that the residence was an "improvement," and subject to a debt created before its erection, under Gen. St. c. 38, art. 13, § 16.—*Butler v. Davis*, (Ky.) 23 S. W. 220.

Extent.

5. Where a debtor, owning 84 acres of land, exchanges 20 acres for a smaller tract, on which there is a house, and moves into it, his residence lot and the remaining 64 acres, connected by a passway 150 yards in length, constitute one tract, which he is entitled to hold as his homestead if less than \$1,000 in value.—*Slaughter v. Karn*, (Ky.) 23 S. W. 791.

6. Where the owner of a block, on one end of which he has built a home, divides the rest into lots, and sells one of them, dividing the residence lot from the others, the latter are not part of the homestead.—*Cullum v. Price*, (Tex. Civ. App.) 23 S. W. 711.

Surviving members of family.

7. D. lived with her grandmother, who had been deserted by her husband, on premises which were the grandmother's separate property, and held by her as a homestead. Her grandmother had cared for her as her own child from infancy, while her own mother, the grandmother's daughter, being also deserted, had been unable to provide her a home, but had worked around from house to house. *Held*, that D. was a constituent member of her grandmother's family, and could, on the latter's decease, continue to use the homestead.—*Clark v. Goins*, (Tex. Civ. App.) 23 S. W. 703.

Title of widow.

8. Where the law in force at an intestate's death vested in the surviving wife and minor children, when the estate was insolvent, an absolute title in the homestead, they would take equal interests therein, and on the death of the widow, who was the second wife of intestate, her child inherited her share to the exclusion of the children by the first wife.—*Gaines v. Gaines*, (Tex. Civ. App.) 23 S. W. 465.

Rights of children.

9. Where a widow and her minor child abandoned the homestead, the fact that such child's guardian, without order of court, rented out the land and collected rents therefor, and

ward to occupy the land as a homestead, as provided by Const. art. 16, § 52, to the exclusion of the other heirs of intestate.—*Gaines v. Gaines*, (Tex. Civ. App.) 23 S. W. 465.

Rights of heirs.

10. Where a grandmother dies leaving a homestead and a daughter, and also a granddaughter who was a constituent member of her (the grandmother's) family, the property vests in the daughter as legal heir, free from deceased's debts, and subject only to the granddaughter's right of occupation, and the daughter has a right to object to the approval of a sale of the premises by deceased's administrator.—*Clark v. Goins*, (Tex. Civ. App.) 23 S. W. 703.

Abandonment.

11. Where a married man removes with his family from his homestead to a neighboring town, to act as tax collector, and at the expiration of his term keeps an hotel in another city for several months, and later a butcher shop, he has abandoned his homestead.—*Mattingly v. Berry*, (Ky.) 23 S. W. 215.

12. Intestate died insolvent, leaving, him surviving, three minor children by his first wife, his second wife, and one child by her, part of his land being set aside to the wife and their child for homestead. Shortly after his death his wife left such land, and lived in another county till her death. *Held*, that the wife had abandoned her homestead, and that her child acquired no homestead right by the prior occupancy of her mother.—*Gaines v. Gaines*, (Tex. Civ. App.) 23 S. W. 465.

13. A man sold and conveyed land which he and his wife had occupied as a homestead. Two weeks before the sale, he and his family had moved away from the premises, and his wife consented to such removal, but she favored a lease of the land, and not a sale, and hence did not join in the deed. She, however, had no intention to return to the land without her husband, and he had frequently expressed his intention not to return. The husband bought, with part of the proceeds of sale, some lots, which were exempt from liability to creditors as constituting a homestead, though the family lived for a time in a rented house; and subsequently he leased for five years a large farm, on which he died. *Held*, that the homestead was abandoned by both husband and wife before the sale.—*Nash v. Herring*, (Tex. Civ. App.) 23 S. W. 739.

Mortgages and conveyances.

14. A defense of homestead will not avail on foreclosure of a mortgage where, at the time of its execution, the land was not part of the homestead.—*McCandless v. Freeman*, (Tex. Civ. App.) 23 S. W. 1112.

15. Where a purchaser of land executes his notes for the deferred payments, which expressly retain a vendor's lien, the fact that he uses the premises as a homestead for his family will not invalidate a mortgage executed by him alone to secure other notes given by him in renewal of the vendor's lien notes which he was unable to pay at maturity.—*Baker v. Collins*, (Tex. Civ. App.) 23 S. W. 493.

16. A mortgage given on the homestead by an unmarried surviving spouse is valid.—*Kiobassa v. Raley*, 23 S. W. 253, 1 Tex. Civ. App. 165.

17. Act March 18, 1887, provides that no conveyance affecting the homestead shall be valid unless the wife joins in executing and acknowledging it. Act April 13, 1893, declares that all such conveyances executed since March 18, 1887, which are deficient because not executed and acknowledged in accordance with the act of March 18th, shall be as valid as though such act had never been passed. *Held*, that where the name of the wife did not appear in the granting part of such conveyance,

nor anywhere else in the conveyance. except in a clause declaring that she released to the grantee all her right and possibility of dower, no third person having acquired any interest in the land conveyed, the defect, if any, was cured by the act of April 13th.—*Sidway v. Lawson*, (Ark.) 23 S. W. 648.

Dedication of street as incumbrance.

18. Const. 1868, art. 12, § 2, provides that the homestead of any resident, who is a married man or head of a family, shall not be incumbered while owned by him. *Held*, that a person who laid off his homestead into blocks, lots, and streets, for the purpose of sale, but reserved as his homestead the block on which his residence stood, did not incumber his homestead, in violation of the constitution, by dedicating the streets, as laid out, to the city. *Klenk v. Knobbe*, 37 Ark. 298, followed.—*City of Little Rock v. Wright*, (Ark.) 23 S. W. 876.

HOMICIDE.

Right to bail, see "Bail," 1-3.

Murder.

1. Defendant and another, the only persons present when deceased was killed, swore that deceased was trying to get at defendant around a certain tree, and was cutting at him with a large knife; that defendant did not fire until he had retreated from the tree, followed by deceased. Other witnesses testified that, while they saw tracks on defendant's side of the tree, there were none on the other side between deceased's body and the tree, a space of 15 feet, though the ground was soft. A knife was lying loose in deceased's hand. *Held*, that a verdict of guilty was sustained by the evidence.—*Nelson v. Commonwealth*, (Ky.) 23 S. W. 350.

2. On a prosecution for murder it appeared that a farmhouse, in which deceased and her mother lived, was destroyed about 10 o'clock P. M. by fire, and their bodies taken from the ruins in a much charred condition, but showing signs that murder had been committed before the fire took place. Tracks were found in the snow, leading from a strawstack to the house, along which straw was scattered, as if some had been carried to the house in order to start a fire. There were other tracks leading from the house, which were immediately followed up, and which led to a railroad yard, where a man was seen, who was identified as defendant. This man was followed to a point near an hotel, and on inquiry there it was found that defendant had just registered. When found in his room his clothes were drabbed with snow and mud, and when told that a house and its occupants had been burned he said that he had not been to the country that night, though he had not been told that the house was in the country. There was evidence that defendant, who had at times lived at the farmhouse, had had improper relations with the mother, had tried to have an abortion committed, and had said that the child would "have to be gotten rid of," and after the fire a fetus was found in the cellar of the burnt house. Defendant was at the house on the afternoon of the day on which the crime was committed, and later was seen in a neighboring town, and after 8 o'clock he was seen leaving the town, and going in the direction of the house. *Held*, that defendant was properly found guilty.—*State v. Howell*, (Mo. Sup.) 23 S. W. 263.

3. Where the evidence of defendant's brother, an eyewitness, and of the person who did the killing, and of defendant, who is charged merely with aiding and abetting, shows that defendant did not, by word or act, aid, abet, or assist the person who did the killing, and the other evidence tends to corroborate rather than to contradict the statements of such witnesses, a verdict of guilty is not sup-

ported by the evidence.—*State v. Rector*, (Mo. Sup.) 23 S. W. 1074.

4. Defendant's confession was that he had met deceased, a young woman, and, after walking together, they stopped at a gate and talked; that deceased quarreled with him about another man, told him she would cut his throat, drew a knife on him to do so, and defendant knocked her down; that she got up and struck at him with the knife; that defendant took the knife away from her, and said, "If one of us has got to die, * * * I just as well be hung for you as you for me," and that he took the knife from deceased, and struck her in the throat. *Held* a deliberate killing, without apparent provocation or necessity.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

5. Defendant was convicted of murder in the second degree. It appeared that a few minutes after the release of defendant from an arrest made at the instance of deceased, and while he was standing on a corner with friends, deceased passed by, having his hand in his pocket. Defendant said to him, "Howdy, Alf?" and deceased replied, "You son of a bitch," and started to turn around, at the same time attempting to draw his hand from his pocket, whereupon defendant shot him. After defendant was arrested, in reply to a question why he had killed deceased, he replied that he thought he had just as soon kill him then as any time. In the pocket of deceased was found a slung shot, and for some time before the killing there had been hard feeling between them, and each had made threats against the other, which had been communicated. *Held*, that the verdict was not against the weight of the evidence.—*State v. Lewis*, (Mo. Sup.) 23 S. W. 1082.

Manslaughter.

6. The fact that an aged cripple replies to insulting questions asked him by defendant, a young and vigorous man, "none of your d—n business," and shoves defendant, and raises his hand as if to strike defendant, does not reduce to manslaughter a series of brutal assaults on the old man by defendant, who knocked him down, and kicked him to death; and defendant cannot complain of a verdict finding him guilty of murder in the second degree.—*State v. Kloss*, (Mo. Sup.) 23 S. W. 780.

7. On a murder trial, evidence that deceased and another, armed with a knife, advanced on defendant, warrants an instruction on the law of self-defense, but does not require one on manslaughter.—*Williams v. State*, (Tex. Cr. App.) 23 S. W. 793.

8. On a prosecution for murder, there was evidence that defendant and two others, who confessed their guilt, were together on the morning of the day of the killing, armed with guns and one pistol, which latter defendant had; that he was heard to say that the matter would be settled that day; and that they went so armed to a house, where deceased was shot with a gun and a pistol. *Held*, that a verdict of manslaughter was authorized by the evidence.—*Braford v. Commonwealth*, (Ky.) 23 S. W. 690.

9. On a trial for murder it conclusively appeared that deceased was killed by one stroke of a knife, and that a brother of defendant, since dead, had been convicted of the crime, after confessing on his trial that he killed deceased, declaring that it was done in self-defense. No witness for the prosecution stated that the stab was inflicted by defendant, but such witnesses agreed generally that both he and his brother were striking at deceased with knives at the time. Several witnesses testified to dying statements by deceased that defendant's brother killed him, and 10 or more disinterested witnesses testified that defendant was not present. *Held*, that a verdict of manslaughter should be set aside.—*Smith v. Commonwealth*, (Ky.) 23 S. W. 588.

10. Manslaughter in the fourth degree being the intentional killing of a human being

the involuntary killing of another by a weapon or by means neither cruel nor unusual, in the heat of passion, in any case other than justifiable homicide,—where two persons ran together to the scene of a fight, and one of them, shouting, "Shot them down!" threw a club at a person present, which knocked him down, and the other grabbed him as he attempted to rise, and struck him, the two may be equally guilty, though the blow which caused death was that received from the club first thrown.—*State v. Hermann*, (Mo. Sup.) 23 S. W. 1071.

11. The court charged that "if defendant and deceased willingly engaged in a combat, and fought on equal terms, * * * and defendant killed deceased, then you will find defendant guilty of manslaughter." *Held* proper.—*Craig v. State*, (Tex. Cr. App.) 23 S. W. 1108.

Manslaughter—Accessories.

13. A finding that accused was accessory to the killing of deceased, and guilty of manslaughter, was warranted by evidence which showed that deceased and a friend went to the house of accused to play cards with accused and D.; that, while there, notes passed between deceased and a woman with whom D. was criminally intimate; that D. and accused went out of the house for a few minutes; that, on their return, D. got into trouble with deceased's friend, knocked him down, shot him while down, and then shot deceased; that, when the trouble began, accused rushed upstairs, got his gun, returned, and would have shot deceased, but was prevented by the woman; that deceased requested accused not to shoot, as he was already killed; and that accused said he would not hurt him, and left the house with D.—*Sloan v. Commonwealth*, (Ky.) 23 S. W. 676.

Excusable homicide—Self-defense.

13. An instruction excusing homicide on the ground that deceased was making an attack on defendant under circumstances indicating an intention to take life or do great bodily harm, or if it so appeared to defendant as a reasonable man, and the circumstances were such as to excite the fears of a reasonable man, is too broad and unqualified, as it must appear that the danger is not only impending, but so pressing and urgent as to render the killing necessary.—*Johnson v. State*, (Ark.) 23 S. W. 7.

14. Where defendant's wrongful acts bring on a difficulty, the fact that he is an officer, and in the course of the difficulty attempts to arrest deceased, will not avail him as a defense.—*Johnson v. State*, (Ark.) 23 S. W. 7.

15. An instruction denying defendant the right of self-defense if he was the assailant, though he afterwards abandoned the conflict in good faith, and did not kill till forced to do so, is erroneous.—*Johnson v. State*, (Ark.) 23 S. W. 7.

16. The fact that defendant was on his own premises at the time of the homicide does not render erroneous an instruction that the killing was not justifiable on the ground of self-defense unless defendant had no safe means, or apparently safe means, of protection, but to kill deceased, since the jury, in finding defendant guilty of murder, though he had been knocked down by deceased, must have believed that he was never in any danger from which he was required to escape.—*Johnson v. Commonwealth*, (Ky.) 23 S. W. 507.

17. Defendant having had a difficulty with B., a warrant was given deceased, a constable, for defendant's arrest, and, stepping into a store where defendant was, deceased threw up his hands, exclaiming, "Don't do that," and was immediately shot and killed by defendant. Defendant claimed that he thought that deceased was B., who he had been in-

him to kill him, and if, believing this, he shot to save his own life, he was excusable, was as favorable to defendant as he had a right to expect.—*West v. Commonwealth*, (Ky.) 23 S. W. 368.

18. On a trial for murder, it appeared that defendant feared that deceased would report him to the federal marshal for carrying on an illicit still, and that each had threatened to kill the other. On the day of the homicide, deceased, wholly unarmed, was with others at defendant's still, and defendant two or three times challenged deceased to strike him. Deceased finally did so, knocking him down, but made no attempt to do anything further, when defendant, lying on his back, fired his pistol, killing deceased. *Held*, that an instruction that the killing was not justifiable, on the ground of self-defense, if defendant brought on the difficulty with deceased, "and sought his life," was not misleading as authorizing the jury to convict if the difficulty was brought on by defendant innocently, and with no felonious or unlawful intent.—*Johnson v. Commonwealth*, (Ky.) 23 S. W. 507.

19. One who has been summoned by a deputy sheriff to aid in suppressing disorder is not bound to seek means of escape from a disorderly person threatening his life with a knife; nor, having been forced to retreat, is he in fault for returning armed.—*Cockrell v. Commonwealth*, (Ky.) 23 S. W. 659.

20. An instruction that the jury may acquit if they believe that, when defendant shot, he was in immediate danger, etc., is error, as it requires the jury to find that the danger was real, and not merely apparent.—*Cockrell v. Commonwealth*, (Ky.) 23 S. W. 659.

21. On trial of an officer for shooting a person when pursuing him to make an arrest for breach of the peace, it was error to charge that if the officer gave deceased reasonable ground to believe that he intended to take the life of deceased, or to do him great bodily harm, and deceased thereupon tried to shoot the officer, to prevent the apprehended danger, the officer could not avail himself of the threatening conduct of deceased as a ground of self-defense.—*Doolin v. Commonwealth*, (Ky.) 23 S. W. 663.

22. Defendant and deceased were fellow workmen, and deceased, who was of an overbearing nature, interfered with defendant's work, and in the presence of the workmen placed a pistol in his drawer. Shortly before the killing he threatened to kill defendant, and on several occasions shoved him off the pavement when he met him on the streets. *Held*, that an instruction that if defendant, at the time of the shooting, in good faith believed, and had reasonable grounds to believe, that he was in immediate danger of loss of life or of great bodily harm from deceased, he might use such means as were necessary, or apparently necessary, to protect himself from impending danger, and if, in so doing, he shot and killed deceased, he was excusable, embraced the law of self-defense as applicable to the facts.—*Haverly v. Commonwealth*, (Ky.) 23 S. W. 664.

23. The fact that some one, after an old man had been twice knocked down by defendant, called out that he was getting his gun, did not give defendant the right to again attack and jump on him, without even looking to see if he was getting or had a pistol; and the refusal of the court to instruct on the law of self-defense was proper.—*State v. Kloss*, (Mo. Sup.) 23 S. W. 780.

24. Where, on trial of a person for willfully and maliciously shooting and wounding another with intent to kill him, the testimony shows a mutual combat, in which both parties were anxious to engage, it is error to give instructions which make the guilt of defendant depend on whether or not he brought on the

altercation.—*Watson v. Commonwealth, (Ky.)* 23 S. W. 666.

26. The court defined a cause justifying homicide as "a serious personal conflict, in which great injury is inflicted by the person killed, by means of a weapon or instrument of violence, or means of great superiority of personal strength, although the person guilty of the homicide was the aggressor, provided such aggression was not made with intent to bring on a conflict for the purpose of killing." *Held* proper.—*Craig v. State, (Tex. Cr. App.)* 23 S. W. 1108.

26. It is error to instruct that the jury are not authorized to acquit on the ground of self-defense if they believe from the evidence that defendant voluntarily sought or brought on or invited the combat or difficulty in which deceased lost his life, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily entered into the difficulty of his own free will, since, if mutual combat is entered into without any felonious intent, it is not murder if one of the combatants is killed.—*State v. Lewis, (Mo. Sup.)* 23 S. W. 1082.

27. Defendant cannot justify a homicide on the ground of threats against his life by deceased, unless, at the time of the homicide, deceased, by some act done, manifested an intention to execute such threats.—*Craig v. State, (Tex. Cr. App.)* 23 S. W. 1108.

Assault with intent to kill.

28. On a trial of a person for an assault with intent to murder his wife, the evidence showed that defendant had quit her for a year, and she had returned to her parents; that he suddenly appeared at night, on the gallery, and, pointing a gun in the room where his wife was, snapped a cap, and began cursing the gun; and that he warned his father-in-law and others not to come to him. Defendant testified that the gun was not loaded. *Held*, that a verdict of guilty was supported by the evidence.—*Lynn v. State, (Tex. Cr. App.)* 23 S. W. 689.

29. On the trial for assault on a city marshal with intent to kill, defendant testified that he shot four times at the marshal, merely to scare him away, and with no intention to kill. *Held*, that defendant's own testimony justified a conviction, and did not require an instruction as for a simple assault.—*State v. Nelson, (Mo. Sup.)* 23 S. W. 1088.

Indictment—Murder.

30. Where the concluding part of an indictment for murder states merely that the accused, "him, the said —, in manner and form aforesaid, did kill and murder," etc., omitting "by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought," it is fatally defective.—*State v. Rector, (Mo. Sup.)* 23 S. W. 1074.

31. An indictment charging, in the conclusion, that defendant "maliciously, premeditatedly, and of malice aforesaid, did kill and murder deceased, against the peace and dignity of the state," sufficiently charges murder.—*State v. Banks, (Mo. Sup.)* 23 S. W. 1079.

32. Where an indictment for murder undertakes to charge that the crime was committed by an assault with some heavy weapon, to the jurors unknown, the omission of the word "with" is fatal.—*State v. Rector, (Mo. Sup.)* 23 S. W. 1074.

— Manslaughter.

33. In an indictment for manslaughter alleged to have been committed "unlawfully, willfully, maliciously, feloniously, in a sudden affray," the word "maliciously" is mere surplusage, and the offense is sufficiently charged.—*Coe v. Commonwealth, (Ky.)* 23 S. W. 371.

— Assault with intent to kill.

34. An indictment charging that defendant "did unlawfully, feloniously, and maliciously, with intent to kill him, cut and wound one"

Y., is sufficient, under Gen. St. c. 29, art. 6, § 2, making it a felony for any person to "willfully and maliciously cut, strike, or stab another, with intention to kill," if the person so injured does not die thereby.—*Flint v. Commonwealth, (Ky.)* 23 S. W. 346.

Evidence.

35. On a trial for murder, committed while the parties were engaged in a game of cards, evidence of the conduct of deceased and his partner while engaged in another game of cards on the same day, with another person, is incompetent.—*Ferrill v. Commonwealth, (Ky.)* 23 S. W. 344.

36. On a trial for murder, where the evidence tends to show that deceased and a person who was with defendant at the time of the shooting were unfriendly, by reason of an alleged assault of such person on a son of deceased, whether such assault occurred, and, if so, the circumstances connected with it, are immaterial, the shooting having been some time after the assault.—*Caskey v. Commonwealth, (Ky.)* 23 S. W. 368.

37. On the trial for cutting another with intent to kill, evidence of a difficulty between defendant and another person, which had no connection with the offense charged, is incompetent.—*Flint v. Commonwealth, (Ky.)* 23 S. W. 346.

38. It is not error to strike out testimony that deceased, two weeks before the killing, had a revolver, as such evidence is immaterial.—*State v. Lewis, (Mo. Sup.)* 23 S. W. 1082.

39. On a trial for homicide, which defendant seeks to justify on the ground of self-defense, evidence of threats, or any other competent evidence tending to rebut the defense, is admissible, though it may tend to establish the crime of murder, of which defendant has already been acquitted.—*Craig v. State, (Tex. Cr. App.)* 23 S. W. 1108.

— Declarations.

40. In a murder case, where one of the principal questions is whether deceased was attempting to draw a pistol on accused when he fired, the statements of all the persons engaged in the quarrel during which the shooting occurred, made while it was going on, are competent as showing the nature of the difficulty, and the attitude of the parties towards each other.—*Ferrill v. Commonwealth, (Ky.)* 23 S. W. 344.

41. On a prosecution for the killing of a person while present at a fight between J. and G., testimony as to what B. said to J. with regard to G. in the presence of deceased was properly excluded, there being no pretense that deceased said anything that might characterize his subsequent conduct.—*State v. Hermann, (Mo. Sup.)* 23 S. W. 1071.

— Dying declarations.

42. Where a wound is of such a nature as to make it plain that the wounded man believed he would die very soon, and his conversation shows that he believed death inevitable and near at hand, his declarations made within an hour of his decease are admissible, though he did not expressly state that he was bound to die, or that he had no hope of recovery.—*McHargue v. Commonwealth, (Ky.)* 23 S. W. 349.

Instructions.

43. On a trial of a person for an assault with intent to murder his wife, a charge as to the failure of the gun with which the assault was made to fire, qualified by an instruction to acquit of an assault with intent to murder if the jury believed it was not loaded, is not a charge on the weight of evidence, nor improper.—*Lynn v. State, (Tex. Cr. App.)* 23 S. W. 689.

44. It appeared that from the beginning of the trouble between defendant and deceased until they were left alone, just before the killing, the latter was the aggressor; that defend-

There was evidence that deceased was quarrelsome, and habitually carried a pistol, and that defendant's reputation was good. *Held*, that it was error to modify the usual charge as to self-defense by adding: "Unless the jury believe from the evidence that 'defendant brought on' the trouble, in which event he cannot avail himself of the plea of self-defense, unless he had 'withdrawn from the difficulty prior to the stabbing,'"—since there was no evidence to authorize it.—*Wilcoxon v. Commonwealth*, (Ky.) 23 S. W. 195.

43. Such instruction is objectionable in that it ignores the important questions as to the manner of bringing on the difficulty, and defendant's intent.—*Wilcoxon v. Commonwealth*, (Ky.) 23 S. W. 195.

46. In a prosecution for homicide, the use in an instruction of the language, "brought on the conflict by attacking the deceased with a pistol," is not too general, as failing to indicate the manner or purpose of bringing on the difficulty.—*Crawford v. Commonwealth*, (Ky.) 23 S. W. 592.

47. An instruction that if the jury believe, beyond a reasonable doubt, that defendant, after quarrelling with deceased, left the place, and afterwards, being in no danger, and away from deceased, voluntarily returned and renewed the quarrel, he cannot rely on the law of self-defense, unless, after such return, he abandoned the quarrel, in good faith, before the shooting, is erroneous, as requiring defendant to prove his abandonment of the quarrel beyond a reasonable doubt.—*Cockrell v. Commonwealth*, (Ky.) 23 S. W. 659.

48. An instruction that defendant is guilty of murder in the first degree if he shot deceased with a manifest design to kill, with a sufficient time to deliberate and to fully form the conscious purpose to kill, and without sufficient cause or extenuation, and that the state must prove the willfulness, deliberation, and malice aforethought, does not dispense with premeditation as an element of the crime, since that is included in the terms "deliberation" and "malice aforethought."—*State v. Reed*, (Mo. Sup.) 23 S. W. 886.

49. Where the evidence for the state shows the killing to be murder in the first degree, while that of defendant shows it to be purely accidental, a refusal to instruct on murder in the second degree is proper.—*State v. Reed*, (Mo. Sup.) 23 S. W. 886.

50. Where the only defense to a charge of murder is accidental killing, a refusal to instruct on the law of self-defense is proper.—*State v. Reed*, (Mo. Sup.) 23 S. W. 886.

51. All instructions must be read together, and the failure of the court to include the element of premeditation in one of its instructions defining murder in the first degree is immaterial, where other instructions fully cover the subject.—*State v. Reed*, (Mo. Sup.) 23 S. W. 886.

52. An instruction in a prosecution for homicide that malice aforethought is a predetermination to kill without lawful excuse, and that it is immaterial how suddenly or recently this predetermination is formed, is not objectionable as allowing the presence of such malice in a lawful killing in self-defense.—*Armstrong v. Commonwealth*, (Ky.) 23 S. W. 654.

53. Where the only provocation for killing deceased testified to by defendant was an assault accompanied by a battery, a definition of considerable provocation as meaning an assault and battery of some force is harmless error.—*Armstrong v. Commonwealth*, (Ky.) 23 S. W. 654.

54. An instruction on manslaughter is properly refused, where there is no evidence on which to base it.—*State v. Lewis*, (Mo. Sup.) 23 S. W. 1082.

ground that he was present aiding and abetting therein, though he did not actually commit it, when it appears that the case was not tried on such a theory or issue, and the decided weight of the evidence is that he was not present at the time of the commission of the crime.—*Smith v. Commonwealth*, (Ky.) 23 S. W. 588.

56. The punishment for manslaughter being imprisonment for from 2 to 21 years, to be fixed by the jury, the admission of incompetent evidence, the natural effect of which is to lessen the force of other testimony, tending to show criminal intimacy by deceased with plaintiff's wife is reversible error.—*Scott v. Commonwealth*, (Ky.) 23 S. W. 219.

57. An erroneous instruction on self-defense is no ground for reversal where there was no evidence which would warrant acquittal on the ground of self-defense.—*State v. Lewis*, (Mo. Sup.) 23 S. W. 1082.

HORSE AND STREET RAILROADS.

See, also, "Carriers."

Control of streets, see "Municipal Corporations," 4, 5.

Liability for negligence.

In an action for the death of a child, run over by defendant street-car company at a crossing, where there is no evidence of negligence on defendant's part, the court may properly refuse to instruct as to the precautions to be observed by the managers of cars at street crossings.—*Schlenks v. Central Pass. Ry. Co.*, (Ky.) 23 S. W. 589.

HUSBAND AND WIFE.

See, also, "Curtsey;" "Divorce;" "Dower;" "Homestead."

Allowance to widow, see "Executors and Administrators," 23.

Capacity of wife to make will, see "Wills," 2. Community property, bona fide purchaser, see "Vendor and Purchaser," 31, 32.

Conveyance of wife's separate property, acknowledgment, see "Acknowledgment," 1. Deed of wife's land by husband, estoppel of husband, see "Estoppel," 1.

Estoppel of wife, see "Estoppel," 6, 7. Exemption from taxation, see "Taxation," 2. Personal injuries to wife, see "Damages," 24, 25.

Rights of husband.

1. A Texas land certificate being personal property, an interest in such a certificate, inherited by a married woman living with her husband in Virginia, when the common law of descent and distribution obtained, vested in the latter, and her joinder in a power of attorney to locate the land was needless.—*Franklin v. Piper*, (Tex. Civ. App.) 23 S. W. 942.

Right to collect wife's patrimony.

2. Where the husband is insolvent, and the wife is capable of managing her property, executors of her father's estate are justified in paying her distributive share over to her, at her request, and against her husband's protest.—*Bunger v. Petty's Ex'rs*, (Ky.) 23 S. W. 961.

Conveyance by husband—Joinder of wife.

3. A deed by a married man of land not his homestead will convey title without his wife's joining therein.—*Cullum v. Price*, (Tex. Civ. App.) 23 S. W. 711.

Estate by entirety.

4. Where land is conveyed to a husband and his wife during the existence of the marital

relation, they hold it by entirety during their joint lives, and on the death of either the survivor takes the entire estate.—*Chambers v. Chambers*, (Tenn.) 23 S. W. 67.

Antenuptial contracts—Fraud.

5. A man of 68 years of age, worth about \$20,000 in money, was engaged to marry an illiterate woman of 50 years. Two days before the appointed marriage day, with a lawyer, he visited in the evening his intended bride, who had about \$100, and had a marriage settlement read to her, which both parties signed. By it she parted with all her marital rights in his estate for the use of a house and lot worth not exceeding \$1,000, her husband relinquishing his interest in her estate. After the contract was signed he insisted on a marriage the next morning at 5 o'clock, giving her no opportunity to see or consult her friends. After the marriage she was compelled to do the work of a menial, and refused many necessary comforts. *Held*, that the settlement would be set aside.—*Simpson v. Simpson's Ex'rs*, (Ky.) 23 S. W. 361.

Wife's separate estate.

6. Interest due from a husband on money borrowed from his wife, and agreed to be paid her for its use, is her separate property.—*Hamilton-Brown Shoe Co. v. Whitaker*, (Tex. Civ. App.) 23 S. W. 520; *Same v. Kellam*, Id. 524; *Same v. Cameron*, Id. 525; *Same v. Sanger*, Id.

7. Where the price of land is paid partly in cash from the wife's separate estate, and partly by notes, wherein the husband joins pro forma, with the intention that they shall be paid from the wife's estate,—the deed being made to the wife, but not disclosing that the land is her separate estate,—such land is not subject to levy by a creditor of the husband, who has notice of this fact.—*Parker v. Fogarty*, (Tex. Civ. App.) 23 S. W. 700.

8. A wife had at different times from 1867 to 1883 inherited sums amounting to \$2,650, and had loaned them to her husband, who agreed to pay them, with interest. In 1885 the couple sold their homestead for \$4,500 cash, which the husband paid to his wife on account of said loans, and which was deposited in bank to her credit. The wife drew \$1,000 as cash payment for land bought, and the balance was drawn in her name, and was invested by the husband in a mercantile business. It was understood that the land was bought for the wife's separate estate. The husband managed said business, and, as the interest became due on the land, he took out of the business money to pay it. The business was not very profitable. In 1889 he paid the interest from the products of the land. *Held*, that the interest being paid either out of the wife's separate estate, or by the husband in discharge of his debts to her, the land was the wife's, and was not subject to her husband's debts.—*Parker v. Fogarty*, (Tex. Civ. App.) 23 S. W. 700.

Charges on property.

9. After services have been performed for the benefit of a married woman's separate estate, under a contract which did not bind her, her husband cannot ratify it, so as to bind her property.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

10. A wife's separate estate is not bound on the theory that services, rendered under a contract which did not bind her, were necessary, and constituted an equitable charge on the land.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

11. Where a married woman invests her separate estate in a mercantile partnership, her interest in the stock of goods, in the absence of an express agreement by her to the contrary, is not liable for the payment of a note executed by the firm for general partnership purposes. *Snodgrass, J.*, dissenting.—*Theus v. Dugger*, (Tenn.) 23 S. W. 135.

Community property,

12. Pension money paid to a veteran in the Civil War is a donation from the government, and is his separate property, though he did not receive it until after his marriage; and the fact that he invested it in land does not change its character into community property.—*Johnson v. Johnson*, (Tex. Civ. App.) 23 S. W. 1022.

13. Where a deed is made to a married woman during coverture, the presumption is that the land is community property, in the absence of proof that it was purchased with her separate estate; and hence her grantee, on a prosecution for obstructing a public road on the land laid out at the instance of her husband, cannot object that the husband had no authority to grant a right of way without the consent of the wife.—*Augustine v. State*, (Tex. Cr. App.) 23 S. W. 794.

14. Where one, before his marriage, conveys property on condition that from the income there be paid him annually a certain amount, the amount due him, whether treated as an annuity, or a debt for the purchase money of the property, is his separate estate.—*Krohn v. Krohn*, (Tex. Civ. App.) 23 S. W. 848.

15. In an action to recover, as heir of plaintiff's mother, an interest in land which had been sold on execution against her father alone, claiming that when sold the land was community property, the court found that the land was purchased with money brought by plaintiff's parents from Missouri, under whose laws property acquired during marriage becomes the separate property of the husband. The evidence showed that the parents were married in Missouri in October, 1858; that in December, 1859, they were residing in Texas; that in July, 1860, the land was purchased of an estate, under an order allowing a credit of one year; that a note was given for a portion, only, of the price. But there was no evidence as to when or how the balance of the price was paid. *Held*, that the land was community property.—*Crow v. Fiddler*, (Tex. Civ. App.) 23 S. W. 17.

16. Land belonging to a decedent's estate was conveyed by the administrator to B., who gave a note for a part of the price, signed by a surety. The administrator subsequently procured a judgment on the note against the surety alone, and in execution thereof levied on the land conveyed to B., and sold the same to defendant's grantor. While B. held the land, it was community property. *Held*, that, though the decedent's estate received the benefit of the void sale to defendant's grantor, as between defendant and the heirs of B.'s wife, the latter's interest is superior.—*Crow v. Fiddler*, (Tex. Civ. App.) 23 S. W. 17.

17. A single man, with his brother, resided upon a 160-acre tract of land for more than three years, under the pre-emption laws, the land having been surveyed, and the survey returned to the general land office. He then divided with his brother, continuing to reside on the 80-acre tract, and, a year afterwards, married. *Held*, that the division did not affect his right to the 80 acres as his separate property, and his wife acquired no community interest therein.—*Gardner v. Burkhardt*, (Tex. Civ. App.) 23 S. W. 709.

18. Defendant, after he had acquired the right to 80 acres of land by virtue of a homestead entry and residence thereon, married, and afterwards filed an application for 135 acres, including the original 80-acre tract, and received a patent therefor. *Held*, that this application did not constitute an abandonment of the original claim to the 80 acres, so as to destroy his separate right thereto, and vest the whole in the community estate.—*Gardner v. Burkhardt*, (Tex. Civ. App.) 23 S. W. 709.

19. A husband, as surviving member of the community subsisting between himself and his deceased wife, has the right to compromise an outstanding claim to the community real estate, and such compromise is conclusive as against the children, especially where the le-

20. Rev. St. art. 2801, provides that all property owned by the wife before marriage, or acquired afterwards by gift, devise, or descent, and the "increase of all lands thus acquired, shall be the separate property of the wife; and during the marriage the husband shall have the sole management of all such property." *Held*, that the rents accruing on the wife's realty are not her separate property, but are subject to garnishment for the debts of the husband as community property. —Hayden v. McMillan, (Tex. Civ. App.) 23 S. W. 430.

21. The rents of the separate real estate of a married woman are community property. —Shepelin v. Small, (Tex. Civ. App.) 23 S. W. 432.

22. A conveyance by husband and wife of the wife's separate real estate to a trustee, to apply the rents and profits to the support of the wife, is a withdrawal of the rents from the community estate. —Shepelin v. Small, (Tex. Civ. App.) 23 S. W. 432.

Community property—Sale by surviving wife.

23. Pasch. Dig. art. 4642, vests the husband with full control over the community property on the decease of his wife, empowering him to sell the same, and sue and be sued in regard thereto, in the same manner as during her lifetime, on filing in the probate court a full and complete inventory and appraisal, to be taken and recorded as in cases of administration. *Held*, that article 4652, which vests the surviving wife with exclusive management and control of the community property, under the same rights, rules, and regulations as are enacted in favor of the surviving husband, so long as she remains unmarried, empowers an unmarried surviving wife to sell the community property. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

24. The fact that an inventory of community property filed in the probate court by the surviving wife did not, in terms, purport to be an inventory of all the community property, that no list of claims owing to the estate was attached thereto, and that the inventory was not signed and sworn to by her, as required by Pasch. Dig. art. 4648, is not sufficient to invalidate a sale of the community property by her. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

25. In an action involving the validity of a sale of community property by a surviving wife, the records of a suit against her to recover a debt owing by her husband, during the pendency of which the sale was made, are admissible to show that creditors of the estate had no complaint to make against her control and management of the estate, and that there was a debt valid against her. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

26. A decree on such final settlement, in proceedings to which the husband's heirs were parties, showing sales of community property by the wife, charging her with the proceeds, the payment by her of debts owing by the estate, the adjustment of the existing rights of all parties, and the partition of the residue of the estate between the widow and the heirs, is admissible to show that the heirs were bound by the decree, and received their share of the estate, and could not now complain against a purchaser from the survivor before such partition. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

27. In an action involving the validity of a sale of community property by a surviving wife, where plaintiff, claiming under the heirs of the deceased husband, contends that the surviving wife had no power to sell the community property, because of her failure to properly qualify

gave her power to act without qualifying. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

28. Though a power of attorney executed by a surviving wife, authorizing a sale of community property, does not expressly designate her as the duly-qualified survivor, yet a deed executed by the agent conveys a good title, where there are debts owing by the estate authorizing a sale by her without qualifying as survivor. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

29. The failure of a survivor of a community to execute a bond, as required by Act Aug. 1, 1870, passed during the pendency of the administration of the community, does not invalidate a deed executed by her after the passage of that act, where there are debts and charges against the community authorizing a sale by the wife without qualifying as survivor. —Withrow v. Adams, (Tex. Civ. App.) 23 S. W. 437.

Actions by husband—Personal injuries to wife.

30. A married man may maintain an action against his employer for injuries to his wife caused by the negligence of his fellow servant. —Campbell v. Harris, (Tex. Civ. App.) 23 S. W. 35.

Action by feme sole—Joinder by husband on marriage.

31. Where an unmarried woman brings an action and serves notice on defendant to produce on the trial certain documents, and she afterwards marries, and her husband joins her as a party plaintiff, a new notice need not be served, since the case is the same though the title is changed. —Church v. Chicago & A. R. Co., (Mo. Sup.) 23 S. W. 1056.

Action by surviving wife.

32. A wife, surviving her husband, may, before administration is granted on his estate, sue on a cause of action which accrued to the husband during his life, and which, surviving to the community estate, is subject to administration for the payment of his debts. —Western Union Tel. Co. v. Kerr, (Tex. Civ. App.) 23 S. W. 564.

Idem Sonans.

See "Name."

Impeachment.

Of witness, see "Witness," 7-14.

Improvements.

Allowance for, see "Trespass to Try Title," 18.

Imputed Negligence.

See "Negligence," 11.

Inadequate Damages.

See "Damages," 31.

Incorporation.

Of cities, see "Municipal Corporations," 1.

Indemnity.

Consideration for note given to indemnify surety, see "Negotiable Instruments," 3.

Description of money, see "Embezzlement," 4.
For particular crimes, see "Burglary," "Disorderly House," "Embezzlement," 3, 4; "False Pretenses," "Gaming," 1; "Homicide," 30-34; "Larceny," 3, 4; "Libel and Slander," 5, 6.

For assault with intent to kill, see "Homicide," 34.

Idem sonans, see "Name."

Indictment—Return, presentation, and record.

1. Rev. St. 1889, § 4092, provides that indictments by a grand jury "shall be presented by their foreman, in their presence, to the court, and shall be there filed and remain as records of such court." Section 4099 provides that, unless defendant is in custody or on bail, the indictment shall not be open to inspection, "nor shall it be docketed or entered upon the minutes or records of the court until the defendant therein shall have been arrested." *Held*, that where an indictment is signed by the prosecuting attorney, and is indorsed "A true bill," and "Filed," (with date of filing,) by the foreman of the grand jury and the clerk of the court, respectively, but no record entry is made that defendant was in custody or on bail, there is a sufficient record that the indictment was duly returned and presented in open court, though the clerk made no separate minutes of the filing.—State v. Lord, (Mo. Sup.) 23 S. W. 764.

Description of offense.

2. Under Gen. St. c. 29, art. 6, § 2, making it a felony when one "willfully and maliciously" shoots at and wounds another with intent to kill, an indictment accusing defendant of the crime of "maliciously" shooting at and wounding R., with intent to kill him, committed as follows: That defendant did on a certain day "willfully, maliciously," and feloniously, shoot at, etc.—is sufficient, though the word "willfully" is omitted from the accusatory part of the indictment.—Toler v. Commonwealth, (Ky.) 23 S. W. 347.

Variance—Time.

3. On a trial for perjury in swearing falsely in a bastardy proceeding, which the indictment alleges was had on October 1, 1892, the record of that proceeding is admissible, though it states the date as September 19, 1892; both dates being before the finding of the indictment.—Commonwealth v. Davis, (Ky.) 23 S. W. 218.

INFANCY.

See, also, "Guardian and Ward."

Attack on judgment against.

A judgment against infant defendants not served or cited, though represented by a guardian ad litem, will not stand on appeal or writ of error, this being a direct attack.—Moore v. Prince, (Tex. Civ. App.) 23 S. W. 1113.

Information.

See "Indictment and Information."

Infringement.

Of trade-mark, see "Trade-Marks and Trade-Names," 7.

INJUNCTION.

Against infringement of trade-mark, see "Trade-Marks and Trade-Names," 7.

—threatened nuisance, see "Nuisance."

Relief against judgment, see "Judgment," 33-37.

tract awarded by it which will be void when executed because it was awarded without previous advertisement for bids, as required by law and a resolution of such city.—Public Ledger Co. v. City of Memphis, (Tenn.) 23 S. W. 51.

2. The occupation of leased premises under a void assignment of a lease will be enjoined.—Matthews v. Whitaker, (Tex. Civ. App.) 23 S. W. 538.

Dissolution.

3. Where, in an action by a judgment debtor against his creditor and the officers of the county court to restrain the collection of the judgment, plaintiff's ground for injunction rests primarily on an indebtedness exceeding the judgment, alleged to be due him from the judgment creditor, and the answer specifically denies the existence of such indebtedness, and intelligently avers facts excluding the possibility thereof, it is not error to dissolve the injunction and dismiss the action.—Wheeler v. Gray, (Tex. Civ. App.) 23 S. W. 821.

In Pais.

See "Estoppel," 2-10.

Insanity.

Evidence, see "Evidence," 12.

Officer adjudged insane, see "Office and Officer," 1.

Insolvency.

See "Assignment for Benefit of Creditors;" "Fraudulent Conveyances."

Instructions.

See "Criminal Law," 48-60; "Homicide," 43-54; "Trial," 19-60.

INSURANCE.

On exempt property, see "Exemptions," 2.

Cancellation and rescission.

1. An agent, representing the several companies insurers of plaintiff's property, under instructions from them, went to plaintiff to cancel the policies. Plaintiff told him that they were transferred as security to two of his creditors, and declined to accept the unearned premiums. The agent thereupon mailed drafts for the same to said creditors, and one draft was accepted and paid. The other was declined by the creditor, on the ground that the fire had already occurred. It appeared that this creditor had recovered judgment on the policies involved, and the insurers had also compromised with plaintiff for his interest in them. *Held*, that these policies constituted "valid and existing insurance," within the prohibitory condition of a policy taken out by plaintiff the day of his talk with the agent.—East Texas Fire Ins. Co. v. Flippin, (Tex. Civ. App.) 23 S. W. 550.

General rule of construction.

2. No construction should be placed on an accident insurance contract that would defeat the intention of both parties to it.—American Acc. Co. v. Reigart, (Ky.) 23 S. W. 191.

Conditions of policy.

3. A fire insurance policy provided that if the building, "or any part thereof," fall, except as the result of fire, all insurance shall immediately cease. *Held*, that the falling of a minute portion of the material in the insured building would not avoid the policy, where no functional portion of the structure fell before the fire, so that its distinctive character as

such was destroyed.—*London & L. Fire Ins. Co. v. Crunk*, 23 S. W. 140, 91 Tenn. 376.

4. Under a condition in a fire insurance policy that the insured will keep his books in a "fireproof safe," the insured complies with the letter and spirit of the condition when he puts the books in a safe of the kind generally known as fireproof, and does not by this clause warrant the safe to preserve the books.—*Knoxville Fire Ins. Co. v. Hird*, (Tex. Civ. App.) 23 S. W. 393.

Actions on policies—Pleading.

5. In an action on an insurance policy the petition need not negative conditions which avoid the policy, nor aver the performance or nonperformance of conditions subsequent.—*London & L. Fire Ins. Co. v. Crunk*, 23 S. W. 140, 91 Tenn. 376.

Province of jury.

6. A fire insurance policy provided that if the building, "or any part thereof," fall, except as the result of fire, all insurance shall immediately cease. The court charged that if the roof was blown from a part of the building, and one of the upper rooms was uncovered, and the walls thereof partially blown away, but leaving more than three-fourths of the building intact, and that in this condition it was burned, defendant is liable, and that, if the fire was scattered over one of the rooms by the wind, and ignited the furniture, and a strong wind blew the roof and a portion of the building upon it, and it consumed the building, and that the fire, and not the falling of the building, was the proximate cause of the loss, the jury should find for plaintiff. *Held*, that such instruction was not objectionable, as an invasion of the right of the jury to determine as a fact what part of the building falling might be within such clause of the policy.—*London & L. Fire Ins. Co. v. Crunk*, 23 S. W. 140, 91 Tenn. 376.

7. Where the loss was by fire, there was no error in failing to submit to the jury the excepted causes,—"invasion, insurrection," etc.—*Knoxville Fire Ins. Co. v. Hird*, (Tex. Civ. App.) 23 S. W. 393.

Accident insurance.

8. Where an accident insurance policy is, by its terms, made payable in case of death "received through external, violent, and accidental means," the intent is that the means, or that which caused the injury, should be external, and not that the injury must be external.—*American Acc. Co. v. Reigart*, (Ky.) 23 S. W. 191.

9. Where the assured chokes to death while attempting to swallow a piece of beefsteak which accidentally lodges in his windpipe, death results from "violent and accidental means," within the meaning of the conditions of such policy.—*American Acc. Co. v. Reigart*, (Ky.) 23 S. W. 191.

INTEREST.

See, also, "Usury."

Charged by building associations, see "Building and Loan Associations," 1-4.

On damages.

1. The allowance of interest on the value of a mule killed on a railroad track is error.—*Texas & N. O. Ry. Co. v. Cunningham*, (Tex. Civ. App.) 23 S. W. 332.

2. In an action against a railroad company for damages to cattle in transit on defendant's road by delaying them at certain places, interest may be allowed on the amount of damages sustained, though it is not asked for in the pleadings.—*International & G. N. R. Co. v. Lewis*, (Tex. Civ. App.) 23 S. W. 323.

3. A judgment in an action for injuries to cattle shipped may be rendered for damages, and the interest thereon from the time they accrued to the date of judgment.—*International*

& G. N. R. Co. v. Dimmitt County Pasture Co. (Tex. Civ. App.) 23 S. W. 754.

4. A judgment for damages for injuries to cattle shipped, and interest on such damages, may provide that it shall bear interest from its date.—*International & G. N. R. Co. v. Dimmitt County Pasture Co.*, (Tex. Civ. App.) 23 S. W. 754.

Rate.

5. Where, after the conversion of property, the legal rate of interest is reduced, the owner is entitled as damages to the legal rate at the time of the conversion only to the time the law is changed, and to the lower rate from that time to the date of trial.—*Gulf, C. & S. F. Ry. Co. v. Humphries*, (Tex. Civ. App.) 23 S. W. 556.

6. Where, in an action to recover for goods lost in transitu over defendant railroad company's road, there was judgment for plaintiff, the court properly allowed interest on the value of the goods at 8 per cent. until the law changing such rate to 6 per cent. went into effect, since plaintiff was entitled to the current rate of legal interest on the value of the goods lost.—*Rio Grande R. Co. v. Cross*, (Tex. Civ. App.) 23 S. W. 529; *Id.* 1004; *Same v. Munoz' Successors*, *Id.* 531; *Same v. Petitpain*, *Id.*

7. Under Rev. St. art. 2980, providing that on contracts bearing interest at more than 8 per cent. the judgment shall bear the same rate from its date, a judgment on a note calling for 12 per cent. interest and 10 per cent. attorney's fees is properly entered for the sum of principal, interest, and attorney's fees, the whole to bear 12 per cent. interest from date.—*Llano Improvement & Furnace Co. v. Watkins*, (Tex. Civ. App.) 23 S. W. 612; *Same v. Eubanks*, *Id.* 613.

Interrogatories.

See "Trial," 63.

Interstate Commerce.

Regulation of, see "Carriers," 1, 2; "Constitutional Law," 3.

INTOXICATING LIQUORS.

Constitutionality of laws.

1. Rev. St. 1889, § 4622, providing that druggists shall produce in court, or before any grand jury, all prescriptions compounded by them, "whenever thereto lawfully required, and on failing, neglecting or refusing so to do shall be deemed guilty of a misdemeanor," is constitutional. 18 S. W. 894, 108 Mo. 666, approved.—*State v. Davis*, (Mo. Sup.) 23 S. W. 759.

2. The "Fleming County Prohibition Law," §§ 1-3, provide that it shall be unlawful to sell, loan, or traffic in liquors in any quantity whatever, except that the act shall not apply to a resident physician, who in good faith prescribes it as medicine, nor to sales by distilleries in quantities not less than 10 gallons, and then not to be drunk on the premises where sold, nor to those who furnish it to members of their own family, or to invited guests at their own household. Section 4 provides that "any person" violating section 1 shall be fined not less than \$100 or more than \$300. Section 5 provides that any physician who shall furnish such liquors to any person except as a medicine shall be fined \$100. *Held*, that such act does not impose a different penalty on physicians than on other persons for the same offense, and is not, therefore, unconstitutional for such reason; but section 5 is intended to provide a distinct penalty for physicians who prescribe liquors to be used otherwise than as a medicine.—*Commonwealth v. Day*, (Ky.) 23 S. W. 952.

Liquor dealer's bond.

3. A liquor dealer's bond, providing for a penalty in case the dealer permits any game

prohibited by the laws of the state to be conducted on the premises, must be strictly construed; and the state cannot maintain any action thereon for the penalty when the bond is made payable to the county judge, instead of to the state, as required by Act March 29, 1887.—*State v. Vinson*, (Tex. Civ. App.) 23 S. W. 807.

4. In an action to recover statutory penalties on the bond of a retail liquor dealer, in which the breach alleged is that such dealer permitted a minor to enter and remain in his place of business, it is no defense that such minor was a partner in the business, where he is not a party to the bond.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

5. Where a minor is permitted to enter and remain in a retail liquor dealer's place of business, such dealer and his bondsmen are liable to the penalties imposed by Acts 1887, p. 59, regardless of whether the owner or his agents in charge of such place believed, or had reason to believe, that such minor was over 21 years old.—*State v. Meyer*, (Tex. Civ. App.) 23 S. W. 427.

6. The liquor law of 1893, expressly repealing all parts of acts inconsistent therewith by making it a breach of a retail liquor dealer's bond to permit a minor to enter and remain on the premises, only where the liquors are kept for sale "to be drunk on the premises," repeals the provision of the liquor law of 1887, making it a breach of the bond to allow a minor on the premises, though liquors are kept for sale merely to be carried away and used.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 620.

— Action on.

7. An action on a retail liquor dealer's bond is properly brought in the name of the state.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

8. A petition which alleged the giving of a retail liquor dealer's bond, its violation by such dealer, by permitting a minor named to enter and remain in his place of business in a certain city and county in the state, when and where he was engaged in the sale of liquors in less quantities than a quart, states a cause of action.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

9. Evidence that a witness saw a minor go behind the counter in a dealer's place of business, and hand out some beer to other persons, is sufficient to support a finding that it was a place where liquors were sold in quantities less than a quart.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

Illegal sales and gifts.

10. The "Fleming County Prohibition Law," §§ 1-3, provide that it shall be unlawful to sell, loan, or traffic in liquors in any quantity whatever. Section 6 provides that the procuring or delivery by one person of liquor for another, unless a member of the same family, or invited guests at their own household, "to be drank as a beverage," shall be deemed a sale under the provisions of section 1, etc. *Held*, that section 6 is not a limitation on section 1, and a person who sells, barter, gives, or loans liquors to another, as denounced in section 1, is guilty of a violation of such section, whether the liquor is "to be drank as a beverage" or not.—*Commonwealth v. Day*, (Ky.) 23 S. W. 952.

11. Section 6 is intended to bring within the provisions of the act all persons who procure from the seller and deliver to the purchaser such liquors, and thus prohibit the importation of liquors into such county.—*Commonwealth v. Day*, (Ky.) 23 S. W. 952.

Keeping place open on Sunday.

12. Acts 1889, c. 31, makes it unlawful to "keep open on Sunday any place where such [intoxicating] liquors were sold, * * * provided that the provisions of this act shall not apply to druggists selling on the prescription of a practicing physician." *Held* that, where a

druggist also holds a tippler's license, and keeps his bar in the same room where his drugs are kept, so that it cannot be closed without closing the drug room, the latter must be closed on Sunday.—*McNeill v. State*, (Tenn.) 23 S. W. 52.

Sales on election day.

13. Giving a drink of liquor to a person between 9 and 10 o'clock P. M. on election day is a violation of Acts 1891-92, chapter on Elections, (article 18, § 10,) making it a misdemeanor to sell or give liquor to any person "upon the day" of any election, although the statute prescribes that voting shall cease at 4 o'clock P. M.—*Commonwealth v. Murphy*, (Ky.) 23 S. W. 655.

Criminal prosecution.

14. An act known as the "Fleming County Prohibition Law" provides that the certificate of the county board of examiners, showing that a majority of the votes of the county had been cast against the sale of liquors at an election held under such act, shall be recorded in the office of the clerk of the county court, and that "then" the provisions of the act shall be in full force. *Held* that, on a trial for violation of such law, the evidence must show that such certificate had been filed.—*Commonwealth v. Day*, (Ky.) 23 S. W. 193.

15. A statement in the bill of exceptions, immediately after such certificate, as follows: "Showing that the law * * * was in full force and effect in said county at the time of the sale," is but an erroneous conclusion, and does not show that the law was in force.—*Commonwealth v. Day*, (Ky.) 23 S. W. 193.

Inventory.

By executors, see "Executors and Administrators," 5.

Island.

Ownership, see "Riparian Rights," 1.

Joint Tenancy.

Estate by entireties, see "Husband and Wife," 4.

JUDGE.

See, also, "Courts."

Appointment, see "Constitutional Law," 1.

Resignation, see "Office and Officer," 2.

Disqualification.

1. Under Rev. St. art. 1138, which provides that a judge is disqualified when a relative "within the third degree" is a party to the suit, a judge who is the brother-in-law of a stockholder and president of a corporation is not disqualified to try an action to which such corporation is a party.—*Lewis v. Hillsboro Roller-Mill Co.*, (Tex. Civ. App.) 23 S. W. 338.

2. An action in which defendants' property was attached does not involve the validity of an assignment for benefit of creditors made before the attachment was levied, where neither the assignee, nor any person claiming under the assignment, is a party to the action; and therefore a special judge before whom the cause is brought for trial is not disqualified because he drew the assignment, advised the assignee, and was a creditor of defendants, and had accepted under the assignment.—*Kemp v. Wharton County Bank*, (Tex. Civ. App.) 23 S. W. 916.

3. Where, in trespass to try title, the judge in whose court the cause is pending has possession of the land in controversy, claiming title thereto, he is "interested," within Const. art. 5, § 11, providing that "no judge shall sit in any case wherein he may be interested," and is disqualified to try the cause, and the failure of plaintiff, through ignorance, to make him a

a city tax which was sought to be collected is disqualified to render a judgment enjoining the collection thereof.—*Wetsel v. State*, (Tex. Civ. App.) 23 S. W. 825.

Special judges.

5. Under Rev. St. 1889, § 3326, giving the special judge elected by members of the bar, in case of the absence or disqualification of the regular judge, all the powers of the circuit judge, he is under no duty or obligation to the regular judge; and the fact that he adjourned the court before the arrival of the regular judge, in violation of a promise made to the latter, does not affect the regularity of such action.—*State v. Ross*, (Mo. Sup.) 23 S. W. 196.

6. After court has been adjourned until the next regular term by a special judge, the regular judge has no power to reopen it.—*State v. Ross*, (Mo. Sup.) 23 S. W. 196.

7. A judge specially appointed to try a cause, because the regular judge is disqualified, cannot consolidate the cause with another, which he has not been authorized to try.—*Texas-Mexican Ry. Co. v. Cahill*, (Tex. Civ. App.) 23 S. W. 232.

JUDGMENT.

See, also, "Criminal Law," 65, 66; "Execution," 8.

Action by assignee, see "Parties," 1.

Against infants, see "Infancy."

—partnership, see "Partnership," 17.

—principal and surety, see "Principal and Surety," 3.

Appealable judgments and orders, see "Appeal," 1, 2.

Collateral attack on order of commissioner's court, see "Counties," 4.

Contradicting entry of judgment by minutes of court, see "Records," 2.

Evidence as to entry, see "Evidence," 10.

In action by one cotenant, right of action by other, see "Tenancy in Common," 6.

In particular actions, see "Forcible Entry and Detainer."

Merger of cause of action, see "Limitation of Actions," 23.

On award, see "Arbitration and Award," 5, 6.

On claim by third person in execution, see "Execution," 8.

On special verdict, see "Trial," 64.

Proof of, see "Evidence," 42.

Res judicata, election of remedies by seller, see "Sale," 14.

—judgment reversed on appeal, see "Appeal," 92.

Satisfaction by one not primarily liable, rights accruing, see "Partnership," 13.

Variance between judgment and execution, see "Execution," 3.

Rendition and entry.

1. The fact that persons have been improperly joined as parties defendant does not warrant the entry of a judgment in their favor, but the action should be dismissed as to them.—*Gillum v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 716.

2. Where a petition for wrongful attachment of joint purchasers under a bill of sale sets up in severally the interest of each of the plaintiffs in the property conveyed, and the bill of sale was made to them as the several vendees, stating that each should hold the property in proportion to the respective claims of each against the vendor, failure of one of plaintiffs to recover does not prevent a judgment in favor of those who established valid claims.—*Hamilton-Brown Shoe Co. v. Whitaker*, (Tex. Civ. App.) 23 S. W. 520; *Same v. Kellam*, Id. 524; *Same v. Cameron*, Id. 525; *Same v. Sanger*, Id. 526.

3. Where a petition names as plaintiff, among others, "Jane" B., joined by her hus-

band.—*Terry v. French*, (Tex. Civ. App.) 23 S. W. 911.

By default.

4. The mere filing of an answer will not prevent a judgment by default, but there must also be a subsequent appearance by defendant to protect his rights.—*Lytle v. Custead*, (Tex. Civ. App.) 23 S. W. 451.

5. Sayles' Civil St. art. 1220, requires, in order to effect service of citation, that, to a defendant residing without the county in which the suit is pending, the officer shall deliver the "certified" copy of the petition accompanying the citation. *Held*, that where the officer serving citation on a defendant who was temporarily residing without the county in which action was brought delivered to such defendant only an uncertified copy of the petition, and no copy of a supplemental petition which had been filed, it was error to render judgment against him by default.—*Lazarus v. Barrett*, (Tex. Civ. App.) 23 S. W. 822.

Res judicata.

6. Certain land of plaintiff was, in 1882, condemned for depot purposes, on application of defendant railway company. In an action to recover the land, plaintiff averred that after the judgment of condemnation she and her husband occupied the land as a homestead until 1883, when defendant recovered judgment in an injunction suit against them; that, notwithstanding such injunction, plaintiff had continued to occupy the land as a homestead until 1889, during which time defendant had not attempted to use the land as a depot; that, in 1889, plaintiff was twice adjudged guilty of contempt for violating the injunction, and an order was made placing defendant in possession; and that there was no necessity for the use of land for the purpose for which it was condemned, but that it was inclosed by defendant, and used as a park for adorning other property of defendant. *Held*, that the necessity for the condemnation of the land for depot purposes was conclusively determined by the judgment of the county court condemning it.—*Muhle v. New York, T. & M. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 809.

7. The order authorizing defendant to take possession was conclusive of all matters relied on by plaintiff for a recovery of the land at the time such order was issued, and for the same reason plaintiff's plea of the statute of limitations was of no avail.—*Muhle v. New York, T. & M. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 809.

8. A judgment, except in special cases, is res judicata, not only on the points as to which the court was required by the parties to form an opinion and pronounce judgment, but also on every point which properly belonged to the subject of litigation, and which the parties exercising a reasonable diligence might have brought forward at the time.—*Robinson v. Boyd*, (Tenn.) 23 S. W. 72; *Same v. Robinson*, Id.

9. Where, in partition, certain parties were held to have no title, it was not error to exclude as evidence, in a subsequent action by them to try title, certain tax deeds executed prior to such judgment, under which one of the defeated parties thereto claimed title.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

10. A judgment ordering that the cause be filed away for want of prosecution is not final or a bar to a subsequent action.—*Nickell v. Fallen*, (Ky.) 23 S. W. 366.

11. In an action by the state to dissolve the incorporation of a certain town, defendants offered in evidence a judgment in their favor in a former action brought for the same purpose. *Held*, that the former judgment was conclusive, the parties to each suit being in contemplation of law the same, though the relators were different.—*McCleskey v. State*, (Tex. Civ. App.) 23 S. W. 518.

12. In an action against the heirs of a deceased person to quiet title to property, under 2 Pasch. Dig. art. 5460, a judgment for plaintiff concludes all who claim by inheritance in the succession of the deceased, whether inheriting immediately from him or as successors of those so inheriting.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

Persons concluded by decision.

13. A vendor of land, who in his deed expressly retains a vendor's lien, is not affected by a judgment of foreclosure obtained by his vendee against a subsequent vendee in a proceeding to which he is not a party.—*Foster v. Andrews*, (Tex. Civ. App.) 23 S. W. 610.

14. A vendor of land, who expressly retains a vendor's lien for the whole price of the land, is not affected by a judgment for the land, obtained against his vendee, in a proceeding to which he is not a party; and it is immaterial that subsequently the vendee, having failed to pay the purchase money, reconveys the land to him, since his title is not dependent on such deed.—*Foster v. Andrews*, (Tex. Civ. App.) 23 S. W. 610.

15. Where a husband and wife, who had mortgaged land, had a judgment of foreclosure set aside to have a credit for a homestead interest allowed, and the litigation resulted in the exclusion of such credit, and the sale of the land under another judgment of foreclosure, the children of the mortgagors could not subsequently petition for the allowance of such credit.—*Rafferty v. Buckler*, (Ky.) 23 S. W. 947.

16. In an action by a father for the loss of his son's services because of personal injuries alleged to have been sustained while employed by defendant, the court found that the son was not injured while in the service of defendant. *Held*, that such finding is not admissible to prove the same defense in an action by the son against the same defendant to recover for such personal injuries.—*Guy v. Fisher & Burnett Lumber Co.*, (Tenn.) 23 S. W. 972.

Judgment against receiver—Effect on debtor.

17. The appointment of a receiver of a railroad does not pass title to the property, so as to render a judgment against the receiver conclusive against the company; and no writ of restitution should issue, even after the restoration of the property to the company, on a judgment against the receivers, to which the company is not a party.—*Abbey v. International & G. N. R. Co.'s Receivers*, (Tex. Civ. App.) 23 S. W. 934.

Lien.

18. Where a judgment creditor acquires a lien on land as against the grantee of a prior unrecorded deed, because he has no notice of such deed, and he purchases the land at sheriff's sale on execution issued on his judgment, his title is paramount to the title of such grantee, though he had notice of such prior deed at the time of his purchase.—*Russell v. Nall*, 23 S. W. 901, 2 Tex. Civ. App. 60.

19. A judgment was rendered December 3, 1875, and the first execution issued March 7, 1876, and was returned the same day; the second issued the same day, and was directed to the sheriff of another county; the third issued January 12, 1877; and the fourth, March 21, 1884. *Held*, that, under the statute of 1806, in force at the date of the judgment, it was not barred at time of filing a petition for a writ of scire facias, January 13, 1892.—*Mundine v. Brown*, (Tex. Civ. App.) 23 S. W. 90.

20. Defendant, by a deed absolute in form, conveyed land to one R. to secure a loan. After the loan was paid, R. executed a reconveyance of the land to defendant, but it was not filed for record until several years later, and after plaintiff had obtained and docketed a judgment against R., and had issued execution thereon. *Held*, that plaintiff could not subject such land to his judgment against R., since

a judgment creates a lien on land only to the extent of the debtor's actual interest therein, and the registration statutes do not apply to such a case.—*Michael v. Knapp*, (Tex. Civ. App.) 23 S. W. 280.

21. Under Rev. St. art. 3158, which requires the index to judgment abstracts recorded to show the name of each plaintiff and of each defendant in the judgment, no lien is created where both the record of the judgment and the index thereof state merely the firm name of plaintiffs, but do not state the names of each partner.—*Willis v. Nichols*, (Tex. Civ. App.) 23 S. W. 1025.

22. Rev. St. art. 3158, which requires the index to the judgment record to be alphabetical, and to show the name of each plaintiff and of each defendant, is sufficiently complied with by placing defendant's name in the proper alphabetical position, followed by plaintiff's name, though neither party is designated as defendant or plaintiff, and though neither the word "versus" or "against," nor any abbreviation thereof, is placed after the name of either party.—*Von Stein v. Trexler*, (Tex. Civ. App.) 23 S. W. 1047.

23. In Texas a judgment lien takes precedence of a prior, unrecorded deed by the judgment debtor, unless the judgment creditor has notice thereof.—*Von Stein v. Trexler*, (Tex. Civ. App.) 23 S. W. 1047.

Collateral attack.

24. An order of a special judge, vacating an order previously made by the regular judge appointing a receiver for a corporation, cannot be attacked on the ground of such judge's relationship to an interested party, in a mandamus proceeding by the person whose appointment is so revoked to procure the delivery to him of the corporate property by a receiver appointed by another court.—*State v. Ross*, (Mo. Sup.) 23 S. W. 196.

25. Nor can such order be attacked in such collateral proceeding as having been fraudulently issued. *Sherwood, J., dissenting.*—*State v. Ross*, (Mo. Sup.) 23 S. W. 196.

26. A judgment entered by default against a nonresident will not be subject to attack in a collateral proceeding on the ground that the record does not show an affirmative compliance with the provisions of the statute providing for the publication of a citation to defendant, the presumption being that there has been a full compliance. 21 S. W. 52, followed.—*Meade v. Bartlett*, 23 S. W. 186, 1 Tex. Civ. App. 342.

27. In an action by the state to dissolve the incorporation of a certain town, defendants offered in evidence a judgment in their favor in a former action brought for the same purpose, which judgment was entered on the refusal of the relators to prosecute the suit, the district attorney of the state offering no objection. *Held*, that it was error to exclude such evidence on the ground that the judgment was void, for, as the court had jurisdiction of the subject-matter, and power to render the judgment, such judgment would not be open to collateral attack.—*McCleskey v. State*, (Tex. Civ. App.) 23 S. W. 518.

28. A judgment cannot be collaterally attacked because founded on insufficient and incompetent testimony.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

29. A judgment which finds that "proper service had been made by publication on defendants" cannot be collaterally attacked because the affidavit for service by publication was insufficient.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

30. The county court, in probate matters, is a court of general jurisdiction, and its orders and judgments cannot be collaterally attacked.—*Corley v. Anderson*, (Tex. Civ. App.) 23 S. W. 839.

Probate of will.

31. The decree of a probate court, having jurisdiction of the subject-matter, admitting a

6, 7.
Under execution, see "Execution," 9-18.
was filed at the term at which the judgment was rendered, and continued to the next term, it suspended the judgment, so that the court can act on the motion the same as at the prior term.—*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

Equitable relief.

83. A vendor's lien was foreclosed, and the judgment assigned. Thereafter the vendor released his lien of record, but the judgment, though in fact paid to the assignee, was not so released. *Held*, that since said judgment was on its face a valid and subsisting lien on the land, requiring extrinsic and parol evidence to defeat it, equity would enjoin execution thereunder, and order its cancellation as a cloud on the title.—*Texas Land & Mortgage Co. v. Worsham*, (Tex. Civ. App.) 23 S. W. 938.

84. To warrant a court of equity in reviewing a judgment and in enjoining proceedings thereunder, the party seeking the relief must show, not only that injustice has been done him, but also that he was prevented from prosecuting his cause of action, or interposing his defense, by fraud, accident, or the act of the opposing party, wholly unmixed with any fault or negligence of his own; and the diligence required to be used to prevent injury is such as prudent and careful men would ordinarily use in their own causes of equal importance.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

85. The fact that a party to a suit is in delicate health, and goes abroad to recover, does not excuse him from making some provision by which his interest will be protected, and is no ground for a review of a judgment obtained against him.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

86. The fact that defendant's counsel informed plaintiff that the records of the case had been destroyed by fire does not excuse the failure of plaintiff or his counsel to pay any attention to the action, where the papers are subsequently produced in court, and given to plaintiff's counsel several months before the trial.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

87. The destruction of the records in a case will not excuse plaintiff, who has sequestered property of his adversary in an amount largely exceeding his claim, from paying any attention to the case; and a judgment for defendant on his plea in reconvention for damages for wrongful sequestration will not be disturbed on the ground that plaintiff was abroad for his health when it was rendered, and that he thought nothing would ever be done in the case.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

Laches in suing for relief.

88. A consent judgment will not be declared void on the ground of fraud in an action brought by the party against whom it was rendered nearly 20 years afterwards, where the facts constituting the alleged fraud were open to the observation of such party during the whole time.—*City of Goliad v. Weisiger*, (Tex. Civ. App.) 23 S. W. 694.

Assignment.

89. An assignee of a judgment takes it subject to all equities that then exist between the parties, including the right of the debtor to offset against the judgment a claim arising out of the same transaction as the one in which the judgment was rendered, but which the debtor was unable to plead at the beginning of the action because it was not then due, and which he could not plead when it matured, owing to the pendency of an appeal in the action to the supreme court.—*Ellis v. Kerr*, (Tex. Civ. App.) 23 S. W. 1050.

Confirmation.

1. Though an entry in the minutes of the court in relation to an executor's sale of a land certificate was not in terms a confirmation, yet where no further sale was ordered, and no objection was raised, and the money was paid, and possession of the certificate taken, by the purchaser, this is equivalent to a confirmation, and is sufficient to pass title.—*Corley v. Anderson*, (Tex. Civ. App.) 23 S. W. 839.

2. An administrator, under an order of court, sold a land certificate of his intestate in March, but the sale was not confirmed until the following May. In April a patent was issued by virtue of the certificate. *Held*, that title to the land passed on the sale of the certificate, the presumption being that the certificate had not been located at the time of the sale, and was personal property, and the confirmation, though subsequent to the day of sale, relates back to the date, and carries title from that time.—*Edwards v. Gill*, (Tex. Civ. App.) 23 S. W. 742.

Rights of purchaser.

3. Where land is sold under a vendor's lien, and afterwards is conveyed by the vendee to a third party, the latter cannot hold the title as against the purchaser at the execution sale under the lien, whether such sale was void or voidable only, without paying the amount of such lien.—*Terry v. Cutler*, (Tex. Civ. App.) 23 S. W. 539.

Jurisdiction.

See "Appearance;" "Courts;" "Criminal Law," 4.

On appeal, see "Appeal," 1-4.

On appointment of receiver, see "Receivers," 2.

Jurisdictional Amount.

See "Appeal," 3, 4; "Courts," 6-11.

JURY.

Custody and conduct of, see "Criminal Law," 61, 62.

Disqualification of juror as ground for new trial, see "Criminal Law," 72.

Province of, invasion by court, see "Trial," 50-59.

Competency of jurors.

1. A juror is not disqualified to serve on a trial for robbery by the fact that he was a juror on a former prosecution in which defendant was convicted of maiming, the record of which was, without objection, read in evidence on the trial for robbery.—*State v. Maloney*, (Mo. Sup.) 23 S. W. 1084.

2. Under Rev. St. 1889, § 4197, declaring it a good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried, but providing that, if such opinion is founded only on rumor and newspaper reports, and not such as to bias the juror's mind, he may be sworn, jurors who have read in newspapers what "purported" to be the evidence taken at the coroner's inquest, and what "purported to be" defendant's confession of the crime for which he is being tried, are competent.—*State v. Robinson*, (Mo. Sup.) 23 S. W. 1066.

Right to jury trial.

3. The court has jurisdiction to try, with a view to disbarment, charges against an attorney of misconduct in office, without the in-

of conviction is not supported by the evidence.—*Overturf v. State*, 23 S. W. 147, 31 Tex. Crim. R. 10.

6. Though, on a prosecution for theft of hogs, it was shown that the hogs were driven to the place where they were killed by others than defendant, the jury were authorized to infer that he was connected with the theft, where it was shown that he, with three others, was driven away from the dead hogs, and that he was afterwards overheard to say in his home that one of the state's witnesses had given them away.—*Tucker v. State*, (Tex. Cr. App.) 23 S. W. 682.

Instructions.

7. Where defendant contends that he bought the cattle he is accused of stealing, a charge that if the jury believes that he bought said cattle, or has a reasonable doubt that he stole them, the jury will acquit him, sufficiently states the issue.—*Mattheus v. State*, (Tex. Cr. App.) 23 S. W. 690.

Laws.

See "Statutes."

Leases.

See "Landlord and Tenant," 4, 5.

Legacies.

See "Wills."

Levy.

Of execution, see "Execution," 4, 5.

LIBEL AND SLANDER.

What actionable.

1. A postal card sent by a bank to a correspondent, from whom it had received a draft on B. Bros. & Co., a mercantile firm, for collection, and reading, "B. in hands of notary," while in fact the draft had been paid to the bank, is libelous per se.—*Continental Nat. Bank v. Bowdre*, (Tenn.) 23 S. W. 131.

Action for—Pleading.

2. Defendants may plead the truth of the language used by them, without regard to any innuendo that may have been employed in the declaration, and may join with such plea a denial of the meaning ascribed by the innuendo.—*Continental Nat. Bank v. Bowdre*, (Tenn.) 23 S. W. 131.

3. In an action for libel, whether or not the libelous matter is actionable per se, by pleading the general issue only, defendants admit that the language used by them is untrue.—*Continental Nat. Bank v. Bowdre*, (Tenn.) 23 S. W. 131.

—Instructions.

4. In an action for libel, where there is evidence to show the truth of the article alleged to be libelous, asserting that plaintiff, while deputy federal supervisor of elections, intimidated and interfered with the voters on one side, and worked for the other side, it is proper to instruct the jury that they must find for plaintiff if the publication was false and malicious, and that malice is inferable from the falsity of the publication, but that if they believe the publication was substantially true, or a reasonable and fair criticism of plaintiff's conduct as supervisor, and made in good faith, then they must find for defendant.—*Vance v. Louisville Courier Journal Co.*, (Ky.) 23 S. W. 591.

defendant] did then and there, in the presence and hearing of [two named persons,] and divers other persons, falsely, maliciously, and wantonly say of and concerning the said R. that T. was keeping her, the said R., and that T. was caught on R." Held, that the information was not sufficient to support a conviction for falsely imputing a want of chastity to a female, since it fails to state, except inferentially, what was imputed to the female, or who the female was.—*Neely v. State*, (Tex. Cr. App.) 23 S. W. 798.

—Pleading and proof.

6. In a prosecution for slander imputing want of chastity to a female, while it is unnecessary for the indictment to mention the name of more than one person in whose presence the slander was uttered, yet, when the names of two or more are alleged, the allegations must be proven, since the names then become descriptive of the offense.—*Neely v. State*, (Tex. Cr. App.) 23 S. W. 798.

License.

To operate ferry, see "Ferry," 3.

LIENS.

See, also, "Garnishment;" "Mechanics' Liens." Of attachment, see "Attachment," 5. Of judgment, see "Judgment," 18-23. Of mortgages, see "Mortgages," 4, 5. Of vendor, see "Vendor and Purchaser," 11-18.

Of bail bond.

The execution of a bail bond creates no lien on the land of the obligors.—*Cole v. Warner*, (Tenn.) 23 S. W. 110.

Life Insurance.

See "Insurance."

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."

Estoppel to plead, see "Mortgages," 10.

When statute is applicable.

1. Mansf. Dig. § 4474, providing that actions for the recovery of lands sold at judicial sales shall be brought within five years, is binding on courts both of equity and law.—*Bland v. Fleeman*, (Ark.) 23 S. W. 4.

2. The loss or waste of a grain crop, caused by the failure of a harvester to work as represented by the seller, is a "debt," within the meaning of Rev. St. art. 3203, § 4, which provides that "actions for debt, where the indebtedness is not evidenced by a contract in writing," are barred if not commenced within two years after the cause of action accrues.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Hancock*, (Tex. Civ. App.) 23 S. W. 384.

3. A grantee in a deed absolute in form, but intended as a mortgage, cannot enforce the lien thereof, where he is not in possession under it, after the debt secured is barred by limitation.—*McKeen v. James*, (Tex. Civ. App.) 23 S. W. 460.

4. An action for the breach of a written contract granting a license to manufacture and sell a patented article may be brought at any time within four years after the breach.—*Schurenberg v. Wilhelm*, (Tex. Civ. App.) 23 S. W. 817.

5. Rev. St. art. 3207, providing that every personal action "for which no limitation is otherwise prescribed shall be brought within four years," applies to an action for the rescission of

a contract on the ground of fraud.—*Evans v. Goggan*, (Tex. Civ. App.) 23 S. W. 854.

6. In an action to recover land which defendants claimed under a conveyance pursuant to a contract made in 1855 to give it to them for legal services then performed, plaintiff's demurrer, setting up the statute of limitations to a demand for the value of the services in case plaintiff recovered the land, should have been sustained.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

7. Act Jan. 10, 1857, § 1, limits to two years the right to maintain an "action for the recovery of any lands or for the possession thereof against any person who may hold such lands by virtue of a purchase thereof at a sheriff's or auditor's sale for the nonpayment of taxes, or under an auditor's deed." *Held*, that such statute applies to deeds of the commissioner of state lands, as the name of the officer in charge of the land department has been changed from "auditor" to "commissioner of state lands," while the office and its functions remain the same.—*City of Helena v. Hornor*, (Ark.) 23 S. W. 966.

8. A statute of limitations may be pleaded against a municipal corporation. *City of Ft. Smith v. McKibben*, 41 Ark. 43, followed.—*City of Helena v. Hornor*, (Ark.) 23 S. W. 966.

9. The term "lands," as used in Act Jan. 10, 1857, § 1, includes "town lots."—*City of Helena v. Hornor*, (Ark.) 23 S. W. 966.

Accrual of cause of action.

10. Where land is owned by husband and wife by entireties, and, after divorce, is sold on execution against the husband, and the purchasers take immediate possession, and occupy the same adversely for more than seven years, an action of ejectment by the wife and her second husband against such purchasers is barred, though it was commenced within two years after the death of such divorced husband, since the statute runs from the date of such sale and possession, and not from the death of the husband.—*Hopson v. Fowlkes*, (Tenn.) 23 S. W. 55.

11. Where notes are made payable to a married woman, with interest from maturity at a certain rate per annum, but the interest is not payable annually, or at stated times, and is not evidenced by interest coupons, the contract to pay interest is not separable from the contract to pay principal, and the cause of action for the interest is not barred by the statute of limitations, if, owing to the coverture of the payee, that for the principal is not barred.—*Scott v. Sloan*, (Tex. Civ. App.) 23 S. W. 42.

12. An account for goods sold, which contains no credits, is not a "mutual or current account," within the meaning of Rev. St. art. 3203, excepting from the two-years statute of limitations generally applicable to accounts "mutual or current accounts" arising in certain mercantile transactions.—*Richardson v. Vaughan*, (Tex. Sup.) 23 S. W. 640.

13. When another is in possession of land conveyed, the covenant of warranty is broken immediately, and the statute at once begins to run in favor of the warrantor.—*Eustis v. Cowherd*, (Tex. Civ. App.) 23 S. W. 737.

14. The statute of limitations does not begin to run against the right of a purchaser at a void sale on foreclosure of a vendor's lien, to be subrogated to the vendor's rights in the judgment of foreclosure, until adverse possession is taken by the vendee.—*Terry v. Cutler*, (Tex. Civ. App.) 23 S. W. 539.

15. As against a minor who marries subsequently to the settlement of a person on her land, the statute of limitations begins to run from the time of her marriage.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

Disabilities and exceptions.

16. In an action to set aside a purchase by an administrator of lands previously sold by him, before the confirmation of the sale, it

appeared that plaintiff knew 12 years before suit all the facts constituting his cause of action, except that the purchase by the administrator was prior to the confirmation of his sale, and that he could have discovered that fact as easily then as later. There was no evidence of actual fraud on the part of the administrator, or that he attempted to conceal the facts in the case. *Held*, that plaintiff's cause of action was barred by the five-years statute of limitations applicable to judicial sales.—*Bland v. Fleeman*, (Ark.) 23 S. W. 4.

17. The fact that the administration has not been closed does not prevent the running of the statute of limitations as against an action to set aside a sale by the administrator to himself.—*Bland v. Fleeman*, (Ark.) 23 S. W. 4.

18. Where an administrator purchases property sold under execution in favor of the estate, he becomes clothed with a constructive trust in favor of the estate, which will be barred by the statute of limitations.—*Bland v. Fleeman*, (Ark.) 23 S. W. 4.

19. A claim which matured before the debtor's death, and was presented to his administrator four years and three months after maturity, was not barred by the four-years statute of limitations, since by Rev. St. art. 3218, the statute of limitations was suspended for one year after intestate's death.—*Klobassa v. Raley*, 23 S. W. 253, 1 Tex. Civ. App. 165.

20. The effect of the provision in the constitution of 1869 suspending the operation of the statute of limitations from January 28, 1861, until the acceptance of the new constitution by congress, was merely to prevent the suspended period from being taken into account in the computation of the time required by statute to bar an action, and not to restore the disability of coverture, which had been removed by statute. *Ragsdale v. Barnes*, 5 S. W. 68, 68 Tex. 504, followed.—*Harvey v. Carroll*, (Tex. Civ. App.) 23 S. W. 713.

21. After land had been located under a headright certificate, but before it was patented, the holder of the certificate deeded the land to another, so that when the patent issued to him he held the legal title in subordination to the equitable title of his grantee, for whom he became simply a trustee, and the trust relation continued for over 30 years, and during the life of the trustee. There was no evidence of an intention on the part of the trustee or his heirs to hold adversely to the grantee until this suit was filed by the heirs. *Held*, that they could not recover the land.—*Peterson v. Ward*, (Tex. Civ. App.) 23 S. W. 637.

Interruption by legal proceedings.

22. Where plaintiff changes the form of his action from one of partition to one of trespass to try title and partition, there is no such change in the cause of action as will prevent the original petition from having the effect to stop the running of the statute of limitations.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

23. Where a personal judgment is obtained on a note secured by mortgage, the note is merged in the judgment, which also carries with it the mortgage lien, and an action on the original indebtedness will not stop the running of the statute of limitations against the judgment.—*McKeen v. James*, (Tex. Civ. App.) 23 S. W. 460.

Acknowledgment and new promise.

24. A letter dated in 1880, stating that the writer had previously purchased land from plaintiff, for which he was to pay \$1,500 in January, 1869, and that "my intentions are true and faithful, but my abilities are rather cramped now, until can sell, or make some money otherwise," is not a direct and unqualified acknowledgment of the debt, or an unconditional promise to pay the same, one of which is required by Rev. St. 1889, § 6793, to take a debt out of the operation of the statute of limitations.—*Wells v. Hargrave*, (Mo. Sup.) 23 S. W. 885.

the statute of limitations by acknowledgment of the debt and a new promise to pay it, especially where he is the sole logatee.—*Park v. Prendergast*, (Tex. Civ. App.) 23 S. W. 535.

Who may plead statute.

26. A junior mortgagee may avail himself of the defense of limitations in an action to foreclose the senior mortgage.—*Scott v. Sloan*, (Tex. Civ. App.) 23 S. W. 42.

27. A second mortgagee, who has foreclosed and bought in the chattels, can plead limitation against the first mortgagee, seeking to foreclose, though the mortgagor has waived his right, and the first mortgage was not barred when the second was given.—*Dunn v. Smith*, (Tex. Civ. App.) 23 S. W. 449.

Pleading and practice.

28. Where the replication alleged infancy, only, in avoidance of the plea of limitation, the disability of coverture cannot be asserted on the trial.—*Crow v. Fiddler*, (Tex. Civ. App.) 23 S. W. 17.

29. Where, in trespass to try title against two defendants, only one of them pleads the three-years statute of limitations, it is error to submit the issue of limitation by possession as to both defendants.—*Bailey v. Baker*, (Tex. Civ. App.) 23 S. W. 454.

Burden of proof—Disabilities.

30. The burden is on one who pleads coverture to defeat the statute of limitations, not only to show her marriage, but also to show that the coverture continued for a sufficient time.—*Corley v. Anderson*, (Tex. Civ. App.) 23 S. W. 839.

Live Stock Shipments.

See "Carriers," 11-14.

Local and Special Laws.

See "Constitutional Laws," 2.

MALICIOUS PROSECUTION.

Probable cause.

1. If plaintiff was innocent of the crime, but defendants had reasonable ground of suspicion, supported by circumstances strong enough, in themselves, to warrant a cautious man in the belief that he was guilty, the jury should find for defendants.—*Hurlbut v. Boaz*, (Tex. Civ. App.) 23 S. W. 446.

Advice of counsel.

2. Advice of counsel should be considered in determining, not only the existence of probable cause, but also the absence of malice.—*Hurlbut v. Boaz*, (Tex. Civ. App.) 23 S. W. 446.

Evidence—Burden of proof.

3. The burden is on plaintiff to show, not only his prosecution and acquittal on the charge, and defendants' malice and lack of probable cause in making it, but also that the charge was in fact false.—*Hurlbut v. Boaz*, (Tex. Civ. App.) 23 S. W. 446.

Admissibility.

4. In an action for malicious prosecution on the charge of embezzlement by plaintiff from defendants, his employers, plaintiff's statement that he did not blame defendants for prosecuting him; that they had to do it to vindicate themselves, as people believed that they had instigated him to burn their store building,—was incompetent and prejudicial.—*Hurlbut v. Boaz*, (Tex. Civ. App.) 23 S. W. 446.

ment, see "Judgment," 24.

Manslaughter.

See "Homicide," 6-12.

Marriage.

See "Curtsey," "Divorce," "Dower," "Homestead," "Husband and Wife."

Of executrix, see "Executors and Administrators," 2.

MASTER AND SERVANT.

See, also, "Principal and Agent."

Negligence, evidence of usage, see "Custom and Usage."

—of fellow servant, defense raised by third person, see "Negligence," 12.

When relation exists.

1. Plaintiff was employed by defendant railroad company as stock claim agent. Afterwards, a new contract was made, increasing his salary for the same services. In an action for part of his salary under the second contract, a witness for defendant testified that, during the period thereof, defendant had had no employees, but that its road had been managed and controlled by another company under a lease, which he had seen, but the contents of which he did not state. Plaintiff testified that he was employed by defendant; that he never heard of any lease of the road; that defendant was the one who accepted his resignation; and that he was under the impression, all the time, that he was working for the same company. *Held*, that there was evidence to support a judgment for plaintiff.—*Galveston, H. & S. A. Ry. Co. v. Scheldemantel*, (Tex. Civ. App.) 23 S. W. 453.

Discharge.

2. Where a salesman is employed for a year at a specified salary, and is discharged before the end of the term, because of the failure of his employers in business, they are liable for the year's salary, less any amount earned, or that ought by reasonable diligence to have been earned, in other employment.—*Allen v. Maronne*, (Tenn.) 23 S. W. 113.

3. Where a salesman was discharged without cause, and immediately after his discharge found other employment, where he earned more than he would have earned if he had not been discharged, his first employers are not entitled to credit for what he would have earned by the end of the year under his second contract, but for his own misconduct and consequent discharge.—*Allen v. Maronne*, (Tenn.) 23 S. W. 113.

4. Where a salesman is employed for a year at a specified salary, and is discharged before the end of the term, he does not abandon the contract by accepting a new and distinct employment with one of them for the same time and salary specified in the first contract, in the absence of clear proof of renunciation thereof or acquiescence in his discharge.—*Allen v. Maronne*, (Tenn.) 23 S. W. 113.

Master's liability to third persons.

5. The fact that a boarding-house keeper who is injured by the unsafe condition of a depot platform, while meeting an incoming train to secure a boarder, was present at the depot by invitation of the telegraph operator employed by the railroad company, does not render the latter liable, in the absence of any showing that the operator was acting within the scope of his employment in extending such invitation.—*Post v. Texas & P. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 708.

6. A brakeman has an implied authority to remove from his train, in a lawful manner, a trespasser found on a car platform.—*Smith v. Louisville & N. R. Co., (Ky.) 23 S. W. 652.*

7. A railroad company is not liable for the willful act of a brakeman in kicking a trespasser from its moving train, whereby the latter was killed, in the absence of evidence to show that it was within the general scope of the brakeman's authority to eject trespassers from its trains. *Railway Co. v. Anderson, 17 S. W. 1039, 82 Tex. 519, followed.—Texas & P. Ry. Co. v. Moody, (Tex. Civ. App.) 23 S. W. 41.*

8. In an action against a railroad company for the death of a trespasser, who was kicked from defendant's train by its brakeman while the train was running fast, a witness who had been a brakeman testified that he knew it was the duty of defendant's brakemen to put trespassers off the trains; that orders were given out to put them off when the train was running, and he had done so; that he did not know of any printed or general orders issued by the company to put trespassers off; and that his orders, in each case, came from the conductor, when a person was on the train who had no right to be there. *Held*, that there was no evidence that the brakeman, in ejecting deceased, acted within the general scope of his authority.—*Texas & P. Ry. Co. v. Moody, (Tex. Civ. App.) 23 S. W. 41.*

9. Where a brakeman, in removing a trespasser, kicks him from the train while in rapid motion, the railroad company is liable for injuries caused thereby, the act being within the scope of the brakeman's employment.—*Smith v. Louisville & N. R. Co., (Ky.) 23 S. W. 652.*

10. The allegation of the petition, in an action against the railroad company for such injuries, that defendant "willfully" kicked plaintiff, does not charge the act to have been malicious on the part of the brakeman, and therefore beyond the scope of his authority, the company, and not he, being charged with committing the act willfully.—*Smith v. Louisville & N. R. Co., (Ky.) 23 S. W. 652.*

Negligence of master.

11. In an action against a railroad company for injuries to an employee, resulting from a collision, the question as to whether the orders given by the superintendent to the conductors and engineers of the colliding trains were ambiguous and conflicting was for the jury.—*Galveston, H. & S. A. Ry. Co. v. Ariespe, (Tex. Civ. App.) 23 S. W. 928.*

12. Where, in an action against a railroad company for the death of an employee, it is not shown that any rule for the protection of defendant's employees while at work on cars standing on their tracks could have protected deceased, the absence of rules for such protection is immaterial.—*Texas & P. Ry. Co. v. Cumpston, (Tex. Civ. App.) 23 S. W. 47.*

13. In an action for injuries caused plaintiff while in defendant's employ by the caving in of a ditch in which he was at work, under the weight of a piece of timber intended to be used as a skid in launching a barge, an allegation in the petition that he was injured through the negligence of defendant in placing a piece of timber "on the ground, and causing the ditch to be dug so close to it that the weight of the timber caused the bank to cave," does not justify a charge that it was defendant's duty to adopt such plans as would afford a reasonable degree of safety to its employees, and that, if it failed in this respect, it would be liable for injury resulting therefrom. *22 S. W. 366, reversed.—Texas & P. Ry. Co. v. French, (Tex. Sup.) 23 S. W. 642.*

—Furnishing driver with runaway team.

14. A complaint alleged that defendant employed plaintiff to drive a team and peddle

ranges; that defendant's agent told him he would furnish a gentle team; that he was furnished a team which had frequently run away, as defendant knew; that at a certain place where plaintiff was driving such team a sapling was bent across the road too low to permit the wagon seat to pass under it; that, on coming to the sapling, plaintiff halted the team, locked the brake to his wagon, dropped the lines, and began gently to raise the sapling out of the way; and that the team at once took fright, and ran away, and injured plaintiff. *Held*, that the complaint stated a cause of action.—*Martin v. Wrought-Iron Range Co., (Tex. Civ. App.) 23 S. W. 387.*

—Defective appliances.

15. In an action against a railroad company for the death of a brakeman caused by the failure of defendant to provide a regular caboose car for deceased's train, there was evidence that the car used, while not a caboose car, was suitable for that purpose. *Held*, that the unsuitableness of such car for the purpose of a caboose could not be implied from the fact that its construction was different from a regular caboose.—*Galveston, H. & S. A. Ry. Co. v. Davis, (Tex. Civ. App.) 23 S. W. 1019.*

16. An instruction that a railroad company is liable if it failed to furnish a safe and suitable car, with the necessary appliances, for the use of its employees, and an employee was killed by reason thereof, is erroneous, as it makes it the duty of the company to absolutely furnish a safe car, no matter what care may have been exercised in selecting the same.—*Galveston, H. & S. A. Ry. Co. v. Davis, (Tex. Civ. App.) 23 S. W. 301.*

17. The error is not rendered harmless by construing the instruction together with an instruction immediately preceding it, to the effect that it is the duty of a railroad company to use all reasonable care in furnishing safe cars, as it is equivalent to saying that if the company failed to furnish a safe car it did not exercise proper care.—*Galveston, H. & S. A. Ry. Co. v. Davis, (Tex. Civ. App.) 23 S. W. 301.*

18. Where an employee is injured by a defective flange in a belt, an instruction that it is the duty of a master to take reasonable care to keep the machinery in a reasonably safe condition, by proper repairs, is correct.—*Texas & P. Ry. Co. v. Nix, (Tex. Civ. App.) 23 S. W. 328.*

19. In an action by an engineer against his employer for injuries from the explosion of a boiler, plaintiff introduced evidence that the hammer test used by defendant in trying the boiler's strength was not effective, or the test usually applied. *Held*, that evidence in rebuttal that the hammer test was the one generally used by mill men in the vicinity was admissible to show that it was the test usually employed by persons operating similar machinery.—*Jones v. Malvern Lumber Co., (Ark.) 23 S. W. 679.*

20. Evidence that a certain company used the test was inadmissible, it having no tendency to prove the usual and customary test.—*Jones v. Malvern Lumber Co., (Ark.) 23 S. W. 679.*

21. In an action for damages for injuries received while a brakeman on the defendant's train, the evidence showed that plaintiff was standing on the rear of the tender of an engine which was backing onto a side track to connect with a car; that as the tender approached the car, with plaintiff ready to make the coupling, the two drawheads missed, and passed each other, plaintiff being caught between the car and the tender. The evidence showed that the failure of the drawheads to meet was caused by the sinking of the track. *Held*, that plaintiff could recover, it being the duty of defendant to inspect its track, and keep it in a reasonably safe condition, which duty plaintiff had a right to presume had been performed.—*Texas & N. W. Ry. Co. v. Guy, (Tex. Civ. App.) 23 S. W. 633.*

Negligence of master — Sufficiency of evidence.

22. In an action by a brakeman against the railroad company for personal injuries, plaintiff testified that the conductor ordered him to "go to the front," that he went forward, and got on the pilot of the engine, and, thinking that the brake beam of the engine was down, he jumped off, as was his duty, to see; that, when he attempted to board the train again, he caught the hand ladder on a car, and drew himself up, but, finding no step, he was obliged to drop to the ground, and that he fell under the car, and was injured. He also testified that it was not dangerous to board a train moving at the speed of his train, (seven or eight miles an hour;) that he did not look to see if the step was on the car, because the car would have passed him while he was looking. Defendant produced the testimony of two surgeons that plaintiff stated immediately after the accident that he went to the engine to get a drink of water; that he fell under the car while jumping from the engine; and that the accident was not caused by the negligence of any of defendant's employees. The fireman testified that, when plaintiff got on the pilot, the engineer asked him (witness) to tell plaintiff that he could not ride on the pilot, but he did not know how plaintiff got off. *Held*, that the evidence was not sufficient to sustain a verdict for plaintiff. 7 S. W. 791, followed.—Missouri Pac. Ry. Co. v. Walker, (Tex. Civ. App.) 23 S. W. 855.

— Instructions.

23. In an action for injuries caused plaintiff while in defendant's employ by the caving in of a ditch in which he was at work, under the weight of a piece of timber at the side of the ditch, the court charged that "if, with the log as it was, in digging the ditch there was no danger that could have been known to either plaintiff or" defendant's foreman, "C., (assuming C. to be a competent man in his business,) by the exercise of ordinary care," plaintiff could not recover. *Held* that, in the absence of any allegation or evidence of C.'s incompetency, the insertion of the parenthetical clause was erroneous. 22 S. W. 866, reversed.—Texas & P. Ry. Co. v. French, (Tex. Sup.) 23 S. W. 642.

— Pleading.

24. In an action for damages for the death of plaintiffs' minor son, an employe on a work train on defendant's road, who was killed in a collision, an allegation that the accident was caused through the negligence of defendant, acting through its superintendent and train dispatcher, was sufficiently specific.—Galveston, H. & S. A. Ry. Co. v. Arispe, (Tex. Civ. App.) 23 S. W. 928.

Fellow servants or vice principals.

25. A train dispatcher, who controls the movement of trains, represents the company, and is not the fellow servant of an engineer injured in a collision resulting from his negligence.—Little Rock & M. R. Co. v. Barry, (Ark.) 23 S. W. 1097.

26. Where a division superintendent of a railway sends conflicting telegrams to a work train and a freight train, both directly under his control, and thereby causes a collision, his negligence is the negligence of the corporation, as he is not a fellow servant of an employe on the work train.—Galveston, H. & S. A. Ry. Co. v. Arispe, (Tex. Civ. App.) 23 S. W. 928.

27. A car repairer at work on the tracks and the engineer of a switch engine are fellow servants.—Texas & P. Ry. Co. v. Cumpston, (Tex. Civ. App.) 23 S. W. 47.

28. Where a vice principal in charge of certain machinery negligently starts it, whereby a servant is injured, the master is liable, though the character of the act may have been that of

a fellow servant.—Texas & P. Ry. Co. v. Nix, (Tex. Civ. App.) 23 S. W. 328.

29. The conductor of a freight train, whom, by the rules of the company, the engineer is bound to obey, and who is accountable for the conduct of the trainmen, is a vice principal, and not a fellow servant of a brakeman who is injured in a collision.—Illinois Cent. R. Co. v. Spence, (Tenn.) 23 S. W. 211.

Negligence of vice principal—Injury to employe's wife by fellow servant.

30. In an action by a railroad employe against his employer for personal injuries to his wife, caused by the negligence of another employe, the rule that an employe cannot recover of the master for injury caused by the act of a fellow servant has no application.—Campbell v. Harris, (Tex. Civ. App.) 23 S. W. 35.

Incompetency of fellow servants.

31. Though the incompetency of an employe cannot be proven by specific acts of carelessness, yet where these acts have been brought to the employer's knowledge they can be proven to establish that knowledge.—Galveston, H. & S. A. Ry. Co. v. Davis, (Tex. Civ. App.) 23 S. W. 301.

32. A question as to what a locomotive engineer's general reputation as to care and competency while running his engine was, is improper where it is not confined to his reputation among those persons engaged in the same kind of occupation, as the general public could not be acquainted with his reputation.—Galveston, H. & S. A. Ry. Co. v. Davis, (Tex. Civ. App.) 23 S. W. 301.

33. Under the statute in force October 10, 1886, a railroad company was liable in damages only for the gross negligence of its servants, but was liable to its servants for injuries inflicted through the negligence of an incompetent fellow servant, where it had retained him in its employ with knowledge of his incompetency, or where, by the exercise of ordinary care and inquiry, it could have known of his incompetency; and where a servant seeks to recover under the latter circumstances a charge on gross negligence is not called for.—Galveston, H. & S. A. Ry. Co. v. Davis, (Tex. Civ. App.) 23 S. W. 301.

Concurrent negligence of master and fellow servants.

34. Where an employer furnishes defective machinery to his servant, of which defect the latter was ignorant, though the master knew of it, the latter is liable to the servant for injuries caused thereby, though a fellow servant was guilty of negligence which contributed to the injury.—Gulf, C. & S. F. Ry. Co. v. Kizziah, (Tex. Sup.) 23 S. W. 578.

Assumption of risks.

35. Plaintiff's son, a minor, was employed by defendant railway company, with plaintiff's consent. While on a train with a message, at the request of the defendant's yard foreman, he attempted to uncouple a car, and was injured. He was under no obligation to obey the foreman. *Held*, that he was a mere volunteer, and could not recover.—Texas & N. O. Ry. Co. v. Skinner, (Tex. Civ. App.) 23 S. W. 1001.

36. A yard master, on being complained to by the train master for slowness in making up trains, explained that it could not be done faster with only an engineer on the engine, to which the train master replied that he would see to getting a fireman at once. *Held* that the yard master not having complained of the danger of working about the trains without a fireman, and the promise not having been made on account of such danger, there was nothing to rebut the yard master's assumption of the risk.—International & G. N. Ry. Co. v. Turner, (Tex. Civ. App.) 23 S. W. 146.

37. In an action for injuries received by plaintiff, a brakeman, while making a coup-

ling, due to the sinking of the track, the court properly refused to charge that, "if said defect was as equally open to the inspection of the plaintiff as to the railway company, then, in that event, defendants would not be liable."—*Texas, S. V. & N. W. Ry. Co. v. Guy*, (Tex. Civ. App.) 23 S. W. 633.

38. An employe assumes not only the risks which always attend his employment, but those, also, which commonly do so.—*Gulf, C. & S. F. Ry. Co. v. Kizziah*, (Tex. Sup.) 23 S. W. 578.

39. Where plaintiff, in entering defendant's employment to drive a team and peddle goods, was promised a gentle team, he did not assume the risk incident to the use of a vicious team.—*Martin v. Wrought-Iron Range Co.*, (Tex. Civ. App.) 23 S. W. 387.

40. In an action for injuries caused plaintiff while in defendant's employ by the caving in of a ditch in which he was at work, under the weight of a piece of timber at the side of the ditch, it appeared that plaintiff was of mature years, and, while it was alleged that he was inexperienced in the work, it appeared that the danger of the bank caving in was open to the observation of any man of ordinary mental capacity. *Held*, that it was error to refuse a charge that, if such danger was as open to the observation of plaintiff as it was to that of defendant's foreman, under whose direction he was digging the ditch, plaintiff could not recover, as in such case plaintiff assumed the risk of the bank's caving in. 22 S. W. 866, reversed.—*Texas & P. Ry. Co. v. French*, (Tex. Sup.) 23 S. W. 642.

41. Such refusal to charge was not covered by a clause in the general charge to the effect that plaintiff was bound to use ordinary diligence to protect himself from danger, and that he was chargeable with notice of such defects as he might discover by the exercise of such diligence.—*Texas & P. Ry. Co. v. French*, (Tex. Sup.) 23 S. W. 642.

Contributory negligence.

42. Defendant's requested charge that if decedent was standing on the track as the train approached, attending to his usual business, then it was his duty to watch for trains, and if by looking he could have seen, or by listening could have heard, the train coming in time to get out of its way, and he failed to do so, the verdict must be for defendant, though the engineer gave no signal, was properly modified by adding, "unless the jury shall believe" that decedent "was thrown off his guard by such failure to give a signal."—*Church v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 1056.

43. In an action for the death of a railroad employe, plaintiff's evidence tended to show that while decedent was standing on the track in the discharge of his duties he was struck by a train which approached from behind without giving any signal as required by the company's rules. Defendant introduced evidence that decedent went hurriedly on the track, immediately in front of the approaching train, and endeavored to remove a cable which his duty required him to keep off the track. *Held*, that whether decedent was guilty of contributory negligence was a question for the jury.—*Church v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 1056.

44. Where cars, standing on tracks used exclusively for storage of cars needing repair, are moved by car repairers so close to the switch that one of them is struck by a switch engine properly running on the adjacent track, thereby driving such cars against, and killing, one of such car repairers while at work, the negligence of the repairers is the proximate cause of such death, and the railroad company is not liable therefor.—*Texas & P. Ry. Co. v. Cumpston*, (Tex. Civ. App.) 23 S. W. 47.

45. In an action by a brakeman against a railroad company for personal injuries, the only evidence as to a coupling knife was given by

plaintiff, who testified that he had been given one, and told to use it, but that it was more dangerous than the hands, and he did not use it. *Held*, that it was not error to refuse to charge that, if the failure to use the coupling knife contributed to plaintiff's injury, he could not recover.—*Bonner v. Hickey*, (Tex. Civ. App.) 23 S. W. 85.

46. Where there was a distinct issue made as to whether it was the duty or not of plaintiff to inspect the cars and brakes, it was proper, on request of defendant, to charge that if it was the duty of plaintiff to inspect the cars and brakes he could not recover for any defects in them which he might have discovered by inspection. 22 S. W. 110, reversed.—*Gulf, C. & S. F. Ry. Co. v. Kizziah*, (Tex. Sup.) 23 S. W. 578.

47. While a servant may hold his master liable for the results of defective and dangerous appliances, still, if the immediate duty of keeping such appliances in order rests on such servant, and he is injured through his neglect to keep them in proper order, or through the neglect in relation thereto of servants immediately under him, and whose acts in regard to the appliances he is bound to oversee, he cannot recover. *Railway Co. v. Hohn*, 21 S. W. 942, 1 Tex. Civ. App. 35, distinguished.—*Maes v. Texas & N. O. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 725.

— Burden of proof.

48. In an action by an engineer against his employer for injuries from the explosion of a boiler, an instruction that, in order to find for plaintiff, the jury must be satisfied by a preponderance of the evidence that the boiler was unsafe, that defendant might have known this by ordinary diligence, and that plaintiff was free from contributory negligence, is erroneous, as compelling plaintiff to prove the absence of contributory negligence.—*Jones v. Malvern Lumber Co.*, (Ark.) 23 S. W. 679.

49. In an action by an engineer for injuries received by jumping from a train to avoid running into a wreck on the track, plaintiff can recover if, by reason of failure of those in charge of the wreck, plaintiff was placed in a position which seemed to him one of immediate danger, and he jumped to avoid such danger, as an ordinarily prudent engineer would have done under the circumstances.—*Louisville & N. R. Co. v. Rains*, (Ky.) 23 S. W. 506.

MECHANICS' LIENS.

Property subject to.

1. An hotel company was incorporated with 1,000 shares of stock, of which B. owned 998. B. contracted with the company to furnish some land, and build an hotel thereon, and turn it over to the company when completed, he to receive \$100,000 in bonds and the same amount in capital stock. When the hotel was partly built, B. failed. He had conveyed the lot to one W., and also delivered to him \$50,000 of the bonds of the company, to secure a debt. B. afterwards made a deed of the lot to the hotel company. The secretary of the hotel company procured a deed of the lot from W., and bought the bonds from him, giving his note for \$25,000 in payment. *Held*, that the hotel company acquired no such equitable interest in the land as to defeat liens for labor and material furnished B. for the construction of the hotel.—*Houston v. Long*, (Ky.) 23 S. W. 586.

Consent of landowner to improvements — Liability of vendor.

2. Where building improvements are made on premises for one in possession under a parol contract of purchase only, a mechanic's lien for the improvements does not attach as against the true owner.—*Smith v. Huckaby*, (Tex. Civ. App.) 23 S. W. 397.

for the purpose of loaning money to stockholders on their stock and on real-estate security is not entitled to a mechanic's lien on the homestead of a stockholder for money loaned to him, which he has used in the construction of a building on his land.—*International Bldg. & Loan Ass'n v. Fortassain*, (Tex. Civ. App.) 23 S. W. 496.

Liability of homestead.

4. No lien could be claimed on lots constituting defendant's homestead, where the contract was not signed by his wife.—*Ricker v. Schadt*, (Tex. Civ. App.) 23 S. W. 907.

Rights of material men—Payment to contractor.

5. In an action to enforce a mechanic's lien for material furnished the contractor, and to fix a personal liability on the owner, the petition showed that the contractor abandoned his contract, and that at that time the owner had paid him more than was due him on the contract, so that, when plaintiff gave the owner notice of his claim of lien, the owner owed the contractor nothing. *Held*, that the action could not be maintained.—*Ricker v. Schadt*, (Tex. Civ. App.) 23 S. W. 907.

6. The fact that the last payment to the contractor was made before it was due was immaterial, for, until plaintiff had given notice under the statute, the parties to the contract had the right to make any settlement they chose.—*Ricker v. Schadt*, (Tex. Civ. App.) 23 S. W. 907.

7. An allegation of the petition that the contract was made payable in installments, to protect those who should furnish material, was not sufficient to show a right in plaintiff against the owner, for no contractual obligation was thereby assumed by the owner towards plaintiff.—*Ricker v. Schadt*, (Tex. Civ. App.) 23 S. W. 907.

—Abandonment of contract by contractor.

8. An allegation that, subsequent to the contractor's abandonment of the work, an agreement was made between plaintiff and other material men, on one part, and defendant owner, on the other, for the completion of the house, and that defendant had broken such agreement, was of no avail, for any cause of action thereon accrued to plaintiff jointly with the others.—*Ricker v. Schadt*, (Tex. Civ. App.) 23 S. W. 907.

9. Plaintiff alleged that after the abandonment of the work defendant owner used in the building certain material furnished by plaintiff to the contractor, and left unused by him. There was no allegation that at the time notice had been given defendant of plaintiff's claim, or that at any subsequent time defendant was indebted to the contractor, or that the payment to the contractor by defendant was not sufficient to cover all work done and material furnished by the contractor, or that the lumber appropriated still belonged to plaintiff. *Held*, that plaintiff could not recover, for, aside from the provisions of the mechanic's lien law, defendant, by use of the lumber belonging to the contractor, incurred no liability to plaintiff.—*Ricker v. Schadt*, (Tex. Civ. App.) 23 S. W. 907.

Mental Anguish.

Element of damages, see "Damages," 11; "Telegraph Companies," 6-8.

Merger.

Of oral contract in subsequent written one, see "Contracts," 11.

Mining leases.

1. A lease of coal lands reserved to the lessor and his assigns the joint use of such portions of the leased lands as might be necessary for roads, railways, water ways, side tracks, and other structures necessary for the profitable working of adjacent coal lands of the lessor and his assigns, but not so as to injuriously interfere with the workings of the lessee. *Held*, that the lessee might enjoin the making of an entry through and under his land for the purpose of mining coal on adjacent leased land, where the weight of evidence showed that the coal in the adjacent lands could be mined profitably without such entry, though not so profitably or so conveniently as with it.—*Reliance Coal & Coke Co. v. Kentucky Coal & Coke Co.*, (Tenn.) 23 S. W. 1095.

2. The reservation in the lease as to "roads, railways, water ways, side tracks, and other structures" related to surface ways for the purpose of ingress and egress to the surface of the adjacent land, and did not embrace underground entries through complainant's leased land.—*Reliance Coal & Coke Co. v. Kentucky Coal & Coke Co.*, (Tenn.) 23 S. W. 1095.

3. The language of complainant's lease could not be enlarged or altered by the grant in a subsequent lease, of adjoining land, of all such rights of making entries and erecting structures for mining purposes under, through, or upon complainant's leased land as the lessor was competent to grant, since the lessor could grant no rights over complainant's land, except in strict conformity with the reservations of complainant's lease.—*Reliance Coal & Coke Co. v. Kentucky Coal & Coke Co.*, (Tenn.) 23 S. W. 1095.

4. The making of an entry through, and the erection of structures on, complainant's land, by the lessee of adjoining land, for the latter's exclusive use, were not authorized by the reservation in complainant's lease.—*Reliance Coal & Coke Co. v. Kentucky Coal & Coke Co.*, (Tenn.) 23 S. W. 1095.

Minor.

See "Infancy."

Misdemeanor.

What is, see "Criminal Law," 3.

MORTGAGES.

See, also, "Chattel Mortgages."

Assignment or mortgage, see "Assignment for Benefit of Creditors," 1.

By husband, joinder of wife, see "Husband and Wife," 3.

Of homestead, see "Homestead," 14-17.

Subrogation to mortgagee's rights, see "Subrogation."

What constitutes.

1. A note for \$2,000, "being money advanced to me to help pay for a house and lot on Jefferson, between 22 and 23 streets, and on which she [the payee] holds a lien until paid," creates no present lien on the property, within Gen. St. c. 24, § 10, providing that no deed of trust or mortgage shall be valid against creditors without notice until recorded, and may be disregarded by an attaching creditor with notice of it.—*Schmidt v. Carter's Adm'r*, (Ky.) 23 S. W. 864.

2. Plaintiff alleged that, by oral agreement between them, defendant bought land for \$700, defendant paying \$850 and plaintiff \$50; that defendant was to take the deed to herself, and allow plaintiff two years to pay her the \$650, with interest, and on payment was to convey him the land; that within the two years he tendered payment, and demanded the deed, which was refused. *Held*, that since plaintiff

did not make, and was not bound by, the deed, and there was no mutuality in the contract, the deed could not be held a mortgage.—*Benge v. Benge*, (Ky.) 23 S. W. 668.

— Deed absolute in form.

3. Where it is sought to declare a deed absolute on its face a mortgage, the burden of proof is on the party asserting such claim, and in determining such question the situation of the parties, and all the attending circumstances, at the time the deed was agreed on and made, are to be considered.—*McKeen v. James*, (Tex. Civ. App.) 23 S. W. 460.

Lien.

4. A mortgage by an heir on his undivided interest in his father's land includes any and all interest which he owns therein, whether in possession, reversion, or remainder.—*Carter v. McDaniel*, (Ky.) 23 S. W. 507.

— Priorities.

5. In an action against an executrix and a firm to foreclose a mortgage executed by deceased, the petition averred that such firm claimed to have a lien on the mortgaged premises. The executrix set up, in answer, the execution of certain notes, and a mortgage to secure the same by deceased prior to plaintiffs' mortgage. The firm pleaded the same notes and mortgage, and all other facts essential to foreclosure of their lien, against both plaintiffs and the executrix, and prayed for relief. Plaintiffs pleaded the four-years statute of limitations as to such notes and prior mortgage. After demurring, such firm replied, *inter alia*, that the executrix, on a certain date, before the expiration of the four years, indorsed on such notes an acknowledgment of the amount then due, and allowed the same as a just claim against the estate; and that in plaintiff's mortgage the debt set up by such firm was admitted by deceased, and its prior payment specially provided for. *Held*, that the pleadings authorized a judgment that the firm's lien was superior to plaintiff's.—*Park v. Prendergast*, (Tex. Civ. App.) 23 S. W. 535.

Rights of mortgagee.

6. The holder of an absolute deed given to secure the payment of a debt has a right to take possession of the premises on their abandonment by the debtor, and cannot be ousted by subsequent purchasers from the debtor until his debt is satisfied.—*Baker v. Collins*, (Tex. Civ. App.) 23 S. W. 493.

Foreclosure.

7. Where a trust deed authorizes the mortgagee to declare the entire debt due for default in the payment of interest, an agreement to forbear so to do for the nonpayment of a specified installment, in consideration of the assignment to the mortgagee of all the rents accruing from the mortgaged premises, continues only for a reasonable time, and does not prevent the mortgagee from declaring the entire debt due for the nonpayment of a subsequent installment of interest.—*Martin v. Land Mortg. Bank*, (Tex. Civ. App.) 23 S. W. 1032.

8. In a suit to foreclose a trust deed the complaint set up a clause in the mortgage empowering the mortgagee to declare the principal due for the nonpayment of the interest, and alleged that default had been made in the payment of two installments of interest, and that the entire principal was due for failure to pay the first installment. The answer alleged that the mortgagee had agreed to forbear to declare the principal due for the nonpayment of the first installment in consideration of the assignment to it of all the rents accruing from the mortgaged premises. *Held*, that a reply that the suit was authorized by the default in the second installment was sufficient; and showed that the suit was not prematurely brought.—*Martin v. Land Mortg. Bank*, (Tex. Civ. App.) 23 S. W. 1032.

9. In trespass to try title against a mortgagee in possession, brought by the purchasers of the equity of redemption, plaintiffs cannot object for the first time on appeal that the mortgage cannot be foreclosed, as prayed for by defendant, because the mortgagor was not made a party, where no personal judgment was rendered against him, or could be on account of his nonresidence.—*Baker v. Collins*, (Tex. Civ. App.) 23 S. W. 493.

10. Where a mortgage is expressly made subject to a prior mortgage, the junior mortgagee cannot, in an action to foreclose the prior mortgage, claim that the latter is barred by the statute of limitations.—*Park v. Prendergast*, (Tex. Civ. App.) 23 S. W. 535.

Power of sale.

11. Where a trust deed provided for a sale at the courthouse door, a sale made at the door of a building used by the commissioner's court and the county court is void, the commissioners having, under article 2310, Rev. St., designated the opera house as the courthouse and place where the district court is held.—*Miller v. Boone*, (Tex. Snp.) 23 S. W. 574.

12. A sale was made under a deed of trust, and the property purchased by the holder of the note secured thereby. He conveyed the property to one M. The sale proved invalid. At the request of M., a second sale under the trust deed was made. *Held*, that the conveyance to M. did not carry the debt, the note, or the trust deed, and the latter authorizing a sale at the request of the payee of the note, a request by M. was unavailing, and the sale thereunder void. 22 S. W. 102, reversed.—*Miller v. Boone*, (Tex. Snp.) 23 S. W. 574.

13. An entry of satisfaction on the record of a mortgage, made by the mortgagee after a foreclosure sale, under the belief that the sale had effectually foreclosed the mortgage, is not conclusive on the purchaser, and he may show that no title passed at the sale, owing to a misdescription of the premises in the advertisement and deed.—*Lanier v. McIntosh*, (Mo. Sup.) 23 S. W. 787.

14. A foreclosure sale, which does not pass the legal title, owing to a misdescription of the land in the advertisement and deed, will not exhaust the power of sale contained in the mortgage, so as to prevent a resale to correct the error in the first.—*Lanier v. McIntosh*, (Mo. Sup.) 23 S. W. 787.

Motion.

For new trial, see "New Trial" 1.
Notice, see "Practice in Civil Cases," 3, 4.
To strike out scandalous pleading, see "Contempt."

MUNICIPAL CORPORATIONS.

See, also, "Counties;" "Highways;" "Schools and School Districts."

Adverse possession of land dedicated for street, see "Adverse Possession," 4.

Decision by council, review by courts, see "Courts," 11.

Dedication of public square to nonexistent city, see "Dedication," 1.

Taxable persons and property, see "Taxation," 3.

Incorporation.

1. The incorporation of a municipality will be held valid, though a reasonable amount of land not in actual occupation be included; but if the excess is such as, in effect, to evidence an attempted fraud on the law, and territory be embraced that cannot be fairly termed a part of the town, it will be annulled.—*McCleskey v. State*, (Tex. Civ. App.) 23 S. W. 518.

Ordinances—Enforcement.

2. A proceeding by a city to recover a penalty for the violation of one of its ordinances

by the commission of an assault, commenced by a warrant sued out in favor of the city, charging such assault, is a civil action, and a preponderance of evidence only is necessary to authorize a recovery.—*City of Sparta v. Lewis*, 23 S. W. 182, 91 Tenn. 370.

Contracts.

3. The act creating the taxing district of Memphis provides that the fire and police commissioners shall in every case, before entering into any contract for any purpose, advertise for proposals for the work to be done, material to be furnished, or services to be performed, and award the contract, if at all, to the lowest bidder, etc. *Held*, that such commissioners could designate some newspaper in which the city would insert its advertisements, notices, etc., for a year, and agree with such proprietor that the printing thus done should be at a stated price per line, square, or column, but in no event exceed by a specified sum the cost of the preceding year, without previous advertisement, and the reception of bids.—*Public Ledger Co. v. City of Memphis*, (Tenn.) 23 S. W. 51.

Control of streets.

4. The use of a street for an electric railway will not be enjoined because the construction of the track will prevent an abutting owner from loading his drays by standing them at right angles to the sidewalk, such a method obstructing the use of the streets, and being in violation of a city ordinance.—*Louisville Bagging Manufg Co. v. Central Pass. Ry. Co.*, (Ky.) 23 S. W. 592.

5. The operation of an electric street railway by the overhead wire system is not so dangerous to those who reside or do business on a public street as to authorize its restraint by injunction.—*Louisville Bagging Manufg Co. v. Central Pass. Ry. Co.*, (Ky.) 23 S. W. 592.

Defective streets.

6. A city is not an insurer against accidents on its walks, but is only bound to use ordinary care and attention to keep them in a reasonably safe condition for persons using them, while exercising reasonable care and caution.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

— Notice.

7. In an action against a city for personal injuries caused by a defective sidewalk, plaintiff has no ground for complaint where the court charged that if the walk was originally defective, and so remained until the time of the accident, no notice, either actual or constructive, was necessary to render defendant liable.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

8. If there was a defect in the walk, and some officer or agent of defendant, whose duty it was to keep or see the streets were kept in repair, saw it, or some one informed either of them of its existence, such facts constituted actual notice to defendant of the condition of the walk.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

9. If there was a defect in the walk, which was so patent as to be generally noticed by persons passing over it, and this continued for such a length of time prior to the accident as that it might be reasonably inferred that some officer or employee of defendant, whose duty it was to keep the streets in repair, had notice of such defects, such facts constituted constructive notice.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

10. Where the question at issue is as to constructive notice to defendant of the condition of the walk, it is not error to permit witnesses to state whether or not the walk was in an apparently safe condition at and before the time of the accident, when they examined it, when the evidence is limited by the court to such issue.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

Defective streets — Negligence of traveler.

11. The fact that one uses a sidewalk in ordinary use by the public, with knowledge of a defect therein, instead of taking another route to his destination, does not constitute negligence.—*Ball v. City of El Paso*, (Tex. Civ. App.) 23 S. W. 835.

— Evidence.

12. Evidence that the walk where the injury occurred "was laid in the ordinary way walks were laid in the city," and that "the planks were laid of good, sound timber, usual and customary," was competent.—*Pool v. City of Jackson*, (Tenn.) 23 S. W. 57.

Public improvements—Damages.

13. Where buildings on the line of the improvements are threatened with injury thereby, greatly in excess of the cost of protecting them, the owner is bound to use reasonable exertion and necessary expense in protecting them, and his damages should be measured by such exertion and expense.—*In re Wyandotte and Central Sts.*, (Mo. Sup.) 23 S. W. 127; *Appeal of Morton*, Id.

14. The charter of Kansas City, § 8, art. 9, provides that an ordinance for the grading of a street or alley shall determine the limits within which private property is benefited thereby. Section 13, relating to the ascertainment of damages, provides that should the court or judge, on evidence, find the benefit district unreasonable, he shall so declare, and the proceedings shall be void. *Held*, that the court cannot find, without evidence, that any property in the district was not specially benefited.—*In re Wyandotte and Central Sts.*, (Mo. Sup.) 23 S. W. 127; *Appeal of Morton*, Id.

15. The charter of Kansas City provides that, in ascertaining damages from grading, allowance shall be made for all benefits, and that if property is damaged the commissioners shall first assess against the city the amount of the benefit the city at large will receive, and against the property in the district benefited the balance, not assessing any lot where the damages exceed the benefits. *Held*, that the allowance to be made for all benefits means such benefits as are not borne by the city at large, and the rule applies whether the whole of a lot is taken, or whether it is damaged, only.—*In re Wyandotte and Central Sts.*, (Mo. Sup.) 23 S. W. 127; *Appeal of Morton*, Id.

— Assessment of benefits.

16. Under the provision of a city charter that assessments for street improvements shall be made on the whole of each quarter of the square binding on the improvements, all property in a quarter square is subject to the assessments, though the improvements extend along only a part of its face.—*Boone v. Nevin*, (Ky.) 23 S. W. 512; *Rowan v. Same*, Id.

— Enforcement of assessment.

17. Rev. St. art. 376, empowers city councils to construct sidewalks at the cost of the abutting owner, to be collected, if necessary, by the sale of the property, in such a manner as the council may by ordinance provide. A city ordinance declared the cost a lien on the property, and provided for its sale in the manner provided for other tax sales, but reserved any right or authority the city might have to collect the assessments by suit. *Held*, that a suit to enforce the city's lien by sale of the property was not authorized.—*City of Bonham v. Preston*, (Tex. Civ. App.) 23 S. W. 391.

Actions to enjoin nuisance.

18. A municipal corporation, being a governmental agency intrusted with the care and superintendence of the highways and public squares within its boundaries, may sue a county to enjoin it from maintaining a nuisance on one of the city's public squares.—*City of Llano*

v. Llano County, (Tex. Civ. App.) 23 S. W. 1008.

Murder.

See "Homicide," 1-5.

NAME.

Idem sonans.

On trial of an indictment of "Carney Griffie" for petit larceny, second offense, the record of a previous conviction of "Carney Griffin" for petit larceny is inadmissible in evidence in the absence of an averment in the indictment of the identity of the persons and the difference in the names, as the names are not idem sonans. —State v. Griffie, (Mo. Sup.) 23 S. W. 878.

NAVIGABLE WATERS.

Ownership of islands, see "Riparian Rights," 1. Rights in abandoned channel, see "Riparian Rights," 2.

Title to submerged lands.

A grant from the United States of land on a large river like the Missouri, navigable in fact, though not subject to the ebb and flow of the tide, will, even when containing no reservation or condition, pass to the grantee title only to the water's edge, but will vest in the state title to the land beneath the water, though the state has adopted the common law.—Cooley v. Golden, (Mo. Sup.) 23 S. W. 100.

Necessary Parties.

See "Parties."

NEGLIGENCE.

See, also, "Death by Wrongful Act;" "Horse and Street Railroads."

Contributory, of person at railroad crossing, see "Railroad Companies," 15-21.

—of person on track, see "Railroad Companies," 25-27.

—of servant, see "Master and Servant," 42-49.

Defective streets, see "Municipal Corporations," 6-12.

Evidence of custom, see "Custom and Usage."

Injuries to passengers, see "Carriers," 42-53.

Injury to wife, action by husband, see "Husband and Wife," 30.

In transmission of telegrams, see "Telegraph Companies," 3-9.

Of master, see "Master and Servant," 11-24.

Of railroad companies, see "Railroad Companies," 9-32.

Of servant, liability of master, see "Master and Servant," 5-10.

Of traveler, see "Municipal Corporations," 11.

What constitutes.

1. It is error for the court to group certain facts, and instruct the jury that from such facts, if they are found to exist, negligence follows.—Galveston, H. & S. A. Ry. Co. v. Briggs, (Tex. Civ. App.) 23 S. W. 503.

Remote and proximate cause.

2. The negligence of an engineer, who was a fellow servant, in violating the time card of the company, was not the proximate cause of a collision whereby a brakeman was injured, where the negligence of the conductor in permitting such violation contributed to such collision.—Illinois Cent. R. Co. v. Spence, (Tenn.) 23 S. W. 211.

3. Plaintiff's decedent, an employe of defendant railroad company, was, while standing on the track, struck and killed by defendant's engine. Held, that an instruction that plaintiff may recover if the jury believe that decedent remained at his post of duty, and was, without fault on his part, struck and killed by defend-

ant's engine because of failure to sound the whistle, requires the jury to find that such failure was the proximate cause of his death.—Church v. Chicago & A. R. Co., (Mo. Sup.) 23 S. W. 1056.

4. Failure of the owner of a cotton gin to do is not the proximate cause of the subsequent destruction of the cotton by fire while at the gin, and he is not responsible for such destruction, unless he failed to use ordinary care for its preservation.—James v. James, (Ark.) 23 S. W. 1099.

Dangerous premises.

5. Maintenance of a barbed-wire fence on one's premises along a highway, though in a city, if not prohibited by ordinance, is not negligence per se, and, in the absence of other evidence showing it a nuisance, its owner will not be liable for injury to stock occasioned thereby.—Robertson v. Wooley, (Tex. Civ. App.) 23 S. W. 828.

6. Evidence that plaintiff's horse came to its death from a wound received while being driven over defendant's street railway, and which was caused by a nail used in constructing or repairing the track, does not justify a verdict for plaintiff for the value of the horse, in the absence of anything to show that the company had knowledge of the dangerous condition of the track in that regard.—Houston City St. Ry. Co. v. Autrey, (Tex. Civ. App.) 23 S. W. 817.

Contributory negligence.

7. The failure of an employe of a railroad company to use a danger signal on a car which he was repairing, as required by the rules of the company, cannot be set up as contributory negligence in an action by such employe against another railroad company for injury caused by the backing of an engine of defendant against the car which was being repaired, when such engine was wrongfully on the tracks of the company which employed plaintiff.—Ft. Worth & D. C. Ry. Co. v. Bell, (Tex. Civ. App.) 23 S. W. 922.

8. In an action for injuries caused by the sudden increase in speed of a car from which plaintiff was about to alight, it was proper to refuse an instruction that "the instincts of self-preservation are not proper to be considered in determining whether or not plaintiff was guilty of contributory negligence."—Slaughter v. Metropolitan St. Ry. Co., (Mo. Sup.) 23 S. W. 760.

9. In an action for personal injuries, where defendant was guilty of negligence, plaintiff can recover, unless his own negligence proximately contributed to the injuries.—Campbell v. McCoy, (Tex. Civ. App.) 23 S. W. 34.

10. On an issue of contributory negligence, consisting of a lack of ordinary prudence, the court should instruct as to what would be expected of a "person of ordinary prudence," and not of a "person of prudence."—La Prelle v. Fordyce, (Tex. Civ. App.) 23 S. W. 453.

Imputed negligence.

11. The negligence of a nurse, through which a child in her charge is injured, is imputable to the parents of the child.—Schlenks v. Central Pass. Ry. Co., (Ky.) 23 S. W. 580.

Of fellow servants—Defense raised by third person.

12. In an action by a railroad company's employe against another railroad company for personal injuries, wrongfully caused by defendant, it is no defense that a coemploye of the injured person aided in causing the injury.—Ft. Worth & D. C. Ry. Co. v. Bell, (Tex. Civ. App.) 23 S. W. 922.

Evidence.

13. In an action for personal injuries, caused by a defective drawbar in a freight car, evidence that after the accident defendant changed the old style of drawbars for another kind

road company for the negligent killing of plaintiff's child, where the contributory negligence of plaintiff is pleaded as a defense, he can show that his wife and son, with whom the child was left, were accustomed to exercise the greatest watchfulness over it.—*San Antonio & A. P. Ry. Co. v. Vaughn*, (Tex. Civ. App.) 23 S. W. 745.

15. In an action against a railroad company for damages resulting from an overflow alleged to have been caused by defendant's construction of an embankment, it is error to admit evidence that, after the overflow, defendant altered the embankment, so as to allow a free passage for water.—*Gulf, C. & S. F. Ry. Co. v. Haskell*, (Tex. Civ. App.) 23 S. W. 548.

16. In an action for damages against a railroad company for the negligent killing of plaintiff's child, evidence of the worldly condition of plaintiff is admissible to show whether plaintiff and his wife were guilty of negligence in their care of the child.—*San Antonio & A. P. Ry. Co. v. Vaughn*, (Tex. Civ. App.) 23 S. W. 745.

Evidence—Sufficiency.

17. Evidence that while a freight train was passing an employe of the road, standing close to the track, a nut such as was used on freight cars, the threads of which were freshly broken, struck him, being seen by him when a foot away, coming from the direction of the train, was sufficient to authorize the submission to the jury of the theory that the nut flew off of one of the cars.—*Texas & P. Ry. Co. v. Raney*, (Tex. Civ. App.) 23 S. W. 340.

NEGOTIABLE INSTRUMENTS.

Provision for attorney's fees.

1. Where a note provides for the payment of 10 per cent. of its amount as an attorney's fee in case of legal proceedings, an allowance of 10 per cent. on the principal and interest is proper.—*Behrens v. Diguowity*, (Tex. Civ. App.) 23 S. W. 288.

2. In an action on purchase-money notes, it is error to compute the commission for attorneys' fees on the full amount due on the notes without deducting the amount found to be due defendants as damages.—*D. A. Tompkins Co. v. Galveston City St. R. Co.*, (Tex. Civ. App.) 23 S. W. 25.

Consideration.

3. Where a note is given to indemnify the payee against liability on a bond executed by him, such liability is a good consideration for the note, though no damage had accrued on the bond at the time the note was made.—*Branch v. Howard*, (Tex. Civ. App.) 23 S. W. 478.

Payment.

4. Where a note is given to secure money advanced by the payee, and the amount advanced has been repaid, the note, as to the original parties to it, is discharged, notwithstanding that the consideration therein expressed exceeds the amount repaid, and though a portion of amount was repaid by a person other than the maker.—*Branch v. Howard*, (Tex. Civ. App.) 23 S. W. 478.

Actions on—Complaint.

5. A petition which alleges that defendant is indebted to plaintiff in a certain sum, "according to the terms of his certain promissory note," setting out a copy of the same, sufficiently avers the execution of the note by defendant, in the absence of any special exception.—*Behrens v. Dignowity*, (Tex. Civ. App.) 23 S. W. 288.

—Proof of ownership.

6. A note, payable to plaintiff or order, and indorsed in blank, and in plaintiff's possession,

orate such ownership.—*Grant v. Ennis*, (Tex. Civ. App.) 23 S. W. 998.

7. In an action by the holder on a note indorsed in blank, and which defendant had paid to the indorser, plaintiff's testimony as to his ownership was contradictory, and he had, according to defendant's testimony, acted in relation to the payment in such a way as induced defendant, and was calculated to induce a reasonably prudent man, to believe the indorser was the owner. *Held*, that a judgment on a verdict for defendant should not be disturbed.—*Garza v. Manchke*, (Tex. Civ. App.) 23 S. W. 836.

Newly-Discovered Evidence.

See "Criminal Law," 73-77.

New Promise.

See "Limitation of Actions," 24, 25.

NEW TRIAL.

Decision on appeal, see "Appeal," 97, 98.

In criminal case, see "Criminal Law," 69-77. Necessity of motion for new trial, see "Appeal," 20.

Time of application.

1. Under a statute providing that application for new trial for newly-discovered evidence may be made not later than the second term after the discovery, an application made later than that is properly dismissed.—*Nickell v. Fallen*, (Ky.) 23 S. W. 366.

Excessive damages—Remittitur and reduction by court.

2. Where pleadings will warrant a judgment for the damages found, but the evidence will not warrant more than nominal damages, the finding should not be ignored, and judgment entered for nominal damages, but the verdict should be set aside, and a new trial granted.—*Maxwell v. First Nat. Bank*, (Tex. Civ. App.) 23 S. W. 342.

3. Where the damages allowed are excessive, the court cannot allow a remittitur, instead of granting the new trial applied for.—*Clifford v. Lee*, (Tex. Civ. App.) 23 S. W. 843.

Surprise.

4. The refusal of a motion for new trial was in the discretion of the court, though defendant was surprised by the testimony of a grantor in a deed, called to prove its execution, where defendant does not show that the deed in question was necessary to his defense.—*Dempsey v. Taylor*, (Tex. Civ. App.) 23 S. W. 220.

Effect of granting as to part only of defendants.

5. In an action to recover land, judgment was rendered on a verdict in favor of plaintiffs as to part of defendants, and against plaintiffs as to the other defendants. A motion by plaintiffs for a new trial was granted as to part of such successful defendants, and denied as to the others. *Held*, that the judgment on such motion had the effect of granting a new trial as to all the defendants, and left the cause as if there had been no trial.—*Parker v. Adams*, 23 S. W. 902, 2 Tex. Civ. App. 357.

Imposing conditions.

6. An order granting a new trial, which recites that the judgment be set aside on condition that defendant, "before expiration of this term of court, pay all costs of court that have accrued during the pendency of this appeal to the state; otherwise said judgment to remain in full force and effect,"—is void because of such condition, and the judgment remains in

full force and effect.—*Hargrave v. Bocro*, (Tex. Civ. App.) 23 S. W. 403.

NOTARY PUBLIC.

See, also, "Acknowledgment."

Seal.

The Ohio statute requires a notary's seal to be $\frac{1}{4}$ inches in diameter, surrounded by the words, "Notarial Seal — County, Ohio," and to contain of the coat of arms the mountain range, the rising sun, the bundle of arrows, and the sheaf of wheat. A deed recorded more than 11 years showed a very dim impression, but under a magnifying glass the range, sun, and arrows were visible, and the surrounding words "Notarial Seal Hamilton County, O." *Held prima facie* sufficient to admit the deed as evidence.—*Stearns v. Chenault*, (Ky.) 23 S. W. 351.

Notes.

See "Negotiable Instruments."

Notice.

Of appeal, see "Criminal Law," 78.
Of authority of officers, see "Corporations," 6.
Of defects in streets, see "Municipal Corporations," 7-10.
Of election contest, see "Elections and Voters," 3.
Of filing plea, see "Practice in Civil Cases," 6.
Of motions, see "Practice in Civil Cases," 3, 4.
Rights of judgment creditor as against unrecorded deed, see "Judgment," 18.
To agent, effect on principal, see "Principal and Agent," 13.

NUISANCE.

See, also, "Dedication," 5; "Disorderly House." Action by city to enjoin, see "Municipal Corporations," 18.

Beer garden and concert hall.

A bill by neighboring residents in a large city alleged the former use of premises as a pleasure resort garden, with temping, dancing, and band music till early morning; that the noise would keep the neighbors awake, to the detriment of their health and comfort; that crowds of idle, disorderly persons were attracted, and became a nuisance in the streets; that all this was not due to mismanagement, but inherent in the business; that defendants proposed to reopen the place. *Held*, that the nuisance was not clearly made out, and, being only threatened, could not be enjoined.—*Pfingst v. Senn*, (Ky.) 23 S. W. 358.

OFFICE AND OFFICER.

See, also, "Judge;" "Notary Public;" "Receivers;" "Sheriffs and Constables."

Action to determine title to office, jurisdiction, see "Courts," 6.

Assignment of unearned salary by government employe, see "Assignment," 2.

Authority, see "Corporations," 6.

County treasurer, see "Counties," 2.

Liability of tax collector, see "Taxation," 6-9.

Filling vacancies—What constitutes vacancy.

1. Gen. St. c. 33, art. 6, § 1, defines the term "vacancy in office" to mean such as exists when there is an unexpired term without a lawful incumbent, whether by death, resignation, removal, or otherwise. *Held*, that an adjudication that one holding the office of assessor is a lunatic, and that he should be confined in the asylum, creates a vacancy in his office.—*Long v. Bowen*, (Ky.) 23 S. W. 343.

Resignation — Withdrawal before acceptance.

2. Under Const. art. 16, § 17, providing that all officers in the state shall continue to perform the duties of their offices until their successors are qualified, the unconditional tender of his resignation by a county judge creates no vacancy where it is not accepted and is afterwards withdrawn.—*McGhee v. Dickey*, (Tex. Civ. App.) 23 S. W. 404.

Opinion Testimony.

See "Evidence," 24-31.

Ordinance.

See "Municipal Corporations," 2.

Ouster.

See "Tenancy in Common," 2.

Outstanding Title.

See "Trespass to Try Title," 11.

Parent and Child.

Custody of child, see "Divorce," 18.

Parol Evidence.

See "Evidence," 49-62.

PARTIES.

To mortgage foreclosure, see "Mortgages," 9.
Who may sue on official bonds, see "Bonds," 1, 2.

Necessary parties.

1. The assignee of a judgment, seeking to enforce it, is the only necessary party to an action by the judgment debtor to enjoin its collection.—*Ellis v. Kerr*, (Tex. Civ. App.) 23 S. W. 1050.

2. Where plaintiff, pending an action of trespass to try title, conveys his interest in the land, his grantees need not be made parties.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

3. Where the specific land sued for is claimed by defendants under a deed binding the tenants in common of a tract of which this was part, plaintiff, seeking to recover her interest as one of such tenants, need not make the other tenants in common parties to the action.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

PARTITION.

By agreement.

1. Though a partition deed found in the papers of decedent was neither witnessed nor acknowledged, it was an acknowledgment that deceased held the land in trust for himself and the other parties thereto, and was a good partition thereof.—*Smith v. Adams*, (Tex. Civ. App.) 23 S. W. 49.

2. A deed from part of the tenants in common of land, to one having no interest therein, of part of the land, does not constitute a partition thereof.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

By judicial proceedings.

3. Where, in partition, the cotenants, in possession of the entire premises, seek to compel contribution for taxes paid by them during a series of years, the court should, in adjusting the equities, take into account the value of such possession, though a cotenant cannot recover rent until demand and refusal of joint occupancy.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

4. Tenants in common, in surveying and platting their land for a town, by mistake included land adjoining theirs, and omitted from the plat a portion of theirs. They afterwards partitioned the land among themselves by lots, and certain creditors of one of them (B.) purchased his lots at sheriff's sale. Some of these were on the land not owned by such tenants, and the title failed. *Held*, that such creditors were not entitled, in partition, to have set apart to them the interest of B. in that part of the land of such tenants which was omitted from the plat, to compensate them for their loss on account of such failure of title.—*Willis v. Robinson*, (Tex. Civ. App.) 23 S. W. 822.

5. In 1797 a grant of land patented to a company of which H. was a member was partitioned, H.'s heirs taking his share, and all of them except plaintiffs' ancestress, one of the heirs, entered into possession. In 1811 partition was had between H.'s heirs, plaintiffs' ancestress receiving a deed to her share. *Held*, in ejectment to recover such share against persons holding it by adverse possession, that the court will not hold the original deeds of partition to the patentees invalid because the statute under which the partition was made required the appointment of six commissioners, instead of two, the number actually appointed; it being improper to inquire into such irregularity after the lapse of such a time, in order to aid the claims of persons having no paper title, and holding by adverse possession only.—*Smith v. Norment*, (Ky.) 23 S. W. 370.

By judicial proceedings—Sale.

6. Code, § 490, providing that a vested estate in realty jointly owned may be sold in an action brought by one of the joint owners if the share of each owner be worth less than \$100, or if the estate be in possession, and the property cannot be divided without materially impairing its value, does not authorize a sale in an action brought for the purpose by the owner of a life estate against the infant remaindermen.—*Malone v. Conn*, (Ky.) 23 S. W. 677; *Ames v. Same*, Id.

PARTNERSHIP.

Conveyance by firm, acknowledgment, see "Acknowledgment," 3.

What constitutes.

1. A contract by which a number of railroad companies "lease" their roads and other property to one company for 99 years, the latter company agreeing to operate and maintain the lines and pay to each of the other companies a certain proportion of 93 per cent. of the net profits from such operation, is a contract of partnership, and not a lease.—*Galveston, H. & S. A. Ry. Co. v. Davis*, (Tex. Civ. App.) 23 S. W. 301.

2. At the time of a collision defendant's railroad and rolling stock were operated by the S. P. Ry. Co. Several railroads, among them defendant, had combined to expedite the transportation of through freight, and placed the government of the combination under the management of the S. P. Co., which road received the net earnings of the respective lines. The president of the S. P. Co. was defendant's president. *Held*, that the agreement was a partnership, and not a lease.—*Galveston, H. & S. A. Ry. Co. v. Arispe*, (Tex. Civ. App.) 23 S. W. 928.

Partnership property.

3. Plaintiff and decedent moved on a farm, under a written agreement that they should own it equally. This agreement was afterwards taken by plaintiff from the clerk's office, where it had been left, and placed in the care of decedent, plaintiff being about to move away, and it being thought that the agreement might interfere with a sale of part of the property by decedent in case he needed money for his

support. Thereafter decedent repeatedly stated that plaintiff owned half of the property. *Held*, that the land was partnership property.—*Lucas v. Cooper*, (Ky.) 23 S. W. 959.

Power of partners to bind the firm.

4. A partner in a mercantile firm cannot bind the firm by a subscription to the capital stock of a corporation for the establishment of a mill, without the consent or ratification of the other member of the firm.—*Patty v. Hillsboro Roller-Mill Co.*, (Tex. Civ. App.) 23 S. W. 336.

5. Where a partnership exists between a bank and a joint stock company, it is a defense to an action on overdrafts made by the manager of the company, that there was a rule of the company that no money should be borrowed except by its board of directors.—*Cameron v. First Nat. Bank*, (Tex. Civ. App.) 23 S. W. 334.

Dissolution, settlement, and accounting.

6. Partnership account books, carelessly kept by one partner, a competent bookkeeper, difficult to understand, not posted for a number of years, and omitting many items, are not admissible in evidence in an action by the personal representatives of such partner to recover from the personal representatives of the other a balance alleged to be due on a settlement of the partnership account.—*Greer's Adm'r v. Greer's Adm'r*, (Ky.) 23 S. W. 866.

7. Entries in partnership account books, made at the instance of one of the partners, from memoranda and from memory, as to transactions purporting to have taken place 15 and 20 years before, are not admissible in evidence against his copartner, who denied the correctness of the entries when they were being made, and who refused to settle by them.—*Greer's Adm'r v. Greer's Adm'r*, (Ky.) 23 S. W. 866.

8. A partner who has knowledge of entries in the partnership books by his copartner, charging him with items for which he is not liable, is guilty of laches in settling up the partnership business on the showing made by the books, without examining them to see whether they have been corrected to conform to his contention, and he cannot thereafter impeach the settlement on the ground that the books were not correct.—*Kneeland v. McLachlen*, (Tex. Civ. App.) 23 S. W. 309.

9. Plaintiff alleged that he and defendant agreed to operate a newspaper and job-printing business, in which defendant was to furnish printing press and type, and plaintiff his time, skill, and labor, the net proceeds to be equally divided between them; that plaintiff established the paper, securing 450 subscribers, an advertising patronage of about \$50 per month, and a patronage in job work of about \$15 per month; that, after plaintiff had operated the business six months, he was ousted by defendant, who took possession of the entire property, and notified the patrons that he had discharged plaintiff from his employment. Plaintiff sought to recover \$100 per month for his services, and \$1,000 as exemplary damages. *Held*, that the complaint stated a good cause of action. *Bali v. Britton*, 58 Tex. 57, followed.—*Sewell v. Connor*, (Tex. Civ. App.) 23 S. W. 555.

10. Where personality owned by two persons as partners is divided, though unequally, the one receiving the smaller share cannot, on the death of the other, nine years thereafter, assert a claim to that retained by the latter.—*Lucas v. Cooper*, (Ky.) 23 S. W. 959.

Power of partner after dissolution.

11. After the dissolution of a partnership, a note executed by one member in the firm name, even in the payment of a debt due from the firm, is not binding on the other members of the firm, unless they have authorized the execution, or unless the payee of the note received the same in ignorance of the dissolution.—*Funck v. Heintze*, (Tex. Civ. App.) 23 S. W. 417.

Liability of firm as member of another firm.

12. In an action by a bank for money loaned to a partnership of which the bank is a member and its vice president the manager, the latter's mismanagement of the firm's business is not chargeable to the bank.—*Cameron v. First Nat. Bank*, (Tex. Civ. App.) 23 S. W. 334.

Payment of firm debts—Rights accruing to partner on satisfying judgment.

18. On the dissolution of the partnership composed of plaintiff and defendant, the latter assumed payment of the firm debts. Plaintiff alleged that a debtor had obtained a judgment against the firm, which he (plaintiff) was obliged to pay, and sought to recover the amount thereof from defendant. The evidence showed that, if plaintiff paid the judgment at all, he did so by satisfying a claim which he held against the debtor, but the amount of such claim was not shown. *Held*, that plaintiff could not recover.—*O'Fiel v. King*, (Tex. Civ. App.) 23 S. W. 696.

Actions.

14. A dismissal of an action as to all the individual members of a partnership, except the one through which it had by service been brought into court, is not a dismissal as to the partnership.—*Frank v. Tatum*, (Tex. Civ. App.) 23 S. W. 311.

15. In an action against a firm on a note signed in the firm name by one of the partners after a dissolution, and given for a debt owing by the firm, a judgment in favor of the partners not signing will not be disturbed on appeal, where there is no statement of facts in the record, and no finding by the court as to whether the signing partner had authority from his copartners to execute the note, or whether the payee had knowledge of the dissolution.—*Funck v. Heintze*, (Tex. Civ. App.) 23 S. W. 417.

16. Two of several defendants, sued as a partnership, pleaded their right to be sued in the county of their residence, but they did not deny that they were partners of defendant B., and B. did not plead that the action had been brought in the wrong county, as to him. The partnership was denied only as to a fourth defendant. *Held* that, on sustaining the plea of the first two defendants, the court erred in dismissing the whole case, since plaintiff was entitled to recover against defendant B.—*Kemp v. Wharton County Bank*, (Tex. Civ. App.) 23 S. W. 916.

— Judgment and execution.

17. An execution sale of partnership property is valid, though the judgment under which the execution was issued was invalid as to one of the partners because erroneously entered.—*Haisell v. McMurphy*, (Tex. Sup.) 23 S. W. 647.

Passengers.

See "Carriers," 36-64.

PAYMENT.

See, also, "Accord and Satisfaction;" "Compromise;" "Release and Discharge."

Of negotiable instruments, see "Negotiable Instruments," 4.

Of taxes, see "Taxation," 4.

What constitutes.

1. In an action to recover money collected by a banker, it appeared that plaintiff drew on one K., to defendant's order, and sent the draft to defendant for collection. Defendant's collector went to K. to collect the draft, and, receiving from K. a check on defendant for the amount of the draft, stamped the same "Paid," and delivered it to K. There were no funds in defendant's hands belonging to K., and the

check was not paid, but K. refused to surrender plaintiff's draft. Defendant's collector was not authorized by defendant to receive in payment of drafts anything but money, though it was shown that he had before received from defendant his checks for drafts. *Held*, that even if defendant had himself presented plaintiff's draft for payment, and had taken therefor a check on a third person, the receipt of such check would not have had the effect of a payment to defendant, unless he received the check as a payment.—*Western Brass Manuf'g Co. v. Maverick*, (Tex. Civ. App.) 23 S. W. 728.

Pleading and proof.

2. An answer, in an action on a note, which alleges various payments to plaintiff's attorney, who had the note for collection, and final payment to such attorney, but fails to state the times or amounts of such payments, or how made, is insufficient, under Rev. St. art. 1266, which provides that, where defendant desires to prove any payment, he shall file with his plea an account stating the nature of such payment, and the several items thereof, and shall not be entitled to prove the same unless it is so particularly described in the plea as to give plaintiff full notice of the character thereof.—*Hann v. Broussard*, (Tex. Civ. App.) 23 S. W. 88.

Perjury.

Variance, see "Indictment and Information," 3.

Personal Injuries.

See "Carriers;" "Damages," 22-25; "Horse and Street Railroads;" "Negligence;" "Railroad Companies."

To wife, action by husband, see "Husband and Wife," 30.

PLEADING.

See, also, "Damages," 32-36; "Libel and Slander," 2-4; "Parties;" "Trove and Conversion," 3.

Description of land, see "Trespass to Try Title," 19.

Filing pleadings, notice, see "Practice in Civil Cases," 6.

In action for negligence, see "Master and Servant," 24.

— on bond, see "Bonds," 3, 4.

— on insurance policy, see "Insurance," 5.

Joining action in tort and on contract, see "Torts."

Necessity of special plea to sustain admission of parol evidence, see "Evidence," 53.

On appeal from justice's court, see "Appeal," 56, 57.

Petition to enforce homestead right, see "Homestead," 2, 3.

Pleading and proof, see "Contracts," 13; "Release and Discharge," 3; "Trespass," 5; "Trespass to Try Title," 12, 13.

Statute of limitations, see "Limitation of Actions," 28, 29.

Striking out scandalous pleading, see "Contempt."

Supplemental petition.

1. Under Rev. St. 1879, § 3573, providing that a party may on motion file an amended supplemental petition, alleging material facts, or praying for different relief, where a supplemental petition in an action for waste sets up a continuation of the acts complained of since the filing of the original petition, a judgment may be rendered assessing damages down to the date of the filing of such supplemental petition.—*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

Plea in abatement.

2. In an action in a justice court one of the defendants, who was a nonresident of

the county in which the action was brought, filed a plea negating all the jurisdictional facts, if he had been sued alone, and averring that his codefendant, who was a resident of the county, was not his partner, or in any way interested in the business out of which the action arose, or liable to plaintiff, but omitting to aver that the codefendant was made a party for the fraudulent purpose of conferring jurisdiction. *Held*, that the plea was fatally defective because of such omission.—*Needham v. Dial*, (Tex. Civ. App.) 23 S. W. 240.

Demurrer.

3. The overruling of a demurrer is not a final adjudication, preventing the court, on renewal of the demurrer, from revising its ruling.—*Burrows v. Gonzales County*, (Tex. Civ. App.) 23 S. W. 829.

4. An assignment of error to the court's action in overruling intervenor's general demurrer to the petitions of plaintiff and other intervenors cannot be sustained, since, if any one of the petitions was good, the demurrer was properly overruled.—*Ellis v. Vernon Ice, Light & Water Co.*, (Tex. Civ. App.) 23 S. W. 856.

5. Though the husband can sue in his own name for damages to his wife's separate property, and the wife is not a necessary party, a suit by her when joined by her husband is not such a defect in pleading as can be reached by a general demurrer.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

Answer.

6. Under Rev. St. art. 1262, permitting a defendant to plead as many several matters, whether of law or fact, as he may think necessary, an answer may embrace a general demurrer.—*Alliance Milling Co. v. Eaton*, (Tex. Civ. App.) 23 S. W. 455.

7. When one defendant has filed an answer, and another answers, adopting that answer as his own, an answer adopting the latter answer, after the case has been dismissed against the first defendant, is a good adoption of the substance of his answer.—*Alliance Milling Co. v. Eaton*, (Tex. Civ. App.) 23 S. W. 455.

Reply.

8. In an action on a note, where the answer denies the execution and delivery, another allegation in the same paragraph, setting up want of consideration, is not admitted by failure to reply, since Civil Code, § 113, requires each cause of action or defense to be distinctly stated in a separate numbered paragraph; and, the issue of non est factum having already been made, plaintiff was not required to move that the answer be paraphrased.—*Mullikin v. Mullikin*, (Ky.) 23 S. W. 352.

9. In an action against a railroad company for injuries caused plaintiff by defendant's brakeman kicking him, while a trespasser, off the train, an allegation in the answer that plaintiff swung himself off the train is not an affirmative averment requiring a reply, being merely in emphasis of the denial that he was kicked off.—*Smith v. Louisville & N. R. Co.*, (Ky.) 23 S. W. 652.

Amendment.

10. Where defendant in an action on contract pleads want of consideration, a defect in the form of the affidavit to the truth of the plea may be amended.—*Baker v. Wahrmond*, (Tex. Civ. App.) 23 S. W. 1023.

11. In an action on a joint contract, after the testimony was all in, it was not error for the court to refuse to allow plaintiff to file a trial amendment that the defendants were partners, and that the materials were sold to them as such.—*Guinn v. O'Daniel*, (Tex. Civ. App.) 23 S. W. 850.

12. An amended petition should show the date of the original petition.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Hancock*, (Tex. Civ. App.) 23 S. W. 384.

13. A shipper of cattle, which he consigns to himself, has a right to sue the railroad company for overcharge on the freight, though others are interested in the shipment, and an amendment making the other parties plaintiffs is proper, it neither changing the cause of action nor the character in which plaintiff sues.—*Galveston, H. & S. A. Ry. Co. v. House*, (Tex. Civ. App.) 23 S. W. 332.

Pleading and proof.

14. In an action for services, a written contract of employment, signed by only part of the defendants, is admissible in evidence, under an allegation that the contract is in writing, but not stating that it is signed by all the defendants.—*Voss v. Feurmann*, (Tex. Civ. App.) 23 S. W. 936.

15. In garnishment proceedings on a judgment against N. and others, in which money due them was attached, N. intervened, and alleged that the judgment creditors had agreed to release him on payment of \$25 as his pro rata share of such judgment, and that he paid them such sum. *Held*, that it was error to admit evidence of an agreement to release each one of the judgment creditors on payment by him and by one S. (who was sued, but discharged on his plea of infancy) of \$25 each.—*Bowlen v. Robinson*, (Tex. Civ. App.) 23 S. W. 216.

— Variance.

16. A decree awarding a partition of lot 15, in block 14, in a certain town, is not supported by a petition which seeks partition of lot 5, of block 14, in such town.—*Lasaras v. Barrett*, (Tex. Civ. App.) 23 S. W. 822.

17. On complaint for a gross sum as damages for nonperformance of a contract, plaintiffs cannot recover compensation due under the contract for a small fraction of said sum which has become due and payable on defendants' admitted performance of a proportionate part of the contract.—*Cowart v. Edwards*, (Tex. Civ. App.) 23 S. W. 569.

18. On complaint for damages for nonperformance of a contract, plaintiffs cannot obtain judgment for rescission of the contract.—*Cowart v. Edwards*, (Tex. Civ. App.) 23 S. W. 569.

19. Plaintiff, a passenger on defendant's train, sued for personal injuries, alleging that he was injured through the reckless running of the train and the dangerous condition of the roadbed. The causes of the accident were the dangerous condition of the track and the failure of the section foreman to inspect it. *Held*, that the negligence of the foreman was but an incident of proof of the negligence alleged, and that there was no variance.—*Texas & Pac. Ry. Co. v. Barron*, (Tex. Civ. App.) 23 S. W. 537.

20. In an action to enforce a vendor's lien, the fact that the complaint states that the lien exists for the whole amount of a note, while the evidence shows that it is for only part thereof, is not ground for denying its enforcement for the part established; there being no variance between the pleading and proof, but merely a failure to establish the whole of the cause.—*Bergman v. Blackwell*, (Tex. Civ. App.) 23 S. W. 243.

21. In an action to foreclose a chattel mortgage made subject to a prior one in favor of persons not parties, the failure to allege this fact does not constitute a variance, and the exclusion of the mortgage as evidence on this ground is error.—*Wynne v. Admire*, (Tex. Civ. App.) 23 S. W. 418.

22. Where, in an action on a contract, the petition states enough of the terms of the contract to identify it with the one in proof, and the court finds the conditions which impose liability, either as stated in the petition or evidence, there is no material variance, if any, because the proof shows terms and conditions in the contract additional to those pleaded.—*Terry v. French*, (Tex. Civ. App.) 23 S. W. 911.

Waiver of objections.

23. Where facts are defectively pleaded, the adverse party can only avail himself of the defect by exception to the pleading or objection to the evidence in the trial court.—*Park v. Prendergast*, (Tex. Civ. App.) 23 S. W. 535.

24. In answer to an action for damages to horses shipped over defendant's railroad, defendant pleaded a written contract requiring, as a condition precedent to plaintiff's recovery, notice, in writing, of his claim, to some officer of defendant, or its nearest station agent, before the stock was removed from its destination. The answer was defective, but no exceptions were taken by plaintiff, and the contract was admitted without objection. The court charged that, under the pleadings, the jury could not consider the contract as a defense. *Held* that, since no objection was urged to the pleading or testimony, the charge was erroneous, but was not prejudicial to defendant, as it did not introduce any testimony to sustain its plea of failure to give notice of damages.—*Galveston, H. & S. A. Ry. Co. v. Thompson*, (Tex. Civ. App.) 23 S. W. 930.

25. It is immaterial whether an amendment to a complaint amounted to the bringing of a new suit, where defendant voluntarily appeared in reference to it.—*Burrows v. Gonzales County*, (Tex. Civ. App.) 23 S. W. 829.

26. An objection to an amended petition as being a departure from the original is waived by pleading over and going to trial without raising the question.—*Gelatt v. Ridge*, (Mo. Sup.) 23 S. W. 882.

Plea in Abatement.

See "Pleading," 2.

Possession.

See "Adverse Possession."

POWERS.

Conveyance by trustee by attorney, see "Trusts," 5, 6.

Of agent, see "Principal and Agent," 1-4.

Of receiver, see "Receivers," 3.

Of sale, see "Mortgages," 11-14.

Power of attorney.

1. A power of attorney authorizing the sale of a land certificate does not authorize the sale of the land on which such certificate is subsequently located.—*Collins v. Durward*, (Tex. Civ. App.) 23 S. W. 561.

2. Under a power of attorney in Texas, a conveyance may be made in the name of the attorney, and without reference to the principal.—*Trinity County Lumber Co. v. Pinckard*, (Tex. Civ. App.) 23 S. W. 720; *Id.* 1015.

3. A power of attorney authorizing the agent to investigate and by suit or other legal manner recover any lands to which the principals are or can become entitled, and sell the same by sufficient deed, empowers the agent to convey any land to which the principals apparently have title, and does not restrict his authority to convey merely the principals' chance or right in the land; and hence a bona fide purchaser for value from such attorney takes a valid title as against one claiming under a prior unrecorded conveyance of the ancestor of the principals, of which conveyance both the principals and the purchaser were ignorant.—*Meyer v. Hale*, (Tex. Civ. App.) 23 S. W. 930.

4. A power of attorney to sell and convey for money, or such other consideration as may seem to the grantor's advantage, and to receive the consideration, gives no power to convey in satisfaction of a pre-existing moral obligation.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1100.

v. 23 S. W.—76

5. A power of attorney to take all lawful means for the recovery of lands due from the Texas republic for military services of donors' ancestor, to appoint attorneys, and, should donee receive a patent, to sell the land, empowered the donee to appoint a suitable person, a citizen of Texas, attorney in fact to procure and locate the certificates, and pay him for his services in the usual way.—*Franklin v. Piper*, (Tex. Civ. App.) 23 S. W. 942.

Conveyance or power of attorney.

6. A writing executed in 1838, in the republic of Texas, recited that, for a valuable consideration, S. appointed C. "a substitute as attorney under me, to apply for and obtain a patent or title" to one league and labor of land, which G. obtained through his assignees from the board of land commissioners, and which certificate was transferred by the assignees to said S., "wherefore C. is hereby authorized to obtain patent in his own name, or in the name or names of any other person or persons," and generally to do everything necessary in the premises; "and I, the said S., do hereby declare the same to be legal and binding on me, as though done by himself, in my own proper person." *Held* that, in the absence of evidence showing the contrary, such writing was a conveyance of the land certificate, and not a mere power of attorney.—*Davidson v. Senior*, (Tex. Civ. App.) 23 S. W. 24.

7. In an action to recover land by the heirs of S., to whom the land was patented under a land certificate, against parties claiming under such instrument, it appeared that part of such certificate had been located before such writing was executed, but it was not shown who located it or procured the patent. Four days before its execution, S. conveyed the land thus located to C. The latter died 12 years, and the former 17 years, thereafter, and it was not shown that either exercised any acts of ownership over the unlocated part of the certificate after the instrument was executed. Soon after C.'s death, his administrator sold the land, and it was not shown that either S., in his lifetime, or plaintiff, asserted any claim to it during a period of over 50 years. *Held*, that it was error to submit to the jury the question as to whether S. intended by such writing to convey such certificate to C., or to give him a power of attorney only.—*Davidson v. Senior*, (Tex. Civ. App.) 23 S. W. 24.

PRACTICE IN CIVIL CASES.

See, also, "Abatement and Revival," "Appeal," "Appearance," "Certiorari," "Continuance," "Costs," "Courts," "Equity," "Evidence," "Judgment," "Jury," "New Trial," "Parties," "Pleading," "Trial," "Venue in Civil Cases," "Witness," "Writs."

Dismissal, see "Certiorari," 3.

Stipulations, parol agreement to arbitrate, see "Arbitration and Award," 1.

Dismissal.

1. Where sufficient diligence is not being used by plaintiffs to bring a suit to trial, but they duly appear to represent their cause, defendant's remedy is to force them to trial, and not to have the suit dismissed for want of prosecution.—*Roemer v. Shackelford*, (Tex. Civ. App.) 23 S. W. 87.

Voluntary dismissal.

2. Where plaintiff's motion to dismiss is assigned for hearing to a later date, a motion by defendant to file an amended answer and counterclaim, made at a date intermediate the date of plaintiff's motion and the date assigned for the hearing thereof, does not affect plaintiff's right to a dismissal; Civil Code, § 371, providing that an action may be dismissed without prejudice to a future action by plaintiff before final submission of the case to the jury, or to the court sitting as a jury.—*Northwestern*

Notice of motions.

3. Notice need not be given defendant of a motion to dismiss, since Code, § 371, makes the right unconditional.—*Northwestern Mut. Life Ins. Co. v. Barbour*, (Ky.) 23 S. W. 584.

4. Where the petition of plaintiff contains impertinent matter, plaintiff should be given notice of motions or exceptions seeking to expunge the impertinent matter, in the manner provided by rule 21, relating to practice in the district and county courts. 23 S. W. 558, reversed.—*Herdon v. Campbell*, (Tex. Sup.) 23 S. W. 980.

Stipulations.

5. In trespass to try title, in which certain defendants also sued their codefendants on the warranty contained in deeds conveying them parts of the land in dispute, it appeared that there was filed an agreement "by plaintiff and defendants" that either party might read from certified copies of title papers, "This agreement to become binding when sanctioned by all of the defendants." It was originally signed by such warrantors, and was signed by one of the warrantors during the trial, but was not signed by the other warrantor. On objection being made by the warrantors to the introduction in evidence of copies of their deeds to such warrantors, the latter stated that they knew of the agreement, and announced that they were ready for trial, relying on it and sanctioning it. *Held*, that there was a waiver by such warrantors of the right to call for the original deeds.—*Collins v. Durward*, (Tex. Civ. App.) 23 S. W. 561.

Filing pleadings—Notice.

6. No notice need be given to plaintiff of a plea in reconvention filed by defendant.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

Prescription.

See "Adverse Possession;" "Limitation of Actions."

Highway by, see "Highways," 1.

Presumption.

On appeal, see "Appeal," 64-67; "Criminal Law," 97-101.

On execution sale, see "Execution," 13.

Of divorce from lapse of time, see "Divorce," 2.

Principal and Accessory.

See "Criminal Law," 5, 6.

Accessories to manslaughter, see "Homicide," 12.

PRINCIPAL AND AGENT.

See, also, "Attorney and Client;" "Factors and Brokers;" "Master and Servant."

Authority of agent of telegraph company, see "Telegraph Companies," 1, 2.

Power of attorney, see "Powers," 1-5.

Ratification of unauthorized county contract, see "Counties," 1.

Powers of agents.

1. Plaintiff drew on one K., to defendant's order, and sent the draft to defendant for collection. Defendant's collector went to K. to collect the draft, and, receiving from K. a check on defendant for the amount of the draft, stamped the same "Paid," and delivered it to K. There were no funds in defendant's hands belonging to K., and the check was not paid. Defendant's collector was not authorized by defendant to receive in payment of drafts anything but money, though it was shown that he had before received from K. his checks for drafts. *Held*, that the receipt by defendant's

collector of the check from K. was not binding on defendant. (Tex. Civ. App.) 23 S. W. 728.

2. Where an agent of a railroad company is generally intrusted with the settlement of claims for overcharges of freight, a waiver by him of a clause in a bill of lading that suit for overcharges must be brought within 40 days is binding on the company, though such waiver was contrary to his instructions.—*Galveston, H. & S. A. Ry. Co. v. House*, (Tex. Civ. App.) 23 S. W. 332.

3. An agent authorized to make a rent contract has no power to collect the rent, unless specially authorized.—*Heflin v. Campbell*, (Tex. Civ. App.) 23 S. W. 595.

4. Where cotton is left with an agent to be sold at the highest market price upon approval by the principal, a sale by the agent without the principal's consent conveys no title.—*Skeeters v. Slater Milling Co.*, (Tex. Civ. App.) 23 S. W. 1000.

Evidence of agency.

5. Neither express nor ostensible agency can be proved by declarations or acts of the alleged agent unless the alleged principal is connected with them.—*Mills v. Berla*, (Tex. Civ. App.) 23 S. W. 910.

6. On the question whether an agent had authority to make a contract which was renounced by his principal, it may be shown that he made similar contracts, before such renunciation, which were carried out by the principal, but not that he made similar contracts subsequent thereto.—*Mills v. Berla*, (Tex. Civ. App.) 23 S. W. 910.

Estoppel to deny agency.

7. If one places another in such a position as to reasonably lead others to believe that he is authorized to do certain acts, he will be bound thereby.—*Mills v. Berla*, (Tex. Civ. App.) 23 S. W. 910.

Ratification.

8. The failure of the grantors of a power of attorney to sell a land certificate to commence suit in trespass to try title to recover land unlawfully sold under it until nine years after the execution and record of the deed thereof by the attorney in fact, and until one year after the execution and recording of a second deed by such attorney of the same land to the same grantees, to correct an error in the description in the first deed as to the county in which the land is situated, is insufficient to constitute a ratification of the acts of such attorney in fact.—*Collins v. Durward*, (Tex. Civ. App.) 23 S. W. 561.

9. The owner of a building does not become liable for improvements made under an unauthorized contract with his agent, because he afterwards uses them, if they are of such a character that they cannot be removed.—*Mills v. Berla*, (Tex. Civ. App.) 23 S. W. 910.

— Evidence.

10. It being claimed that a married woman had ratified an unauthorized deed of her separate estate executed by her husband, and had estopped herself to deny it, evidence was admissible that, when informed thereof by her husband, she objected to it, and that thereafter she refused the grantees' request that she sign it.—*Smith v. Powell*, (Tex. Civ. App.) 23 S. W. 1109.

11. In an action by a real-estate agent for commissions, a deed executed by the principal to the purchaser after the commencement of the suit is admissible to show the principal's ratification of the agent's contract.—*Gelatt v. Ridge*, (Mo. Sup.) 23 S. W. 882.

Rights and liabilities as to third persons.

12. In an action against a railroad company for failure to deliver goods, an instruction that defendant was bound by a promise made by a

clerk in the office of defendant's auditor that defendant would pay for the goods is erroneous, in the absence of evidence that the clerk had authority to make such promise.—*Gulf, C. & S. F. Ry. Co. v. Jacobs*, (Tex. Civ. App.) 23 S. W. 145.

When notice to agent imputed to principal.

13. Where a person purchases land of heirs for himself and another jointly, he is not only the partner, but the agent also, of such other purchaser, and the latter is charged with the knowledge of and notice to the former of an unrecorded deed by the ancestor of such heirs.—*Smith v. Adams*, (Tex. Civ. App.) 23 S. W. 49.

PRINCIPAL AND SURETY.

See, also, "Ball;" "Bonds;" "Guaranty."

Consideration for note given to indemnify surety, see "Negotiable Instruments," 3.

Fraud of surety, see "Fraud."

Extent of liability of principal to surety.

1. If a surety discharges his obligation for a less sum than its full amount, he can only claim against the principal the actual sum paid.—*Price v. Horton*, (Tex. Civ. App.) 23 S. W. 501.

Remedies against sureties.

2. In an action against an administrator and the sureties on his bond for misappropriating the assets of the estate, where it is alleged and proven that the administrator's residence is not known, and cannot be ascertained with reasonable diligence, and that he is notoriously insolvent, the action may be discontinued as against him, and judgment entered against the sureties, though no citation was ever served on the administrator.—*Chapman v. Brite*, (Tex. Civ. App.) 23 S. W. 514.

Judgment—Directing sheriff to first proceed against principal.

3. A judgment against the principal and sureties on a note should protect the sureties by directing that the execution be first levied on the principal's property, as required by Rev. St. art. 3863.—*Montrose v. Fannin County Bank*, (Tex. Civ. App.) 23 S. W. 709.

Subrogation of surety.

4. A surety for the debts of a firm becomes subrogated to all the rights of the creditors, on paying the debts; and, when sued by any member of the firm, he is entitled to offset the debts thus paid.—*Baker v. Wahrmond*, (Tex. Civ. App.) 23 S. W. 1023.

Priorities.

Of mortgage liens, see "Mortgages," 5.

Privileged Communications.

See "Witness," 1, 2.

Probable Cause.

See "Malicious Prosecution," 1.

Probate.

Of will, see "Wills," 5.

Process.

See "Writs."

Promissory Notes.

See "Negotiable Instruments."

Proof.

Pleading and proof, see "Pleading," 14-22.

Proximate Cause.

See "Damages," 5-7; "Negligence," 2-4.

Public Cotton Ginner.

See "Bailment."

Public Improvements.

See "Municipal Corporations," 13-17.

PUBLIC LANDS.

Title by adverse possession, see "Adverse Possession," 3.

Titles derived from states.

1. A duplicate land certificate, issued in place of one which never had any existence, confers no rights. *Gunter v. Meade*, 14 S. W. 562, 78 Tex. 634, followed.—*Texas Land & Mortg. Co. v. State*, 23 S. W. 258, 1 Tex. Civ. App. 616.

2. A power of attorney to recover such land as the donors' deceased brother was "entitled to receive from the Texas government, for services rendered said government as a soldier," cannot include a certificate for a one-third league of land, since certificates for that amount were never issued for military services.—*Franklin v. Piper*, (Tex. Civ. App.) 23 S. W. 942.

3. In trespass to try title to land located in W. county under plaintiff's duplicate land certificate No. 30-185, the land commissioner testified that duplicate No. 108 was located in 1877 in K. county, after having been lost and substituted in 1867 by duplicate No. 29-10, and that the location in W. county was made in 1874 under duplicate No. 30-185, which was issued in 1873 as a substitute for duplicate No. 29-10 which had been lost. *Held*, that such testimony proved the location of duplicate No. 30-185 before that of No. 108, and could not be overcome by a deed to plaintiff which recited that it conveyed land which had been located under a headright land certificate issued in 1841, and substituted in 1857, after loss of the original, by duplicate No. 108, and the following indorsements on duplicate No. 108: "Filed April 18, 1859, by J. M. Donathan. Filed Jan'y 23, 1862. Filed March 22, A. D. 1876, at 10 A. M. C. M. Hobbill, D. C. M. Co. Replied July 19, '77. J. J. Gross, Comr."—*Seibert v. Richardson*, (Tex. Civ. App.) 23 S. W. 899.

4. The location of 1877 under duplicate No. 108 could not prejudice the location in 1874 under duplicate No. 30-185, where plaintiff ratified the location of 1874, though made without his knowledge, and had had nothing to do with making the location of 1877, except to protest against the issuance of a patent thereon.—*Seibert v. Richardson*, (Tex. Civ. App.) 23 S. W. 899.

5. The return of field notes with duplicate No. 30-185 to the general land office within 12 months after making a survey, and before the inception of defendant's rights in 1875, furnished prima facie evidence of a valid location, provided the certificate was valid, since no application for the land or entry was necessary before a survey, prior to the passage in 1879 of Rev. St. art. 3395, requiring such application or entry.—*Seibert v. Richardson*, (Tex. Civ. App.) 23 S. W. 899.

6. The certificate of a publisher accompanying a printed advertisement of the loss of a land certificate stated that the publication was made for 60 days, showed a substantial compliance with the statute except that it was not sworn to, and had been on file since 1873; and the commissioner was satisfied of its truth, as he issued a duplicate land certificate. *Held*, that such certificate was sufficient proof that notice had been given of the loss of the land certificate and the application for a duplicate, as required by Rev. St. art. 3885.—*Seibert v. Richardson*, (Tex. Civ. App.) 23 S. W. 899.

7. Duplicate certificate No. 29-10 was not invalidated, before the issuance of its substitute, by the fact that surveys of locations under it had been forfeited for nonreturn of the certificate.—*Seibert v. Richardson*, (Tex. Civ. App.) 23 S. W. 899.

8. In ejectment, plaintiffs claimed a strip of land along the Indian boundary line in the Ocoee land district, under a grant from the state made pursuant to an act of the legislature authorizing the entry and grant of all unsurveyed land in such district. Previous to such act, the state had caused surveys to be made of the lands in such district, and in the Hiwassee district, adjoining, after they were granted to the state, and purchased from the Cherokee Indians by the United States; the evident purpose of the legislature being to survey all the land in each of such districts up to the Indian boundary line, as manifested by the surveys and plats in the land offices of such districts. Abutting landowners recognize that they hold up to a common dividing line, and that there is no strip of unsurveyed land along the Indian boundary line extending across the state, in Ocoee district. Defendants hold under a chain of title from the state, by numerous grants. *Held*, that plaintiffs must establish that there was such a vacant, unoccupied, and unsurveyed strip of land by evidence that is clear and convincing.—*Hennegar v. Seymour*, (Tenn.) 23 S. W. 969.

9. In such case, plaintiffs' claim was supported by the evidence of a surveyor of only five years' experience, and of no experience in the mountainous region where the land in dispute is situated, while defendants' claim, that there was no such unsurveyed land, was sustained by the evidence of four intelligent engineers, of many years' standing, and much experience in surveying in such locality, and in locating old lines, including the Indian boundary line in question. It also appeared that portions of the land in dispute have been in defendants' possession, inclosed and cultivated, for periods ranging from 7 to 40 years. *Held*, that plaintiffs failed to sustain their claim by clear and convincing proof, and that judgment for defendants was proper.—*Hennegar v. Seymour*, (Tenn.) 23 S. W. 969.

10. Plaintiff purchased from the state the east half of a certain surveyed section, and one of the defendants purchased the west half. It afterwards appeared that all of the east half, except 67 acres, was covered by a prior survey. The land commissioner had no knowledge of the conflict, and all parties thought each purchaser had a full half section. *Held*, that as plaintiff never intended to buy, and the state did not intend to sell him, any part of the west half of the section, he could not recover from the defendants any portion thereof to make up the deficiency in the east half.—*Creech v. Davidson*, (Tex. Civ. App.) 23 S. W. 996.

11. Though a prior locator who has not secured a patent must show a valid certificate and survey in order to recover, he is only required in the first instance to make a prima facie case, and need not exclude all possible defects of title.—*Seibert v. Richardson*, (Tex. Civ. App.) 23 S. W. 899.

Titles derived from states—Homestead donations.

12. Sayles' Civil St. art. 3948, provides that if any person claiming a homestead donation shall fail to have the survey made, and the field notes thereof returned to and filed in the land office, within 12 months after the date of his application, he shall forfeit all right to the land. *Held*, that, to relieve one from the operation of the section, on a failure to comply therewith, because of the wrongful acts of the surveyor, such acts must be clearly shown.—*Taylor v. Criswell*, (Tex. Civ. App.) 23 S. W. 424.

13. Rev. St. tit. 70, c. 9, (entitled "Homestead Donations," arts. 3939, 3940, require

each person who desires to acquire a homestead to present to the county surveyor his application in writing, containing, *inter alia*, a statement under oath that he has actually settled on the land he claims, and that the application shall be made at the time of settlement, or within 30 days thereafter. *Held*, that, to entitle a person to a homestead, he must make an actual settlement, which must precede his application.—*Busk v. Lowrie*, (Tex. Sup.) 23 S. W. 983.

14. Where a man, with his wife, goes on vacant land, and makes slight improvements thereon, which are completed by the middle of the day, and on the following day makes application to the surveyor, as required by statute, but does not return to or move his family on the land until three or four months afterwards, there is no "actual settlement" on the land before the application is made, and the application and survey made pursuant thereto are void. 22 S. W. 414, reversed.—*Busk v. Lowrie*, (Tex. Sup.) 23 S. W. 983.

15. Where no application for survey is made by such claimant after he actually settles on the land, he acquires no rights to or interest in it, since such acts of settlement cannot relate back to the time of making a false statement, and make good that which was not true when made.—*Busk v. Lowrie*, (Tex. Sup.) 23 S. W. 983.

Title cured by legislation.

16. The title of a purchaser of school land, under the act of 1883, who had not fully complied with the act, was cured by subsequent legislation if he became a bona fide settler within six months of the sale, as provided in the act; and the sale dates from the award by the land board, and not from the registration of the application to purchase in the surveyor's office.—*State v. Pendleton*, (Tex. Civ. App.) 23 S. W. 923.

School lands.

17. A provision in a contract to purchase school lands from the state that the contract shall be forfeited on failure of the purchaser to pay interest on the purchase money is not enforceable unless such provision is authorized by law.—*Patterson v. O'Docherty*, (Tex. Civ. App.) 23 S. W. 203.

18. Under Act April 1, 1887, § 9, requiring the applicant for the purchase of state school land to be an actual settler, in good faith, an applicant is not entitled to his selection, where he only built a small house thereon, which remained unoccupied, and once plowed a fire guard around it, but lived on other land, where he was employed.—*Atkeson v. Bilger*, (Tex. Civ. App.) 23 S. W. 415.

19. Act April 1, 1887, § 11, providing that "if any purchaser [of state school land] shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, and such land shall again be for sale as if no such sale and forfeiture had occurred," does not require the state to obtain, by action against the purchaser, a decree of forfeiture, before the land may be sold to a subsequent purchaser.—*Atkeson v. Bilger*, (Tex. Civ. App.) 23 S. W. 415.

20. The fact that public school land was sold to one who was not an actual settler thereon, in violation of Act April 1, 1887, amended April 8, 1889, may be alleged and proved by one claiming such land under a subsequent application to buy while an actual settler thereon, the right to attack such sale not being in the state alone.—*Eastin v. Ferguson*, (Tex. Civ. App.) 23 S. W. 918.

Public Policy.

See "Contracts," 3, 4.

Public Roads.

See "Highways."

Public Schools.

See "Schools and School Districts."

Purpresture.

See "Dedication," 5.

QUIETING TITLE.

See, also, "Ejectment;" "Trespass to Try Title."

Decree in trespass to try title, cancelling deed, see "Trespass to Try Title," 19.

Sufficiency of evidence.

In an action by the holder of the perfect legal title of record to 2,700 acres of land to remove a cloud from such title, it appeared that D., the owner of a tract of land including that in dispute, gave to defendants' predecessor in title, C., a bond for title to 350 acres, more or less, in such county; that 31 years afterwards defendants brought an action against the heirs of D., who had previously divested themselves of title by the deeds, duly recorded, under which plaintiff claimed, and obtained a commissioner's deed to the land in dispute, under averments that they had deeds from the heirs of C. for that amount of land; and that plaintiff, who then had title of record, was not made a party to such action. The preponderance of evidence showed that C. never claimed any part of such land. *Held*, that plaintiff was entitled to have such commissioner's deed removed as a cloud on his title, and that a judgment for defendants was erroneous.—*Kant v. Hall*, (Ky.) 23 S. W. 964.

Qui Tam and Penal Actions.

Penalty for detaining goods after tender of freight, see "Carriers," 32-35.

RAILROAD COMPANIES.

See, also, "Carriers;" "Eminent Domain;" "Horse and Street Railroads."

Agreements between, see "Partnership," 1.

Forfeiture of charter—Rights of new company.

1. Even if it should be conceded that on failure of a railroad company to construct ten miles of road within two years of its incorporation, whereby it forfeits its charter, all rights in the roadbed are forfeited, a new company cannot, by simply taking out a charter calling for the same termini as the old company, acquire title to such property.—*Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co.* in Texas, 23 S. W. 1012, 2 Tex. Civ. App. 650.

Liability for penalties incurred during receivership.

2. Under Sayles' Civil St. art. 4258a, § 3, imposing a penalty on railroads for the acts of their officers, agents, or employees for detention of freight shipment after tender of freight due, as shown by the bill of lading, a company is not liable; the detention having been while the road was in the hands of receivers.—*Missouri, K. & T. Ry. Co. v. Stoner*, (Tex. Civ. App.) 23 S. W. 1020.

3. A railroad company is not liable for the penalty imposed on carriers of animals for a failure to properly care for them in transit, where the penalty was incurred while the road was operated by a receiver.—*Texas & P. Ry. Co. v. Barnhart*, (Tex. Civ. App.) 23 S. W. 801.

Liability of receiver—Discrimination.

4. Receivers operating a railroad under judicial appointment are not within Sayles' Civil St. art. 4258b, § 7, which prescribes a

penalty for unjust discrimination in freight rates by "railroad companies." *Turner v. Cross*, 18 S. W. 578, 83 Tex. 218, followed. *Clark v. Dyer*, 16 S. W. 1061, 81 Tex. 339, distinguished.—*Bonner v. Franklin Co-op. Ass'n* (Tex. Civ. App.) 23 S. W. 317.

Death by wrongful act.

5. A receiver is not a "proprietor, owner, charterer or hirer," within Rev. St. art. 2399, giving a right of action for injuries resulting in death, caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, or by the negligence of their servants or agents. *Turner v. Cross*, 18 S. W. 578, 83 Tex. 218, followed.—*Brown v. Record*, (Tex. Civ. App.) 23 S. W. 704.

Road operated by trustees—Liability for goods lost.

6. Where a railroad passes into the management of trustees under authority conferred by a mortgage of the company's property and franchises, such trustees become the company's agents, and it will be liable for goods lost in transitu over the road during the trustees' management; Sp. Act 12th Leg. pp. 189-192, under which said road was organized, and which authorizes it to raise money by sale of bonds secured by mortgage on its road and franchises, not being intended to empower it to surrender control of its road to others, and to relieve itself of its liabilities to the state and public.—*Rio Grande R. Co. v. Cross*, (Tex. Civ. App.) 23 S. W. 529, 1004; *Same v. Munoz Successors*, Id. 531; *Same v. Pettipain*, Id.

Taxation—Exemption.

7. Railroad companies which began the construction of their roads after Act May 5, 1884, exempting newly-constructed railroad property from taxation, was repealed by Acts Sept. 14, 1886, cannot claim exemption from taxation under the act of 1884, on the ground that they did such construction work in the belief that such act was still in force.—*Commonwealth v. Owensboro, F. of R. & G. R. Co.* (Ky.) 23 S. W. 868; *Same v. Louisville & N. R. Co.*, Id.; *Same v. Elkton & G. R. Co.*, Id.; *Same v. Mammoth Cave R. Co.*, Id.; *Same v. Burnside & C. R. Co.*, Id.; *Same v. Hodgenville & E. Ry. Co.*, Id.; *Same v. Louisville Southern R. Co.*, Id.; *Same v. Louisville, H. & W. R. Co.*, Id.; *Same v. Ohio Val. Ry. Co.*, Id.; *Same v. Louisville, St. L. & T. Ry. Co.*, Id.; *Same v. Kentucky & I. Bridge Co.*, Id.; *Same v. Kentucky Midland Ry. Co.*, Id.; *Same v. Kenesee Coal Co.*, Id.; *Same v. Owensboro & N. R. Co.*, Id.

8. The act of 1856, reserving to the legislature the right to repeal or amend "charter privileges" granted by the legislature to particular persons, does not enable the legislature to repeal an act exempting newly-constructed railroad property from taxation for a certain time, as against railroad companies which, on the faith of such act, constructed their roads before it was repealed.—*Commonwealth v. Owensboro, F. of R. & G. R. Co.* (Ky.) 23 S. W. 868; *Same v. Louisville & N. R. Co.*, Id.; *Same v. Elkton & G. R. Co.*, Id.; *Same v. Mammoth Cave R. Co.*, Id.; *Same v. Burnside & C. R. Co.*, Id.; *Same v. Hodgenville & E. Ry. Co.*, Id.; *Same v. Louisville Southern R. Co.*, Id.; *Same v. Louisville, H. & W. R. Co.*, Id.; *Same v. Ohio Val. Ry. Co.*, Id.; *Same v. Louisville, St. L. & T. Ry. Co.*, Id.; *Same v. Kentucky & I. Bridge Co.*, Id.; *Same v. Kentucky Midland Ry. Co.*, Id.; *Same v. Kenesee Coal Co.*, Id.; *Same v. Owensboro & N. R. Co.*, Id.

Negligence—Injuries to person on station platform.

9. A railroad company is under no obligation to keep the platform about its depot in safe condition as against a boarding-house keeper, who goes to the depot to meet an incoming train for the purpose of securing a boarder.—*Post v. Texas & P. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 708.

plaintiff's wife was staying on the car by the permission and at the suggestion of defendant's agent, under whose orders plaintiff was working at the time she was injured; and the accident was caused by the negligence of a conductor. *Held*, that defendant was liable.—*Campbell v. Harris*, (Tex. Civ. App.) 23 S. W. 35.

Accidents at crossings.

11. The fact that a boy on a railroad track became confused at the shouts and signals of a brakeman on a train trying to direct his attention to the engine following it, and that he stopped and stood on the track, trying to understand him, till too late, does not render the railroad company liable for the injury from the engine.—*Texas & N. O. R. Co. v. Hare*, (Tex. Civ. App.) 23 S. W. 42.

12. In an action for the death of plaintiff's mother from injuries received at a railroad crossing in a city which had an ordinance prohibiting the running of trains faster than six miles an hour, the court instructed that it was decedent's duty to look and listen before stepping on the track, but, if the jury found that she saw the train, she had a right to presume, unless she knew to the contrary, that the person in charge of the train would not run faster than six miles an hour, and to act on that presumption. *Held*, that the instruction was proper, as advising the jury what, under the law, were decedent's rights and duties, and that it did not direct them to presume a fact concerning which there was evidence. *Barclay and Gantt, JJ.*, dissenting.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo. Sup.) 23 S. W. 149.

13. The rate of speed of the train, if a proximate cause, may be considered with other facts on the issue of the railroad's negligence, though there is no statutory limit to said speed.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 596.

14. Under Acts 1883, (page 28,) requiring engineers, at 80 rods from a highway crossing, to whistle and ring the bell, and to continue to ring till the crossing is past, an instruction which makes a ringing or whistling at 80 rods' distance, without continuance of the ringing, a compliance with the law, is properly refused.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 596.

—Contributory negligence.

15. The failure of an engineer to give any signal on approaching a railroad crossing will not relieve a traveler from the effects of his contributory negligence in going upon the track.—*Texas & N. O. R. Co. v. Hare*, 23 S. W. 42.

16. In an action against a railroad company for killing a traveler at a highway crossing, where negligence by the railroad company is clearly established, the defense of contributory negligence must be clearly made out to warrant the court in taking the case from the jury; and, if inferences other than that of contributory negligence may be fairly drawn from the evidence, the question is for the jury.—*Weller v. Chicago, M. & St. P. Ry. Co.*, (Mo. Sup.) 23 S. W. 1061.

17. Evidence by the only eyewitness to an accident at a railroad crossing that deceased, driving a wagon in the nighttime, did not use any precaution to ascertain the approach of a train after he got within 50 feet of the track, does not show him guilty of contributory negligence, as matter of law, when it appears that he had an unobstructed view of the track for 600 feet before reaching the crossing.—*Weller v. Chicago, M. & St. P. Ry. Co.*, (Mo. Sup.) 23 S. W. 1061.

18. In an action against a railroad company for killing a traveler at a highway crossing, where the defense is contributory negligence, and the evidence is almost conclusive that he

care in moving trains, and that he was not bound to anticipate the company's failure to ring the bell, carry a light, and run its train within a limited rate of speed, since the jury may well have inferred that the traveler's failure to exercise care did not exist if the company omitted the acts enumerated. *Brace, J.*, dissenting.—*Weller v. Chicago, M. & St. P. Ry. Co.*, (Mo. Sup.) 23 S. W. 1061.

19. The driving of a horse at a rate of speed forbidden by a city ordinance at the time of a collision between the wagon and a railroad train on a highway crossing is such negligence on the part of the driver as will prevent recovery against the railroad company if it contributed directly to the accident.—*Weller v. Chicago, M. & St. P. Ry. Co.*, (Mo. Sup.) 23 S. W. 1061.

20. For one to step behind and follow a freight train without listening or looking to discover if an engine was following, though he knew that engines did sometimes follow freight trains, was contributory negligence, preventing recovery for an injury from an engine following the train at a distance of 50 to 150 yards, and running at 5 to 15 miles per hour, and that, too, though the accident was at a crossing, and the engine failed to give any signal.—*Texas & N. O. R. Co. v. Hare*, (Tex. Civ. App.) 23 S. W. 42.

21. In an action to recover for personal injuries sustained by being struck by a locomotive at a crossing, plaintiff testified that, a few minutes before he was injured he crossed the same track, and looked and listened for trains, and saw one about 250 yards from the crossing heading towards it, but standing still; that on recrossing the track, at which time he was injured, he listened for trains, but did not look, though there was nothing to obstruct his view, and he knew a strong wind was blowing from a point which would tend to prevent his hearing a noise from the direction in which he had only a few minutes before seen a train headed. *Held*, that plaintiff was guilty of contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Moss*, (Tex. Civ. App.) 23 S. W. 475.

Injuries to persons on track.

22. Where an engineer blows the whistle on seeing a man on the track, and, on discovering from the man's manner, when within 200 feet of him, that he is intoxicated, makes no effort to check the train, and there is evidence that the man was struck on the side, as he was trying to leave the track, the jury are justified in finding defendant liable.—*Texas & P. Ry. Co. v. Robinson*, (Tex. Civ. App.) 23 S. W. 433.

23. In an action for damages against a railroad company for the negligent killing of plaintiff's child, a charge that the company was liable if it failed to use reasonable care to avoid injury to "any person that may come upon its track" was not prejudicial because it failed to draw the distinction between the care necessary towards a person rightfully on the track and a trespasser.—*San Antonio & A. P. Ry. Co. v. Vaughn*, (Tex. Civ. App.) 23 S. W. 745.

24. Where a child two years old is killed on the track by the lack of ordinary care of those in charge of the train, his father can recover damages unless those in charge of the child failed to exercise ordinary diligence in keeping it off the track.—*San Antonio & A. P. Ry. Co. v. Vaughn*, (Tex. Civ. App.) 23 S. W. 745.

—Contributory negligence.

25. An instruction that, though decedent was negligent in stepping on the track, yet if, after such negligence, defendant's employee in charge of the engine discovered, or could have discovered by the use of ordinary care, her condition, and its danger, and could have avoided injuring her by the use of ordinary care, and failed to do so, her negligence was no defense.

to the action, was proper.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo. Sup.) 23 S. W. 149.

26. An instruction that though decedent was guilty of negligence in stepping on the track, and defendant's employes in charge of the engine, after seeing her danger, could not have avoided injuring her, yet if their inability to avoid the injury was caused by running at an illegal speed, and they could have avoided it if they had been running at a lawful speed, the negligence of decedent was no defense to the action, was erroneous. *Barclay and Burgess, JJ.*, dissenting.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo. Sup.) 23 S. W. 149.

27. A railroad company is bound to exercise reasonable care to discover persons on its track, and, in the case of a child under two years of age, the fact that it was on the track is not contributory negligence on its part; and, the negligence of defendant being conceded, the question is whether plaintiff was guilty of contributory negligence in allowing it to wander alone on the track.—*San Antonio & A. P. Ry. Co. v. Vaughn*, (Tex. Civ. App.) 23 S. W. 745.

Stock-killing cases.

28. The omission to give statutory signals at a railroad crossing renders a railroad company liable where injury to stock results.—*Texas & N. O. Ry. Co. v. Cunningham*, (Tex. Civ. App.) 23 S. W. 332.

29. In an action against a railroad company for killing a horse, where there is no evidence that the fence through which the animal escaped on the right of way was ever a lawful fence, the question whether a railroad company must have notice of the defective condition of a fence which had once been sufficient will not be considered on appeal.—*Gulf, C. & S. F. Ry. Co. v. Rowland*, (Tex. Civ. App.) 23 S. W. 421.

Fires.

30. A railroad company which permits combustible material to grow and remain on its right of way, where it is liable to be ignited by sparks from passing engines, is guilty of negligence as matter of law, and an instruction to this effect is not objectionable as being on the evidence.—*Gulf, C. & S. F. Ry. Co. v. Rowland*, (Tex. Civ. App.) 23 S. W. 421.

31. In an action against a railroad company for damages from fires set on its right of way, the court properly refused to charge that defendant had a right to kindle such fire to burn off the right of way, if it used reasonable care to prevent it from spreading and injuring the property of others.—*Gulf, C. & S. F. Ry. Co. v. Cusenberry*, (Tex. Civ. App.) 23 S. W. 851.

Damages.

32. The testimony showed permanent injury to the land, and there was no testimony as to the separate value of the grass. Plaintiff, in testifying to the difference in the value of the land immediately before and after the fires, doubtless included the grass destroyed. *Held*, that it was not error to charge that the measure of damages was the difference in the value of the land before and immediately after each fire, with interest from such time to date of trial, at 8 per cent, per annum.—*Gulf, C. & S. F. Ry. Co. v. Cusenberry*, (Tex. Civ. App.) 23 S. W. 851.

RAPE.

See, also, "Abduction."

Assault with intent to rape, see "Criminal Law," 63.

Evidence.

1. The defense cannot show what prosecutrix said to a doctor, examining her a week afterwards, as to how the assault occurred.—*State v. Yocum*, (Mo. Sup.) 23 S. W. 765.

Character of prosecutrix.

2. In a prosecution for assault with intent to rape, evidence of the general reputation of

prosecutrix for unchastity is admissible.—*Shields v. State*, (Tex. Cr. App.) 23 S. W. 893.

Instructions.

3. When the court has postulated that the offense must have been done forcibly, and against the will of prosecutrix, it is no error to refuse charges requiring it to have been done by force and against her will, notwithstanding her resistance, and to gratify defendant's passions, at all events, notwithstanding said resistance.—*State v. Yocum*, (Mo. Sup.) 23 S. W. 765.

4. In a prosecution for assault with intent to rape it is error to fail to instruct as to the degree of force which must have been intended by defendant in order to constitute the crime.—*Shields v. State*, (Tex. Cr. App.) 23 S. W. 893.

5. In a prosecution for assault with intent to rape, where the evidence makes an issue as to whether defendant intended to use force, it is error not to submit to the jury the law of aggravated assault and battery.—*Shields v. State*, (Tex. Cr. App.) 23 S. W. 893.

Rate.

Of interest, see "Interest," 5-7.

Ratification.

Of agent's acts, see "Principal and Agent," 8-11.

Real-Estate Agents.

See "Factors and Brokers."

Rebellion.

See "Reconstruction."

RECEIVERS.

Effect of appointment on levy, see "Execution," 5.

For corporation, see "Corporations," 12, 13.

Judgment against, effect on debtor, see "Judgment," 17.

Of railroad, liability for discrimination, see "Railroad Companies," 4.

—Liability for negligence, see "Railroad Companies," 5.

—Liability of company for penalties incurred, see "Railroad Companies," 2, 3.

Appointment—Waiver of objections.

1. Where intervenor failed to take any steps in the trial court to vacate a receivership of the property on which he seeks to foreclose a mortgage, and his plea seems to have contemplated the continuance of the receivership, and there was an agreed judgment to that effect, he must be held to have acquiesced therein, and assignments of error to the court's action in appointing a receiver cannot be noticed.—*Ellis v. Vernon Ice, Light & Water Co.*, (Tex. Civ. App.) 23 S. W. 856.

Jurisdiction of other courts than one appointing.

2. In an action by a landowner against the receivers of a railroad company for the recovery of land occupied by the roadbed, the court, on rendering judgment in plaintiff's favor, properly declined to award plaintiff a writ of restitution, since any interference with the property would be a contempt of the court appointing the receiver, and plaintiff's proper course is to apply to that court.—*Abbey v. International & G. N. R. Co.'s Receivers*, (Tex. Civ. App.) 23 S. W. 934.

Business continued by receiver—Authority to create debts.

3. A court of equity has power to authorize a receiver of a waterworks company to incur an indebtedness to continue the operation of the works, and to make it a charge upon the body

ment of running expenses.

4. Acts 1889, p. 56, provides that all moneys which come into the hands of a receiver shall be applied—First, to the payment of costs of suit; second, wages of employes due from the receiver to the employes; third, debts for materials purchased during the receivership to improve the property; fourth, debts for improvements to the property during the receivership; fifth, claims against the receiver on contracts made during the receivership. *Held*, that running expenses, salary, etc., including receiver's certificates, constituted a lien on the property which took precedence over a pre-existing mortgage thereon.—*Ellis v. Vernon Ice, Light & Water Co.*, (Tex. Civ. App.) 23 S. W. 856.

5. Claims of creditors which have accrued prior to the appointment of a receiver, however, do not take precedence of such mortgage.—*Ellis v. Vernon Ice, Light & Water Co.*, (Tex. Civ. App.) 23 S. W. 856.

Debts created during receivership.

6. Claims under contracts made by a receiver, under direction of the court, for the loan of money to preserve the property, were properly allowed precedence over bonds secured by a pre-existing mortgage.—*Ellis v. Vernon Ice, Light & Water Co.*, (Tex. Sup.) 23 S. W. 858.

Recognizance.

On appeal, see "Bail," 4-9.

RECONSTRUCTION.

Compliance with conditions of act.

Under Act Cong. March 2, 1867, (one of the reconstruction acts,) providing that when the people of Texas should adopt a constitution containing certain requisites the powers of the military commander should become inoperative, county judges appointed by such commander did not at once lose jurisdiction theretofore exercised, on the adoption of the constitution of 1869, referring such jurisdiction exclusively to district courts, but only after said courts had become fully organized through appropriate legislation, and the military government was at an end. *Daniel v. Hutcheson*, (Tex. Sup.) 22 S. W. 933, followed.—*Daniel v. Blake*, (Tex. Civ. App.) 23 S. W. 242.

Reconvention.

See "Set-Off and Counterclaim."

RECORDS.

Evidence as to entry of judgment, see "Evidence," 10.

Of assignment, see "Assignment for Benefit of Creditors," 4, 5.

Of deed, see "Deed," 5.

Of mortgage, see "Chattel Mortgages," 2.

On appeal, see "Appeal," 37-53; "Criminal Law," 79.

Parol evidence of contents, see "Evidence," 58.

Recording bill of sale of stock, see "Sale," 4.

— judgment, see "Judgment," 21.

Amendment.

1. When a will was probated it was incorrectly recorded. Seven years later the court ordered the record amended, and the will properly recorded. *Held*, that the probate court had power in such case to amend the record, under Sayles' Civil St. arts. 1354, 1355, empowering the court to correct any mistake or misrecital in its judgments; and the lapse of time was immaterial.—*Hamilton-Brown Shoe Co. v. Whitaker*, (Tex. Civ. App.) 23 S. W. 520; Same

here the validity of a judgment is attacked because it appears to have been rendered "July 14, 1874," and the action was not begun till 1875, the minutes of the court are admissible to show a clerical mistake in the entry of the judgment for "July 14, 1876."—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

REFERENCE.

Review of report.

An auditor's report, being good against the exceptions urged, is conclusive of the matters within its scope, and makes immaterial any errors in admitting or rejecting evidence bearing on those matters.—*Cameron v. First Nat. Bank*, (Tex. Civ. App.) 23 S. W. 334.

Rehearing.

See "Appeal," 55.

RELEASE AND DISCHARGE.

See, also, "Accord and Satisfaction;" "Compromise;" "Payment."

Of right to recover back usury paid, see "Usury," 6-9.

Validity—Consideration.

1. A reduction in the amount of premium that a borrowing stockholder is to pay a building society for a loan is a sufficient consideration to uphold a contract releasing his right to recover back usurious interest theretofore paid.—*International Bldg. & Loan Ass'n v. Fortasain*, (Tex. Civ. App.) 23 S. W. 496.

Of joint tortfeasor.

2. Where property is jointly converted by two persons, the fact that one of the converters accounts to the owner, who accepts part of the proceeds of the property, does not remove the other converter's liability, as this does not amount to a satisfaction of the conversion.—*Horsley v. Moss*, (Tex. Civ. App.) 23 S. W. 1115.

Pleading and proof—Variance.

3. An agreement to release one of several judgment debtors on payment of \$25 as his share of the judgment is not shown by evidence that the judgment creditors agreed with all the judgment defendants that they would release them from payment of the judgment if each of them would pay \$25, and not that they would release each one on payment by him of \$25.—*Bowden v. Robinson*, (Tex. Civ. App.) 23 S. W. 816.

Evidence.

4. Recitals in receipts given to some of such judgment debtors, to the effect that the judgment creditors agreed to give to the party making the payment a receipt in full for his pro rata on payment of \$25, are not inconsistent with an arrangement between the parties for each to pay his pro rata share, and do not show any agreement by such creditors to release each on payment by him of a part, only, of the judgment.—*Bowden v. Robinson*, (Tex. Civ. App.) 23 S. W. 816.

Remittitur.

See "Damages," 47.

Remote and Proximate Cause.

See "Damages," 5-7; "Negligence," 2-4.

Renewal.

Of lease, see "Landlord and Tenant," 4.

Rent.

Distress, see "Landlord and Tenant," 7.

Renting on Shares.

See "Landlord and Tenant," 6.

Repeal.

Or statute, see "Statutes," 6-8.

Reply.

See "Pleading," 8, 9.

Rescission.

Of contracts, see "Equity," 1-4.
Of policy, see "Insurance," 1.
By seller, see "Sale," 12, 13.

Resignation.

Of officer, withdrawal, see "Office and Officer," 2.

Res Judicata.

See "Judgment," 6-12.

Resulting Trusts.

See "Trusts," 3, 4.

Return.

Of execution, see "Execution," 7.
Of writ, see "Writs," 4-6.

Revenue.

See "Taxation."

Reversal.

On appeal, see "Appeal," 92.

Review.

On appeal, see "Appeal," 58-88; "Criminal Law," 87-96.

Revocation.

Of will, see "Wills," 4.

Right of Way.

See "Easements."

RIPARIAN RIGHTS.

Title to submerged lands, see "Navigable Waters."

Ownership of islands.

1. Where an island springs up in a navigable river, and by accretion to the shores of the island and the mainland they are united, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land.—*Cooley v. Golden*, (Mo. Sup.) 23 S. W. 100.

Rights in abandoned channel.

2. Where a navigable river suddenly changes its course, the owner of the shore does not acquire title to the abandoned channel.—*Cooley v. Golden*, (Mo. Sup.) 23 S. W. 100.

Risks of Employment.

See "Master and Servant," 35-41.

Roads.

See "Easements;" "Highways."

Rumors.

Evidence of, see "Evidence," 12.

SALE.

See, also, "Judicial Sales;" "Vendor and Purchaser."

Damages for breach of contract, see "Damages," 12, 13.

In general.

1. The acts alone of parties will not constitute a sale of personality without the minds of the parties met, the one in an agreement to buy and the other to sell.—*Skeeters v. Slater Milling Co.*, (Tex. Civ. App.) 23 S. W. 1000.

When title passes.

2. A creditor agreed to buy his debtor's cotton crop and pay one-quarter or one-half cent per pound more than any one else would give, and credit the amount on the debt, which was due. At the time only part of the cotton was gathered. The debtor was to pick the balance of the cotton, and haul it all to S.'s gin, to be held by him subject to such creditor's order. *Held* that, on delivery of the cotton to S. by such debtor, and obtaining an offer for it after it was ginned and its weight was ascertained, he became entitled to credit on his debt as agreed, and the title passed to such creditor, though the credit was not made until after a levy on the cotton by other creditors as the property of such debtor.—*Baker v. Guinn*, (Tex. Civ. App.) 23 S. W. 604.

Sale of stock—Necessity of written evidence.

3. *Sayles' Civil St. arts. 4562, 4563*, provide that on the sale of stock actual delivery thereof shall be accompanied by a written transfer, and that on the trial of the right of property of any stock animal possession without the transfer shall be deemed illegal. *Held*, that title may be shown to have passed, though there was no written transfer, by evidence of a bona fide sale on sufficient consideration.—*First Nat. Bank v. Brown*, (Tex. Sup.) 23 S. W. 862.

—Recording bill of sale.

4. *Sayles' Civil St. art. 4564*, provides that persons may dispose of stock animals as they run in the range by sale and delivery of the brands and marks, but for the purchaser to acquire title his transfer shall be recorded. *Held* that, where there was actual delivery of the cattle, title passed, though the bill of sale, describing them by certain marks and brands, was not recorded.—*First Nat. Bank v. Brown*, (Tex. Sup.) 23 S. W. 862.

Warranty.

5. In an action to recover damages for the sale by defendant to plaintiff, for use in plaintiff's meat market, of hogs which were so diseased that they died soon after delivery, plaintiff testified that he examined the hogs before he bought them; that they did not appear to be in very good condition, and defendant told him that they were not doing well in the pen, and wished to get rid of them, but did not tell him that they were diseased. Defendant testified that, as far as he knew, the hogs were healthy when he sold them; that there was no perceptible disease among them; and that they ate and drank heartily, though they did not improve as they should have done. *Held*, that the evidence did not show an implied warranty, and a judgment for plaintiff could not be sustained. *Needham v. Dial*, (Tex. Civ. App.) 23 S. W. 240.

Buyer's rights and remedies.

6. Defendant signed an order for certain historical works, whose scope was not described in said order, nor in any accompanying prospectus. *Held*, that the agent's misdescription of their scope and character, on which defendant relied, was a complete defense to an action for the price.—*History Co. v. Durham*, (Tex. Civ. App.) 23 S. W. 327.

7. In an action for the price of engines, a sum spent in repairing defects in one of them

is recoverable as damages.—*D. A. Tompkins Co. v. Galveston City St. R. Co.*, (Tex. Civ. App.) 23 S. W. 25.

8. Where the engine was intended for use in generating electricity with which to propel cars over the purchaser's street railroad, defendants are not entitled to damages because certain cars had to lie idle while the engine was being repaired, such damages being too remote.—*D. A. Tompkins Co. v. Galveston City St. R. Co.*, (Tex. Civ. App.) 23 S. W. 25.

9. Where chattels are sold partly on credit, and the purchaser agrees to execute at a specified date a note and mortgage to secure the deferred payment, his failure and refusal so to do give the seller an immediate right of action for the entire unpaid purchase money; and he need not wait until the expiration of the period of credit originally given.—*Morgan v. Turner*, (Tex. Civ. App.) 23 S. W. 284; *Turner v. Morgan*, *Id.*

10. The only issue in an action for the price of goods shipped by plaintiff to defendant was whether plaintiff warranted that they should arrive in good order. It was not pleaded in defense that they were in bad order when shipped. It appeared without contradiction that the goods were in bad order when received by defendant. *Held*, that evidence as to the condition of the goods when shipped was irrelevant, since, under the issue, that fact could only be material as bearing on the condition of the goods on arriving at their destination, which was not disputed.—*Battaglia v. Thomas*, (Tex. Civ. App.) 23 S. W. 385.

11. In an action for merchandise sold and delivered, defendant cannot prove an implied warranty, in the absence of an allegation thereof or of facts from which it would necessarily be implied, especially where he alleges an express warranty.—*Battaglia v. Thomas*, (Tex. Civ. App.) 23 S. W. 1118.

Rescission by seller.

12. An election to rescind a sale of goods for the purchaser's fraudulent representation as to financial standing is clearly manifested by the seller when he institutes the statutory proceeding of claim and delivery, by filing the claimant's oath and bond, and retaking the goods, as provided by *Sayles' Civil St. arts. 4822-4847*; and the fact that the nature of the seller's claim or title is not disclosed until the issues are tendered is immaterial.—*Heinze v. Marx*, (Tex. Civ. App.) 23 S. W. 704.

13. Where a seller of goods has disaffirmed the sale for the purchaser's fraud, by instituting proceedings for the recovery of the goods, the fact that he afterwards obtains a judgment against the purchaser for the value of the balance of the goods, which the purchaser had wrongfully disposed of, and which could not be found, does not estop him from asserting title to the goods retaken, as against other creditors of the purchaser, not parties to the action in which such judgment for value was obtained.—*Heinze v. Marx*, (Tex. Civ. App.) 23 S. W. 704; *Manhattan Cloak & Suit Co. v. Same*, *Id.* 707.

Election of remedies by seller.

14. Though a seller of goods has shown his intention to disaffirm the sale for the purchaser's fraud, by instituting proceedings for the recovery of the goods, a subsequent judgment obtained by him against the purchaser for the value of all the goods sold estops him from asserting title to the goods retaken, as against other creditors of the purchaser.—*Krause v. Marx*, (Tex. Civ. App.) 23 S. W. 708.

Sale induced by fraud—Rights of seller against third persons.

15. Where F. obtained goods of defendants on credit, with the intention of not paying for them, for the purpose of transferring them to plaintiffs in payment of debt, his purchase is fraudulent, and gives him no title, and plaintiffs, knowing the facts, get no title against

defendants.—*Blum v. Jones*, (Tex. Civ. App.) 23 S. W. 844.

Evidence of conspiracy between buyer and another.

16. In an action involving the right to certain goods, defendant alleged that plaintiffs had conspired with F., whereby he was to purchase goods on credit, and afterwards deliver them to plaintiffs in payment of their debt. *Held* that, in connection with other evidence of the conspiracy, it was proper to show that F. purchased such lines of goods as were carried by plaintiffs in their business, and made purchases out of proportion to his own business.—*Blum v. Jones*, (Tex. Civ. App.) 23 S. W. 844.

Bona fide purchasers.

17. On a trial of the right of property in goods taken under attachment, where the attachment creditor contended that the attachment debtor had transferred the goods to one B. to defraud creditors, and that claimant purchased from B. with notice of the fraud, it was proper to admit in evidence a circular by which B. represented himself as an infallible seer of all human affairs.—*Ross v. Lewyn*, (Tex. Civ. App.) 23 S. W. 450.

Scandalous Pleading.

See "Contempt."

SCHOOLS AND SCHOOL DISTRICTS.

School lands, see "Public Lands," 17-20.

Contracts—Personal liability of trustees.

1. Where a trustee of a common school district agrees to give a person a specified sum to render certain assistance in connection with the erection of a schoolhouse for the district by a contractor, in order to prevent the contractor's sureties from becoming liable to damages, and it is further agreed that such sum shall be payable when collected from the district, no personal liability is incurred by the trustees of such district.—*Goodin v. Trustees of Common School Dist. No. 94, (Ky.)* 23 S. W. 964.

Investment of school funds—Duties of officers.

2. Const. art. 7, § 6, provides for sales of county school lands by the county, and for the investment of the proceeds "as prescribed by law." *Sayles' Civil St. art. 986m, §§ 2, 3*, provide that the investment must be by an order of the commissioners' court, made at a regular term of the court, when the full court is present, and that not less than four must concur in the order, and the names of those concurring must be spread on the minutes of the court. *Held*, that the statute was mandatory, and a purchase of bonds by the county judge, to be paid for out of the permanent school fund, without an order of the county court, as provided by law, was wholly void.—*Boydston v. Rockwall County*, (Tex. Civ. App.) 23 S. W. 541.

3. *Sayles' Civil St. art. 994*, provides that the county treasurer shall pay out the moneys of the school fund as required by law, in such manner as the commissioners' court of his county may direct. *Held*, that an order of the county judge to pay money from such fund for the purchase of bonds as an investment for the school fund affords no protection to him or the sureties on his bond.—*Boydston v. Rockwall County*, (Tex. Civ. App.) 23 S. W. 541.

Seal.

Of notary public, see "Notary Public."

Evidence—Good faith of defendant.

1. In a prosecution under Rev. St. § 3480, for seducing an unmarried woman under 18 years of age, under promise of marriage, it is not error to refuse to allow defendant to answer a question as to whether it was his honest intention to marry the prosecutrix, and if he is now ready to do so, or to instruct as to defendant's good faith in making the promise to marry, as, by plain provision of the statute, an offer to marry is no bar to the prosecution.—*State v. Brandenburg*, (Mo. Sup.) 23 S. W. 1080.

— **Character of prosecutrix.**

2. Testimony that the witness is acquainted with prosecutrix, and has never heard anything against her character, is competent evidence of her character, and he need not base his knowledge on what is "generally said" of her.—*State v. Brandenburg*, (Mo. Sup.) 23 S. W. 1080.

Self-Defense.

See "Homicide," 13-27.

Sentence.

See "Criminal Law," 65, 66.

Separate Estate.

Of wife, see "Husband and Wife," 6-11.

SEQUESTRATION.

Affidavit.

Under Rev. St. art. 4490, subd. 3, which requires the affidavit for a writ of sequestration to state the value of each article of property to be sequestered, it is not sufficient to state that each article is worth "about" a designated sum, but the allegation as to the value should be definite and certain.—*Morgan v. Turner*, (Tex. Civ. App.) 23 S. W. 284; *Turner v. Morgan*, Id.

Servant.

See "Master and Servant."

SET-OFF AND COUNTER-CLAIM.

Claim of exemption as against set-off, see "Exemptions," 3.

When allowable.

1. Where a chattel mortgagee takes possession of the mortgaged property, and, after using it for several months, sells it without notice to the mortgagors, the latter, in an action on the notes, can plead the damages for the conversion in reconvention.—*Streep v. Thompson*, (Tex. Civ. App.) 23 S. W. 326.

2. A judgment debtor is entitled to offset against the judgment a debt owing to him by the judgment creditors, both of whom are insolvent, without presenting it to the administrator of one who has died, or of reducing it to judgment, as against the other.—*Ellis v. Kerr*, (Tex. Civ. App.) 23 S. W. 1060.

3. A judgment debtor is entitled to offset against the judgment a claim against the judgment creditors which was not due when the action was brought, but which matured after the judgment creditors had become insolvent, and before judgment was finally rendered against the debtor on appeal in the supreme court, where he was unable to plead the offset, owing

Settlement.

See "Accord and Satisfaction;" "Compromise;" "Family Settlements;" "Payment;" "Release and Discharge."

By trustees, see "Trusts," 8, 9.

Of partnership, see "Partnership," 6-10.

SHERIFFS AND CONSTABLES.

Liability for punitive damages, see "Damages," 4.

Liabilities.

Where an execution was addressed to the sheriff of one county, the process was void on the face in the hands of the sheriff of another county, and if, knowing this, he caused the property to be seized willfully, he was liable, not only for actual, but also for exemplary, damages.—*Steel v. Metcalf*, (Tex. Civ. App.) 23 S. W. 474.

Slander.

See "Libel and Slander."

Sleeping Cars.

See "Carriers," 63, 64.

Special Interrogatories.

See "Trial," 63.

Special Judge.

See "Judge," 5-7.

SPECIFIC PERFORMANCE.

Contracts enforceable.

1. A contract to convey half the mineral in defendant's land to plaintiffs, in consideration of one dollar and the benefits to accrue to defendant from the extension to a point named of a railroad, with which plaintiffs do not appear to have any connection, will not be specifically enforced, as there is only a nominal consideration for the contract; and the fact that plaintiffs did aid in constructing a railroad to the point named does not make a legal consideration, since the construction of the road is not the one mentioned in the contract.—*Northup v. Sandifer*, (Ky.) 23 S. W. 348.

Performance by complainant.

2. Where a vendee of land pleads and proves his willingness to pay the entire balance due, he is not required, before obtaining a decree for specific performance, to make actual payment, or tender of payment, but is entitled to relief, provided that, within a time to be fixed by the decree, he shall pay the amount due.—*Kalklosh v. Haney*, (Tex. Civ. App.) 23 S. W. 420.

Spirituous Liquors.

See "Intoxicating Liquors."

Statute of Frauds.

See "Frauds, Statute of."

Statute of Limitations.

See "Limitation of Actions."

When construed as merely directory, see "Elections and Voters." 1.

1. Gen. Laws 1889, p. 48, providing that a suit for damages growing out of the suing out of a writ of attachment or sequestration may be brought in any county from which such writ was issued, or in any county in which such levy was made in whole or in part, applies only to suits to be brought after such act takes effect, and does not affect the venue of an action begun before but not tried till after, such act went into effect.—*Baines v. Jemison*, (Tex. Sup.) 23 S. W. 639.

Amendment.

Construction by executive department.

Scope of act discontinuing court.

5. Const. § 125, which discontinued a certain court, "as constituted and organized" under the constitution of 1850, and created another court to succeed it, did not repeal a special act regulating practice in the discontinued court, as the practice act was not a part of

7 The fact that the act of 1886 expressly enumerates a number of acts intended to be repealed, not including the act of 1884, does not continue the latter in force, in view of the express repeal of all inconsistent acts contained in the act of 1886.—Commonwealth v. Owensboro, F. of R. & G. R. Co., (Ky.) 23 S. W. 808: Same v. Louisville & N. R. Co., Id.; Same v. Elkton & G. R. Co., Id.; Same v. Mammoth Cave R. Co., Id.; Same v. Burnside & C. R. R. Co., Id.; Same v. Hodgenville & E. Ry. Co., Id.; Same v. Louisville Southern R. Co., Id.; Same v. Louisville, H. & W. R. Co., Id.; Same v. Ohio Val. Ry. Co., Id.; Same v. Louisville, St. L. & T. Ry. Co., Id.; Same v. Kentucky & I. Bridge Co., Id.; Same v. Kentucky Midland Ry. Co., Id.; Same v. Kensee Coal Co., Id.; Same v. Owensboro & N. R. Co., Id.

8. The fact that the legislature in 1888 adopted a private compilation of the statutes, published in 1887, which embodies both an act of 1884 and an act of 1886, covering the same subject, as being still in force, does not conclusively show a legislative intention to continue the act of 1884 in force.—*Commonwealth v. Owensboro, F. of R. & G. R. Co., (Ky.) 23 S. W. 868; Same v. Louisville & N. R. Co., Id.; Same v. Elkton & G. R. Co., Id.; Same v. Mammoth Cave R. Co., Id.; Same v. Burnside & C. R. Co., Id.; Same v. Hodgenville & E. Ry. Co., Id.; Same v. Louisville Southern R. Co., Id.; Same v. Louisville, H. & W. R. Co., Id.; Same v. Ohio Val. Ry. Co., Id.; Same v. Louisville, St. L. & T. Ry. Co., Id.; Same v. Kentucky & I. Bridge Co., Id.; Same v. Kentucky Midland Ry. Co., Id.; Same v. Kenesee Coal Co., Id.; Same v. Owensboro & N. R. Co., Id.*

9. Pen. Code, art. 16, provides that the repeal of a penal law, without substitution of other penalty, will exempt from punishment all offenders against the repealed law, unless otherwise declared in the repealing statute. *Held*, that where, pending an appeal from a conviction for violating the usury law, it is repealed without substitution of penalty, the judgment will be reversed.—*Kenyon v. State*, 23 S. W. 191. 31 Tex. Crim. R. 13.

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Stock.

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Corporate stock, see "Corporations," 8-11.
Sale of stock, see "Sale," 3, 4.

Storage.

On failure to accept goods, see "Carriers," 7.

Street Railroads.

See "Horse and Street Railroads."

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Striking.

Pleading, see "Contempt."

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See "Witness," 16.

SUBROGATION.

Of purchaser at void judicial sale, see "Judicial Sales," 3.

Of surety, see "Principal and Surety," 4.

To rights of mortgagee.

A foreclosure sale and payment of the purchase price, which fail to pass the legal title to the land owing to a misdescription in the advertisement and deed, do not operate as a discharge of the debt and mortgage, but give the purchaser an equitable right to the security of the mortgage for the amount of the mortgage debt.—*Lanier v. McIntosh*, (Mo. Sup.) 23 S. W. 787.

SUBSCRIPTION.

To corporate stock, see "Corporations," 8-11.

Joint or several obligation.

1. A subscription contract, providing that the subscribers shall be "liable only for the amount opposite his name," is a several obligation.—*McFarland v. Lyon*, (Tex. Civ. App.) 23 S. W. 554.

2. Where several persons to a subscription each agree to pay the amount set opposite his name on condition that the payee perform certain acts, the agreement is several, and each may sue separately for a breach by the payee.—*Batsell v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 552.

Actions on.

3. The fact that the subscribers appointed a committee to act as their agent in carrying out the purpose of the subscription does not prevent a subscriber from suing for a breach by the payee.—*Batsell v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 552.

Summons.

See "Writs."

SUNDAY.

Contracts—Validity.

A contract made on Sunday, whereby certain persons agree to cease the contest of a will, in consideration of a certain sum, is

not void, since it is not made in the course of a business prohibited on that day by statute.—*Terry v. French*, (Tex. Civ. App.) 23 S. W. 911.

Supplemental Petition.

See "Pleading," 1.

Suretyship.

See "Principal and Surety."

Surprise.

See "Continuance," 3; "New Trial," 4.

Tacking.

See "Adverse Possession," 7.

TAXATION.

Of railroads, see "Railroad Companies," 7, 8.
Payment of taxes, see "Adverse Possession," 11.

Taxable persons and property.

1. Since the mineral interest in land may be severed from the surface interest thereof by conveyance, thereby becoming separate real estate, it may be taxed as other real estate.—*Stuart v. Commonwealth*, (Ky.) 23 S. W. 367.

Exemption.

2. Under Const. 1870, art. 2, § 28, which provides that the legislature shall except from taxation \$1,000 worth of personal property in the hands of "each taxpayer," a married woman is entitled to such exemption, though her husband is entitled to, and has been allowed, the same exemption; such exemption being to the taxpayer, and not to the family.—*First Nat. Bank v. City of Morristown*, (Tenn.) 23 S. W. 975.

3. Where the situs of such taxpayer's personal property is within the limits of a certain municipal corporation, she is entitled to such exemption, though she resides without the corporation, unless it has been allowed to her elsewhere, on other taxable personal property.—*First Nat. Bank v. City of Morristown*, (Tenn.) 23 S. W. 975.

Payment.

4. On an issue as to whether one who claimed land under the five-years statute of limitations had paid the taxes thereon, evidence may be introduced to show that certain tax receipts, reciting payment of the taxes on another piece of land, were intended to be receipts for taxes paid on the land in controversy.—*Brymer v. Taylor*, (Tex. Civ. App.) 23 S. W. 635.

Collection.

5. Where the machinery provided by law for the collection of taxes levied by a county has failed because of the refusal of the county court to appoint tax collectors, and the refusal of the sheriff to act in their behalf, the liens of the county on property taxed for the payment of bonds cannot be enforced in a court of equity by holders of the bonds, as the chancellor cannot be transformed into a tax collector.—*Louisville Trust Co. v. Muhlenburg County*, (Ky.) 23 S. W. 674.

Liability of tax collector.

6. A special act empowering a county to issue railroad aid bonds, and to levy a tax therefor on the same property as is subject to state revenue taxes, makes the powers and liabilities of the collector the same as those of the sheriff in collecting state taxes; and, since the latter is entitled to credits for delinquents, exonerations, or removals from the county only after these have been passed on by the county court, the sinking fund commissioner has no power to allow the collector other or larger

credits on the same accounts, when settling with him for the railroad tax, and the county court's subsequent confirmation of the commissioner's unauthorized acts will not bind the county.—*Hardy v. Logan County Court*, (Ky.) 23 S. W. 661.

7. A tax collector is not chargeable with interest on taxes collected and not paid over by him to the sinking fund commissioner within the time prescribed by statute, when he had been requested to retain them by said commissioner, with the sanction of the county court.—*Hardy v. Logan County Court*, (Ky.) 23 S. W. 661.

8. The sheriff's collection of taxes that had been reported and allowed him as delinquent is prima facie shown by tax receipts signed by the sheriff and given to the reported delinquents. Such receipts may be explained or rebutted by the sheriff's books or by other evidence.—*Hardy v. Logan County Court*, (Ky.) 23 S. W. 661.

9. The rule that, when the county court has levied a tax to pay claims against the county, the sheriff, failing to pay over the tax collected, is suable only by the creditors, not by the county court, does not prevent said court from suing the sheriff for a surplus in his hands collected on a levy that has turned out to be larger than was needed for its special purpose.—*Hardy v. Logan County Court*, (Ky.) 23 S. W. 661.

Sale for nonpayment.

10. Under Acts 1876, p. 262, authorizing the collector to levy upon and seize any property of the taxpayer, for the purpose of collecting the taxes due, a levy and sale of one survey of land, not homestead or exempt, may be made, in order to satisfy the taxes due on another survey.—*Brymer v. Taylor*, (Tex. Civ. App.) 23 S. W. 635.

TELEGRAPH COMPANIES.

Contract to deliver telegram.

1. The addressee of a telegram, in anticipation of its receipt, informed the receiving agent that he expected a message from his father, calling his mother and himself to the bedside of a sick brother; and the agent agreed to deliver the message to a person residing near the telegraph office, who was to take it to the addressee. *Held*, that the agreement of the agent was within the scope of his authority, and constituted a part of the contract with the telegraph company for transmission and delivery.—*Western Union Tel. Co. v. Evans*, (Tex. Civ. App.) 23 S. W. 998.

2. In an action by the sender of a telegram against the telegraph company for delay in delivering the message, the company was not injured by an instruction making its liability depend on delivery, *vel non*, to the agreed person, without reference to the extent of diligence exerted to effect such delivery, where the testimony showed no effort whatever by the company to comply with agreement.—*Western Union Tel. Co. v. Evans*, (Tex. Civ. App.) 23 S. W. 998.

Liability for negligence.

3. A stipulation in the printed blank on which a telegram is written, relieving the company from liability for mistakes or delays in the transmission or delivery where the message has not been repeated, is void, in so far as it seeks to relieve the company from liability for its servants' negligence in delaying the delivery of the message.—*Western Union Tel. Co. v. Linn*, (Tex. Civ. App.) 23 S. W. 895.

4. A telegram stating that "Grace is very low. Can you come, and bring Maud?" is notice to the company of a relationship existing between the addressee and the person whose sickness is announced, and that the object is to afford the addressee an opportunity to attend

on his relative in her last sickness, or to be present at the funeral in case of death.—*Western Union Tel. Co. v. Linn*, (Tex. Civ. App.) 23 S. W. 895.

Damages.

5. In an action against a telegraph company for failure to promptly deliver a message announcing the serious illness of plaintiff's father, plaintiff testified that if it had been delivered promptly he could have reached his father in time to see him alive, assuming that a certain train was running between certain points on a connecting railroad. On cross-examination he stated that he did not know whether such train was running or not. The evidence of the train dispatcher, offered by defendant, showed that the first train carrying passengers between such points, which plaintiff could have taken, arrived at the point nearest his father's home after the latter's death. *Held*, that it was error to submit to the jury the issue as to whether or not plaintiff would have been able to reach his father before he died.—*Western Union Tel. Co. v. Houswright*, (Tex. Civ. App.) 23 S. W. 824.

Mental anguish.

6. The sender of a telegram cannot recover for mental anguish caused by nondelivery thereof, where it is sent in the name of another person, and there is nothing in it, or the circumstances attending its delivery to defendant company, to give notice of any interest therein on the part of the sender, or to excite inquiry in that regard.—*Western Union Tel. Co. v. Kerr*, (Tex. Civ. App.) 23 S. W. 564.

7. Mental pain caused by delay in delivering a message is a proper element of damages; and, in an action by the addressee against the company, an allegation that plaintiff would have taken a train enabling him to be present at his sister's funeral, if the message had been seasonably delivered, is not the statement of a result too remote and contingent to support the action.—*Western Union Tel. Co. v. Linn*, (Tex. Civ. App.) 23 S. W. 895.

8. Where there was delay in the transmission of a message from plaintiff, addressed to his son, summoning him, together with plaintiff's wife, to the bedside of another son, and by such delay the wife was prevented from reaching her son before his death, the injury to her feelings was a proper element of damages, as she was one of the beneficiaries of the telegram, and plaintiff sent it, acting for his wife and sons, and informed the sending agent of the relationship of the parties, and of the urgency of the message.—*Western Union Tel. Co. v. Evans*, (Tex. Civ. App.) 23 S. W. 998.

Excessive damages.

9. In such case a verdict for \$2,500 damages will not be set aside as excessive.—*Western Union Tel. Co. v. Evans*, (Tex. Civ. App.) 23 S. W. 998.

TENANCY IN COMMON.

Estate by entireties, see "Husband and Wife," 4.

Partition deed, see "Partition," 1, 2.

Rights inter se.

1. A tenant in common has the right to sell marketable timber growing on the land, so long as he does not commit waste; and the purchaser takes a good title as against the other cotenants, their remedy being to compel the seller to account for the proceeds.—*Gillum v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 717.

Ouster—Ejectment between cotenants.

2. H. and G. owned land as tenants in common, and on H.'s death one of her four heirs, together with G., conveyed all the land to plaintiff. A year later the four heirs conveyed to G. an undivided half interest in the land, and thereafter G. conveyed to defendant

or way 100 feet wide across the land, subject to plaintiff's rights in the other undivided half of such right of way. *Held*, that by the latter conveyance plaintiff and defendant became tenants in common of the right of way, and that plaintiff was entitled to maintain ejectment for his interest in the land, and recover damages for rents, if defendant's use of the land was such as to preclude plaintiff's use.—*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

Adverse possession by grantee of cotenant.

8. The possession of land by grantees in a deed, wherein the grantors describe themselves as the "sole heirs" of the original owner, is adverse to the other heirs of the original owner from the time that the deed is placed on record, since the record of such a deed is an express notice of repudiation of any cotenancy with the other heirs.—*De Leon v. McMurray*, (Tex. Civ. App.) 23 S. W. 1038.

Waste by cotenant.

4. Defendant, a cotenant, excavated large quantities of rock from the property, selling a part and using the rest in the improvement of its road, and the excavation and removal of the rock diminished the value of the land. *Held*, to constitute waste, for which defendant was accountable to plaintiff.—*Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo. Sup.) 23 S. W. 373.

Rights as to third persons.

5. In Texas, a release and settlement of damages for trespass on land executed by one of the tenants in common does not bind his cotenant, and is not a bar to a suit for the damages they have sustained.—*Gillum v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 716.

6. A judgment in favor of a tenant in common for a trespass on land does not prevent his cotenant from recovering from the trespasser the damages he has sustained by the trespass.—*Gillum v. St. Louis, A. & T. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 716.

Testamentary Capacity.

See "Wills," 1, 2.

Theft.

See "Larceny."

Time.

Of issuance of execution, see "Execution," 1, 2.

Title.

See "Quieting Title."

Color of, see "Adverse Possession," 8, 9.

TORTS.

See, also, "Death by Wrongful Act;" "Deceit;" "Forcible Entry and Detainer;" "Fraud;" "Libel and Slander;" "Negligence;" "Trespass;" "Trove and Conversion."

Measure of damages, see "Damages," 16-25.

Of servant, liability of master, see "Master and Servant," 5-10.

Release of joint tortfeasor, see "Release and Discharge," 2.

What are—Action against carrier.

A complaint alleged that plaintiff and his family were passengers on defendants' railroad; that defendants disregarded their contract of carriage, and refused to stop at their destination; that plaintiff requested the conductor half a mile beyond such destination to stop, and allow them to debark, which he refused to do, using insulting language; and that by violation of the con-

TOWNS.

See "Counties;" "Highways;" "Municipal Corporations;" "Schools and School Districts."

TRADE-MARKS AND TRADE-NAMES.

What will be protected.

1. The words "Liver Medicine," being purely descriptive, cannot be appropriated as a trade-mark.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

2. The name "Simmons" cannot be appropriated as a trade-mark, when it has become merely descriptive of medicine prepared under the formula of a Dr. Simmons, and is used by many people in connection with such medicines.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

—Effect of misrepresentations by owner.

3. A trade-mark will not be protected if the owner has knowingly misrepresented the article to the public, and it is immaterial that the adverse party fails to allege such misrepresentations.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

4. The fact that in one year, eight years before bringing suit, and forty years after the business was established, complainant issued a circular misrepresenting the character of the article sold by him, will not prevent his obtaining relief against infringement of the trade-mark or trade name borne by such article.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

5. The fact that complainant falsely stated on his packages that the trade-mark was registered November 11, 1843, will not deprive him of his right to protection from infringement, when he in fact on that date filed the name of the article as a book title under the copyright law, and since the public could not have been deceived by such statement, there being no provision for registering trade-marks at that early date.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

6. Innocent misrepresentations are not ground for refusing complainant relief.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

Infringement—Injunction.

7. Where it appears that defendant put on the market packages of medicine labeled "Dr. M. A. Simmons' Liver Medicine," in packages so substantially similar to those in which complainant's "Simmons' Liver Medicine" had been previously sold as to deceive the public, and that this was done with the purpose of selling it in place of complainant's medicine, the latter is entitled to an injunction to restrain the use of such labels and packages by defendant.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

Action for infringement.

8. The fact that defendant put his packages on the market, in violation of plaintiff's trade-mark, a year before complainant filed his bill to restrain such competition, does not deprive complainant of his right to an accounting.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, (Tenn.) 23 S. W. 165.

TRESPASS.

Leased land, who may sue, see "Landlord and Tenant," 1, 2.

Who may maintain action.—Title.

1. When plaintiff, holding under color of title, fails to prove adverse possession for the statutory period either before or after an interval during which the land was entirely unoccupied, though his possession was adverse both before and after said interval, his title to maintain trespass fails.—*Zeltinger v. Hackworth*, (Mo. Sup.) 23 S. W. 763.

What amounts to.

2. A judgment creditor is bound by the acts of an officer in levying execution under the instructions of the attorneys who obtained the judgment, and who had charge of its collection.—*Richardson v. Jankofsky*, (Tex. Civ. App.) 23 S. W. 815.

Defenses.

3. An oral contract by the owner of land for the sale thereof to one not in possession gives the latter no right as against one in actual possession, and is no defense in an action for trespass thereon.—*Beaumont Lumber Co. v. Ballard*, (Tex. Civ. App.) 23 S. W. 920.

4. In a suit for breaking plaintiff's inclosure and carrying away property for the use of the wrongdoer the latter cannot introduce evidence to show that title was in a third person.—*Beaumont Lumber Co. v. Ballard*, (Tex. Civ. App.) 23 S. W. 920.

Pleading and proof.

5. In an action for trespass, where the answer alleges the premises to be a highway, without stating how they became so, defendants are not restricted to showing that the road was established by proceedings in the county commissioners' court, but may show an establishment by grant, prescription, dedication, or in any other lawful way; and a special exception to the answer, on the ground that certain proceedings in the county commissioners' court, not referred to in the answer, were invalid, should be overruled.—*Vogt v. Bexar County*, (Tex. Civ. App.) 23 S. W. 1044.

Damages.

6. In an action for trespass on land in the possession of, but not belonging to, plaintiff, he cannot recover for damage committed on land outside of his inclosure.—*Beaumont Lumber Co. v. Ballard*, (Tex. Civ. App.) 23 S. W. 920.

TRESPASS TO TRY TITLE.

See, also, "Ejectment;" "Quieting Title."

Title to maintain.

1. In trespass to try title to school land claimed by plaintiffs by virtue of an assignment from a purchaser from the land board and possession thereof, defendant being a mere trespasser, it is not error to charge the jury to find for plaintiff if she was in actual possession and defendant entered and took possession, but to find for defendant if such possession had been abandoned, thus restricting the issue to that of possession; since, as against a trespasser, prior possession of one claiming under a purchase from the state, whether valid or not, is sufficient ground for ejectment.—*Gray v. Thompson*, (Tex. Civ. App.) 23 S. W. 926.

2. Trespass to try title or an action to remove a cloud from title may be maintained in the district courts of Texas by the holder of the equitable title to land.—*Sloan v. Thompson*, (Tex. Civ. App.) 23 S. W. 613.

3. Trespass to try title may be maintained as well on an equitable as a legal title.—*Garratt v. Lyle*, (Tex. Civ. App.) 23 S. W. 715.

4. In trespass to try title against a corporation to part of the land which was included in a deed of the corporation's president, and which was purchased from the grantee therein,

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payment for the land the note or a third person, and thereby waiving the vendor's lien, where the corporation, by cross bill, asks for a cancellation of the deed, but does not offer to pay plaintiff a proportionate part of the money received from the grantee of the president. 23 S. W. 118, reversed.—*Franco-Texan Land Co. v. McCormick*, (Tex. Sup.) 23 S. W. 123.

5. A conveyance by plaintiff of his interest in the land, during the pendency of the action, will not defeat recovery by him, and his grantees need not be made parties.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

6. In trespass to try title, where plaintiff admits that the legal title is in defendant, but avers that it is founded on fraudulent conveyances, he cannot rest his case on proof of title in himself, but must establish the invalidity of defendant's title.—*Bosse v. Cadwallader*, (Tex. Civ. App.) 23 S. W. 260.

By tenant in possession.

7. A tenant in possession under a lease may maintain trespass to try title against one who makes an unauthorized entry on the leased land.—*Holland v. City of San Antonio*, (Tex. Civ. App.) 23 S. W. 756.

8. The right of the tenant to maintain trespass to try title against one who makes an unauthorized entry on the leased land cannot be defeated by a deed given by the lessor to the trespasser after the tenant has brought action.—*Holland v. City of San Antonio*, (Tex. Civ. App.) 23 S. W. 756.

Common source of title.

9. Rev. St. art. 4802, providing that in trespass to try title plaintiff may show common source of title by certified copies of deeds, and such deeds shall not be evidence of title for defendant unless offered by him, does not change the effect of original deeds when offered as evidence of common title.—*Bosse v. Cadwallader*, (Tex. Civ. App.) 23 S. W. 260.

Defenses.

10. Where the holders of the equitable title to land seek a recovery against trespassers without color of title and with no connection with the legal title and with no evidence of possession, a defense of a stale demand is unavailable.—*Edwards v. Gill*, (Tex. Civ. App.) 23 S. W. 742.

— Outstanding title.

11. In trespass to try title defendants cannot defeat recovery by showing an outstanding title with which they do not connect, unless such title is the superior legal title; and, where the evidence leaves it uncertain whether the outstanding title is legal or equitable, a judgment for defendant will be reversed.—*Meyer v. Hale*, (Tex. Civ. App.) 23 S. W. 900.

Pleading and proof.

12. Parties in trespass to try title in order to establish title need not go back of a former judgment in partition which is the common source though they may have pleaded a chain of title extending further back.—*Bailey v. Laws*, (Tex. Civ. App.) 23 S. W. 20.

13. In trespass to try title, where defendant claims under a void execution sale, he cannot invoke the right of subrogation, because of having extinguished an existing lien, without pleading such fact specially.—*Crow v. Fiddler*, (Tex. Civ. App.) 23 S. W. 17.

Evidence.

14. In trespass to try title by the heirs of one S., plaintiffs, to show title in themselves, may introduce in evidence a deed of the property in dispute, made to one of them, which recited that it was made in consideration of the conveyance of certain claims against the state belonging to the heirs of S.—*Roemer v. Shackelford*, (Tex. Civ. App.) 23 S. W. 87.

Evidence—Sufficiency.

16. In trespass to try title by the heirs of P. against one in possession under a deed from the heirs of W., it appeared that in 1839 P., being the owner in common with his wife, gave H. power of attorney to sell and convey the land; that in 1844 H. conveyed the land to W. by deed, the certificate of acknowledgment to which reciting facts showing that the consideration therefor inured to H. personally, and not to P.; that such deed was recorded by H. in 1850, and that W. paid the taxes from 1846 to 1850, at least; that in 1886 W.'s heirs conveyed the land to defendant. The evidence showed that P. died in 1850, and his wife in 1890; that in 1850 plaintiffs removed with their mother from the county in which the land was situated, and have never paid taxes on, nor asserted any claim to, the land, until 1891, when suit was brought. *Held*, that the circumstances, in view of the great lapse of time, justified the court in holding that the deed to W. passed the title, notwithstanding the defective acknowledgment. — *Palmer v. Texas Tram & Lumber Co.*, (Tex. Civ. App.) 23 S. W. 38.

Damages.

17. In trespass to try title against one who makes an unauthorized entry on the leased land, the tenant may recover the actual damages sustained by him on account of the unauthorized entry.—*Holland v. City of San Antonio*, (Tex. Civ. App.) 23 S. W. 756.

Allowance for improvements.

18. In trespass to try title, defendant may be allowed for improvements made by him while a possessor in good faith, he having held a deed from the tax collector purporting to convey the land for taxes due by the unknown owner.—*Franklin v. Campbell*, (Tex. Civ. App.) 23 S. W. 1003.

Adjudging lands to defendant—Pleadings to sustain.

19. In trespass to try title, where plaintiffs set up title under an execution sale, and attack defendants' title as being a fraudulent conveyance by the judgment debtor, an answer denying these averments, and alleging the transfer to be bona fide, and praying that the sheriff's deed to plaintiffs be canceled as a cloud on defendants' title, warrants a decree adjudging the land to defendants, though it is not described in the answer.—*Willis v. Nichols*, (Tex. Civ. App.) 23 S. W. 1025.

Disclaimer—Judgment and costs.

20. Where defendant disclaims a portion of the land sued for, but remains in possession of part of the land disclaimed, plaintiff is entitled to recover the disclaimed land, and to have judgment for costs.—*Willburn v. Tow*, (Tex. Civ. App.) 23 S. W. 853.

TRIAL.

See, also, "Appeal;" "Appearance;" "Continuance;" "Evidence;" "Judgment;" "Jury;" "New Trial;" "Pleading;" "Practice in Civil Cases;" "Witness."

Instructions, credibility of witness, see "Witness," 4-6.

Reception of evidence.

1. Where the trial judge permits a written contract to be read to the jury, subject to a charge to be given, and he gives no charge in reference to it, the contract is in evidence; and an assignment of error to the alleged refusal of the court to admit it in evidence is not well taken.—*International Bldg. & Loan Ass'n v. Fortassain*, (Tex. Civ. App.) 23 S. W. 496.

special answer. The witness was taken suddenly ill and had to leave court, and, defendant's counsel being unable to say when he would be able to testify, the court refused a postponement. Two hours later, after plaintiff's counsel had made his opening argument, the witness was again tendered, but the court refused to hear him. *Held*, that defendant had shown due diligence in producing the witness, and the court should have allowed it opportunity to supply the proof, under Sayles' Civil Stat. art. 1298, empowering the court at its discretion, at any time before conclusion of argument, where necessary to justice, to allow a party to supply an omission in the testimony on such terms as it may prescribe.—*Ft. Worth & D. C. Ry. Co. v. Johnston*, (Tex. Civ. App.) 23 S. W. 827.

—Excluding witnesses from court room.

8. It is not an abuse of discretion for the trial judge to deny a motion by plaintiff to exclude two of his witnesses from the court room while the others are testifying, where such witnesses are defendants to the action.—*Willis v. Nichols*, (Tex. Civ. App.) 23 S. W. 1025.

Right to benefit of evidence offered by adverse party.

4. Original deeds offered by plaintiff in trespass to try title to show common source of title are evidence of title in defendant, though not offered by him.—*Bosse v. Cadwallader*, (Tex. Civ. App.) 23 S. W. 260.

Objections to evidence.

5. Where testimony is admitted in connection with inadmissible testimony by the same witness, and the objection is made to the evidence as a whole, error cannot be predicated on the action of the court in overruling such objection.—*Fant v. Willis*, (Tex. Civ. App.) 23 S. W. 99.

6. An objection to the acknowledgment of a deed sought to be introduced in evidence, on the ground that it "was not acknowledged as required by law," is too general.—*Leon & H. Blum Land Co. v. Dunlap*, (Tex. Civ. App.) 23 S. W. 473.

7. Where a statement of facts was agreed on by the parties, and when offered on trial defendant objected to it as an entirety, the objections not showing the particular parts deemed objectionable, the action of the trial court in overruling the objections will not be reviewed on appeal.—*Rio Grande R. Co. v. Cross*, (Tex. Civ. App.) 23 S. W. 529; *Id.* 1004; *Same v. Munoz' Successors*, *Id.* 531; *Same v. Petitpain*, *Id.*

8. Where evidence is properly admitted under the pleadings, but is not relevant to the issues submitted to the jury, parties fearing that the findings may be affected by such testimony should ask that the jury be directed to disregard it.—*Blum v. Jones*, (Tex. Civ. App.) 23 S. W. 844.

Arguments.

9. In an action for balance due plaintiff from defendant for services as station agent, defendant reconvened for loss caused by plaintiff's negligent management, and showed that, when discharged, plaintiff was short a large sum in his accounts. Plaintiff's counsel, in closing, accused defendant of hounding and persecuting plaintiff, and being determined to "down him," and added that plaintiff had been tried and acquitted by a jury, yet defendant still kept following him up in the courts. *Held* prejudicial, not only as tending to rouse passion, but as importing the matter of plaintiff's prosecution and acquittal, which was foreign to the record, and damaging to defendant.—*Ft. Worth & D. C. Ry. Co. v. Johnson*, (Tex. Civ. App.) 23 S. W. 826.

10. In an action for services, plaintiff's counsel in argument said, without rebuke, and against objection, that defendant had tried to squeeze the farmers on the price of wheat bought, and cheated them by false weights, and was trying to swindle plaintiff out of his earnings; and that E., defendant's president, should be taught that such practices would not be tolerated by an honest jury. The evidence was conflicting, and E.'s testimony had to be broken down to secure a verdict for plaintiff. The only evidence to support the language was testimony that a witness had heard complaint of short weights. *Held* ground for reversing a judgment for plaintiff.—*Wichita Valley Mill & Elevator Co. v. Hobbs*, (Tex. Civ. App.) 23 S. W. 923.

11. In an action against a corporation, statements by counsel in argument, and without evidence to support them, that defendant had swindled people, etc., were not justified by a statement of defendant's counsel that the whole case was bolstered up by defendant's discharged employes, some of plaintiff's witnesses having in fact been discharged employes.—*Wichita Valley Mill & Elevator Co. v. Hobbs*, (Tex. Civ. App.) 23 S. W. 923.

12. In an action against a water company for damages from a failure to supply sufficient water to operate plaintiff's machinery, pursuant to contract, in his closing argument plaintiff's counsel remarked that "I have not told you of the great privileges the city has given it, [defendant.] I have not said anything about its not having an effective hydrant in this whole city. I have not told you that this corporation has a place up here on the street where it retails water by the barrel." This being excepted to, counsel remarked that he knew it was a tender spot he had touched, and that there were many other sore spots; that he "expected the galled jade to wince when its wethers were sore." *Held*, that the failure of the court to reprimand counsel for the remarks, and instruct the jury to disregard the same, was reversible error.—*Houston Waterworks Co. v. Harris*, (Tex. Civ. App.) 23 S. W. 46.

13. Where, in an action on an accident insurance policy, the only issue of fact is the denial by defendant that the accident causing death happened as alleged by plaintiff, the fact that the court had overruled a demurrer to the petition, thus deciding the case in favor of plaintiff if the accident occurred as alleged, does not entitle defendant's counsel to the closing argument.—*American Acc. Co. v. Reigart*, (Ky.) 23 S. W. 191.

14. In an action against a railroad company for personal injuries, a remark of counsel to the jury that defendant was a corporation, which had neither soul nor feeling, and could be reached only through its pocket, is not ground for reversing the denial of a new trial where the amount of the verdict is not complained of, and it cannot be said from the record that the remark probably influenced the jury to defendant's prejudice.—*Texas & P. Ry. Co. v. Raney*, (Tex. Civ. App.) 23 S. W. 340.

15. In an action against a railroad company, it is improper for counsel to say in argument to the jury: "This railroad is a monster, wealthy and powerful, more powerful than any individual in the state, and is not on equality with any private citizen."—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

16. In an action for injuries received by collision with a train at a highway crossing, the complaint having alleged negligence on the part of the trainmen, and none of these having testified that any effort was made to stop the train after plaintiff was seen, plaintiff's counsel could properly insist to the jury that no effort was made for that purpose.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 598.

17. In an action against a railroad company for personal injuries, plaintiff's counsel said to

the jury: "And we know * * * that corporations have no souls, and therefore, I say, no consciences, and there is no way to make these big corporations respect the rights of these little defendants except by making them pay for it." Defendant objected, and the court reversed the counsel, who nevertheless repeated the remark. The court again stopped him, and instructed the jury not to heed the argument, and counsel told the jury that he would quit, and let them render a verdict to suit the judge. The verdict was for one-third of the amount sued for. *Held* not ground for reversal.—*Galveston, H. & S. A. Ry. Co. v. Duelm*, (Tex. Civ. App.) 23 S. W. 598.

18. The fact that the trial judge permitted defendant, who personally conducted his own defense, to go into facts in his address to the jury that were not in evidence, is harmless error, where the evidence is insufficient to support plaintiff's cause of action.—*Johnson v. Johnson*, (Tex. Civ. App.) 23 S. W. 1022.

Instructions.

19. Where, in an action by a landlord against his tenant for damages for permitting his stock to injure fruit trees on the leased premises, the court charges that, if defendant "carelessly or knowingly permitted" stock to injure such trees, he is liable, etc., it is not necessary for the court to define the word "carelessly" to the jury.—*Wardner v. Henry*, (Mo. Sup.) 23 S. W. 776.

20. Rev. St. 1889, § 2188, providing that the court may instruct the jury "when the evidence is concluded, and before the case is argued," does not prevent the giving of instructions after the argument of the case by counsel.—*Bogges v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 159.

21. An instruction in a civil action requiring facts to be "conclusively" shown is erroneous.—*Greathouse v. Moore*, (Tex. Civ. App.) 23 S. W. 226.

22. Where the complaint in an action to set aside deeds to defendant on the ground that they were made to defraud the grantor's creditors also alleged that the deeds were intended as mortgages, and asked appropriate relief in case such should be found to be the fact, and evidence is adduced in support thereof, it is error for the court to refuse to charge on the hypothesis.—*Weiss v. Dittman*, (Tex. Civ. App.) 23 S. W. 220.

23. It is error to charge the jury that they may consider certain evidence for certain purposes, or in proof of certain issues, since the admission of the evidence is an intimation to them that they may consider it as a part of the whole testimony, and a special charge upon it gives it undue emphasis, and is in the nature of argument.—*Hurlbut v. Boaz*, (Tex. Civ. App.) 23 S. W. 446.

24. An agreement between the parties to submit a case without a charge necessarily waives an instruction to separate the findings of actual and exemplary damages, and neither party can complain of the jury's failure so to do.—*Claunch v. Osborn*, (Tex. Civ. App.) 23 S. W. 937.

25. It was error for the court to submit the issue concerning estoppel, though embodying a correct proposition of law, after having directed the jury not to consider the plea of estoppel for want of sufficient evidence to sustain it, since such charges were contradictory, and tended to mislead.—*Chamberlain v. Showalter*, (Tex. Civ. App.) 23 S. W. 1017.

26. Plaintiff's decedent, an employe of defendant railroad company, was, while standing on the track, struck and killed by defendant's engine. *Held*, that an instruction given at plaintiff's request, which leaves to the jury the question whether defendant's rules required the whistle to be sounded as trains approached the place where decedent was killed, is not inconsistent with an instruction given at defendant's request that no rule was read in evidence requir-

ing the whistle to be sounded on approaching the place of the accident, there being evidence that the rules of defendant required the whistle to be sounded on approaching "obscure" curves, and that the curve at the place of the accident was within the designation "obscure."—*Church v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 1056.

27. In an action for services rendered in taking charge of the farm of his father under an alleged memorandum under which defendant was to have one-half of the rental value of the farm, and plaintiff was to board defendant and wife, defendant filed a counterclaim for moneys advanced and stock sold to plaintiff. *Held*, that an instruction to find for defendant "on his counterclaim" for such balance as might be found due after deducting anything due plaintiff was not misleading as including debts paid by the father several years previously, and incidentally referred to in evidence.—*Elliott v. Elliott*, (Ky.) 23 S. W. 216.

28. Where the issue is as to whether a person was agent for defendant for the purpose of making a contract which he assumed to make as agent, an instruction that if, in making the contract, he did so as agent for the purpose, defendant is liable, is erroneous, as calculated to withdraw the issue as to the existence of the agency.—*Mills v. Beria*, (Tex. Civ. App.) 23 S. W. 910.

29. Error cannot be predicated of a portion of a charge, for being misleading, if, when construed in connection with the entire charge, it states the law correctly.—*Jobe v. Houston*, (Tex. Civ. App.) 23 S. W. 408.

Instructions—Requests.

30. Under Rev. St. art. 1319, providing that either party may present to the judge, in writing, such instructions as he desires given to the jury, and article 1321, providing that instructions given to the jury may be carried with them in their retirement, the court may refuse to give requested instructions on the ground that the good are written with the bad, on the same piece of paper, so that they cannot be separated; such ground of refusal being stated at the time of the refusal.—*Missouri Pac. Ry. Co. v. King*, 23 S. W. 917, 2 Tex. Civ. App. 122.

31. A court is not required to give an instruction on a given issue, where the instruction is not formulated and presented.—*Texas & P. Ry. Co. v. Robinson*, (Tex. Civ. App.) 23 S. W. 433.

Necessity for requests.

32. An omission to charge on a given point is not ground for reversal, where no instruction was requested.—*Richardson v. Jankofsky*, (Tex. Civ. App.) 23 S. W. 815.

33. In trespass to try title, the court charged that: "In order for the defendants to recover upon the pleas of ten years' limitation, it is not necessary to prove the payment of taxes upon the land. The mere naked, adverse, and peaceable possession, as defined by the law, for the period of ten years, is sufficient, if established, to authorize a recovery upon the plea of ten years' limitation." *Held*, that the charge was not erroneous, but only defective, in not defining "adverse possession," and in not stating that the limitation would be interrupted by the filing of the suit, and plaintiff cannot assign error on such defects, in the absence of a request for an instruction curing the same.—*Robinson v. McIver*, (Tex. Civ. App.) 23 S. W. 915.

34. A party who put a question in issue, but failed to ask to have it called to the attention of the jury by charge, cannot claim on appeal that the evidence was conflicting, and object to the omission of the court to charge on the question.—*McLane v. Elder*, (Tex. Civ. App.) 23 S. W. 757.

35. Where, in an action for damages, the court fails to instruct as to interest thereon, and no such instruction is asked, the omission

cannot be urged as error.—*Fink v. Gulf. C. & S. F. R. Co.*, (Tex. Civ. App.) 23 S. W. 359.

36. Where defendant desires to use as a defense against, or in mitigation of, exemplary damages for converting certain coal, the fact that it used it believing that it had a legal offset against plaintiff for the value of it, it should ask for a charge submitting that view to the jury; and, failing to do so, it cannot, on appeal, have such matter considered, or complain if the jury did not take it into consideration.—*San Antonio & A. P. Ry. Co. v. Kpiffa*, (Tex. Civ. App.) 23 S. W. 457.

Repetition.

37. Refusal to give requested instructions is not error, where their substance is given in the general charge.—*Butler v. Wilson*, (Tex. Civ. App.) 23 S. W. 932.

38. In an action for personal injuries, where the charge correctly stated the law governing the case, a judgment will not be reversed because in the charge the judge twice stated that, in order to entitle plaintiff to a verdict, he must show negligence on the part of defendant, and twice stated that plaintiff must show that he exercised ordinary care to avoid the accident; for, though the charge was redundant in this respect, it did not require the jury to find any fact not essential to plaintiff's recovery.—*Maes v. Texas & N. O. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 725.

Pleadings to support.

39. Where a petition in intervention alleges that money in the hands of defendant was procured from the intervenor by defendant, to invest, on fraudulent representations, a charge that, if the money was borrowed by defendant through fraud, the title did not vest in him, was outside the issue presented, and misleading.—*Flint v. Van Hall*, (Tex. Civ. App.) 23 S. W. 573.

40. In an action to recover damages for breach of contract, it appeared that plaintiff, a lawyer, contracted with defendant, another lawyer, to assist in the defense of an action, and, as compensation, was to share with defendant in the proceeds of a note from one D. to the latter, secured by a deed of trust of real and personal property, defendant agreeing to realize on the property at once. Plaintiff assisted in the trial of the action, but not in the appeal. Defendant sold the personal property, and appropriated the proceeds; and, in an action by a third person to partition the land, one-eighth thereof was adjudged to belong to such third person, and seven-eighths to D. The land was sold under the judgment in the action, and bought by defendant. In his petition, plaintiff alleged fraud on defendant's part in the sale of the personal property, but, in regard to the land, complained only of defendant's failure to foreclose his lien. *Held* that, inasmuch as the question of fraud was raised only as to defendant's dealings with the personal property, it was error to submit to the jury the question of whether defendant had fraudulently depreciated the value of the land for the purpose of buying it in.—*Burleson v. Lindsey*, (Tex. Civ. App.) 23 S. W. 729.

41. In an action to set aside a deed on the ground of undue influence, plaintiffs are not entitled to have an instruction on the question of whether the deed was in fact a will.—for the reason that the grantee gave the grantor a life lease,—and, as such, invalid, no such issue having been raised by the pleadings.—*Ellis v. Ellis*, (Tex. Civ. App.) 23 S. W. 896.

42. In trespass to try title, when defendant pleads the statute of limitations of 3 and 5 years, it is error to charge on the statute of limitations of 10 years.—*Stringer v. Singleterry*, (Tex. Civ. App.) 23 S. W. 1117.

Evidence to support.

43. While a court may not submit to the jury questions not raised by the evidence, it is

from circumstances surrounding the case.—*Maes v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 23 S. W. 725.

44. Where plaintiff, a car repairer, was injured while at work between cars on the track of defendant, by the moving of certain cars on the track from some cause unknown, where the only evidence was that the air brakes did not hold the cars, but there was no evidence that there were any defects in them, a charge based on the issue of defective brakes is erroneous. 22 S. W. 110, reversed.—*Gulf, C. & S. F. Ry. Co. v. Kiziah*, (Tex. Sup.) 23 S. W. 578.

45. Where, in an action against a carrier for conversion of goods, plaintiff claims a demand and refusal, and the only evidence on the question was that an attorney made a request for pay for the goods, and not for the goods, it is error to charge that, if there was a demand and refusal or failure by defendant to deliver the goods, such failure would amount in law to a willful conversion.—*Gulf, C. & S. F. Ry. Co. v. Humphries*, (Tex. Civ. App.) 23 S. W. 556.

46. Where, in an action against a railroad company for the death of a brakeman caused by the failure of defendant to provide a regular caboose for deceased's train, there was no evidence as to the use of diligence by defendant, and no issue of fact thereon, and also no evidence from which the jury could find that the car actually used was unsafe, instructions which defined defendant's duties in respect to diligence, and submitted to the jury the question of the unsuitableness and unsafeness of such car, were erroneous, and prejudicial to defendant.—*Galveston, H. & S. A. Ry. Co. v. Davis*, (Tex. Civ. App.) 23 S. W. 1019.

47. It is error to submit in the charge to the jury an issue not raised by the pleadings, or an issue which, though raised, is wholly unsupported by the evidence.—*Galveston, H. & S. A. Ry. Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. 298.

48. In an action against a railroad company for burning plaintiff's cotton while lying on defendant's platform, the petition alleged that, through the negligence of defendant, the fire escaped from its engines; but it did not allege a delivery of the cotton to defendant, or that defendant was negligent in not providing a warehouse for the protection of cotton awaiting shipment. The evidence showed that the fire was set by one of defendant's engines about 1 o'clock P. M., and defendant introduced evidence that the engine in question was provided with the best appliances for preventing the escape of fire, and was operated by a competent man, and in a careful manner. Plaintiff testified that when the engine passed he was about to go to defendant's agent to get his bills of lading for the cotton signed; that the agent always signed the bills whenever they were presented, though he did not like to do so until 4 o'clock. *Held*, that the only evidence presented by the pleadings and evidence was whether defendant was guilty of negligence in burning the cotton, and it was error to give an instruction based on a hypothetical delivery to defendant for shipment.—*Gulf, C. & S. F. Ry. Co. v. Courtney*, (Tex. Civ. App.) 23 S. W. 226.

— Questions of law.

49. In an action for personal injuries, defendant pleaded that by the laws of the state in which the injury was received by plaintiff the latter was guilty of contributory negligence, and read a statute of such foreign state, adopting the common law, and also several decisions of the supreme court of that state. *Held* that, since the common law prevailed in that state as in Missouri, it was for the court to declare the law of the case, and it was error to permit such decisions to be read

for the law applicable to the case.—*Slaughter v. Metropolitan St. Ry. Co.*, (Mo. Sup.) 23 S. W. 760.

— Assumption of facts.

50. In an action for services under a contract, it is proper for the court, in its instructions to the jury, to assume the existence of the contract, which is in evidence by undisputed testimony.—*Voss v. Feurmann*, (Tex. Civ. App.) 23 S. W. 938.

51. In an action against a telegraph company for delay in the delivery of a message announcing the sickness of plaintiff's sister, an instruction to find for plaintiff "such sum, and no more, as the evidence may show will compensate plaintiff for the injury sustained, if any, to his feelings, taking into consideration the mental pain and suffering, if any, sustained by him because of not being able to attend the funeral," does not assume that plaintiff suffered injury or mental anguish, but leaves that question to the jury.—*Western Union Tel. Co. v. Linn*, (Tex. Civ. App.) 23 S. W. 895.

— On weight of evidence.

52. Though malice may be inferred from want of probable cause for issuing an execution before expiration of the 10 days allowed after rendition of judgment, it is error to so instruct the jury.—*Clifford v. Lee*, (Tex. Civ. App.) 23 S. W. 843.

53. It is reversible error for the court to group certain facts, and to instruct the jury that such facts, if found to exist, constitute negligence.—*Ball v. City of El Paso*, (Tex. Civ. App.) 23 S. W. 835.

54. In an action for premature issue of execution, it is error to charge that "the issuance of an execution immediately upon the rendition of a judgment, upon the filing of the proper affidavit, without waiting for the lapse of ten days, is summary, and might be rendered exceedingly harsh and oppressive, by resorting to it wrongfully," as the charge intimates that the court thinks a wrong has been done.—*Clifford v. Lee*, (Tex. Civ. App.) 23 S. W. 843.

55. It is error to instruct that a railroad company which permits weeds to grow on its roadbed so as to conceal it from view is guilty of negligence, as matter of law, rendering it liable for injuries to a passenger caused by the collision of the train with a cow, which was concealed from the trainmen by the weeds, as on the weight of evidence.—*San Antonio & A. P. Ry. Co. v. Long*, (Tex. Civ. App.) 23 S. W. 490.

56. It is not within the province of the court to instruct the jury as to what constitutes prima facie evidence of a fact, unless such evidence is made so by law.—*Missouri Pac. Ry. Co. v. Byars*, (Ark.) 23 S. W. 533.

57. A charge in an action for personal injuries, that if plaintiff, by his negligence, contributed to his injury, so that but for it he would not have been hurt, the jury should find for defendant, is not on the weight of evidence.—*Campbell v. McCoy*, (Tex. Civ. App.) 23 S. W. 84.

58. An instruction that direct evidence is not required to establish fraud, but it may be inferred from all "the facts and circumstances of this case," and that, if the jury believe certain facts, they shall find that there was a fraudulent conveyance, does not charge the jury that the facts show fraud.—*Alberger v. White*, (Mo. Sup.) 23 S. W. 92.

— Credibility of witnesses.

59. An instruction that the jury are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony is proper, and not objectionable on the ground that it may lead the jury to think some of the wit-

nesses unworthy of belief.—*Galveston, H. & S. A. Ry. Co. v. Davis*, (Tex. Civ. App.) 23 S. W. 301.

Instructions—Directing verdict.

60. Where, in a suit on a note, defendant alleges fraud and a failure of consideration, and the evidence is somewhat conflicting, it is error for the court to direct a verdict for plaintiff.—*Fitzgerald v. Hart*, (Tex. Civ. App.) 23 S. W. 933.

—Harmless error.

61. In an action against a master for negligence, an instruction that he was bound to exercise all the care which prudence required, in providing the servant with machinery and instrumentalities adequately safe for his use, while exacting too high a degree of care, is cured by a further instruction that he was bound only to use ordinary care in furnishing machinery.—*Texas & P. Ry. Co. v. Nix*, (Tex. Civ. App.) 23 S. W. 328.

Verdict.

62. A verdict in an action for damages, assigning the same at "350.00," is sufficiently definite on which to render a judgment for \$350.—*Fink v. Gulf, C. & S. F. R. Co.*, (Tex. Civ. App.) 23 S. W. 330.

63. Where the purchaser of a machine brings an action against the seller to recover the purchase money, and relinquishes all claims to, and tenders back, the machine, a verdict in plaintiff's favor for part of the purchase money only, and allowing him to retain the machine, is not responsive to the issues made by the pleadings and submitted by the charge.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Hancock*, (Tex. Civ. App.) 23 S. W. 384.

Special interrogatories and verdict.

64. Plaintiffs alleged that defendant agreed to join with them in a certain land purchase, each taking a third interest; that, unknown to them, defendant was agent for and received commissions from the vendor; that afterwards he refused to carry out his agreement with them; and that he transferred his interest in the purchase to one of them in consideration of his release from the obligation to pay part of the price. Defendant denied generally, and, for special answer, admitted that he bought the land with plaintiffs, and alleged that his transfer to one of them was made in a settlement, by which it was agreed that he should retain all commissions received by him. The court submitted to the jury the questions whether plaintiffs, when purchasing, knew that defendant was the agent of the vendor, and whether they relinquished their claim to commissions received by defendant, as he alleged. *Held*, that answers by the jury in the negative to both questions did not justify a judgment for two-thirds of the amount of commissions alleged to have been received by defendant.—*Triplis v. Rosborough*, (Tex. Civ. App.) 23 S. W. 231.

Judgment on special verdict.

65. A judgment which the court could not have entered without looking to the evidence as well as the special verdict, for the reason that one of the material issues was not submitted to the jury, will be set aside.—*Maxwell v. First Nat. Bank*, (Tex. Civ. App.) 23 S. W. 342.

Trial by court—Findings of fact.

66. In an action by several plaintiffs on a contract for the payment of money, the petition stated that the contract was entered into between defendants and all the plaintiffs, and the court found that the contract declared on was proved as alleged. It also found that the contract with defendants was entered into by them and F., one of plaintiffs, and rendered judgment for plaintiffs over a plea by defendants of misjoinder of parties, on which plea it made no special finding. *Held*, that where

the facts were such that the court could properly act on the theory that F. was acting for all of plaintiffs in entering into the contract, the findings were not inconsistent.—*Terry v. French*, (Tex. Civ. App.) 23 S. W. 911.

TROVER AND CONVERSION.

Exemplary damages, see "Damages," 2, 3.
Liability of administrator for conversion, see "Executors and Administrators," 14.

When lies.

1. Where, in an action against a carrier for the conversion of goods, it appears that plaintiff was the owner of the claim at the time suit was brought, it is immaterial whether or not he was owner of the goods at the time of their conversion.—*Gulf, C. & S. F. Ry. Co. v. Humphries*, (Tex. Civ. App.) 23 S. W. 556.

2. In an action by a landlord for conversion of crops upon which he has a lien for rent, it is not necessary for him to show that he was entitled to the possession of the property at the time of the conversion.—*Taylor v. Felder*, (Tex. Civ. App.) 23 S. W. 490.

Complaint.

3. In an action against a railroad company, a petition alleging that defendant's agent wrongfully, willfully, and wantonly took possession of and withheld a bill of lading on which lumber was shipped to plaintiff, and that the agent's acts were authorized and ratified by defendant, states a tort for which actual and exemplary damages may be recovered.—*Alderson v. Gulf, C. & S. F. Ry. Co.*, (Tex. Civ. App.) 23 S. W. 617.

Pleading and proof—Variance.

4. An allegation as to place in an action for conversion is immaterial, and therefore there will not be held to be a material variance though the evidence shows a different place.—*First Nat. Bank v. Brown*, (Tex. Sup.) 23 S. W. 862.

Damages.

5. In an action for the conversion of personal property, it is proper to award damages sufficient to compensate plaintiff for the loss occasioned by the detention of the property, in addition to the value thereof, when an award of the value, with interest thereon, is insufficient for the purpose.—*Moore v. King*, (Tex. Civ. App.) 23 S. W. 484.

6. While, in an action by a landlord for conversion of crops sold by the tenant to a third person, and upon which the landlord had a lien for rent, the defendant cannot set up as a defense that the landlord has not exhausted his claim from the crops remaining in the hands of the tenant, still, where the landlord actually lives on such crops, he is bound to see that the property is properly cared for, and defendant is entitled to credit for any loss on same caused by the landlord's negligence in regard thereto.—*Taylor v. Felder*, (Tex. Civ. App.) 23 S. W. 490.

Trustee Process.

See "Garnishment."

TRUSTS.

See, also, "Mortgages."

Express trusts.

1. A deed of all the interest in and to a certain tract which is or may be located to E., deceased, which R. has a power of attorney to locate, "for which services said R. is to receive one-half for locating and perfecting the title," declares an equitable title in R. to one-half of the surveys vested in the grantee in trust for R., and the declaration is equally binding on the grantors as if made in a separate deed.—

property of the trust funds, and takes a deed as trustee, the character of the trust is determined by the will, and not by the deed.—*Lewis v. Citizens' Nat. Bank*, (Ky.) 23 S. W. 667.

Resulting trusts.

8. S., who held a mortgage on L.'s land, purchased a smaller tract of L.'s, not covered by the mortgage, at a sale thereof under execution, and the mortgaged tract was afterwards conveyed to S. in payment of debts owed by L. After the latter conveyance, S. said that L. would still have the small tract left, and L. appropriated the rents therefrom with his consent. On trying to sell it, L. declared that it belonged to S., and that he was to receive all over \$3,000 that it would sell for, and, on the last application to him to rent it, he told the person applying to see S., who owned it. He then moved off it, declaring that he owned no land, and that a rumor that it was held secretly for him by S. was false. *Held* insufficient to show that the land was purchased and held by S. in trust for L.—*Cummins v. Shawhan*, (Ky.) 23 S. W. 669.

4. After a railroad company had voluntarily conveyed town lots to a bishop of the Roman Catholic Church, for the benefit of the church, by a deed which vested in him the fee-simple title, it executed a general mortgage on all its property, which was subsequently foreclosed. Afterwards, the bishop conveyed the fee-simple title to such lots to the purchaser at the foreclosure sale, by a deed which recited that the consideration was that "whereas, said property never having been used for the purpose for which it was donated, nor is there any purpose to so use the same, nor is there any hope to do so in the near future, this conveyance is made to restore said property to its rightful owner, and to cancel said conveyance so made by it to" such bishop. *Held*, that the grantee's title was not in trust for the benefit of such railroad company. 22 S. W. 286, reversed.—*Gabert v. Olcott*, (Tex. Sup.) 23 S. W. 985.

Conveyance by trustee.

5. Where a bishop of the Roman Catholic Church conveys land to which he holds the fee-simple title in trust for the church, it will be presumed, in the absence of evidence to the contrary, that such conveyance was made by authority.—*Gabert v. Olcott*, (Tex. Sup.) 23 S. W. 985.

6. Where a bishop of the Roman Catholic Church is invested with the legal title to land in trust for the benefit of the church, he can convey it through an attorney in fact.—*Gabert v. Olcott*, (Tex. Sup.) 23 S. W. 985.

Trustee purchasing claims against estate.

7. Defendant A. purchased a mortgage on plaintiff railroad company's property; thereafter, with knowledge of defendant C.'s fiduciary relation to plaintiff as trustee, transferring to C. a half interest on the mortgage. *Held*, that A.'s purchase did not inure to plaintiff's benefit, even though, at the time of the purchase, it was understood between A. and C. that such purchase should inure to the joint benefit of A. and C.—*Rio Grande R. Co. v. Armendal*, (Tex. Civ. App.) 23 S. W. 568.

Accounting by trustee—Costs.

8. A trustee, who is removed on account of ill health, after having properly performed the duties of the trust, is entitled to a settlement of his accounts at the cost of the trust estate.—*Lape's Adm'r v. Taylor's Trustee*, (Ky.) 23 S. W. 960.

9. One who unsuccessfully resists an application for his removal as trustee is liable for the costs of such resistance.—*Lape's Adm'r v. Taylor's Trustee*, (Ky.) 23 S. W. 960.

10. Where a debtor conveys his property to a trustee, and directs it to be sold, and the proceeds applied to the payments of specified debts, the purchaser of such property from the trustee is not liable to the creditors for failure to pay the purchase money to them, in the absence of any agreement to pay such creditors.—*Bartley v. Conn*, (Tex. Civ. App.) 23 S. W. 382.

Following trust funds,

11. Where an assignor for the benefit of creditors, with the knowledge of the assignees, used notes held by him in trust for his children with which to discharge a lien on a certain lot assigned to them, such children, in the absence of laches affecting creditors, are entitled to be paid by the assignees, out of the proceeds of the sale of such lot, the amount of such notes and interest.—*Shinkle's Assignees v. Bristol*, (Ky.) 23 S. W. 670; *Same v. Bishop*, Id.

Lapse of time in winding up trust—

Rights of beneficiaries.

12. Decedent, in the place of a will which he had made, and in order that his estate might be wound up in his lifetime, gave a deed of trust empowering the trustee to sell and dispose of a large landed estate for the benefit of his children. The deed provided that, after paying debts, and settling between the children for advancements, the trustee should divide the estate into equal shares, and invest it for, and pay it over to, the children, some of them to be paid their share in money, and others to have their share invested in land, the title to be taken to them for life, remainder in fee to their heirs. The trustee was directed to lay off lots out of a certain tract from time to time as it might seem best. An annual income was to be paid the children until the trust should be settled. *Held*, that the trust was to be executed in a reasonable time, and, 12 years having elapsed without the estate being wound up, the beneficiaries are entitled to partition, those whose share is payable in money having the right to sell the land if they desire, or, when partitioned, if they insist on the land being sold, the chancellor may authorize the trustee to sell their parcel, and pay them over the money.—*Taylor's Trustee v. Abert*, (Ky.) 23 S. W. 962.

13. Before such division is ordered, a settlement should be made by the trustee, and, if there are any debts, land should be sold to pay them.—*Taylor's Trustee v. Abert*, (Ky.) 23 S. W. 962.

Usage.

See "Custom and Usage."

User.

Highway by, see "Highway," 1.

USURY.

See, also, "Interest."

Charged by building associations, see "Building and Loan Associations," 1-4.

What constitutes.

1. A firm, owning timber trees, contracted with a sawmill firm that the latter should advance them money and merchandise to get the logs out, and buy the logs at the market price, the two firms to divide profits. Later the sawmill firm retransferred their interest in the venture to the others, who agreed to pay back advances already made, with interest at 10 per cent. The sawmill firm was to continue to buy the logs, and to make advances for the work at the same rate of interest. *Held*, that the agreement to pay 10 per cent. on the advances already made was valid, not being "a

interest in the venture; otherwise as to the future advances.—Eddy's Ex'r v. Northrup, (Ky.) 23 S. W. 353.

2. The fact that interest is to be paid by coupon notes semiannually, and that the coupons bear interest at 12 per cent. after maturity, does not constitute usury.—Martin v. Land Mortg. Bank, (Tex. Civ. App.) 23 S. W. 1032.

Recovery back of usury paid.

3. Though defendant in an action on a note may set up as a defense usurious interest paid, he cannot recover the excess of the amount paid over the amount necessary to wipe out the debt, without first deducting the amount of interest due at the legal rate.—International Bldg. & Loan Ass'n v. Biering, (Tex. Civ. App.) 23 S. W. 621.

4. The fact that a note is usurious because it includes a bonus does not entitle the promisor to recover the interest paid thereon where it does not amount to more than the legal rate on the amount actually received by him.—International Bldg. & Loan Ass'n v. Biering, (Tex. Civ. App.) 23 S. W. 621.

—Release of right.

5. Where, after payment of interest on a usurious note, a supplemental contract is made, supported by a valuable consideration, releasing the payee from all claims whatsoever, it precludes the promisor from setting up such payments of interest in an action on the note.—International Bldg. & Loan Ass'n v. Biering, (Tex. Civ. App.) 23 S. W. 621.

6. The right of a borrowing stockholder to recover back usurious interest paid to a building society is waived by his subsequent execution of a contract releasing the society from any and all claims.—International Bldg. & Loan Ass'n v. Fortassain, (Tex. Civ. App.) 23 S. W. 496.

7. A stockholder borrowed \$700 from a building and loan association, and gave a note, secured by pledge of his stock, which was usurious because it included a premium of \$700, being for \$1,400 in addition to full legal interest on the \$700. Afterwards, a new contract was made, releasing the association from all claims for usurious interest theretofore paid, and by which the obligation was reduced to \$1,200. Under a by-law any borrower had the right to repay the loan and redeem his stock by paying the amount actually loaned and a certain percentage of the premium. *Held*, that the release was supported by a sufficient consideration, as the second contract, in reducing the premium, allowed the redemption of the stock on less onerous terms.—International Bldg. & Loan Ass'n v. Biering, (Tex. Civ. App.) 23 S. W. 621.

8. Even if the second contract were usurious, it would be affected thereby only as to interest, and would not make the release invalid.—International Bldg. & Loan Ass'n v. Biering, (Tex. Civ. App.) 23 S. W. 621.

Value.

Evidence as to, see "Damages," 38, 39.
Opinion evidence, see "Evidence," 30, 31.

Variance.

See "Indictment and Information," 3; "Larceny," 4; "Pleading," 16-22; "Release and Discharge," 3.

In name of corporation, see "Corporations," 7.

VENDOR AND PURCHASER.

See, also, "Deed;" "Frauds, Statute of;" "Fraudulent Conveyances;" "Sale;" "Specific Performance."

Vendor's lien, see "Judgment," 13, 14.

Rights and remedies.

1. Where, in an action on a note given for the price of land, defendants defeat the claim by the plea of the statute of limitations, plaintiffs are entitled to amend their plea, and to judgment quieting title in them.—Adkins v. Harn, (Tex. Civ. App.) 23 S. W. 28.

2. Plaintiff, by written contract, agreed to convey defendant land, defendant to pay a specified sum every four months, and further agreed to take cordwood by the car of nine cords of defendant, at \$20 per car, in payment, plaintiff to pay freight. *Held* an executory contract of sale, which gave defendant no right to a deed of the land until payment of the price.—Boyd v. Robertson, (Tex. Civ. App.) 23 S. W. 534.

3. Plaintiff, by written contract, agreed to convey defendant land, defendant to pay a specified sum every four months, and further agreed to take cordwood in payment. Defendant entered upon the land, put improvements thereon, aggregating \$800 in value, and, on making his first payment in cordwood, a deed was promised, but never given him. A second payment in cordwood was refused, plaintiff alleging that he did not need the wood, and no further payment was ever made, and plaintiff never thereafter informed defendant that he would receive payments in wood if tendered. *Held* to bar plaintiff's right to recover the land, but that he might recover the purchase money due at the time of suit brought, with interest from date of judgment, and costs of suit.—Boyd v. Robertson, (Tex. Civ. App.) 23 S. W. 534.

—Deficit in quantity of land.

4. Where one, without receiving any consideration, joins in a deed, as one of the grantors, merely for the purpose of perfecting the title, he is not liable for a deficit in the quantity of land.—Alvey v. Logsdan, (Ky.) 23 S. W. 865.

—Failure of title to part of land.

5. Defendants, in platting their land for a town site, by mistake left out a part, and included land belonging to others. They afterwards conveyed certain lots of the proposed town site to plaintiff by warranty deed, some of which were on the land included by mistake. *Held* that, on failure of title to such lots, plaintiff was not entitled to have other land of defendants set aside to it, but should look to the covenant of warranty for money compensation.—Wilbarger County v. Robinson, (Tex. Civ. App.) 23 S. W. 823.

—Rescission.

6. Where an insolvent vendor of land has broken his contract to convey a good title by accepting the first installment of the price, and notes and mortgages for the deferred payment, without clearing the property of an incumbrance of the existence of which the purchasers are ignorant, the fact that the unpaid price exceeded the outstanding incumbrances will not prevent a rescission of the sale, since the vendor's creditors have a right to enforce their lien against the land at any time, and thus put the purchasers in danger of losing, not only the land, but also the first installment of the purchase money.—Peak v. Gore, (Ky.) 23 S. W. 356.

7. The fact that a vendor of hotel property misrepresented its value and its daily earning capacity to the vendees, who had no experience or knowledge in regard to such property, is no ground for rescission of the sale, where they purchased after having opportunity to ascertain for themselves the value of the property, and did in fact examine it.—Peak v. Gore, (Ky.) 23 S. W. 356.

therefor is not standing alone, a ground for the rescission of the contract of sale.—Peak v. Gore, (Ky.) 23 S. W. 356.

9. An owner of land who has suffered another to take possession thereof under an executory contract, cannot arbitrarily rescind the contract, time not being of the essence; and whether or not such other's conduct has warranted her in believing that he has abandoned the contract is a question of fact.—Lachausen v. Laughter, (Tex. Civ. App.) 23 S. W. 513.

— Action for price.

10. Where the vendor, in an action for the purchase price of land, tenders a deed, and alleges ability and readiness to make title, the answer of the purchaser, which merely denies that the vendor is able to make a good and sufficient deed, is defective, in that it neither points out a defect in the title, nor makes an averment requiring an exhibition of title.—Burchett v. Dailey, (Ky.) 23 S. W. 874.

Vendor's lien.

11. Where land is sold and a deed executed to a married woman, and notes are given by her for the price, the vendor has an equitable lien on the land, though not expressly reserved, and though the husband did not join in the deed.—Davis v. Wheeler, (Tex. Civ. App.) 23 S. W. 435.

12. A provision in a note that it is to retain a vendor's lien on certain land till paid creates a contract lien, good as to purchasers of the land with notice of it.—Bergman v. Blackwell, (Tex. Civ. App.) 23 S. W. 243.

13. Where land and chattels are sold for a lump sum, there will be a vendor's lien on the land for such part of the sum as represents the proportional value of the land.—Bergman v. Blackwell, (Tex. Civ. App.) 23 S. W. 243.

14. Where one's interest as an heir in an estate consisting of personal and real property is sold, the vendor's lien attaches to the undivided interest in the lands of the estate, and, on partition, follows the tracts set apart to the purchaser.—Bergman v. Blackwell, (Tex. Civ. App.) 23 S. W. 243.

15. Where a vendor, instead of asserting a vendor's lien, brings suit for the purchase money, and attaches the land sold, persons claiming title under the attachment proceedings must depend on the validity of such proceedings, and cannot avail themselves of any right which the vendor had to a lien.—Myers v. Paxton, (Tex. Civ. App.) 23 S. W. 284.

16. Where, pending suit to foreclose a vendor's lien, the plaintiff sells his interest in the land, the purchasers need not be made parties to the suit, as they will be bound by the judgment rendered.—Elmendorf v. Beirne, (Tex. Civ. App.) 23 S. W. 315.

17. Where a vendor of land reserves a lien, a transfer of the purchase-money notes carries with it the lien, and the transferee has the right to foreclose it, and have the land sold to satisfy his claim.—Elmendorf v. Beirne, (Tex. Civ. App.) 23 S. W. 315.

18. A subvendee of land subject, with a larger tract, to a vendor's lien, who has not been made a party to an action to foreclose the lien, is entitled, in a subsequent action to remedy the defect, to have the land remaining in the hands of the original vendee sold before his parcel is subjected to the payment of the debt; and it is error to render a money judgment against the subvendee for the difference between the value of the parcel still owned by the original vendee and the amount of the unpaid price, without ordering a sale of either parcel.—Elmendorf v. Beirne, (Tex. Civ. App.) 23 S. W. 315.

Bona fide purchasers.

19. A purchaser with notice of outstanding equities is not affected thereby, if his vendor

20. The construction of a railway track does not affect purchasers of land 132 feet from the track with notice of a claim of title to such land by the railroad company.—Gulf, C. & S. F. Ry. Co. v. Gill, (Tex. Civ. App.) 23 S. W. 142.

21. Where land sold to plaintiff was described in the deed, which was duly registered, as a certain block in a certain addition, without any statement of the dimensions thereof, a subsequent purchaser of part of such land, under a different description, will be treated as having notice of plaintiff's title, unless he can show that he was unable, by the exercise of reasonable diligence, to ascertain that such land was included in the block conveyed to plaintiff.—Gulf, C. & S. F. Ry. Co. v. Gill, (Tex. Civ. App.) 23 S. W. 142.

22. One who executes a deed in ignorance of its contents, and through the fraud of the grantee is bound by her action, as against an innocent mortgagee, who advanced money to the grantee on the faith of the deed.—Elmendorf v. Tejada, (Tex. Civ. App.) 23 S. W. 965.

23. Where a person purchases land from the holder of the legal title for a grossly inadequate consideration, without actual notice of the equities of the true owners, and agrees to accept a quitclaim deed from his vendor, he is not an innocent purchaser, and will not be protected, because his deed, which both he and his grantor believed at the time was in effect a quitclaim, was in fact in form a conveyance with special warranty.—Tate v. Kramer, 23 S. W. 255, 1 Tex. Civ. App. 427.

24. A recital in a deed that the consideration is a certain amount, to be paid in sheep and cattle, gives notice to one claiming under it that the consideration was unpaid, and is sufficient to put him on inquiry as to the existence of a vendor's lien therefor.—Bergman v. Blackwell, (Tex. Civ. App.) 23 S. W. 243.

25. The facts that an unrecorded deed was not found until after the commencement of an action of trespass to try title by the true owners against purchasers, and that an inquiry pursued by the latter would not have resulted in its discovery, do not relieve them of the obligation to take notice of the chain of title as claimed by plaintiffs, which such inquiry would have enabled them to ascertain.—Smith v. Adams, (Tex. Civ. App.) 23 S. W. 49.

26. Where, in trespass to try title by the true owners against a purchaser from one holding the legal title, and his grantees, it appears that such purchaser, who is not a bona fide holder, holds the notes of his grantees, who were innocent purchasers, for the greater part of the price, plaintiffs are entitled to judgment against such grantees for such unpaid price.—Tate v. Kramer, 23 S. W. 255, 1 Tex. Civ. App. 427.

27. The grantees of the purchaser of land at a void partition sale are chargeable with notice of the vice of their grantor's title.—Blagge v. Moore, (Tex. Civ. App.) 23 S. W. 466.

— Possession as notice.

28. At the time of plaintiff's purchase of the land in suit, defendant had title thereto by a deed which was not recorded, and possession of the land was held by one who had leased it from defendant by a lease, the term of which had expired. This lessee took possession before he obtained title under defendant's lease, and had exclusive possession down to the time of suit; and though, since the expiration of the lease, he had paid no rent, he had not notified defendant that he refused to hold as her lessee. Plaintiff had no knowledge of any adverse claim to the land, but failed to inquire if any one was in possession. Held, that the lessee's possession operated as constructive notice of defendant's claim.—League v. Snyder, (Tex. Civ. App.) 23 S. W. 825.

29. Possession of land by strangers is not notice to a purchaser from the record owner of

an outstanding title in another, with whom the occupants show no privity.—*Meyer v. Miller*, (Tex. Civ. App.) 23 S. W. 993.

80. Where an officer levies on and takes possession of goods belonging to a tenant, in a leased building, but does not levy on the building, and the tenant, while the officer is in possession, conveys his leasehold interest, by unrecorded deed, to a third person, who then leases the building to such officer, subsequent attaching creditors and purchasers of the leasehold are affected with notice of the character of the officer's possession and the rights of his landlord.—*Le Doux v. Johnson*, (Tex. Civ. App.) 23 S. W. 902.

Bona fide purchasers—Of community property.

81. Where a deed conveying land to a married man does not show that it was paid for with his separate property, and therefore, from the records, the land appears community property, which would pass to the wife on the husband's death without issue, one purchasing it from the wife after the husband's death, without notice that it was paid for with his separate property, gets good title against those who would inherit it as his separate property.—*Sanburn v. Schuler*, (Tex. Sup.) 23 S. W. 641.

82. H. bought land in 1860, paying for it with community property. His wife died the same year, and he married again in 1861. In 1864 he sold the land to S., who in 1873 sold it for a fair cash price to K. K. had no actual knowledge that H. had ever been married before he acquired the land, though he knew both H. and one of his sons. *Held*, that as against H.'s sons by the first marriage, who had never before asserted claim to the land as heirs of their mother, K. was not charged with notice that the land was community of the first marriage.—*Hall v. Gwynne*, (Tex. Civ. App.) 23 S. W. 289.

VENUE IN CIVIL CASES.

Action against firm, see "Partnership," 16.

County where contract is to be performed.

1. Where an action based on a written contract, which specifies the place of its performance, is commenced in the county specified in the contract, the venue will not, on the application of defendant, be changed to the county of defendant's residence, under Rev. St. art. 1198, subd. 5, which provides that where a person has contracted, in writing, to perform an obligation in any particular county, suit may be brought either in such county, or where defendant has his domicile.—*Burleson v. Lindsey*, (Tex. Civ. App.) 23 S. W. 729.

Actions concerning land—Residence of defendants.

2. A plea to the jurisdiction by executors in trespass to try title that they live in another county than that in which suit is brought, and administered the estate there, is bad.—*Terry v. Cutler*, (Tex. Civ. App.) 23 S. W. 539.

Change of venue.

3. Change of venue may be taken directly from the county court of one county to the district court of another, having jurisdiction of the subject-matter, where the county court of such other county has been abolished.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

4. Where a change of venue has been taken from the county court of one county to the district court of another, the jurisdiction of the district court is the same as though the action had been originally brought in that court, and it may render judgment in defendant's favor on his plea in reconvention in an amount exceeding the jurisdiction of the county court

from which the case was removed.—*Wood v. Lenox*, (Tex. Civ. App.) 23 S. W. 812.

Venue in Criminal Cases.

Change, see "Criminal Law," 7-9.
—liability for costs, see "Costs," 4.

Verdict.

See "Criminal Law," 63, 64; "Trial," 62, 63.

Vested Remainders.

See "Deed," 8.

Vice Principal.

See "Master and Servant," 25-29.

Villages.

See "Municipal Corporations."

Voters.

See "Elections and Voters."

Wager.

See "Gaming," 2.

Waiver.

Of defects in pleading, see "Pleading," 23-26.
Of objections on appeal, see "Appeal," 87, 88.

Warning Order.

See "Writs," 3.

Warrant.

See "Arrest."

Warranty.

See "Sale," 5.

WASTE.

By cotenant, see "Tenancy in Common," 4.

By landlord—Levy of distress warrant.

The levy of a distress warrant has not the effect *prima facie* of satisfying the debt so as to put on plaintiff the burden of showing that the property levied on has not been wasted, and, if defendant claims waste, the burden is on him to prove it.—*Taylor v. Felder*, (Tex. Civ. App.) 23 S. W. 490.

Waters and Water Courses.

See "Navigable Waters;" "Riparian Rights."
Damages for overflowing land, see "Damages," 19.

Ways.

See "Easements;" "Highways."

Weapons.

See "Carrying Weapons."

Widow.

See "Descent and Distribution;" "Dower;" "Homestead."

Wife.

See "Husband and Wife."

WILLS.

See, also, "Descent and Distribution;" "Executors and Administrators."

Amending record of, see "Records," 1.
Collateral attack on probate, see "Judgment," 31.
Rights of children omitted, see "Descent and Distribution," 8-5.

Capacity to make.

1. On a will contest, it appeared that more than 20 years before making his will, and nearly 30 years before his death, testator was confined to an insane asylum for a few months for religious insanity; that he was a great reader of the Bible and of a religious paper; that before making his will he prayed much at night, and professed to have seen three lights typifying different religious denominations; that in the heat of discussion he talked of religion in an excited manner; that he sometimes had a wild look, and lost much sleep. *Held*, that these facts do not support a verdict of insanity, rendering void the will which devised his property to a religious society, where it further appeared that he amassed a considerable fortune after his release from the asylum; that his relatives, the contestants of the will, often procured him to go on their bond as surety; and that they joined him in business transactions, and allowed him to look after their interests; and where many witnesses, who had known testator intimately for years, testified that he was perfectly rational on all subjects, and that he had perfect health, slept well, and was a fine business man.—*Williams v. Williams*, (Ky.) 23 S. W. 789.

Married women.

2. Testatrix and her husband, being childless, had accumulated a considerable property, mostly from the husband's labor. Testatrix held notes payable to her alone, which she caused to be re-executed payable to her sole and separate use, and took an assignment of a bond and mortgage in like terms. Her husband knew nothing of these arrangements, nor of the will which she made assuming to dispose of the property to his exclusion. *Held*, that testatrix was merely custodian of the common funds, and could not make such a will under the statute empowering a married woman to dispose by will "of any estate secured to her separate use by deed or devise."—*Wehle v. Umpfenbach*, (Ky.) 23 S. W. 360.

Validity—Inequality of provisions.

3. Testator, when he made his will, was rational, and capable of understanding his relation to his family; and the will was written by his attorney, wholly at his dictation, after which he read and subscribed it, and had it attested. Though he afterwards declared that he intended to change it because it was unequal and failed to carry out his wishes, no alterations were ever made; and, when spoken to about the division he has made of his land, he said "that, if his children were not satisfied with what they got, they could just let it alone, and let some one else have it." *Held* not to show grounds sufficient to set aside the will.—*Herbert v. Long*, (Ky.) 23 S. W. 658.

Revocation by marriage.

4. Where testator's will was executed before his marriage, and made no provision for his wife, and testator and his wife released all their claims in the estates of each other by an antenuptial contract, the wife could not appeal from an order admitting the will to record, on the ground of revocation by the marriage.—*Biggerstaff's Ex'rs v. Biggerstaff's Adm'r*, (Ky.) 23 S. W. 965.

Probate.

5. A writing referred to in a will, so as to be made a part of it, need not be probated with the will.—*Tuttle v. Berryman*, (Ky.) 23 S. W. 345.

Contest.

6. Where a will is contested for want of testamentary capacity, and undue influence, it

is misleading to charge that, if one has capacity to make a will, he may dispose of his estate as he sees proper, but an equal or unequal disposition of it is a circumstance, in common with other circumstances, to be considered in determining testamentary capacity, since it singles out, and gives undue prominence to, the inequality in the devise, as a circumstance to be considered. *Zimlick v. Zimlick*, 14 S. W. 837, 90 Ky. 657, followed.—*Herbert v. Long*, (Ky.) 23 S. W. 658.

7. In a will contest, the burden is on the propounders to show by a preponderance of evidence that testatrix had testamentary capacity, and on contestants to show by a preponderance of evidence that she was unduly influenced.—*Johnson v. Stevens*, (Ky.) 23 S. W. 957.

8. In a will contest the propounders may ask a witness in regard to decedent's recognition of his family and friends, or as to any other of the necessary requisites of testamentary capacity, without asking him in regard to all such requisites, including ability to know his heirs at law and relatives, the claims they have on his bounty, and the value of his estate, as well as to make a rational disposition of his property according to a fixed purpose of his own.—*Reed v. Lilly's Ex'r*, (Ky.) 23 S. W. 955.

Construction—Parol evidence.

9. Where a will states that land is to go to certain persons according to deeds which testator has made, parol evidence is not admissible to show that by "deeds" were meant certain memoranda made by the draughtsman, and never signed by testator.—*Tuttle v. Berryman*, (Ky.) 23 S. W. 345.

Description of devisees and legatees.

10. The second item of a will gave all testator's estate to his two sons, and provided that if either should die before testator, leaving children, then his share should go to his children, "but in the event of the death of either of my two sons before reaching his majority, or in the event of his dying intestate and without children born in lawful wedlock, then his share to his surviving brother." Item 3 provided that, "in case of the death of both of my said sons, neither leaving children born in lawful wedlock, then I give my whole estate to my daughter." *Held*, that the two items should be construed together, and that testator intended to carry his property over to his daughter in case only that both sons died without issue and intestate.—*Robinson v. Boyd*, (Tenn.) 23 S. W. 72; *Same v. Robinson*, *Id.*

11. Testator devised a lot and houses to his wife for life, "and at her death" to E., and, if E. die without issue "living at the death of my wife, or if he should die after the death of my wife without leaving any child or children. I devise the above-described lot and houses to the living children of my daughter, B., and the child or children of any of her children that may be dead." E. died before the death of testator's wife, without issue, and children of B. were living at the death of such life tenant. *Held*, that children of B. born after the death of the life tenant took nothing by the devise.—*Blass v. Helms*, (Tenn.) 23 S. W. 138.

12. A testator gave his estate to "my brother J., and his lawful heirs. If he dies without such heirs, then I give everything to my sister." *Held*, that the word "heirs" should be construed "children."—*Robinson v. Boyd*, (Tenn.) 23 S. W. 72; *Same v. Robinson*, *Id.*

Description of property.

13. Testator gave to his son his set of books, and the proceeds of all collections he could make from accounts which were the results of testator's past oil and cotton business, with full power to continue suits, and to sue or compromise any accounts therein; the accounts against certain persons, as well as accounts of properties, rents, stocks, etc., to be

treated as memoranda, only, and not included in the bequest. *Held*, that the son was entitled to all accounts in the set of books, whether the result of testator's oil and cotton business or not, except only the accounts mentioned.—*Johnson v. Johnson*, (Tenn.) 23 S. W. 114.

14. A devise of "two town lots" in C., "together with all the buildings, all the cattle, and all other property," conveys all the real and personal property of testator, including a farm.—*Dempsey v. Taylor*, (Tex. Civ. App.) 23 S. W. 220.

15. A will devised to testator's wife "one-third of my entire estate, real and personal,—that is, she is to have all the land during her life,"—and directed that "the remaining two-thirds of my estate" should go to his son, and declared that "my will is, at the death of my wife, then all her aforesaid part to go to my son." *Held*, that the words "she is to have all the land during her life" enlarged testator's seeming intention of giving her only a one-third interest in the realty; that she took a life estate in all of testator's land, with remainder on her death to the son; and that the devise of the remaining two-thirds to the son applied only to the personality.—*Young v. Morehead*, (Ky.) 23 S. W. 511.

Construction—Nature of estate.

16. Where property is left by will to a person "as a trustee * * * for the use of his children," and there is an explanatory clause stating that "this gives him the power to use the principal for his children, or any of them, equally or unequally," such construction is controlling, and the children have only a contingent interest, subject to be defeated by the exercise of the power of appointment.—*Lewis v. Citizens' Nat. Bank*, (Ky.) 23 S. W. 667.

WITNESS.

See, also, "Deposition;" "Evidence."

Absence as ground for continuance, see "Continuance," 1, 2; "Criminal Law," 11–17. Credibility, province of jury, see "Trial," 59. Examination of experts, see "Evidence," 33. Exclusion from court room, see "Trial," 3. Impeaching evidence of deponent, see "Deposition," 7.

Privileged communications.

1. In a homicide case, a letter written by defendant to his wife is not admissible against him, however the letter was obtained from her.—*Scott v. Commonwealth*, (Ky.) 23 S. W. 219.

2. The fact that defendant, on being compelled by the court to answer the questions asked him on cross-examination, admitted he wrote the letter, and identified it, did not legalize it as evidence.—*Scott v. Commonwealth*, (Ky.) 23 S. W. 219.

Examination.

3. A witness, being asked by counsel for the railroad if she were not giving an opinion about the signals, was properly allowed to answer: "I know that no signals were given until after passing the crossing, and this is not a mere opinion."—*Galveston, H. & S. A. Ry. Co. v. Duellm*, (Tex. Civ. App.) 23 S. W. 596.

Credibility—Instructions.

4. Where the evidence is conflicting, and the testimony of one witness is essentially different in some respects from that given by him in a deposition previously taken, it is not error to charge that if the jury believed any witness had willfully sworn falsely as to any material fact in the case they may disregard the whole or any part of his testimony.—*Church v. Chicago & A. R. Co.*, (Mo. Sup.) 23 S. W. 1056.

5. An instruction in a criminal case that defendant and his wife are competent witnesses for defendant; that the jury should not discard their testimony for the reason alone that one is defendant on trial and the other is his wife, but might consider such facts in de-

termining their credibility; that, if they believe that any witness has intentionally sworn falsely as to any material fact, they may disregard the whole or any part of the testimony of such witness,—is erroneous, as telling the jury by implication to disregard defendant's testimony on some ground, but not alone because he is defendant on trial. *State v. Austin*, (Mo. Sup.) 21 S. W. 31, followed.—*State v. Hobbs*, (Mo. Sup.) 23 S. W. 1074.

6. Such instruction is also erroneous in that it applies a similar rule to the testimony of the wife of defendant.—*State v. Hobbs*, (Mo. Sup.) 23 S. W. 1074.

—Impeachment.

7. It is not error to exclude evidence offered to impeach a witness where such witness has testified only to an immaterial fact.—*Battaglia v. Thomas*, (Tex. Civ. App.) 23 S. W. 385.

8. A witness cannot be impeached by the contradiction of immaterial statements.—*Jones v. Malvern Lumber Co.*, (Ark.) 23 S. W. 679.

9. A witness who has testified in the case may be impeached, whether his evidence was material or not.—*Davis v. Commonwealth*, (Ky.) 23 S. W. 585.

10. Evidence of the bad character of a witness, sought to be impeached, two years before the trial, is competent.—*Davis v. Commonwealth*, (Ky.) 23 S. W. 585.

11. The issue in a case being whether a conveyance to plaintiff firm was fraudulent, it is proper to show that a witness for plaintiffs, alleged to have participated in the fraud, in making a deposition, consulted the attorney of the firm before making his answers, was assisted by a member of the firm in giving them, and had his deposition taken by a clerk of the firm.—*Blum v. Jones*, (Tex. Civ. App.) 23 S. W. 844.

12. Where the affidavit as to what an absent witness would testify to is admitted in evidence as a deposition so as to prevent a continuance, the reputation of the absent witness may be impeached by the commonwealth.—*Johnson v. Commonwealth*, (Ky.) 23 S. W. 507.

13. It is proper cross-examination, as bearing on the credibility of a witness, to ask her if she had not kept girls for the purpose of prostitution.—*State v. Hack*, (Mo. Sup.) 23 S. W. 1089.

14. A witness for defendant may be asked on cross-examination if she did not offer the prosecuting witness money if he would go away and not testify against defendant.—*State v. Hack*, (Mo. Sup.) 23 S. W. 1089.

—Corroboration of witness.

15. To entitle a party to introduce witnesses in support of his character for truth it is not necessary that his general character be first impeached, but it is sufficient that his veracity as a witness has been fairly challenged, especially where he is a stranger at the place of trial.—*Texas & P. Ry. Co. v. Raney*, (Tex. Civ. App.) 23 S. W. 340.

Subpoena duces tecum—Power of grand jury.

16. A subpoena duces tecum, which requires a druggist to produce all prescriptions filed in his store since a certain day, is too indefinite, since the grand jury is not authorized to inspect all the prescriptions, but only such as relate to the matter under investigation.—*State v. Davis*, (Mo. Sup.) 23 S. W. 759.

Words and Phrases.

Avocation and vocation, see "Disorderly House."

WRITS.

See, also, "Attachment;" "Certiorari;" "Error, Writ of;" "Execution;" "Garnishment;" "Injunction;" "Sequestration."

Appearance, effect as waiver of objections, see "Appearance," 2.
 Issuance of second writ, see "Attachment," 2.

Issuance and validity.

1. A writ of possession issued by a federal court in 1879, which remained in possession of the agent of the successful party until 1882, when it was placed in the hands of a deputy marshal for execution, was *functus officio*, and did not affect the rights of the parties evicted under it.—*Texas-Mexican Ry. Co. v. Cahill*, (Tex. Civ. App.) 23 S. W. 232.

2. Where a petition on a liquor dealer's bond states that the district and county attorneys instituted the suit "on behalf of and in the name of the state, for the use and benefit of the county of K.," in which it was brought, a citation which states that the state of Texas is plaintiff, and the parties to such bond, naming them, are defendants, is not open to the objection that the parties plaintiff and defendant are not properly stated therein.—*Drake v. State*, (Tex. Civ. App.) 23 S. W. 398.

Warning order.

3. In a proceeding by an administrator against the heirs and creditors of his intestate to settle the latter's estate as an insolvent one, the petition alleged the nonresidence of certain heirs, and a warning order issued against them recited that it was made on proof heard as to their nonresidence. An attorney was appointed for the nonresidents, and he acted for them thereafter. Subsequently plaintiff swore to his petition, and the judgment which was finally entered, and under which decedent's property was sold, was not rendered till a year after this affidavit was made by plaintiff. *Held*, that

after the lapse of 15 years it would be presumed that the warning order was made after proof of nonresidence, or that the order was re-executed and re-adopted by the court after the making of the affidavit.—*Wilson v. Tague*, (Ky.) 23 S. W. 656.

Return.

4. Under Rev. St. art. 1225, requiring the officer's return of a citation to state when the citation was served, and the manner of service, conforming to the command of the writ, a return, "Came to hand the 24th day of September, A. D. 1891, at 12 o'clock A. M., and executed the 24th day of —, A. D. 189—," was fatally defective, and could not support a judgment, though defendant, after judgment, excepted, and gave notice of appeal.—*Llano Improvement & Furnace Co. v. Watkins*, (Tex. Civ. App.) 23 S. W. 612; *Same v. Eubanks*, *Id.* 613.

5. Under Rev. St. art. 1395, requiring service of a citation in error to be made by delivering a true copy of the writ to defendant personally, which service shall be stated in the return, a return that the writ was served by delivering a true copy to the defendant is insufficient.—*Womack v. Slade*, (Tex. Civ. App.) 23 S. W. 1002.

6. Where the sheriff makes return that a citation, which directed him to serve a corporation, was served on the secretary thereof, in accordance with Rev. St. art. 1223, providing that, in suits against a corporation, service may be had on the president, secretary, or treasurer of the company, or on its local agent, further proof that the person served was the secretary is not necessary, before judgment by default.—*San Antonio & A. P. Ry. Co. v. Wells*, (Tex. Civ. App.) 23 S. W. 81.

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